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Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives

Janet J. Anderson

Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives

I. INTRODUCTION

Criminal liability of parents who treat their children's illnesses through spiritual means or prayer alone is the subject of increasing debate. When children die as a result of their parents' religious practices, prosecutions for crimes such as felony child endangerment, manslaughter, and murder may follow. Most states have codified some type of religious accommodation statute which provides a criminal liability exemption for parents who engage in spiritual healing or prayer treatment for their sick children instead of seeking traditional medical assistance. The scope, purpose, and language of these statutes, however, vary.[1] Even when statutes appear to be similar in content, courts have

1. The following are examples of state legislation regarding a statutory exemption from liability for use of spiritual healing: Ala. Code § 13A-13-6(b) (1982), Ala. Code § 26-14-1(2) (1992); Alaska Stat. § 47.17.020(d) (Supp. 1988); Ariz. Rev. Stat. Ann. § 8-531.01 (West 1989); Ark. Code Ann. 12-12-502(3) (1987); Cal. Penal Code § 270 (West 1988), Cal. Penal Code § 11165.2(b) (West

disagreed on the correct interpretation and applicability of the liability exemptions. A primary problem facing courts in these cases is how to interpret the language in the statute and whether two or more statutes involved in a case should be construed together in defining criminal behavior.[2] Moreover, defendants in accommodation statute cases have forced courts to decide several constitutional issues dealing with the Establishment Clause, the Due Process Clause, the Equal Protection Clause, and the First Amendment freedom of religion.

While the other concerns implicated by these statutes are siguificant, this Note will focus on the issues of statutory construction, freedom of religion, and the notice requirement of due process. Part II discusses the legal background of religion's role in the law. Part III describes two cases, one from California and the other from Florida, that illustrate the debate over the conviction of parents who rely on similar prayer exemption provisions as criminal defenses. Part IV analyzes the reasoning utilized by both courts in reaching their holdings and examines the ramifications of each holding. Part V concludes that religious accommodation statutes should not protect parents from criminal prosecutions for the death of or serious bodily harm to their children.

1992); Cal. Welf. & Inst. Code § 16509.1 (West 1991), Cal. Welf. & Inst. Code § 18950.5 (West 1991); Colo. Rev. Stat. Ann. § 14-6-101 (West 1989), Colo. Rev. Stat. § 19-3-103 (West 1990); Del. Code Ann. tit. 16, § 907 (Michie 1983), Del Code Ann. tit. 11, § 1104 (Michie 1987); D.C. Code Ann. § 2-1356 (Michie 1988); Fla. Stat. Ann. § 415.503(9)(f) (West Supp. 1992); Haw. Rev. Stat. § 350-4 (Michie 1988); Idaho Code § 16-1602(s)(1) (Bobbs-Merrill Supp. 1992); Idaho Code §§ 18-401(2), 18-1501(3) (Michie 1987); Ill. Ann. Stat. ch.23, para. 2054 (West Supp. 1992); Ind. Code Ann. § 35-46-1-4(a), -5(c) (Michie 1985); Iowa Code § 232.68(2)(c) (West 1985), § 726.6(1)(d) (West Supp. 1992); Kan. Stat. Ann. § 21-3608(1)(c) (1988); Ky. Rev. Stat. § 600.020(1) (Michie 1990); La. Rev. Stat. § 14:403(b)(5) (West Supp. 1992); Me. Rev. Stat. Ann. tit. 17-A, § 557 (West 1983), Me. Rev. Stat. Ann. tit. 22, § 4010 (West 1992); Md. Fam. Law Code Ann. § 5-701(n)(2) (Michie 1991); Miss. Code Ann. § 43-21-105(l)(i), (m) (Supp. 1992); Mo. Ann. Stat. § 210.115.3 (West Supp. 1992), Mo. Ann. Stat. § 568.040.2(4) (West 1979), Mo. Ann. Stat. § 568.050.2 (West Supp. 1992); Nev. Rev. Stat. Ann. § 200.5085 (Michie 1992), § 432B.020(2) (Michie 1991); N.H. Rev. Stat. Ann. § 169-C:3 XIX(c) (1990), N.H. Rev. Stat. Ann. § 170-C.5 II (1990), N.H. Rev. Stat. Ann. § 639.3 IV (1986); N.M. Stat. Ann. §§ 32-1-3(L)(5), 32-1-3(M)(4) (Supp. 1992); N.D. Cent. Code § 50-25.1-05.1(2) (Michie 1989); Okla. Stat. Ann. tit. 21, § 852 (West Supp. 1993), Okla. Stat. Ann. tit. 21, § 852.1 (West Supp. 1993); Or. Rev. Stat. Ann. § 419.500(1) (Butterworth 1987); R.I. Gen. Laws § 40-11-15 (Michie 1990); S.C. Code Ann. § 20-7-490(C)(3) (1985); S.D. Codified Laws Ann. § 25-7-16 (1992), S.D. Codified Law Ann. § 25-7-17.1 (1992), S.D. Codified Law Ann. § 26-8A-23 (1992); Tenn. Code Ann. § 71-6-102(1) (1987), Tenn. Code Ann. § 37-1-157(c) (1991); Utah Code Ann. § 78-3a-19.5 (Michie 1992); Va. Code Ann. §§ 18.2-314, 18.2-371.1 (Michie 1988), Va. Code Ann. § 63.1-248.2A2 (1991); Wash. Rev. Code Ann. § 26.44.020(3) (West Supp. 1992); Wis. Stat. Ann. § 48.981(3)(c)(4) (West 1987); Wyo. Stat. § 14-3-202(a)(vii) (1986), Wyo. Stat. § 35-1-201 (1988).

2. Usually, these cases involve an accommodation statute of some sort and another law containing criminal provisions such as child abuse, murder, or manslaughter. Defendants often argue that an exemption for certain behavior defined in the accommodation statute should he applied to other crimes.

II. LEGAL BACKGROUND

A. *Free Exercise*

The First Amendment to the United States Constitution absolutely protects religious belief.[3] According to the Supreme Court, however, states may still regulate religiously motivated conduct.[4] Of course, this does not mean that all state interferences with religious conduct are constitutional. Rather, the government must have a compelling state interest before it can interfere with the constitutional right to free exercise of religion.[5] Additionally, the state must demonstrate that the regulation chosen is the least intrusive method of effectively protecting its interest.[6]

In *Prince v. Massachusetts*, for example, the Supreme Court indicated that the protection of children is generally a compelling state interest.[7] Therefore, the state may pass a law that infringes on parents' free exercise of their religious beliefs if such a law protects children. In *Prince*, the Supreme Court explored the limits of the free exercise right and concluded that religious freedom does not include the right to harm the community or, more specifically, to expose a child to health risks or

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3. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

4. "Conduct remains subject to regulation for the protection of society." Id. at 304.

5. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In *Sherbert*, the Supreme Court, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945), stated that " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " Id.

But see *Employment Div. Dept. Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court limited the application of the *Sherbert* analysis in certain situations. When an "across-the-board criminal prohibition on a particular form of conduct" exists, the state need not show a compelling interest to defeat a Free Exercise challenge. Id. at 884. In support of this proposition, the Court quoted *Lyng v. Northwestern Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988): "The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " Id. The Court further noted that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,' contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

The *Smith* case, though not exactly on point because no statutory exemption was at issue, may be relevant in future accommodation statute cases. Perhaps state courts will interpret *Smith* as an indication that the Supreme Court would not view the Free Exercise Clause as a defense to a generally applicable law such as murder.

6. *Sherbert*, 374 U.S. at 407.

7. 321 U.S. 158, 167-70 (1944). In *Prince*, the court upheld a child labor law that prohibited, among other things, children under a certain age from selling magazines in public places. The mother of two children allowed them to sell a Jehovah's Witnesses' publication in a public place and claimed that the law prohibiting this behavior contravened her Free Exercise rights. Id. at 169-70.

death.[8] Further, the *Prince* Court also found that parents have no right to make their children religious martyrs; rather, the children themselves, when they reach the age of legal maturity, should be the ones to decide whether to follow in their parents' faith.[9]

B. Due Process

In order to satisfy the demands of the Fourteenth Amendment's Due Process Clause, states must give their citizens fair notice of what actions constitute criminal behavior.[10] States have differed in their interpretations of the notice requirement. In California, for example, the state violates the Due Process Clause if one of its statutes is not definite enough to provide standards of conduct that are proscribed, as well as standards for police enforcement and the ascertainment of guilt.[11] In contrast, Florida's highest court has held that a violation of due process occurs when a law is so confusing that one cannot discern what is being proscribed.[12] In addition, a court might find statutes void for vagueness if they issue commands that are inexplicably contradictory.[13] In such a case, due process is not satisfied since one cannot comply with both laws or even understand exactly what is being prohibited.

III. The Debate

The state supreme court decisions of California and Florida illustrate the debate over whether parents should be criminally liable for the deaths of or substantial harm to their children when the parents rely solely on spiritual healing or prayer for a cure. In *Walker v. Superior Court*, the California Supreme Court held that a spiritual healing

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8. "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Id. at 166-67 (citing *People v. Pierson*, 68 N.E. 243 (1903)).

9. "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Prince*, 321 U.S. at 170.

10. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)) (stating that due process should ensure that no person is convicted "unless 'a fair warning has first been given to the world in language that the common world will understand, of what the law intends if a certain line is passed' ").

11. *Burg v. Municipal Court*, 673 P.2d 732, 746 (Cal. 1983). See also *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

12. The court stated that due process is lacking when "a man of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe." *Linville v. State*, 359 So.2d 450, 453-54 (Fla. 1978). See also *Connally v. General Construction Co.*, 269 U.S. 385, 393 (1926) (stating that a statute lacks due process if it precludes "an ordinary person" from deciding in advance which courses of conduct are legal).

13. *Raley v. Ohio*, 360 U.S. 423, 438 (1959).

exemption, intended to protect parents from misdemeanor child neglect charges, did not provide the parent-defendant with a defense to involuntary manslaughter and felony child endangerment charges.[14] The *Walker* Court further found that the defendant's prosecution did not run afoul of either the Free Exercise Clause or the Due Process Clause.[15] In contrast, the Florida Supreme Court's recent decision in *Hermanson v. State* held that parents should not be prosecuted on criminal charges resulting from reliance on the statutory exemption for spiritual healing contained in child abuse statutes.[16]

A. Walker v. Superior Court

1. The Facts

Four-year-old Shauntay Walker fell ill with flu-like symptoms on February 21, 1984. Her mother, Laurie Grouard Walker, was a member of the Church of Christ, Scientist. Consistent with the tenets of her religion, Walker, the defendant in this case, chose to treat Shauntay's illness with prayer instead of seeking medical care.[17] Walker also contacted both an accredited Christian Science prayer practitioner who prayed for Shauntay and a Christian Science nurse who attended Shauntay on three different occasions during her illness. Despite these measures, Shauntay lost weight and grew increasingly disoriented and irritable during the week before her death. After seventeen days of illness, during which time she received no medical care, the child lapsed into a period of heavy and irregular breathing and finally died of acute purulent meningitis.[18]

The State charged the defendant with involuntary manslaughter and felony child endangerment for criminal negligence proximately causing Shauntay's death. The court denied the defendant's motion to dismiss the prosecution's case, in which she argued that her conduct

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14. 763 P.2d 852 (Cal. 1988).

15. Id. The court analyzed the prosecution under the Free Exercise and Due Process Clauses found in both the California Constitution and the United States Constitution.

16. 604 So.2d 775 (Fla. 1992). Although the Hermansons were actually prosecuted for the death of their child, the *Hermanson* Court contended that the parents were only prosecuted for their reliance on the spiritual accommodation statute.

17. *Walker*, 763 P.2d at 855. The court in *Walker* noted that "[m]embers of the Church 'believe that disease is a physical manifestation of errors of the mind.' " Id. at 855 n.1. (quoting Catherine W. Laughran, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 8 Loy. L.A. L. Rev. 396, 397 n.7 (1975)). However, "if some turn in what they think is an urgent time of need to medical treatment for themselves or their children, they are not—contrary to some recent charges—stigmatized by their church." Id. (quoting Talbot, *The Position of the Christian Science Church*, 26 N. Eng. Med. J. 1641, 1642 (1983)).

18. *Walker*, 763 P.2d at 855. An autopsy revealed that the child had suffered from meningitis for at least two to three weeks. *Walker v. Superior Court*, 222 Cal. Rptr. 87, 88 (Cal. Ct. App. 1986).

was specifically protected by law and that the statutes utilized in her conviction failed to provide fair notice that her conduct was criminal. The California Supreme Court granted the defendant's second petition for review, in which she offered various statutory and constitutional arguments as to why her prosecution was barred as a matter of law. The court held that Walker could be prosecuted as charged.[19]

2. The Majority Opinion

The *Walker* court began its discussion by addressing the three statutory claims presented by the defendant: (1) that Section 270[20] of the California Penal Code was a complete defense to her prosecution; (2) that the legislature expressed an intent to exempt prayer conduct from the reaches of Penal Code Sections 192(b)[21] and 273a(1);[22] and (3) that she lacked the requisite measure of culpability.[23] It then considered the defendant's claims that her conduct was absolutely protected by free exercise clauses contained in both the state[24] and federal[25] con-

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19. All facts come from *Walker*, 763 P.2d at 855.

20. The original statute enacted in 1872 provided the following list of necessities to he furnished by the parent: "food, clothing, shelter, or medical attendance." In 1925, the state legislature added the phrase "or other remedial care" after "medical attendance." Then, in 1976, the statute was again amended to specify that " 'treatment by spiritual means through prayer alone" constitutes 'other remedial care.' "

This Section now reads in pertinent part:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine . . . or by imprisonment . . . or hoth . . . If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care', as used in this section.

Cal. Penal Code § 270 (West 1988).

21. Cal. Penal Code § 192(b) defines involuntary manslaughter as the "unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."

22. This Section reads:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to he placed in such a situation that its person or health is endangered, is punishable by imprisonment . . . .

Id. § 273(a)(1).

23. This Note will not address the culpability issue.

24. Cal. Const., Art. I., § 4. Because the state provision is essentially the same as the federal one, only the federal provision will be discussed.

25. U.S. Const., Amend. I. The amendment bars the government from prohibiting the free exercise of religion.

stitutions and that her due process rights[26] were violated because of a lack of notice in the statutes.

The court first addressed the threshold question of whether Section 270 permits prayer as an alternative to medical care or whether the term "other remedial care" represents a distinct and additional necessity that a parent must furnish aside from "medical attendance." Because of the clear language utilized in the statute, the court concluded that the legislature intended "other remedial care" to be a substitute for "medical attendance" and held that Section 270 exempts parents who use prayer treatment from this statutory requirement to furnish medical care.[27]

The court then turned to the question of whether the exemption applies to the manslaughter and child endangerment statutes. After examining the clear language of these statutes, their respective objectives, and their legislative histories, the court concluded that the exemption does not apply in prosecutions under Sections 192(b) and 273a(1).[28] Specifically, the court noted that conduct which is legal in one context may be actionable under other statutes written with different legislative purposes.[29] The court relied on the statutory construction rule which provides that statutes should be read together only if they are in pari materia.[30] That is, unless the statutes relate to the same person, thing, or class thereof, or have the same purpose or object,[31] they should not be construed as having parallel constructions.[32]

In this case, Section 270 was created not to punish neglectful parents, but rather to secure financial support for children.[33] As a fiscal policy, courts have created an insolvency exception to compliance with this particular statute.[34] However, no such exception has been recognized under Sections 273a or 192(b), both of which are protection statutes.[35] Moreover, the fact that the legislature chose to amend one

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26. Cal. Const., Art. 1, § 7 and U.S. Const., Amend. XIV "assure that no person shall be deprived of 'life, liberty or property without due process of law.'" *Walker*, 763 P.2d at 871.

27. Id. at 858. In so holding, the court overruled dictum in *People v. Arnold*, 426 P.2d 515 (Cal. 1967), which stated that use of "other remedial care" did not satisfy the "medical attention" obligation.

28. *Walker*, 763 P.2d at 862.

29. The court explained that "[c]onduct that is legal in one statutory context thus may be actionable under separate statutes created for different legislative purposes." Id. at 858-59.

30. Id. at 858-59 n.4.

31. Whether two statutes have the same purposes and objects is the most important factor in determining whether they should be construed together. Id. at 862.

32. Id.

33. Id. at 859.

34. Id.

35. Id.

statute to include a religious accommodation while not amending others demonstrates an intent to leave the law as it stands.[36]

The defendant also contended that the California legislature implicitly intended to exempt prayer treatment from the consequences of Sections 192(b) and 273a(1). The defendant's argument was based on a criminal liability exemption for the substitution of prayer for medical attention present in several statutes.[37] The court found, however, that none of these statutes with accommodation exemptions indicated a legislative intent to sanction prayer in the case of a child in "life-threatening circumstances."[38] Moreover, after examining the legislative histories and applying the rules of statutory construction to three specific abuse and neglect statutes[39] which provide that "children receiving treatment by prayer shall not 'for that reason alone' be considered abused or neglected for its purposes," the court found that the legislature intended prayer treatment to be accommodated as a means of attending to the needs of a child only when there is no risk of serious physical harm.[40]

The court based its reasoning on a dependency and neglect case decided by the Supreme Court of Colorado, *People in the Interest of D.L.E.*[41] In *D.L.E.*, the court found that parents' use of prayer treatment in lieu of medical treatment when their child is in a life threatening situation is enough to trigger a finding of neglect.[42]

The defendant's first constitutional claim rested on the Free Exercise Clause of the First Amendment and the analogous provision in the state constitution. In addressing this claim, the court relied on the Supreme Court's decision in *Cantwell v. Connecticut*, which held that states may regulate religiously motivated conduct.[43] In determining whether this particular government restriction on conduct violated the defendant's First Amendment rights, the court balanced the importance of the state's interest against the severity of the religious infringe-

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36. Id. at 862.

37. Since the legislature created the exemption in the first instance, it surely knew how to create such an exemption in other statutes. By not providing for accommodation in these other cases, it seems the legislature was choosing specifically to provide no such defense in these other situations.

38. Id. at 863. Many of the statutes cited deal with exemptions for medical licensing of prayer practitioners and their facilities and the accommodation for an individual to rely on prayer for his own care. Id. at 863 n.9, n.10. Obviously, the legislature would be motivated by different concerns in these cases.

39. Cal. Welf. & Inst. Code §§ 16500 and 18950 (West 1991); Cal. Penal Code § 11164 et seq. (West 1992).

40. *Walker*, 763 P.2d at 863-66.

41. 645 P.2d 271 (Colo. 1982).

42. Id. at 274-75.

43. *Walker*, 763 P.2d at 869. See also *Cantwell*, 310 U.S. at 296.

ment.[44] In addition, the court recognized that the regulation has to be the least restrictive alternative to advance adequately the state's interest.[45]

After analyzing the factors in the balancing test, the *Walker* court concluded that no matter how severe the religious imposition, the governmental interest is clearly sufficient to justify any restrictive effect.[46] Moreover, the court rejected the defendant's claim that a civil dependency proceeding would advance the state interest in a less intrusive manner reasoning that it is unclear that parents would prefer to lose custody of their children rather than face criminal liability. Further, such a proceeding would not necessarily be effective since the state often does not learn of a child's illness until the child's death.[47]

The defendant's final defense to her prosecution was based on the Due Process Clause of the Fourteenth Amendment and the corresponding provision in the California Constitution. As stated previously, due process requires that a state give its citizens fair notice of what constitutes criminal conduct.[48] The court examined the two components of this requirement. Specifically, that the statute must be definite enough to provide: (1) a standard of conduct for proscribed activities and (2) a standard for police enforcement and gnilt determination.[49]

The court summarily dismissed the claim that the statute did not provide adequate standards for police enforcement and guilt determination.[50] However, the court discussed the first requirement more extensively. The defendant initially contended that Sections 192(b) and 273a(1) do not clearly establish at what point in a child's illness a parent's religious treatment becomes criminal.[51] The court stated that there are many instances in which the law requires a person to estimate

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44. The Supreme Court set forth this test in *Sherbert*, 374 U.S. at 406, and *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

45. *Walker*, 763 P.2d at 869 (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981)). This is the same requirement the Supreme Court imposed in *Sherbert*, 374 U.S. at 406.

46. *Walker*, 763 P.2d at 870. In reaching this conclusion, the court relied on the frequently quoted statement made by the Supreme Court in *Prince*, 321 U.S. at 170: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves." *Walker*, 763 P.2d at 870. Additionally, the court noted that " '[t]he right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death.' " Id. (quoting *Yoder*, 406 U.S. at 233-34).

47. *Walker*, 763 P.2d at 870-71.

48. Id. at 871. See notes 10-14 and accompanying text for a discussion of the notice requirement.

49. Id. (quoting *Burg*, 673 P.2d at 732).

50. *Walker*, 763 P.2d at 872.

51. Id. at 871-72.

correctly regarding his conduct[52], and that the law required no more in terms of notice.[53] The defendant also argued that the statute violated her right to fair notice because the same conduct accommodated in Section 270 is criminally punished in Sections 192(a) and 273a(1).[54] The court rejected this contention as well as a matter of law.[55]

B. Hermanson v. State

1. The Facts

On or about September 25, 1986, William F. and Christine Hermanson noticed that there was something wrong with their daughter, Amy. They believed her symptoms were a physical manifestation of an emotional illness. As members of the First Church of Christ Scientist, they called a duly-accredited practitioner of their church for consultation and treatment in accordance with their religious beliefs. The practitioner administered prayer treatment until September 30. On September 29, they noticed that Amy's condition had worsened and called another practitioner for additional spiritual treatment. That day, Mr. Hermanson had a discussion with his father-in-law who suggested that Amy might have diabetes.[56] On September 30, the Hermansons secured the services of a Christian Science nurse.[57] That same day, a counselor from the Department of Health and Rehabilitative Services called and informed Mr. Hermanson that the Department had received a complaint alleging child abuse and that a hearing was set for that afternoon to determine, among other things, whether medical treatment should be ordered for Amy. While at the courthouse, Mr. Hermanson received notice that Amy's condition had worsened and that someone

52. Id. at 872. The Court quoted Justice Holmes:

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree . . . .' An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor.

Nash v. United States, 229 U.S. 373, 377 (1913).

53. That is, all laws proscribing certain conduct necessarily require a person (usually the reasonable person) to determine whether his or her actions cross the threshold of legal behavior. Laws that require such a determination provide adequate notice to society that certain behaviors will not be tolerated. See *Walker*, 763 P.2d at 872.

54. Id.

55. Id. The court requires its citizens to appraise themselves of not only statutory language but also of judicial construction and legislative purpose. Id. Given the previously stated differing objectives in the statutes, it cannot be said that the defendant was subjected to "inexplicably contradictory commands." Id. at 872-73.

56. While there is no evidence in the case that Mr. Hermanson's father-in-law was an expert on diabetes, the conversation tends to demonstrato that a reasonable person would recognize Amy had a serious illness.

57. The case does not detail the specific nature of the care given by the Christian Science nurse.

had called an ambulance. Amy died at 1:27 p.m. on September 30 from diabetic ketoacidosis due to juvenile-onset diabetes mellitus. Expert testimony presented at trial indicated that death most likely could have been avoided with medical treatment.[58]

William and Christine Hermanson were convicted of felony child abuse resulting in third degree murder. They sought a reversal of their convictions in the district court of appeals. The Hermansons claimed that: (1) they had a statutory affirmative defense to, or exemption from, liability; (2) the free exercise and due process clauses of the federal and state constitutions prohibited their convictions; and (3) their motion to dismiss should have been granted because they did not possess the required degree of culpability.[59] The appellate court affirmed the trial court's sentence and certified the issue of whether the spiritual treatment clause found in one section of the Florida Statutes provides a statutory defense to a criminal action brought under Florida's child abuse statute.[60] The state supreme court found that a violation of due process had occurred and accordingly quashed the court of appeals' decision.[61]

2. The Holding

Though the Hermansons challenged the court of appeals' decision on four grounds, the Florida Supreme Court found that the due process claim was dispositive and declined to comment on the others.[62] After explicitly rejecting the *Walker* court's analysis,[63] the court found that in essence, when construed together, Florida Statutes Sections 827.04(1)[64] and 415.503(9)(f)[65] are ambiguous and deny due process be-

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58. Specifically, the expert stated that death could have been avoided "to a reasonable degree of medical certainty, by medical treatment up to shortly before her death." *Hermanson v. State*, 570 So.2d 322, 325-27 (Fla. Dist. Ct. App. 1990).

59. All facts come from id. at 324-27.

60. *Hermanson v. State*, 604 So.2d 775, 775 (Fla. 1992).

61. Id.

62. Id. at 780.

63. The court also rejected the approaches taken by courts in Pennsylvania and Indiana which are similar to the *Walker* decision. Id. at 781-82. See *Pennsylvania v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986).

64. This child abuse statute reads in pertinent part:

> (1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree.

Fla. Stat. Ann. § 827.04(1) (West 1992).

Section 782.04(4), the third degree murder statute, provides that the "killing of a human being," while engaged in the commission of child abuse, "is murder in the third degree." Fla. Stat. Ann. § 782.04(4) (West Supp. 1992).

65. Section 415.503, a section containing definitions to Sections 415.502 to 415.514, reads in pertinent part:

> (1) 'Abused or neglected child' means a child whose physical or mental health or welfare is

cause they fail to give notice as to the point in time at which a parent's reliance on spiritual treatment moves into the realm of culpable negligence.[66] Specifically, the court found that this ambiguity created a "trap" for the ordinary person. In reaching its conclusion, the court relied on one of its prior holdings where it found that a violation occurs when one of ordinary intelligence cannot discern what activity is proscribed.[67]

In addition, the court based its decision on the due process discussion in the Minnesota case of *State v. McKown*.[68] In *McKown*, the two statutes implicated were a child neglect statute containing a spiritual exemption and a manslaughter statute that did not contain such an exemption.[69] The *McKown* court found that the statutes should not be

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harmed, or threatened with harm, by the acts or omissions of the parent . . . (9) (formerly subsection 7) 'Harm' to a child's health or welfare can occur when the parent . . . (f) [f]ails 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 . . . 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: 3. [p]reclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician . . .

Fla. Stat. Ann. § 415.503(9)(f) (West Supp. 1992).

The accommodation language was initially passed in 1975 as Section 827.07(4). The Senate staff analysis stated that "these provisions were 'a defense for parents who decline medical treatment for legitimate religious reasons.'" *Hermanson*, 604 S.2d at 776.

66. Id. at 775. The court explicitly stated that "a person of ordinary intelligence cannot be expected to understand the extent to which reliance on spiritual healing is permitted and the point at which this reliance constitutes a criminal offense . . . The statutes have created a trap that the legislature should address." Id. at 776.

67. The court stated that there is a violation of due process when a man of common intelligence cannot discern what activity the statute proscribes. *Hermanson*, 604 So.2d at 782 (noting *Linville v. State*, 359 So.2d 450, 453-54 (Fla. 1978)).

68. 475 N.W.2d 63 (Minn. 1991). The facts in *McKown* are similar to those in *Walker* and *Hermanson*. The parents were indicted for second-degree manslaughter after their eleven-year-old child died of diabetic ketoacidosis; the parents were Christian Scientists and used spiritual means alone to treat their child's illness. Id.

69. Minn. Stat. § 609.378 (1992) reads in pertinent part:

Subdivision 1 . . . . The following people are guilty of neglect or endangerment of a child and may be sentenced to imprisonment . . . or to payment of a fine . . . or both. . . . (a) . . . A parent . . . who willfully deprives a child of necessary food, clothing, shelter, health care . . . when the parent . . . is reasonably able to make the necessary provisions and the deprivation substantially harms the child's physical or emotional health . . . is guilty of neglect. . . . If a parent . . . in good faith selects and depends upon spiritual means or prayer for treatment . . . this treatment or care is 'health care,' for purposes of this clause (a).

Minn. Stat. § 609.205 (1992) reads in pertinent part:

A person who causes the death of another by any of the following means is guilty of manslaughter in the second degree and may be sentenced to imprisonment . . . or to payment of a

construed together to allow the spiritual treatment exemption defense in a manslaughter charge since they are not ambiguously worded so as to invoke the need for further interpretive tools and that the statutes are not in pari materia because they relate to different purposes.[70] The *McKown* court found the child neglect statute violated due process because it did not inform the defendants that if their chosen method of treatment failed, they could face criminal charges beyond that provided for in the neglect statute.[71] Accordingly, the defendant was not convicted.

IV. Analysis of the Cases and Their Ramifications

A. Constitutional Arguments

1. Free Exercise

Clearly, the state may interfere with its citizens' constitutional rights if it has a compelling interest in doing so.[72] Rarely does anyone challenge convictions in these cases by asserting that the welfare and protection of children is not compelling. Rather, scholars tend to challenge these convictions by arguing that (1) the belief-conduct distinction is merely rhetorical, thereby creating punishment of belief as opposed to conduct;[73] (2) the decisions in cases like *Walker* do not pro-

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fine . . . or both: (1) by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances causing death or great bodily harm to another. . . .

70. *McKown*, 475 N.W.2d at 66.

71. Id. at 68-69. The court in this case specifically noted that the precise due process issue at hand was distinguishable from that discussed in *Walker* and the *Hermanson* case as decided at the Court of Appeals level. Id. at 67 & n.7. Essentially, the court found that the issue it confronted was unique because the question was not whether the language used in a particular statute was sufficient to provide fair notice, but rather whether the statute went far enough in stating what penalties could be imposed by virtue of another statute. Id. at 67. The court noted that the language allowing spiritual treatment was broad and did not provide a point in time when such conduct could become criminal. Id. at 68. Yet, the court concluded by stating that it neither held that conduct complying with one statute necessarily complies with all others absent explicit notice to the contrary nor that the state could never prosecute one whose reliance on spiritual healing resulted in a child's death. Id. The court asserted that its holding was limited to this particular instance when the state has expressed clearly its intention to permit prayer in lieu of medical treatment. Id. at 68-69.

The dissent in the case found that the majority's holding was nothing but the in pari materia argument "garbed in the cloak of due process." Id. at 71. It further found that any mistake on the part of the defendants was one of law, which is not a defense to prosecution. Id.

72. *Sherbert*, 374 U.S. at 406.

73. See Edward Egan Smith, *The Criminalization of Belief: When Free Exercise Isn't*, 42 Hastings L. J. 1491 (1991).

tect children;[74] and (3) there are less restrictive means of advancing the state's interests.[75]

One author has argued that because conduct becomes criminal only at the point that a reasonable person would have sought medical attention, the state is punishing parents for their beliefs and not their conduct. That is, this standard focuses on what a reasonable person believes about spiritual healing, thereby restricting what a particular religious adherent is free to believe.[76] The author has asserted that the distinction between absolutely protected religious belief and regulated conduct based on religious belief is, therefore, purely rhetorical and therefore creates a violation of the First Amendment when parents are convicted on criminal charges based on the spiritual treatment of their children.[77]

Although the purpose of the Free Exercise Clause is to protect minority religions from the will of the majority, the Supreme Court has stated that there is such a distinction between "absolutely protected religious beliefs" and "religiously motivated conduct."[78] In the cases previously discussed, the issue is not whether the parents are free to believe that spiritual healing will cure their children, but rather whether by refusing to seek medical attention for their children they are engaging in unprotected religiously motivated conduct. Thus, although a parent may believe that his or her child will recover from an illness with spiritual treatment alone, because she objectively knows when a child needs medical attention, he or she should be held accountable for failing to act in accordance with a state imposed obligation.[79]

Even conceding that the belief-conduct distinction is purely rhetorical, such a distinction must exist to prevent chaos in society. A civilized society simply cannot exist if everyone is allowed to disregard the law to the detriment of others simply because he or she believes their religion demands the commission of an unlawful act.[80]

The argument that *Walker* type cases do not protect children is also problematic because it does not consider the various goals of crimi-

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74. Elizabeth R. Koller, Walker v. Superior Court: *Religious Convictions May Bring Felony Convictions*, 21 Pac. L.J. 1069 (July 1990).

75. Id. at 1069; Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 Fla. St. L. Rev. 559 (1990).

76. Smith, 42 Hastings L. J. at 1491 (cited in note 73).

77. Id.

78. See notes 3-4 and accompanying text.

79. Parents who use spiritual treatment do not live in a vacuum, and therefore probably do recognize the point in time at which most people would seek medical attention for their children. See note 17 (stating that Christian Scientists may, in an "urgent time of need" utilize medical treatment).

80. See *Smith*, 494 U.S. at 884-85.

nal law.[81] While it may be true that one who has personally seen a religious healing, or perhaps has even received successful spiritual treatment, likely will not pay heed to criminal sanctions at first, it does not follow that protection of children is not enhanced. First, in terms of specific deterrence, if parents are actually imprisoned for the death of one child, it seems likely they would not proceed along the same course with their other children. Second, punishing these parents accomplishes the goal of general deterrence. Parents are thereby forced to acknowledge not only the existence of such laws, but also the fact that ordinary people are subject to them and may be prosecuted for violations to the fullest extent. This awareness may inhibit one from committing the same crime. For example, if a fellow church member is punished for permitting a child to die by withholding medical attention, a parent will be more likely to obey the law.

Finally, scholars have argued that criminal prosecution is not the least restrictive means for advancing the state's interest in child protection. One author has asserted that losing temporary custody of a child is less severe, from the family's standpoint, than criminal prosecution.[82] This may not be an effective alternative, however, since the authorities may not learn of an illness until the child's death. One response to this rebuttal is that modern reporting statutes alert authorities to potentially dangerous situations in time to prevent children's deaths.[83] Yet, the child in *Hermanson* died while the father was actually at the custody hearing.[84] Thus, in at least some cases, reporting statutes and dependency hearings are not effective in preventing harm to a child since the child may die before the judge can order medical care.

The Supreme Court has held that states may regulate religious conduct if they have a compelling interest in doing so. It appears that the safety and welfare of society's children cannot be effectively protected unless states are able to do so. To find otherwise would be to sentence children, as well as other members of society, to serious bodily injury or death whenever one's religious beliefs call for harm to others. For example, if religiously motivated conduct could not be regulated by the state, then one whose religion calls for human sacrifice would be

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81. One of the principal reasons for criminal punishment is deterrence. This deterrence can be specific, meaning that punishment serves to keep one from repeating a crime. The deterrence, however, can also be general. In general deterrence, society at large is warned against committing a crime.

82. Clark, 17 Fla. St. L. Rev. at 559.

83. See, for example, Daniel J. Kearney, *Parental Failure to Provide Child With Medical Assistance Based On Religious Beliefs Causing Child's Death*, 90 Dick. L. Rev. 861, 885 (1986) (arguing that state ordered care is an effective alternative).

84. *Hermanson*, 604 So.2d at 778.

free to kill whomever he or she wished in the name of freedom of religion.[85]

2. Due Process

The alleged problem with notice in *Walker* and *Hermanson* is that individuals supposedly cannot ascertain at which point their conduct becomes criminally culpable. This is different from the traditional problem of fair warning in that the question is not whether the behavior at issue is illegal, but rather at which point, and why, the behavior ceases to be legal. Graphically, one can imagine this problem on a continuum with completely legal conduct on one end and completely illegal conduct on the other. The question is, therefore, where on the continuum does the characterization of the behavior change and how can one recognize that point?

First, note that while the *Hermanson* court relied on the Minnesota court's reasoning in *McKown*, the issues in these two cases were actually completely different.[86] The issue in *McKown* was whether the neglect statute at issue went far enough in that it failed to provide that compliance with the statute did not insulate an individual from prosecution under other statutes.[87] In fact, the *McKown* Court explicitly stated that the issue was different than the one considered in *Walker* and *Hermanson* at the Court of Appeals level.[88] Moreover, the *McKown* Court conceded that the two statutes implicated should not have been read together because they were not in pari materia.[89] Since the finding by the state Supreme Court in *Hermanson* was actually based on the premise that the two statutes, when considered together,[90] violated due process, there is no support in *McKown* for the *Hermanson* decision.[91]

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85. Note that some accommodation statutes recognize beliefs of only Christian Scientists or other established and recognized mainstream religions. However, these statutes present serious problems in terms of the Establishment Clause and the Equal Protection Clause. For a legislature or court to decide which religions are legitimized by society would surely violate the excessive entanglement prohibition and various other coustitutional provisions. For a further analysis, see *State v. Miskimens*, 490 N.E.2d 931 (1984); Paula A. Monopoli, *Allocating the Cost of Parental Free Exercise*, 18 Pepp. L. Rev. 319 (1991); Christine A. Semanson, Walker v. Superior Court: *A Question of Faith?*, 1989 Det. Coll. L. Rev. 263 (1989).

86. 475 N.W.2d at 67. See also note 71 and accompanying text.

87. 475 N.W.2d at 67.

88. Id.

89. Id.

90. *Hermanson*, 604 So.2d at 775.

91. Recall the dissent in *McKown*. There, Justice Coyne noted that the due process argument as framed in the case was really just an in pari materia argument cloaked in due process language. 475 N.W.2d at 69. Thus, any mistake regarding the proscribed conduct contained in the statute is one of law, which is not a legally recognized defense. Id. at 71.

One issue presented in *Walker* and *Hermanson* regards the point in time at which one's previously lawful conduct becomes criminal. The court in *Hermanson* concluded that the state trapped the Hermansons by declaring certain conduct legal in one context but illegal in another without fair warning.[92] There are two crucial elements of this conclusion: (1) whether fair warning was given and (2) whether the statute should be characterized as a trap.

Since the court in *Hermanson* ruled that an objective criteria for determining due process violations of this sort was proper,[93] one must examine what impression a reasonable person would gather from the statute's language. The statute in *Hermanson* clearly provides that the definitions contained therein are to be used with a set of particular statutes only—a set that does not include the statute related to third degree murder. Furthermore, the subsection containing the spiritual treatment exemption expressly states that such accommodation does not preclude authorities from intervening and ordering medical care on the child's behalf.[94] Thus, it is not reasonable to conclude that the exemption applies to create total immunity in all cases related to spiritual healing. Obviously, the state did not intend to remove itself completely from the realm of spiritual treatment. Therefore, a parent's knowledge of a spiritual accommodation statute does not excuse his or her ignorance regarding an applicable murder or manslaughter statute. Courts generally construe this ignorance as a mistake of governing law, a mistake which is not normally considered a legal defense to criminal prosecution.[95]

Additionally, the *Hermanson* Court misinterpreted the real issue in its characterization of the trap. The court stated that the trap resulted from the fact that conduct in one context was legal while the same conduct in another context was illegal. This characterization must be inaccurate because there are several instances in which context determines illegality.[96] The real issue is determining when the line is crossed.

The *Hermanson* court contended that because the statute is too ambiguous to provide adequate notice of when one's behavior becomes

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92. *Hermanson*, 604 So.2d at 782 (quoting Clark, 17 Fla. St. L. Rev. at 585 (cited in note 75)).

93. The appropriate inquiry is whether a person of common intelligence would know that certain conduct is proscribed. *Hermanson*, 604 So.2d at 775.

94. Fla. Stat. Ann. § 415.503 (Supp. 1992). See note 65 for exact language.

95. For further explanation on mistakes of governing law, see John Kaplan and Robert Weisberg, *Criminal Law: Cases and Materials* at 139-74 (Little, Brown, 2d ed. 1991).

96. For example, one is free to walk throughout his home nude but walking in the nude outside of the home would violate an ohscenity law. Similarly, it is not illegal to be intoxicated if one is over the legal drinking age; yet, driving an automobile while intoxicated would violate the law.

illegal, one can only avoid prosecution by guessing correctly about the legality of one's actions.[97] Yet, as the *Walker* Court articulated, the law regularly requires this type of determination. All members of society must estimate when their behavior ceases to be legal—the law forces people to guess, as a matter of degree, where the line between legal and illegal behavior is crossed.[98] Thus, there comes a point at which parents have a duty to seek care for their child to ensure the child's well-being. This point must be estimated as the point when a reasonable person would realize the gravity of the situation and call for medical assistance—usually at a point before the occurrence of great bodily harm or death.

While the *Hermanson* court expressly rejected this approach, it is undeniable that this is exactly how the law customarily operates. An example of having to guess rightly can be seen in the concept of rape. On one end of the continuum is consensual sex. On the other end is rape. Supposedly, the transformation between consensual sex and the illegal act of rape occurs whenever the victim states or shows an unwillingness to proceed with the act. In reality, however, the point where "no means no" has become blurred. An individual making sexual advances must decide when the other party is actually consenting. If he fails to ascertain unwillingness, he is guilty of a crime. Rarely would one expect a rapist to challenge his prosecution by claiming that although he knows that rape is a crime his right to due process has been violated because the state mandated that he guess correctly in determining whether the other party had consented.

With regard to the mandate that a law cannot issue contradictory commands and satisfy the due process requirement, again, the statute is dealing with a continuum and not two opposites. The law does not provide both that one must use spiritual healing and that one must not use spiritual healing. Rather, it says that one may use spiritual healing in certain circumstances, as defined, but not in other circumstances.

As to the question of why, at a certain point in time, the state is willing to interfere with familial relations, the answer is straightforward. The line is drawn at the point at which great bodily harm or death will result to a child. The state has a very real interest in protecting its children, although it refrains from intervening until absolutely necessary in order to preserve the sanctity of the family.

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97. *Hermanson*, 604 So.2d at 782.

98. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. . . ." *Walker*, 763 P.2d at 872.

If ignorance of the law is, indeed, no excuse, then courts must prosecute parents who permit their children to die needlessly.[99] Parents have constructive notice of murder laws. They also have no reasonable right to believe that the state has completely recused itself from spiritual healing matters simply because one statute within a code contains a narrow exception pertaining only to a particular statute or statutes. Furthermore, just because a statute does not define an exact time when conduct becomes unreasonable, that does not make the statute unconstitutional. Again, we all must choose different degrees of behavior every day, and if our decisions are incorrect, we may be held accountable.

B. Statutory Construction

While the court in *Hermanson* made explicit reference to construing the statutes together, it did not address any statutory construction issues. This is a serious error because the two statutes should not be considered together in determining whether due process is violated unless they stand in pari materia. Before one can decide whether the two statutes together create a trap, one must show that they should be read together in the first place.

The two statutes at issue in *Hermanson* should not be construed together for three reasons: (1) neither is ambiguous so as to trigger the need to construe them together; (2) the accommodation statute expressly defines its own limits;[100] and (3) the purposes behind the two statutes are different.

First, the *McKown* court stated that the doctrine of in pari materia is simply an interpretive tool to be used in determining the meaning of ambiguously worded statutes.[101] Neither statute in *Hermanson* is ambiguous. Indeed, the *Hermanson* court only found ambiguity after it construed the statutes together.[102] If the court had adhered to the principle of in pari materia, it would have never found any ambiguity.

Second, the spiritual accommodation provision sets its own limits. It is contained in a section of definitions related to a specifically listed group of laws.[103] After the Florida legislature renumbered former Sec-

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99. The causation argument presented by some defendants is not discussed in this Note.

100. The reasoning utilized in this section applies to any claim of total immunity arising from Section 415.511. For support of such a total immunity claim, see Clark, 17 Fla. St. L. Rev. at 559 (cited in note 75).

101. *McKown*, 475 N.W.2d at 67.

102. *Hermanson*, 604 So.2d at 775.

103. "415.503. Definition of terms used in *§§ 415.502 to 415.514.*" Fla. Stat. Ann. § 415.503 (West Supp. 1992) (emphasis added).

For support of this type of limitation on the applicability of a statute, see Semanson, 1989 Det. Coll. L. Rev. at 263 (cited at note 85) (focusing on the phrase "as used in this section").

tion 827.07(2), now codified at Sections 415.502 to 415.514, it chose not to extend the use of the definitions in Section 415.503 to any other section of the law. Even as previously enacted, the spiritual treatment language of Section 827.07(2) was limited to the reporting and investigating of child abuse and did not form part of the felony child abuse statute contained in Section 827.04(1).[104] Therefore, it seems contradictory to both legislative intent and common sense to construe the two statutes together.

Finally, as was the case in *Walker*, the two Florida statutes have very different purposes and should, therefore, not be construed in pari materia. The Florida Court of Appeals in *Hermanson* properly analyzed the purposes of each statute.[105] The appellate court found that Section 415.503, a definitions section, is part of a comprehensive scheme enacted to provide protective services to children.[106] The legislative intent of this scheme is contained in Section 415.502,[107] which essentially demonstrates that the statutes have the limited purpose of providing a reporting and investigation mechanism for the prevention of child abuse.[108]

The appellate court went further to establish the legislative intent before concluding that the statutes should not be construed together. It first noted that when a death occurs, the scheme has failed since its purpose is the prevention of harm. Action by other state agencies is then triggered.[109] Moreover, the scheme's administrative aspect is apparent because it does not provide for criminal penalties for actual

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104. *Hermanson*, 570 So.2d at 330.

105. Id. at 328-31.

106. See Fla. Stat. Ann. §§ 415.502-415.514 (West Supp. 1992).

107. This section reads:

> The intent of §§ 415.502-415.514 is to provide for comprehensive protective services for abused or neglected children found in the state by requiring that reports of each abused or neglected child be made to the Department of Health and Rebabilitative Services in an effort 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, to the maximum extent possible, by enhancing the parental capacity for adequate child care.

Fla. Stat. Ann. § 415.502 (West 1992).

108. The statutes merely provide a "mechanism for reporting suspected child abuse or neglect so that this may be investigated and stopped if substantiated. . . . The focus of the entire chapter is on the reporting, investigation and prevention of child abuse." *Hermanson*, 570 So.2d at 329.

109. Id. Section 415.504(3) provides that "[a]ny person required to report or investigate cases of suspected child abuse or neglect who has reasonable cause to suspect that a child died as a result of child abuse or neglect shall report his suspicion to the appropriate medical examiner. . . ." The examiner then "make[s] his own investigation and report[s] to the state attorney, local law enforcement, and HRS [Dept. of Health and Rehabilitative Services]." *Hermanson*, 570 So.2d at 329. The court noted that these different responsibilities are necessary since the directives contained within the scheme do not provide for a means of handling death. *Hermanson*, 570 So.2d at 329.

child abuse or neglect; instead, criminal penalties for abuse and neglect are contained in Sections 782 and 827.[110] The only criminal penalties included in the scheme are contained in Section 415.513, which provides for misdemeanor liability for failure to report or for divulging confidential information.[111] Thus, it is clear that Sections 415.502 to 415.514 only direct that for purposes of reporting and investigating, parents who fail to provide their children with medical treatment because of religious beliefs will not be found guilty of child abuse or neglect for that reason alone.[112] Any other construction would render the laws of murder and manslaughter meaningless in a great many cases and would fail in protecting the state's interest in regulating child welfare.

V. Conclusion

The United States Supreme Court should agree to hear any appeal regarding the issue of religious accommodation statutes so that it can revitalize its previous holdings in this area. On more than one occasion, the Court has ruled that religious conduct is not absolutely protected and that society's children have a right to protection against abuse. Furthermore, it has explicitly stated that parents cannot make religious martyrs of their children regardless of their own personal beliefs. However, until the Court reiterates its position that states must prevent needless harm to, or deaths of, children the state courts must consider seriously the constitutional and statutory construction issues raised by the California Supreme Court in *Walker*. In states with accommodation statutes, courts should adopt the reasoning of the California Supreme Court rather than that of the Florida Supreme Court and allow the prosecution of those who insist upon endangering the welfare of children.

By virtue of its verdict, the Florida Supreme Court in *Hermanson* has undermined that state's ability to provide for the well-being of its children. By ignoring constitutional mandates and rules of statutory construction, the *Hermanson* Court has allowed the needless suffering of children who are at the mercy of their parents' religious beliefs.

Again, the United States Supreme Court has clearly stated that religious conduct is not absolutely protected. Since it is not absolutely protected, courts must apply the compelling interest test to the statutes in these cases. Under the first prong of this analysis, it is well-established that the protection of children is a compelling interest justifying

110. *Hermanson*, 570 So.2d at 329.
111. Id.
112. Id.

state interference. It is equally clear that there is no less intrusive manner, as dictated by the second prong of the test, by which the state can effectively regulate this parental conduct. The fact that the Hermansons' child died while the dependency hearing, the only other real alternative means of regulation, was proceeding, supports this conclusion.

In due process terms, the Florida state legislature has satisfied all the required constitutional mandates. The religious accommodation provision indicates that a child will not be adjudged neglected solely because he or she is treated by spiritual means alone. The felony child abuse and murder statutes also give notice that certain conduct will result in criminal convictions. The fact that no statute expressly defines the exact point in time that religious treatment becomes criminal is not fatal. Rather, our entire judicial system is built around the reasonable person standard, under which such a person must determine daily which and to what degree certain behaviors are criminal.

The Florida Supreme Court also has based its holding on a faulty premise—that the two statutes at issue must be construed together. In fact, quite the opposite is true; the statutes unequivocally should not be read in light of one another. Neither statute is so ambiguous that it cannot stand alone. Further, the spiritual accommodation provision contains within itself the range for its application. Finally, the statutes are not in pari materia because they have different purposes.

The Florida Supreme Court has ignored the sound reasoning and analysis set forth in the *Walker* decision without differentiating between the cases.[113] Moreover, the *Hermanson* court relied on the *McKown* case even though the *McKown* court expressly distinguished the due process issue it confronted from those present in both *Walker* and *Hermanson*, at the appellate level. It appears that the Florida Supreme Court has judicially mandated what the Florida Legislature would not. Other states should not follow such a poor standard.[114]

If other jurisdictions interpreting accommodation statutes follow the unsound reasoning of the *Hermanson* court, the limits on freedom of religiously motivated conduct set by the United States Supreme Court will be eroded. Free exercise of religious beliefs is a critical part of our Constitution. Yet the state must recognize a parent has no right to cause serious bodily harm or death to his child by refusing medical

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113. While the California decision was only persuasive authority for the *Hermanson* court, once the Florida court chose to directly criticize and reject the *Walker* reasoning it should have explained its reasons for doing so.

114. See *West v. Pelican Management Services Corp.*, 782 F. Supp. 1132, 1137 (M.D. La. 1992) (stating that it is not the function of the courts to achieve that which the legislature itself could not achieve). See also *McClesky v. Zant*, 111 S. Ct. 1454, 1482 (1991) (stating that the Court did not function as a "backup legislature").

treatment because his religion compels him to do so—although he is free to refuse conventional treatments for himself. In essence, courts must not interpret statutes so as to permit parents to sentence their children to death.

*Janet June Anderson**

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