Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecutions of Faith Healing Parents

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I. Introduction

ROBYN TWITCHELL, a two-year-old child, died on April 8, 1986 of complications caused by a bowel obstruction. For the five days that Robyn was sick before he died, his parents David and Ginger Twitchell cared for him. As practicing Christian Scientists, David and Ginger Twitchell provided their son with faith healing instead of medical care.

2. A number of religious groups rely exclusively on faith healing and thus do not believe in providing medical care for themselves or their children. The most well-known of these groups is the First Church of Christ, Scientist. The Christian Scientists believe that disease exists because an error of the mind inflicts the illness on the body; therefore, the way to treat disease is to treat the mind and remove the error. See, e.g., Walker v. Superior Court, 763 P.2d 852, 855 n.1 (Cal. 1988), cert. denied, 491 U.S. 905 (1989); Steven Schneider, Christian Science and the Law: Room for Compromise?, 1 COLUM. J.L. & SOC. PROBS. 81 (1965); Wayne F. Malecha, Note, Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children, 12 J. LEGIS. 243, 243 n.3 (1985). See generally FREEDOM AND RESPONSIBILITY: CHRISTIAN SCIENCE HEALING FOR CHILDREN (The First Church of Christ, Scientist ed., 1989) [hereinafter FREEDOM AND RESPONSIBILITY] (collected views on practice of Christian Science faith healing). Resorting to medical care is not considered a sin, and thus Christian Scientists purportedly are free
Their decision not to provide medical care for Robyn was based on their good faith religious beliefs.

When Robyn became ill, the Twitchells retained a Christian Science practitioner to provide faith healing for him. They also retained a Christian Science nurse, whose primary role was to make the patient more comfortable. During Robyn's illness, the Twitchells consulted the church's Committee on Publication, which advises Christian Scientists as to their

to choose conventional medical care without fear of retribution. See, e.g., Walker, 763 P.2d at 855 n.1 (quoting Nathan A. Talbot, The Position of the Christian Science Church, 26 N.E. MED. J. 1641, 1642 (1983)); Shell D. Robinson, Comment, Commonwealth v. Twitchell: Who Owns the Child, 7 J. CONTEMP. HEALTH L. & POL'Y 413, 418 (1991); Schneider, supra, at 88. Such retribution has occurred in practice, however. See Robinson, supra, at 418; see also Brown v. Laitner, 435 N.W.2d 1, 2-5 (Mich. 1989) (The court recounted efforts of Christian Science practitioners to discourage parents' resort to medical treatment during child's fourteen-day illness prior to his death. For example, one practitioner told the parents that they would "have a long, hard road back to Christian Science if [they] turn[ed] to materia medica").

Other religious groups rely exclusively on spiritual healing. These groups include: The Church of The New Born, see Funkhouser v. State, 763 P.2d 695, 696 (Okla. Crim. App. 1988), cert. denied, 490 U.S. 1066 (1989); Faith Tabernacle Congregation and First Century Gospel Church, see George E. Curry, Rights Case Grows Over Measles Vaccinations, CHI. TRIB., Mar. 25, 1991, at 10; General Assembly and Church of the First Born, see In re D.E., 645 P.2d 271, 272 (Colo. 1982); Faith Assembly, see Malecha, supra, at 245; and Endtimers, see 20/20: The End is Near (ABC television broadcast, Mar. 6, 1992).

3. Twitchell, 617 N.E.2d at 612. A practitioner is a man or woman who has received special education in Christian Science and devotes his or her full time to healing. THE PERENNIAL DICTIONARY OF WORLD RELIGIONS 168-69 (1981). To some degree every Christian Scientist is expected to be his own practitioner. RICHARD T. BARTON, RELIGIOUS DOCTRINE AND MEDICAL PRACTICE 83 (1958); ROBERT PEEL, HEALTH AND MEDICINE IN THE CHRISTIAN SCIENCE 51 (1989). That is, when a Christian Scientist becomes ill, he treats himself by concentrating on removing the error of the mind that is inflicting illness on his body. See supra note 2. If the illness persists, however, a professional Christian Science practitioner may be called upon to assist in the treatment. The practitioner does not diagnose illness or prescribe medication. Rather, the "practitioner's role is basically one of Christian ministry." PEEL, supra, at 53.

A practitioner must meet certain qualifications to be approved by the Christian Science Church. One must "give evidence of Christian character, a moral life, devotion to Christian Science, and freedom from other business or professional commitments," PEEL, supra, at 51, furnish documented proof of healings which he has performed, id. (detailed testimonies), and possess the proper state of mind in order to heal effectively, MARY B. EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 366 (First Church of Christ, Scientist ed., 1875), Schneider, supra note 2, at 81 (applicant must submit affidavits).

4. Twitchell, 617 N.E.2d at 612. The nurse "[t]akes care of the practical needs of a sick or disabled person." PEEL, supra note 3, at 94. Christian Science doctrine requires only that a nurse have a demonstrable knowledge of Christian Science practice, that she understand the practical wisdom necessary in a sick room, MARY B. EDDY, CHURCH MANUAL OF THE FIRST CHURCH OF CHRIST, SCIENTIST 49 (First Church of Christ, Scientist ed., 1895), and that she be "cheerful, orderly, punctual, patient, full of faith,—receptive to Truth and Love." EDDY, supra note 3, at 395. In addition, current practices require that a Christian Science nurse complete a three-year training course. The academic portion of the course is fulfilled at a nurses' training school accredited by the Christian Science Church, and on-the-job training is completed at a Christian Science sanatorium. PEEL, supra note 3, at 95.
legal rights and obligations concerning faith healing. David Twitchell also read a church publication concerning the legal rights and obligations of Christian Scientists in Massachusetts. This publication quoted portions of a Massachusetts criminal nonsupport statute which contained a "faith healing exemption." According to the church, the exemption allows parents to provide faith healing to their children without suffering any criminal liability. The same publication quoted a portion of an opinion by the Massachusetts Attorney General purportedly stating that parents could provide faith healing without incurring any criminal liability.

After Robyn died, a physician determined that Robyn's condition could easily have been corrected with surgery. Ginger and David Twitchell were subsequently charged with involuntary manslaughter for failing to provide their child with necessary medical care. As a defense during their trial, the Twitchells asserted that the faith healing exemption in the Massachusetts criminal nonsupport statute prevented them from being charged with any crime, including involuntary manslaughter. The trial court refused to allow the Twitchells to assert the faith healing exemption as a defense or to submit any evidence regarding their reliance on the exemption. On appeal, the Supreme Judicial Court of Massachusetts rejected the argument that due process barred the Twitchells' prosecution, but con-

5. Twitchell, 617 N.E.2d at 612.
6. MASS. GEN. L. ch. 273, § 1 (1992). The relevant portion of the statute provided:
A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof.

Id. This exemption was recently repealed. See infra note 87 and accompanying text.

7. These statutory provisions are appropriately considered "exemptions" because they protect spiritual-healing parents from civil and criminal liability that is imposed on nonspiritual-healing parents for the same behavior. Contra Christina A. Clark, Note, Religious Accommodation and Criminal Liability, 17 FLA. ST. U. L. REV. 559, 561 n.6 (1990) (using phrase "accommodation" because it "better expresses the legislative intent that the withholding of medical treatment does not constitute child neglect when spiritual care is provided"). In this Article, "faith healing" will be considered synonymous with "spiritual treatment" and "spiritual healing."

8. Twitchell, 617 N.E.2d at 618.
9. Id. at 618 n.15.
12. Twitchell, 617 N.E.2d at 618.
cluded that a retrial was necessary because the Twitchells may have reasonably relied on an official misinterpretation of the faith healing exemption.13

Because the exemption was contained in the criminal nonsupport statute rather than the involuntary manslaughter statute, the Twitchells' ability to raise the exemption as a defense was not self-evident.14 Rather, the existence of a faith healing exemption in a statute other than manslaughter, the statute under which the parents were charged, raises difficult issues of statutory construction and due process. The statutory construction issue considers whether the exemption is actually incorporated into the manslaughter statute. The due process issue considers whether the manslaughter statute and the faith healing exemption—read together—fail to provide parents with fair notice that they may be prosecuted for failing to provide medical care if their child dies, despite their good faith attempts at faith healing.15 Even if the exemption is not incorporated, due process may be violated because the existence of the exemption sets a "trap" for the parents, who are not notified as to when faith healing becomes unlawful.16 I will refer to this due process issue as "intersectional" lack of fair notice.

Besides Massachusetts, the state supreme courts of California, Minnesota, and Florida have addressed the fair notice issue but none have provided an adequate analysis of the issue.17 In Walker v. Superior Court,18 the California Supreme Court found no fair notice violation in prosecuting a faith healing parent for her failure to provide medical care.19 The faith healing exemption at issue was articulated in California's criminal nonsupport statute, but the parent was charged with two different crimes, felony child endangerment and manslaughter.20 In State v. McKown,21 the Minnesota Supreme Court concluded that the statutes provided insufficient notice that faith healing could lead to prosecution for manslaughter; therefore, due process barred the defendants' prosecution. In Minnesota, the faith healing exemption was located in the criminal child neglect statute and provided

13. Id. at 617, 619-20.
14. See discussion infra notes 105-08 and accompanying text.
15. The application of these exemptions in this context also raises issues of free exercise of religion, establishment of religion, and equal protection. See, e.g., Ann M. Massie, The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach, 21 Hastings Const. L.Q. 725, 728 n.6 (1994); Monopoli, supra note 10, at 334-51. This Article addresses only procedural due process, the issue that has troubled the courts most deeply thus far.
16. See infra notes 126-29 and accompanying text.
17. See discussion infra part IV.C.
19. Id. at 873.
20. Id. at 855-56.
that the use of spiritual healing was not considered a deprivation of medical care.\textsuperscript{22} The Florida Supreme Court in \textit{Hermanson v. State}\textsuperscript{23} found that due process barred the prosecution of faith healing parents for child abuse resulting in third-degree murder. The court reached this conclusion even though Florida's faith healing exemption is found in its child protection statute,\textsuperscript{24} which does not address criminal liability for failure to provide medical care. These inconsistent decisions highlight the need for further analysis of the limits of procedural due process when two separate statutes intersect.

There are three additional reasons to address the procedural due process implications of prosecuting faith healing parents. First, although the United States Supreme Court refused to grant writs of certiorari in the \textit{Walker} and \textit{McKown} cases,\textsuperscript{25} the Court may have another opportunity to define the fair notice requirement more completely, particularly where two separate statutes are involved\textsuperscript{26} and a constitutional right is implicated.\textsuperscript{27} Second, the increase in the number of faith healing parents who have been prosecuted over the past decade\textsuperscript{28} underscores the need to determine how

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 64 & n.3.
\item \textsuperscript{23} 604 So. 2d 775 (Fla. 1992).
\item \textsuperscript{24} \textit{Id.} at 776.
\item \textsuperscript{25} State v. McKown, 112 S. Ct. 882 (1992); Walker v. Superior Court, 491 U.S. 905 (1989).
\item \textsuperscript{26} \textit{See} discussion \textit{infra} pp. 70-71.
\item \textsuperscript{27} \textit{See} discussion \textit{infra} part III.B.2.
\item \textsuperscript{28} Forty-two such prosecutions have been documented. \textit{See} Massie, \textit{supra} note 15, at 728 n.6.
\end{itemize}

It has been questioned whether criminally sanctioning the parents is the most appropriate legal response to the deaths of these children. In particular, criminal sanctions may be inappropriate because the parents loved their children and have already suffered a significant loss: sanctioning these parents would not serve any salutary purpose. \textit{See} Eric W. Treene, \textit{Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law}, 30 \textit{Harv. J. on Legis.} 135, 138-39 (1993). However, criminal sanctions against these parents are justified for a number of reasons. First, other remedies are ineffective because often the sick child's condition does not come to the attention of the authorities prior to her death. \textit{See infra} notes 168-69 and accompanying text. Second, these prosecutions deter parents from failing to provide medical care to their sick children. The need for specific deterrence is satisfied because the convicted parents often will be required to provide medical care to their remaining children. \textit{See}, e.g., People v. Ripberger, 283 Cal. Rptr. 111, 117 (Ct. App. 1991) (ordering parents to report to authorities any future illnesses of their children or any use of Christian Science practitioners); Kevin Cullen, \textit{Legal Victory for Christian Science Pair}, \textit{Boston Globe}, Jan. 14, 1992, at 3 (Massachusetts Superior Court ordered the Twitchells to obtain regular medical checkups for their other children); \textit{Court Trying to See that Children Get Medical Care}, \textit{Orlando Sentinel Trib.}, June 13, 1992, at D8 (the Sweats were ordered to inform the authorities if any of their other ten children develop serious health problems). The need for general deterrence also is satisfied because other parents who fear prosecution will provide their sick children with medical care. \textit{See}, e.g., Newmark v. Williams, 588 A.2d 1108, 1110 (Del. 1991) (parents took their sick child to the hospital because they feared criminal liability for foregoing medical care).
prosecutions may be limited by the existence of faith healing exemptions. Third, when the federal Child Abuse Prevention and Treatment Act of 1974 ("Act") is reauthorized in the coming year, the Department of Health and Human Services will have the opportunity to promulgate regulations to clarify the meaning of the exemptions consistent with the requirements of the Act.

The primary objective of this Article is to analyze critically the existing procedural due process doctrine as it relates to the prosecution of faith healing parents for failing to provide medical care for their children. Specifically, this Article analyzes whether the due process requirement of fair notice bars prosecutions for manslaughter or homicide because of the existence of faith healing exemptions in statutes other than manslaughter or homicide. This analysis reveals a number of inadequacies with respect to the application of the existing fair notice doctrine in the faith healing context: inexplicably contradictory commands, unexpected interpretations of a precise statute, the likelihood of arbitrary enforcement, reasonable reliance on official statements of the law, and lenity are all square pegs that do not fit the round hole of determining whether the intersection of separate statutes provides fair notice to parents that faith healing could result in criminal liability.29 The due process doctrine needs to be reshaped to fit this context.

This Article proposes a reformulation of the procedural due process doctrine that not only considers the need to provide fair notice to prospective defendants of what conduct is prohibited, but also that integrates the well-established principles that ignorance of the law is no excuse and that mistake of law is not generally a defense to a criminal prosecution.30 To ascertain whether a statute or an intersection of statutes provides a defendant with fair notice, this Article proposes that courts engage in a factor

Admittedly, imposing criminal sanctions on these parents is an imperfect solution to this problem and better solutions must be sought. The most significant disadvantage to imposing criminal liability following a child's death is that, by definition, a child must have already died. Moreover, the strength of the parents' religious beliefs may nullify any deterrent effect of the convictions. See Michael Hirsley & Joseph Tybor, *Spiritual Healing on Trial with Dead Boy's Parents*, Ch. Tkm., May 8, 1988, at 1. Christian Scientist, Eileen Eggert, said, "My confidence in [faith healing] is unshakable. I don't think the [Twitchell] case will have any deterrence to myself or more sincere Christian Scientists." *Id.; see also* Peter Marks, *Couple Keeps the Faith: Christian Scientists to Honor God—and Court*, *Newsday*, Aug. 5, 1990, at 6 (After the manslaughter convictions, the Twitchells remained "utterly convinced that praying is the right way for them to deal with any health problems they or their three other sons face."). Ideally, sick children of faith healing parents should be identified by authorities and provided treatment prior to their death, thus obviating the need to impose any criminal liability. Achieving this objective is discussed in more detail in part V.

30. *See discussion infra* part III.
analysis. First, courts should determine whether the statute(s) are presumptively valid: a presumption of validity should apply only if the defendants' constitutional rights are not implicated.\textsuperscript{31} Second, in every case courts should weigh what I call "interpretive factors": the language of the statutes, ascertainable statutory purposes, principles of statutory construction, and published interpretations of the statute by the courts and administrative officials.\textsuperscript{32} The interpretive factors define the law for an ordinary person and are the most important factors in this analysis. In addition to these interpretive factors, the court should weigh other relevant factors, such as the nature of the statutes, any scienter requirement, and the ability of the legislature to draft narrower language.\textsuperscript{33}

After setting forth the factor analysis, this Article criticizes recent cases that have adjudicated the procedural due process issue in the faith healing context without the guidance of the factor analysis.\textsuperscript{34} This Article then applies the factor analysis to the facts in \textit{Twitchell} and concludes that the Twitchells were provided with fair notice that faith healing could result in criminal liability.\textsuperscript{35}

In the last section, this Article proposes statutory and regulatory reforms that will resolve the procedural due process problems posed by faith healing exemptions and that will more effectively protect children's health. Three specific changes are proposed: (1) the exemptions should be completely eliminated in child abuse reporting statutes; (2) any other exemptions that the state retains should clearly provide that the exemptions do not apply if the child risks "serious bodily harm or death"; and (3) the court should be given the express power to order necessary medical care, when appropriate, if the child's illness is brought to the attention of the court prior to his or her death.\textsuperscript{36}

The reshaping of the procedural due process doctrine is necessary to reform its inadequacies, and the statutory reforms are necessary to provide needed protection to children. All of these changes are intended to balance children's rights to medical care and to life, the state's authority to protect children from harm, and the parents' rights to exercise their religion freely and to control the raising of their children. Fundamentally, what is at stake is the degree to which the state may allow parents to impose their religious beliefs on their children, and the degree to which the state is permitted to

\begin{itemize}
\item \textsuperscript{31} See discussion infra part IV.B.1.
\item \textsuperscript{32} See discussion infra part IV.A.
\item \textsuperscript{33} See discussion infra part IV.B.2.
\item \textsuperscript{34} See discussion infra part IV.B.3.
\item \textsuperscript{35} See discussion infra part IV.C.
\item \textsuperscript{36} See discussion infra part IV.D.
\end{itemize}
impose its secular goals on parents. The ultimate objective to be achieved by these reforms is to prevent children from dying unnecessarily while minimizing interference with parents’ religious practices.

II. An Overview of the Faith Healing Exemptions

The language of the faith healing exemptions, their location, and their history are integral to understanding their due process implications. Currently, it appears that all but four states contain statutes with some version of a faith healing exemption. In general, these exemptions protect parents from certain kinds of liability when they provide faith healing to their children in accordance with their good faith religious beliefs. The scope of these exemptions varies from state to state. Thus, they provide varying degrees of notice to parents and fail to provide uniform protection to children.

The adequacy of notice provided to parents depends in part on the location of the faith healing exemptions. These exemptions are found primarily in three types of statutes. First, they are found in statutes adjudicating the status of children: for example, proceedings in which the court determines whether a child is neglected, dependent, deprived, or in need of services. The typical exemption provides that a child who is provided faith healing will not, for that reason alone, be considered an abused or neglected child for the purpose of proceedings in which the judge determines whether the child is abused or neglected.

37. See discussion infra part V.

38. See Commonwealth v. Barnhart, 497 A.2d 616, 622 (Pa. Super. Ct. 1985) (“Accepting as true these statements of appellants’ religious beliefs, the question becomes one of degree: to what extent may a parent impose these beliefs on a minor child?”); Robinson, supra note 2, at 431 (“fundamental principle . . . is who ‘owns’ the child and who will determine what (including religion) is in the child’s best interest. Will it be the state or the parents?”).

39. Massachusetts, Nebraska and Hawaii do not have statutes with faith healing exemptions. See infra notes 40-74 and accompanying text. South Dakota permits the court to order medical treatment for a child who has been treated by spiritual means. S.D. CODIFIED LAWS ANN. § 26-8A-23 (1992); cf. id. §§ 25-7-16, -17.1 (parents’ failure to provide necessary medical care not prima facie evidence of nonsupport when failure is based on religious practices, but court may order treatment).

40. Most states have exemptions in more than one statute. See infra notes 41-60 and accompanying text.

41. See Alaska STAT. § 47.10.085 (1990); ARIZ. REV. STAT. ANN. §§ 8-531.01, 8-546(B), 8-201.01 (1989); ARK. CODE ANN. §§ 9-27-303 (4)(B)(i), 9-27-303(23)(B) (Michie 1993); CAL. WELP. & INST. CODE §§ 300.5, 18950.5 (West 1991); COLO. REV. STAT. § 19-3-103 (1993); CONN. GEN. STAT. ANN. § 46b-120 (West Supp. 1994); DEL. CODE ANN. tit. 10, § 901(11) (1992); FLA. STAT. ANN. §§ 39.01(37) (West 1988), 415.503 (West 1993); GA. CODE ANN. § 15-11-2 (1994); IDAHO CODE § 16-1602 (1994); IND. CODE ANN. §31-6-4-3(d) (Burns Supp. 1994); KAN. STAT. ANN. § 38-1502 (1993); KY. REV. STAT. ANN. § 600.020 (Baldwin 1993); LA. CHILDREN’S CODE ANN. arts. 603(14), 1003(8) (West 1994); ME. REV. STAT. ANN. tit. 22, § 4010 (West 1992); MICH. COMP. LAWS ANN. § 722.634 (West 1993); MISS. CODE ANN. § 43-21-105 (1981); MO.
Second, faith healing exemptions are found in child abuse and neglect reporting statutes. Typically, reporting statutes impose criminal penalties on designated persons who fail to report suspected incidents of child abuse or neglect; these statutes do not address the parents’ liability for failing to care for their children. Exemptions in reporting statutes generally state that, for purposes of the reporting statute, the failure to provide medical care is not considered abuse or neglect if the parent is providing faith healing. One plausible interpretation of such an exemption is that if a child is sick and being provided faith healing in good faith, the failure to provide


medical care should not even be reported as a suspected incident of abuse or neglect.45

A third location of faith healing exemptions is in a number of criminal statutes prohibiting harm to children, including endangering the welfare of a child,46 criminal nonsupport,47 permitting abuse of a child,48 child abuse,49 contribution to deprivation or neglect,50 injury to children,51 neglect of a dependent,52 cruelty to juveniles,53 omission to provide for a child,54 unlawful neglect,55 and ill-treatment of children.56 Only one state contains a faith


Some legislators have given children more protection by providing that even though the failure to provide medical care is not abuse or neglect, such an omission still must be reported. See, e.g., Fla. Stat. Ann. § 415.503(a) (West 1993). In these statutes, it appears that the exemption would apply only when the court is determining whether the child is abused or neglected, after suspected abuse has been reported and investigated.


healing exemption in a manslaughter or homicide statute. Many exemptions apply to a particular crime, but for other states the scope of the exemptions may be broader.

The adequacy of the notice provided to parents not only depends on the location of the faith healing exemption, but also on the language of the exemption. Most exemptions protect faith healing explicitly, although some exemptions protect faith healing implicitly. For example, some statutes incorporate a definition of abuse or neglect that includes an exemp-


Other exemptions allow parents to provide nonmedical remedial care or other remedial care in lieu of medical care.
In addition, many exemptions are qualified. The primary example is one that provides that no liability will be imposed “for the sole reason that” or “solely because” the child is being provided treatment by spiritual means.64 Other exemptions do not appear to be qualified, such as those that consider faith healing an adequate substitute for “medical care,”65 “health care,”66 or “other remedial care.”67

The exemptions also protect different persons. A number of exemptions protect persons providing treatment in accordance with the tenets and practices of “a recognized church or religious denomination by a duly accredited practitioner” or similar phrase.68 Other exemptions extend to parents who are “legitimately practicing their religious beliefs.”69 Some

para. 405/2-3, 2-4 (Smith-Hurd & Supp. 1994) (“child not neglected or dependent if provided with proper medical or other remedial care”).

64. See Walker v. Superior Court, 763 P.2d 852 (Cal. 1988), cert. denied, 491 U.S. 905 (1989). In Walker, the California Supreme Court determined that spiritual healing constitutes “other remedial care.” Id. at 856-58. The California statute containing this phrase set forth criminal penalties for failing to provide certain necessities for children: “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 . . . .” Id. at 856 (quoting CAL. PENAL CODE § 270). Relying primarily on the plain language of the statute, the Walker court concluded that spiritual healing is an acceptable substitute for medical care. Id. at 856-58; see also Elizabeth R. Koller, Note, Walker v. Superior Court: Religious Convictions May Bring Felony Convictions, 21 PAC. L.J. 1069, 1084-85 (1990) (discussing Walker). The Walker court noted that to give meaning to the initial use of the word “or,” the second use of “or” must be interpreted such that “other remedial care” is an alternative. Walker, 763 P.2d at 857. The Walker court supported its conclusion by substituting the definitions of “remedial,” “remedy,” and “other” into the statute, and by examining the exemption’s legislative history. Id. at 857-58.

65. See, e.g., FLA. STAT. ANN. § 39.01(37) (West 1988), 415.503 (West Supp. 1992); KAN. STAT. ANN. § 21-3608(1)(c) (1988); MICH. COMP. LAWS ANN. § 722.634 (West 1993); VA. CODE ANN. §§ 18.2-371.1 (Michie 1988 & Supp. 1993), 63.1-248.2(A)(2) (Michie 1991 & Supp. 1993); WIS. STAT. ANN. § 948.03(b) (West Supp. 1993). Many exemptions have similar language because they were modeled after regulations promulgated pursuant to the Act. See infra note 80 and accompanying text; see also Treene, supra note 28, at 141.


68. See CAL. PENAL CODE § 270 (West 1988).

exemptions extend to those persons in "bona fide religious denominations,"70 in religions with a proven record of success,71 or simply to those engaged in spiritual means or prayer.72 A few states provide the exemption only to Christian Scientists.73


In reality, exemptions referring to practitioners are intended to extend to Christian Scientists because it appears that only Christian Scientists use "practitioners" for healing. See supra note 3. But see Lybarger v. People, 807 P.2d 570, 581 (Colo. 1991) (court concluded that minister in World of Faith Evangelistic Association was considered a duly accredited practitioner under the Colorado exemption).


The meaning of "legitimately" practicing religious beliefs is unclear. It could simply mean that the parents were "sincerely" practicing their religious beliefs. See Hermanson v. State, 570 So. 2d 322, 335 n.10 (Fla. Ct. App. 1990), rev'd on other grounds, 604 So. 2d 775 (Fla. 1992); see also Clark, supra note 7, at 577-79. However, "legitimately" could also mean that the parents must have acted in accordance with certain "mainstream" tenets of the religion. See Clark, supra note 7, at 573-76. In Hermanson, the state's attorney argued that the parents did not legitimately practice their religion because the Christian Science nurse would have called a doctor, and the parents did not call a doctor. Id. "Legitimately" should be read as "sincerely," rather than as consistent with certain tenets. This conclusion makes the most sense because it is difficult to precisely determine the tenets of a particular religion; simply because a Christian Scientist nurse would call a doctor does not mean that other Christian Scientists would not. See supra note 2 (except in limited circumstances, Christian Scientists do not believe in medical care). Moreover, reading "legitimate" beliefs as "sincere" beliefs is consistent with Supreme Court precedent that only permits a court to inquire as to whether the defendants sincerely held their beliefs, not whether the beliefs were true. See Clark, supra note 7, at 577-79.


Even this cursory review of the faith healing exemptions reveals their lack of uniformity, a lack of uniformity that is underscored by their history, which in many cases has not been very long.74 A significant number of them were added by the states after Congress enacted the Act, which was intended to provide uniform protection for abused and neglected children by conditioning a state’s eligibility for federal funding on the satisfaction of certain requirements.75


Although the language of these statutes clearly applies only to Christian Scientists, at least one court has suggested that such statutes may extend to other religious groups. See In re Cochine County Juvenile Action, 650 P.2d 459, 465-66 (Ariz. 1982) (en banc) (doubting whether legislature really intended the exemption to apply to one religious group).

75. See Monopoli, supra note 10, at 330-31 (“statutory exemptions ... are of fairly recent vintage”); John T. Gathings, Jr., Comment, When Rights Clash: The Conflict Between a Parent’s Right to Free Exercise of Religion Versus His Child’s Right to Life, 19 Cum. L. Rev. 585, 591 (1989) (nationwide adoption of exemptions began with enactment of the Act); Malecha, supra note 2, at 246-47 (most exemptions were enacted in response to the Department of Health, Education and Welfare regulations, which were issued in 1975); see also Robinson, supra note 2, at 421 (exemptions may not be ‘‘deeply entrenched in the common law,’’ and in some states the statutory exemption is only a few years old”).

Prior to the enactment of the exemptions, the parents’ religious beliefs did not prevent prosecutions for failing to provide medical care for their children. See Malecha, supra note 2, at 253-54; Massie, supra note 15, at 733-34; Monopoli, supra note 10, at 328-29; Koller, supra note 64, at 1076 & n.69 (“By the mid-twentieth century, the majority rule in the United States ... rejected religious defenses where statutes imposed affirmative duties to provide medical care for children.”); Judith I. Scheiderer, Note, When Children Die as a Result of Religious Practice, 51 Ohio St. L.J. 1429, 1431-32 (1990).

Although it appears that only a few parents were tried, the courts consistently rejected religious belief as a defense, particularly where the applicable statute imposed a specific duty to provide medical care. See Robert L. Trescher & Thomas N. O’Neill Jr., Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist, 109 U. Pa. L. Rev. 203, 208-12 (1960). For example, in People v. Pierson, 68 N.E. 243 (N.Y. 1903), the court concluded that the practice of faith healing was inconsistent with the peace and safety of the state, which “involve[s] the protection of the lives and health of its children, as well as the obedience to its laws.” Id. at 246; see also Owens v. State, 116 P. 345, 346 (Okla. Crim. App. 1911) (religious beliefs were not a defense to a duty to provide medical care); Mitchell v. Davis, 205 S.W.2d 812, 815 (Tex. Civ. App. 1947) (parents’ religious beliefs did not constitute a defense to neglect where the statute under which the defendant was charged imposed a duty to furnish medical treatment); cf. State v. Chenowith, 71 N.E. 197, 199 (Ind. 1904) (stating in dicta that religious beliefs do not provide defense to a criminal prosecution); Craig v. State, 155 A.2d 684, 689-91 (Md. 1959) (following Pierson, the court rejected the defendant’s constitutional challenges under the Free Exercise Clause of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

Courts have found parents to be criminally liable even where the statute under which the defendant was charged imposed no specific duty upon the parents to provide medical care. For example, in Breth and Hoffman, Pennsylvania courts held that a father could be prosecuted for failure to provide medical care for his son when the father relied on prayer instead. Trescher & O’Neill, supra, at 212-13. Both courts reasoned that faith healing was inconsistent with the state’s
The states’ enactment of faith healing exemptions after the passage of
the Act appears to contravene the Act’s purpose to uniformly protect chil-
dren. Although the Act does not require states to have a faith healing ex-
emption,76 the Department of Health, Education and Welfare (“HEW”)77
promulgated regulations78 that require states to enact such an exemption79
to be eligible for federal funding of child protection programs.80 HEW’s
action was motivated, at least in part, by the lobbying efforts of the Chris-
tian Science church.81 After 1974, thirty-three states passed faith healing
exemptions.82

general policy of treatment of diseases and that only qualified physicians were authorized to heal
patients. Id.

Although parents’ religious beliefs have not provided them with a complete defense to prose-
cution, the courts’ sympathy for the parents may have resulted in the reversal of some convictions
for reasons apparently unrelated to the parents’ religious beliefs. See Monopoli, supra note 10, at
329 n.51; Scheiderer, supra, at 1432 (citing Comment, Religious Beliefs and the Criminal Justice
System: Some Problems of the Faith Healer, 8 Loy. L.A. L. Rev. 396, 408 (1975)); see also
People v. Arnold, 426 P.2d 515, 517-18 (Cal. 1967) (the Supreme Court of California reversed
defendant’s conviction on ground that defendant’s incriminating statements to the police were
inadmissible), overruled on other grounds, Walker v. Superior Court, 763 P.2d 852, 856-58 (Cal.
religious belief not a defense, the evidence was insufficient to show proximate cause that parents’
failure caused the child’s death); Beck v. State, 233 P. 495, 496 (Okla. Crim. App. 1925) (court
followed Owen and rejected First Amendment defense, but modified sentence of $50 fine and 6
months in jail to $50 fine only); State v. Watson, 71 A. 1113, 1114 (N.J. 1909) (court did not
consider First Amendment defense, but reversed parents’ manslaughter convictions because the
jury did not have the opportunity to consider whether the negligence was “willful”); Chenowith,
71 N.E. at 197-99 (stating that religious belief does not excuse unlawful conduct, yet affirming
acquittal of defendant on procedural grounds).

76. See, e.g., Deborah Daro, Confronting Child Abuse: Research for Effective Pro-
gram Design 15-16 (1988); Massie, supra note 15, at 759; Monopoli, supra note 10, at 331.

77. See Malecha, supra note 2, at 277 n.45.

78. See Gathings, supra note 75, at 591 n.23; Malecha, supra note 2, at 246 n.34.

79. HEW was responsible for implementing the Act. See Monopoli, supra note 10, at 331
n.64; Gathings, supra note 75, at 591; Malecha, supra 2, at 247 n.45.

80. HEW determined that Congress intended to include a faith-healing exemption in the Act.
See Monopoli, supra note 10, at 331 & n.64 (citing Gathings, supra note 75, at 591). The only
evidence of this intent was the House Committee Report from the Committee on Education and
Labor. See Malecha, supra note 2, at 247 & n.44 (citing H. Rep. No. 685, 93d Cong., 1st Sess. 4-
5 (1973)) (House Committee stated that parent does not neglect child simply by providing faith
healing). Based on this evidence, HEW required states to adopt an exemption that was “the same
in substance” as the one promulgated by HEW. See Monopoli, supra note 10, at 331 & n.66;
Malecha, supra note 2, at 247 n.45, 248 n.48. Most states passed exemptions that were more
protective of children than the exemption set forth in the regulations. See Malecha, supra note 2,
at 247-48.

81. See Monopoli, supra note 10, at 331; Gathings, supra note 75, at 591; Malecha, supra
note 2, at 247 n.45.

82. See Monopoli, supra note 10, at 331; Rita Swann, The Law’s Response When Reli-
gious Beliefs Against Medical Care Impact on Children 26-27 (1990) (after a member of
the Christian Science Church was convicted in 1967 for allowing her daughter to die of pneumo-
nia without medical treatment, the Christian Science Church approached HEW and attempted to
In 1983, HEW (now the Department of Health and Human Services ("HHS")) implemented regulations providing that a state no longer was required to have a faith healing exemption to be eligible for federal funding.\(^{83}\) HHS also redefined the term "neglect" to include the failure to provide medical care.\(^{84}\) Currently, HHS requires that abuse or neglect must be reported if there is harm or substantial risk of harm to the child, and that medical treatment must be ordered if such harm or substantial risk of harm exists. However, a faith healing parent still may be exempt from the court's finding neglect for failure to provide medical care.

Since the 1983 regulations were implemented, it appears that only a few states have repealed their faith healing exemptions.\(^{85}\) Moreover, it ap-

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\(^{85}\) Based on the history of the exemption proposed by HEW and public comments that criticized it, see 48 Fed. Reg. 3697, 3699-3700 (1983), HEW (now HHS) promulgated regulations that permitted the states to retain or abolish their spiritual treatment exemptions. Id. at 3700 ("[S]tates are free to recognize or not recognize a religious exception without that choice having any effect on eligibility for a state child abuse grant."); see Monopoli, supra note 10, at 332; Gatting, supra note 75, at 592 & n.28; Malecha, supra note 2, at 248-49.

Specifically, the regulation did not require states to provide an exemption, but if a state did provide an exemption, it would not limit an agency or court from ordering medical services when the child required such services. See Monopoli, supra note 10, at 332 (citing 45 C.F.R. § 1340.2(d)(2)(ii) (1993)).

\(^{85}\) See Monopoli, supra note 10, at 332 (citing 45 C.F.R. § 1340.2(d)(3)(i) (1993)). Moreover, states were required to order medical treatment where there is "harm or a substantial risk of harm to the child's health or welfare." See id.

After HHS promulgated the 1983 regulations, it received a number of comments expressing confusion over and criticism of these regulations. See Monopoli, supra note 10, at 332-33 (citing 52 Fed. Reg. 3990, 3993-94 (1987)). Therefore, in 1987 HHS attempted to clarify the 1983 regulations "relating to the failure to provide adequate medical care as an element of negligent treatment or maltreatment." 52 Fed. Reg. 3990, 3991; see Monopoli, supra note 10, at 332-33; Gatting, supra note 75, at 592. In this clarification, HHS stated that the deletion of the exemption requirement reflected its approach to regulating, which probably was to give states the flexibility to determine whether to retain the exemption. HHS emphasized that this deletion was not "a
pears unlikely that the remaining states will repeal or narrow their faith healing exemptions any time soon. Although Hawaii, Arkansas, and Massachusetts have recently repealed faith healing exemptions to better protect children’s health, only a few states considered legislation to repeal or narrow their faith healing exemptions. In fact, at least two states have considered legislation to broaden their exemptions. These trends are due at least in part to lobbying efforts of Christian Scientists, which will undoubtedly continue to make it even more unlikely that other states will repeal or narrow their exemptions.

Policy shift regarding state protections for parents who practice their religious beliefs.” 52 Fed. Reg. 3990, 3993; see Monopoli, supra note 10, at 333; Gathings, supra note 75, at 592-93. HHS stated further that it only intended that reports of abuse or neglect be made where "harm or substantial risk of harm to the child exists.” 52 Fed. Reg. 3990, 3994; see Monopoli, supra note 10, at 333. The clarification thus supported the primacy of the parents’ rights in the medical decision making context.


87. In 1992, Hawaii repealed its faith healing exemption, which had prevented children treated by spiritual means from being considered medically neglected. Haw. Rev. Stat. § 350-4 (1985 & Supp. 1992). In deciding to repeal the exemption, the legislature rejected an amendment to the exemption. This amendment, drafted by the Christian Science Committee on Publication, would exempt children treated by faith healing unless “the circumstances indicate harm or substantial risk of harm to the child’s health or welfare and necessary medical care is not being provided to treat or prevent that harm or risk of harm.” Standing Comm. on Judiciary, A Bill for an Act Relating to Child Abuse, S. 2883, 16th Leg., Reg. Sess., 1992 Haw. Laws 2. [hereinafter Hawaii Standing Committee]. The Committee on the Judiciary reasoned that the exemption failed to provide the “necessary protection of a child’s health and welfare” and thus was inconsistent with the policy behind the Hawaii child abuse and neglect laws. Id.


88. H.R. 553, 78th Leg., Reg. Sess. (Minn.).
91. See Swann, supra note 82, at 26-28; Hawaii Standing Committee, supra note 87, at 1.
As this description of the faith healing exemptions demonstrates, the uniform protection of children sought to be achieved by the Act\(^\text{92}\) has not been realized. Rather, a haphazard array of faith healing exemptions has been enacted that fails to protect children who are provided faith healing instead of medical care. Although eligibility for federal funding is no longer conditioned on whether a state has such exemptions, almost all states continue to have them.\(^\text{93}\)

Unfortunately, the 1974 regulations that required states to adopt faith healing exemptions left a significant gap in the protection of children: a parent’s failure to provide medical care is considered neglect, but it is not neglect if the parent, in good faith, treats the child exclusively through spiritual means.\(^\text{94}\) This gap leaves many children vulnerable. A significant number of children such as Robyn Twitchell have already died from medically treatable conditions because their faith healing parents failed to obtain medical care for them\(^\text{95}\) or because their parents failed to provide them with other necessities, such as food.\(^\text{96}\) Indeed, the number of reported cases may

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92. See Massachusetts Committee Report, supra note 83, at 17-29 (unless HHS requires states to repeal their exemptions, current efforts will provide inadequate protection to children). Some groups have advocated for the repeal of the exemptions. For example, the American Academy of Pediatrics supports the removal of the religious exemptions from state laws. See American Academy of Pediatrics, Committee on Bioethics, Religious Exemptions From Child Abuse Statutes, 81 Pediatrics 169 (1988); Hawaii Standing Committee, supra note 87, at 1; see also Robinson, supra note 2, at 421-22 (“The medical community, children’s advocacy groups, and others are now actively lobbying state legislatures to remove or revise the existing exemptions.”).

93. See supra note 75 and accompanying text.

94. See supra note 38 and accompanying text.

95. See Gathings, supra note 75, at 592; Malecha, supra note 2, at 249.


A number of these deaths have been reported in the popular press. See, e.g., Arthur Caplan, The Law Shouldn’t Leave Children to Die: Their Health Should Take Precedence Over Religious Freedom and Parents’ Wishes, Newsday, Mar. 29, 1991, at 49 (six children died in Philadelphia, Pennsylvania from measles-related complications: their parents, members of the Faith Tabernacle
be only a fraction of the actual number of children who have died under such circumstances.\(^\text{97}\)

An exemption in the reporting statute\(^\text{98}\) may prevent a child from ever coming to the attention of a child protective agency, hospital, or court because a faith healing parents’ failure to provide medical care may not be considered a suspected incident of neglect or abuse and thus may not give rise to a duty to report.\(^\text{99}\) Even a requirement to report child abuse and neglect may not adequately protect children where an exemption still exists in a statute adjudicating the child’s status. For example, if the court is unable to find that the child is abused or neglected, the exemption can be read to prevent the court from ordering needed medical treatment.\(^\text{100}\) In practice, however, HHS will find states that apply their exemptions to prevent reporting, investigation, or the ordering of necessary treatment to be out of compliance with the requirements of the Act.\(^\text{101}\)

There are few generalizations that can be made about the exemptions except that they lack uniformity in the notice they provide to parents and that they fail to protect children adequately. The lack of uniform notice to parents is relevant to the discussion of the procedural due process implications of the faith healing exemptions, which is set forth in Part III of this

\(^{97}\) For example, on January 3, 1989, Eric Cottam starved to death after his family engaged in a six-week fast that was religiously motivated. Commonwealth v. Cottam, 616 A.2d 988, 994 (Pa. Super. Ct. 1992). Eric’s parents, who were Seventh-Day Adventists, believed that the $3775 that the family had saved could not be spent on food because the money “belonged to God” as a tithe. Robert Dvorchak, Blind Faith: Teen-age Boy Starves to Death as Parents Wait for the Lord to Provide, L.A. TIMES, Feb. 19, 1989, at 2.

\(^{98}\) See Mark Curriden, Blood, the Bible and the Law, BARRISTER, Fall 1990, at 14. In this article, David Dunn, an attorney who prosecuted two Christian Science parents, characterized these deaths as “Jonestown in slow motion.” Id. One reason that the numbers may be understated is that, until recently, statistics on such deaths have not been readily available. Gatnings, supra note 75, at 585 n.1. It is also possible that some of these deaths may have been actively concealed. See James Harney, In Philadelphia, Doctrine vs. Doctoring, USA TODAY, Feb. 21, 1991, at News 8A (Cambria County coroner charged that two seriously injured adult members of Faith Tabernacle Church were taken to Philadelphia so that their deaths would go unnoticed in Cambria County).

\(^{99}\) See supra notes 42-45 and accompanying text.

\(^{100}\) See supra note 45. Although HHS has stated that medical neglect must be reported, the inclusion of exemptions in reporting statutes is, at best confusing, and at worst inconsistent with HHS’s intent.

\(^{101}\) Only 11 states specifically permit a court to order medical treatment over the parents’ religious objections. See Massie, supra note 15, at 730 & n.13; Treene, supra note 28, at 144-45.
Article. The failure to protect children is relevant to the discussion of legislative reform, which is set forth in Part V of this Article.

III. Assessing the Inadequacies of the Current Doctrine: Putting Square Pegs in a Round Hole

When faith healing parents such as the Twitchells are prosecuted for manslaughter or homicide for failing to provide their children with medical care, they naturally seek the protection of faith healing exemptions. There are two ways in which a faith healing exemption may provide them with a defense, either of which would be sufficient to avoid prosecution. First, the faith healing exemption may be incorporated into the manslaughter or homicide statute, even though the legislature did not explicitly provide an exemption in the manslaughter or homicide statute. Second, even if the faith healing exemption is not actually incorporated into the manslaughter or homicide statute, due process may bar the parents' prosecution because they were not adequately notified of the exemption's limited scope. For the reasons that follow, neither of these defenses should be successful—in most cases.

A. Statutory Incorporation

A court need not determine whether due process bars the parents' prosecution if it finds that the faith healing exemption is incorporated into the manslaughter or homicide statute. For example, the Twitchells might have argued that the exemption in the criminal nonsupport statute was actually incorporated into the involuntary manslaughter statute and should have provided them with a defense to an involuntary manslaughter prosecution, just as it would have provided them with a defense to a nonsupport prosecution. More particularly, the Twitchells might have argued that they did not breach their duty to provide medical care to Robyn because any duty to provide medical care was satisfied by providing faith healing instead.102 Thus far, such statutory incorporation arguments have not persuaded the courts: courts have generally found that the faith healing exemption in one statute should not be read into another statute that forms the basis of the charge.103

Statutory incorporation of the faith healing exemption should be found in two limited circumstances: when the exemption clearly provides that the duty to furnish medical care is satisfied by providing faith healing, or when

102. See supra notes 84-85 and accompanying text.
103. Alternatively, the Twitchells might have argued that because of the incorporated exemption, they had no duty to provide medical care.
a parent is charged with misdemeanor-manslaughter and the misdemeanor forming the basis for manslaughter liability contains a faith healing exemption. This section of the Article briefly discusses why statutory incorporation generally should not be found and discusses the limited circumstances in which it should be found.

Statutory incorporation generally should not be found because it simply is not natural or reasonable to believe that a legislature intended to incorporate a faith healing exemption into its manslaughter or homicide statute. The statutes that contain exemptions are not in pari materia with the statutes that do not contain them, and thus should not be construed together. A court will construe statutes together as in pari materia if it is "natural and reasonable" to believe that members of the legislature passing one statute were influenced by the other statute.\(^{104}\) In making this determination, the court will consider, inter alia, whether the statutes explicitly refer to each other,\(^{105}\) whether the purposes of the statutes are similar,\(^{106}\) and whether the statutes were passed in the same year.\(^{107}\) Although the determination is fact specific as to whether the faith healing exemption should be incorporated, these considerations will probably not be satisfied in most instances.

First, the statutes that contain faith healing exemptions and manslaughter or homicide statutes usually do not refer to each other explicitly.\(^{108}\) In fact, a number of exemptions expressly limit their scope to a particular statute.\(^{109}\)

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107. See Singer, supra note 105, § 51.03, at 138 (citing cases).

108. Where both statutes were passed in the same year by the same session of the legislature, it is more likely that the first statute was considered by the legislature when the second statute was passed. This factor is relevant but is not determinative. See Singer, supra note 105, § 51.03, at 140 (citing cases).

Second, manslaughter or homicide statutes serve different purposes than most of the statutes that contain faith healing exemptions.\textsuperscript{110} The primary purpose of a manslaughter or homicide statute is to protect citizens by permitting the state to prosecute one who intentionally causes the death of another person, or who causes the death by exposing that person to unreasonable risk.\textsuperscript{111} In contrast, the primary purposes of reporting statutes and statutes adjudicating the status of children are to protect children and to preserve the integrity of the family.\textsuperscript{112} Even criminal statutes prohibiting harm to children, such as the nonsupport statute at issue in \textit{Twitchell}, are designed to protect children or to ensure that necessities are provided to them.\textsuperscript{113}

Third, in most instances it is unlikely that faith healing exemptions were passed in the same year as the manslaughter or homicide statutes, thus making it less likely that the legislature intended to incorporate the exemptions into these statutes.\textsuperscript{114}

Finally, and perhaps most importantly, it simply does not make sense to incorporate these exemptions into manslaughter or homicide statutes. As aptly stated by the court in \textit{People v. Rippberger}:\textsuperscript{115} “We cannot accept the proposition that the Legislature intended to carve out an exception that would permit a small segment of our society, with impunity, to endanger the lives of infants who are helpless to act on their own behalf.”\textsuperscript{116}

Notwithstanding this general rule of nonincorporation, a court should recognize two exceptions to the rule: when the duty to furnish care is fulfilled by faith healing, and when the misdemeanor that forms the basis for misdemeanor-manslaughter liability contains an exemption. The first exception should be recognized only when the faith healing exemption clearly

\textsuperscript{110} See, e.g., \textit{McKown}, 475 N.W.2d at 67; see also statutes cited infra note 58 and accompanying text.

\textsuperscript{111} \textit{Walker}, 763 P.2d at 859; Commonwealth v. Twitchell, 617 N.E.2d 609, 614-15 (Mass. 1993); \textit{McKown}, 475 N.W.2d at 66.

\textsuperscript{112} \textit{McKown}, 475 N.W.2d at 66; see \textit{Walker}, 763 P.2d at 860 (“to protect citizens from immediate and grievous bodily harm”); \textit{Twitchell}, 617 N.E.2d at 615 (state’s interest is that persons within its territory not be killed by reckless or wanton conduct).


\textsuperscript{114} See, e.g., \textit{Walker}, 763 P.2d at 859 (purpose of nonsupport statute is to provide financial support to children); \textit{Twitchell}, 617 N.E.2d at 614-15 (purpose of nonsupport statute is to motivate parents to fulfill support obligations). But cf. \textit{Walker}, 763 P.2d at 860 (child endangerment statute intended to protect children from immediate and grievous bodily harm).

\textsuperscript{115} See supra note 108.

\textsuperscript{116} 283 Cal. Rptr. 111 (Ct. App. 1991).
provides that the parents’ duty to furnish medical care to their children is fulfilled by providing faith healing. When the exemption clearly provides that parents have fulfilled this duty by providing faith healing, it reflects the legislature’s view that faith healing is generally an acceptable way to treat children. Because the exemption is intended to be read broadly, it protects the parents from any liability for failure to provide medical care, including liability imposed under the manslaughter or homicide statutes. Under these circumstances, constructive incorporation of the exemption into these statutes is justified.

To determine whether the duty to furnish medical care is fulfilled by providing faith healing, the court must carefully analyze the language, context, history, and purposes of the statutes at issue. Based on these factors, a court should rarely find fulfillment of this duty. Manslaughter or homicide liability is often based on criminally negligent or reckless conduct.\textsuperscript{117} Specifically, such liability may be based on a negligent omission, provided the defendant had a duty to act.\textsuperscript{118} This duty to act may be a statutory or common law duty;\textsuperscript{119} for example, a criminal nonsupport or child endangerment statute may impose a duty on parents to provide necessities such as medical care to their children.\textsuperscript{120} Consequently, failure to provide medical care may result in prosecution under a manslaughter or homicide statute. However, if the duty to provide medical care can be fulfilled by providing faith healing, then the parents should not be prosecuted for manslaughter or homicide. Because most exemptions are qualified and refer to a particular statute,\textsuperscript{121} in most instances they do not clearly show that the parents’ duty is fulfilled by merely providing faith healing.\textsuperscript{122}

The second exception should be recognized in the limited circumstance when a parent is charged with misdemeanor-manslaughter, and the misdemeanor that forms the basis for the manslaughter charge contains a faith healing exemption. Misdemeanor-manslaughter statutes provide that a defendant may be charged with manslaughter when a death occurs during

\textsuperscript{117} Id. at 123.
\textsuperscript{118} See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 7.12, at 671-72 (2d ed. 1986).
\textsuperscript{119} Id. § 7.12, at 672; see Arthur Leavens, A Causation Approach to Criminal Omissions, 76 Cal. L. Rev. 547, 548 (1988).
\textsuperscript{120} LaFave & Scott, supra note 118, § 3.3, at 203-05.
\textsuperscript{121} See, e.g., State v. Williams, 484 P.2d 1167, 1171-72 (Wash. Ct. App. 1971) (parental duty to provide necessary medical care to dependent minor children based on statute and/or common law) (statutes cited supra notes 46-47); cf. Leavens, supra note 119, at 575 ("[T]he duty of parents to prevent harm to their children because empirically, almost all parents act this way, and normatively, our society would consider it reprehensible if they did not.").
\textsuperscript{122} See supra notes 39-68 and accompanying text.
the commission of certain misdemeanors or other unlawful acts.\textsuperscript{123} If the defendant cannot be charged with the misdemeanor, she also cannot be charged with misdemeanor-manslaughter. Therefore, if a faith healing exemption prevents her from being charged with the misdemeanor that forms the basis for manslaughter liability, it also prevents her from being charged with misdemeanor-manslaughter.\textsuperscript{124}

In most circumstances, the statutory incorporation argument will not be successful. As a result, parents such as the Twitchells will have to rely alternatively on the procedural due process argument to prevent their prosecution.

B. Procedural Due Process: Inadequacies of the Doctrine Revealed

Instead of, or in addition to, the statutory incorporation argument, parents such as the Twitchells may argue that procedural due process prevents them from being prosecuted for failing to provide medical care for their child. Specifically, parents have argued that the statutes, read together, fail to provide them with fair notice of the unlawfulness of their conduct. This argument has been articulated in a variety of ways: (1) fair notice of prohibited behavior does not exist because neither the criminal statute nor the exemption clearly state when faith healing becomes unlawful, or fair notice does not exist because the statute and the exemption create contradictory commands that the parent cannot follow;\textsuperscript{125} (2) the meaning of the faith healing exemption, which is clear on its face, has been unexpectedly narrowed;\textsuperscript{126} (3) the vagueness created by the statutes encourages arbitrary enforcement by the prosecutor because it is unclear that faith healing could be the basis for criminal liability;\textsuperscript{127} and (4) the parents reasonably relied on

\textsuperscript{123} However, the court should examine all relevant factors to determine whether satisfying the exemption fulfills the duty to provide medical care.

\textsuperscript{124} See LaFave & Scott, supra note 118, § 7.13, at 675-77.


\textsuperscript{126} See Walker v. Superior Court, 763 P.2d 852, 871-72 (Cal. 1988), cert. denied, 491 U.S. 905 (1989) (defendants argued that the intersection of the statutes created uncertainty on the part of law enforcement officials and citizens reading the statutes as to the point at which lawful prayer treatment becomes unlawful); Hermanson v. State, 604 So. 2d 775, 781 (Fla. 1992) ("[T]he Hermansons claim that the statutes failed to give them sufficient notice of when their treatment of their child in accordance with their religious beliefs became criminal."); State v. McKown, 475 N.W.2d 63, 67 (Minn. 1991) ("[The parents] argue that the child neglect statute does not go far enough to provide reasonable notice of the potentially serious consequences of actually relying on the alternative treatment methods the statute [sic] itself clearly permits."), cert. denied, 112 S. Ct. 882 (1992).

the assurance explicitly set forth in the exemption or in official statements of the law that they would not be prosecuted for providing faith healing.128

These arguments are derived from United States Supreme Court decisions that have interpreted the meaning of procedural due process and, in particular, the meaning of fair notice. The Court has recognized at least four ways in which a statute may violate procedural due process: (1) it may fail to provide fair notice of the prohibited conduct by providing inexplicably contradictory commands; (2) it may be a narrow and precise statute that is unexpectedly broadened by a court’s subsequent interpretation; (3) it may pose a risk of arbitrary enforcement by officials (such as prosecutors) who are responsible for enforcing the statute; or (4) it can be erroneously interpreted by a government official, who assures the defendant that his conduct is not illegal and the defendant reasonably relies on this assurance.129

Each of these categories ordinarily addresses the inadequacy of notice created by a single statute or subsections in a single statute. In contrast, the lack of notice that faith healing parents typically assert is created by the intersection of two separate statutes, the statute containing the faith healing exemption and the statute defining the crime for which the parents have been charged, which does not contain the exemption.130 The Court has never addressed such “intersectional” lack of fair notice.

This section discusses the general principles of fair notice, and the inapplicability of the doctrinal categories that the Court has created to determine the adequacy of notice. Specifically, this section critically analyzes the procedural due process arguments that have been asserted by faith healing parents who have been prosecuted. This section concludes that: (1) the general principles of fair notice are inadequate to determine whether the intersection of two separate statutes violates due process; (2) the inexplicably contradictory command standard is inapplicable in this context; (3) the scope of the faith healing exemption has not been unexpectedly narrowed; (4) that the danger of arbitrary enforcement by prosecutors is minimal; and (5) that in most cases the parents have not reasonably relied on an official misinterpretation of the law. All of these doctrines are inadequate to determine whether the intersection of separate statutes provides fair notice. Therefore, these doctrines are square pegs in the round hole of determining the adequacy of notice in this context.

129. Twitchell, 617 N.W.2d at 617-19; McKown, 475 N.W.2d at 65.
130. See discussion infra part III.B.6.
1. The General Requirements of Fair Notice

The United States Supreme Court has articulated a set of general principles for determining whether a statute provides fair notice to a prospective defendant. Beyond these principles, however, the Court decides each case based on the particular facts at issue. These principles are inadequate to determine whether the intersection of separate statutes results in a lack of fair notice. Although it would be difficult to articulate a uniform standard of fair notice, the lower courts need more guidance than is currently provided.

In determining whether statutes provide fair notice, the Supreme Court has consistently stated that, at least when constitutional rights are not implicated, statutes enjoy a presumption of validity. The Court also has consistently recited that a statute fails to give fair notice if “[persons] of common intelligence must necessarily guess at its meaning and differ as to its application.” However, the Court’s attempts at developing the fair notice standard have been weak. For example, the Court has stated that a stricter standard of vagueness applies when constitutional rights may be in-

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131. In a few cases, the parents have argued that the vagueness was created by the language within a particular statute rather than by the intersection of statutes. See State v. Miskimens, 490 N.E.2d 931, 937 (Ohio Ct. C.P. 1984); Commonwealth v. Barnhart, 497 A.2d 616, 621 (Pa. Super. Ct. 1985), appeal denied, 538 A.2d 874 (Pa. 1988), cert. denied, 488 U.S. 817 (1988).

132. Cf. Anthony Amsterdam, Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 94 (1960) (in determining cases of fair notice the court is guided by the “nature of the individual freedom menaced, the probability of its violation, the potential deterrent effect of the risks of irregularity and violation upon its exercise, and the practical power of the Court to supervise the scheme’s administration”).


134. See Buckley v. Valeo, 424 U.S. 1, 77-78 (1976) (where constitutional requirement of definiteness is at issue, court is obligated to construe statute, if possible, to avoid finding of vagueness); United States v. Harriss, 347 U.S. 612, 618 (1953) (If a “general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.”); Screws v. United States, 325 U.S. 91, 100 (1945) (Court held they would find a statute unconstitutional only if no construction could save it); see also Connally v. General Constr. Co., 269 U.S. 385, 390 (1925) (If a statute’s language cannot be determined with any degree of certainty, the provisions, if enforced, deprive plaintiffs of liberty and property without due process of law, and is therefore fatally vague and uncertain.).

135. Connally, 269 U.S. at 391; see, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (“we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (“law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits”).
hibit[ed][136] and when criminal statutes are involved,[137] but has not indicated how much stricter that standard should be when both of these conditions exist.[138] The Court has also suggested that a stricter standard applies when a statute regulating noneconomic activity is involved,[139] but has not suggested either how much stricter or whether this strictness applies equally to

136. See, e.g., Harris v. Terry, 347 U.S. at 624 n.15 (finding statute at issue was at least as definite as other criminal statutes); Jordan v. Dwyer, 341 U.S. at 231 n.15 (concluding that phrase presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court); see also Amster, supra note 132, at 73 (While some courts attempt to expound policy bases for the fair notice doctrine, the holdings fail to do more than reiterate what other courts have stated as the standard for the doctrine: that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").


138. See, e.g., Kolender v. Lawson, 461 U.S. 352, 358-59 n.8 (1983); Flipside, 455 U.S. at 499; see also Winters, 333 U.S. at 515; LaFave & Scott, supra note 118, § 2.3(a), at 91 n.9 (standard higher for criminal statutes than for civil statutes).

This stricter standard is applied to criminal statutes because the consequences of conviction generally are more severe than the consequences for civil liability. Flipside, 455 U.S. at 498-99; Levas and Levas v. Village of Antioch, 684 F.2d 446, 452 (7th Cir. 1982).

139. See Flipside, 455 U.S. at 498-99.
civil and criminal statutes. One might reasonably conclude that a statute is vague whenever the Court determines it is vague.

In criminal cases, the Court has made some attempts to articulate how much warning of criminal liability is necessary to comport with due process. The Court has determined that, although a statute must provide a defendant with fair notice of the prohibited conduct, a defendant may still be required to determine exactly when her conduct becomes criminal. For example, a non-faith healing parent may be prosecuted for manslaughter or homicide for negligently failing to provide her child with medical care, even if the parent was unaware of the severity of the child’s illness, or even if the parent thought she was acting prudently.

At least when no constitutional rights are implicated, only a reasonable degree of certainty is required: specifically, all that due process requires is that the defendant know when he is approaching the line between prohibited and permitted conduct. In Nash v. United States, for example, the

140. See Kolender, 461 U.S. at 358-59 n.8; Smith v. Goguen, 415 U.S. 566, 573 n.10 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. National Dairy Prods. Corp., 372 U.S. 29, 36 (1963); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); see also Flipside, 455 U.S. at 498 (offering two justifications for a less strict test for economic regulation: the subject matter is often more narrow, and businesses are expected to consult relevant legislation before they act because they must plan their behavior carefully); Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 49 (1966) (business may have the ability to clarify the meaning of the regulation by its own inquiry); McGowan v. Maryland, 366 U.S. 420, 428 (1961) (business persons are expected to know either the law regulating their business as a matter of ordinary business knowledge or to make a reasonable investigation); Chalmers v. City of L.A., 762 F.2d 753, 757 (9th Cir. 1985) (suggestion that economic regulation is subject to a less strict vagueness test because businesspersons are expected to consult the law governing the businesses they run before they act).

141. See Flipside, 455 U.S. at 498-99.


144. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); High Oil' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982). Impossible standards of specificity do not need to be satisfied. See Kolender v. Lawson, 461 U.S. 352, 361 (1983); Jordan v. De George, 341 U.S. 223, 231 (1951); United States v. Petrillo, 332 U.S. 1, 7-8 (1947); see also Collings, supra note 133, at 205-06 ("the presence of difficult borderline or peripheral cases will not invalidate a statute at least where there is a hard core of circumstances to which the statute unquestionably applies as to which the ordinary person would have no doubt as to its application").

145. See Nash v. United States, 229 U.S. 373, 377 (1913); see also United States v. Powell, 423 U.S. 87, 92 (1975) (if statute gives clear notice of reasonably ascertainable standard of con-
Court concluded that language in the Sherman Act was not vague, even though the defendant had to determine when he was involved in an undue restraint of trade. The language in the Sherman Act provided sufficient notice because it provided a standard that the defendant could follow. Justice Holmes, writing for a majority of the Court, reasoned that "the law is full of instances where a [person’s] fate depends on [the person] estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." The jury's estimation is based on the defendant's common sense, which is guided by "common experience," actual (as opposed to hypothetical or unknown) facts, and previous precedent and practice.

The Court has also determined that due process is not violated simply because the defendant may estimate her fate wrongly and be convicted. On the other hand, due process is violated if the defendant is not given adequate guidance to determine the meaning of the statute and is made to "divine prophetically ... [which] is to exact gifts that mankind does not possess." Whether the defendant is "estimating rightly" or "divining prophetically" is of course a matter of degree.

In sum, it appears that all fair notice requires is that the law give the defendant a "yellow light". The law must warn the defendant that he is approaching the area in which his behavior may become criminal and thus

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146. _Coates_, 402 U.S. at 614 (proper notice if imprecise but comprehensible normative standard provided); _Boyce Motor Lines_, 342 U.S. at 340 (defendant must take risk of crossing the line); _Winters v. New York_, 333 U.S. 507, 539 (1948) (Frankfurter, J., dissenting) ("It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes near the proscribed area."); _United States v. Wurzbach_, 280 U.S. 396, 399 (1930) (citing _Nash_, 229 U.S. 373) (if defendant knows he is approaching the line, he takes the risk of crossing it).

147. _Id._ at 377-78. Specifically, the Sherman Act provided for criminal penalties for "unduly restricting competition or unduly obstructing the course of trade." _Id._ at 376.

148. _Id._ at 377; _see also Boyce Motor Lines_, 342 U.S. at 340 ("It is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.").


150. _See Nash_, 229 U.S. at 377; _see also Boyce Motor Lines_, 342 U.S. at 341 (use of common experience is necessary to understand legislation); _United States v. Petrillo_, 332 U.S. 1, 16 (1947) (Reed, J., dissenting) (background of experience and common understanding provides sufficient definiteness).

151. _See International Harvester_, 234 U.S. at 223.

152. _See Winters v. New York_, 333 U.S. 507, 520-21 (1948) (Frankfurter, J., dissenting); _International Harvester_, 234 U.S. at 220-21. These guides for estimation are similar to the interpretive factors discussed _infra_ part IV.B.2.

should exercise caution, which may include obtaining a lawyer.\textsuperscript{154} If the law fails to provide this “yellow light” by failing to warn the defendant before he commits the crime, or if the law leads him into thinking that there is no “red light” ahead and thus allows him to believe that his conduct is lawful, then due process is violated.

These general principles of fair notice provide insufficient guidance to courts determining the limits of due process in the faith healing context. First, unlike \textit{Nash}, the issue here is whether the standard itself is clear, not whether the defendants’ conduct falls within a standard that has already been defined. Moreover, unlike the cases in which the defendant argues that a word or phrase in a single statute is vague, the issue here is the adequacy of the notice provided by the intersection of two separate statutes. Finally, some greater degree of notice may be required because constitutional rights are implicated in this context.

2. Constitutional Rights Implicated: The Need for a Rigorous Notice Requirement

Determining when constitutional rights are implicated is different from determining when they are actually violated.\textsuperscript{155} The danger posed by statutes that fail to provide fair notice is not that protected behavior will be prohibited, but that citizens will be deterred from engaging in protected behavior. In other words, their constitutional rights will not be given the “breathing space” they require:\textsuperscript{156} persons whose behavior is being regulated would rather obey the law than risk violating the law by asserting their constitutional rights. For example, in \textit{Winters v. New York},\textsuperscript{157} the Court

\textsuperscript{154} \textit{International Harvester}, 234 U.S. at 223-24.


\textsuperscript{156} See, e.g., \textsc{LaFave & Scott, supra} note 118, § 2.3, at 96 (When attacking a statute on vagueness grounds, it is not necessary to establish that the statute actually infringes upon defendant’s First Amendment rights “because First Amendment freedoms need breathing space to survive.”); \textsc{Trine, supra} note 133, § 12-31, at 1034 (more specificity required of statutes “potentially applicable” to expression sheltered by the First Amendment); cf. McGowan v. Maryland, 366 U.S. 420, 429 (1961) (when statute not challenged on vagueness but a direct attack on ground that it violates constitutional guarantees of the First Amendment, it is generally required that the party making the challenge establish that the statute actually infringes upon his own constitutional rights).

When the court determines that a prosecution would actually violate the defendant’s constitutional rights, that violation would prevent the prosecution of the defendant and thus would obviate a due process analysis.

struck down a statute as void for vagueness primarily because the vagueness in the statute deterred booksellers from selling literature that was protected by the First Amendment. Although the state courts had narrowed the meaning of the statute, the Court concluded that prospective defendants could not ascertain the line between permitted and prohibited conduct.

The same danger exists for faith healing parents. Although the parents’ First Amendment rights are not violated when they are prosecuted for failing to provide medical care to their critically ill child, their First Amendment rights are implicated. Therefore, a rigorous notice requirement is necessary.

a. Parents’ First Amendment Rights Not Violated

Regardless of which constitutional standard a court applies—strict scrutiny or a less rigorous standard—the prosecution of faith healing parents for failing to provide medical care to their critically ill child probably does not violate the Free Exercise Clause of the First Amendment.

A court will probably apply the strict scrutiny standard to determine whether such a prosecution is unconstitutional. Congress recently passed the Religious Freedom Restoration Act (“RFRA”), which codifies the strict scrutiny standard. Under this standard, no federal or state law can substantially burden the exercise of religion unless the government has a compelling state interest and the government uses the least restrictive means of furthering that interest.

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158. 333 U.S. 507 (1948).

159. It is not entirely clear whether the majority opinion in Winters is based on procedural due process or the First Amendment. See id. at 510. The statute posed both dangers: prohibiting protected speech and failing to provide clear guidance as to the nature of speech that was punishable. NOWAK & ROTUNDA, supra note 137, § 16.9, at 950-51.

160. Winters, 333 U.S. at 509-10. The statute at issue criminalized any printing or selling of any printed material “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . . .” Id. at 508 n.1.

161. The state courts had narrowed the interpretation of the statutory language to “forbid[d]ing the massing of stories of bloodshed and lust in such a way as to incite to crime against the person.” Id. at 514.

162. Id. at 518. The Court stated that the vagueness was exacerbated by the lack of an intent requirement and by the lack of any technical or common law meaning of the operative terms. Id. at 519.

163. The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I. This clause has been extended to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

164. 42 U.S.C.A. § 2000bb-1(a)-(b) (West Supp. 1994). The pertinent section of the statute reads:

(a) In general
When a child has died because of the parents’ failure to furnish medical care, the subsequent prosecution will probably satisfy the strict scrutiny standard. Even before Congress passed RFRA, courts consistently concluded that the Free Exercise Clause did not bar prosecution of faith healing parents for failing to provide medical care to their children. The state has a compelling interest in protecting children whose lives are in imminent danger, and a prosecution is narrowly tailored to achieve that interest. No means short of criminal prosecution will adequately protect these children because they often cannot be identified until after they have died.

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

1. is in furtherance of a compelling governmental interest; and
2. is the least restrictive means of furthering that compelling governmental interest.

Id.

165. Id.; see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226, 2233-34 (1993); Wisconsin v. Yoder, 406 U.S. 205, 214, 225 (1972); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); see also Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991). Initially, the court must determine whether the religious beliefs are sincerely held and whether the exercise of religious beliefs has been significantly burdened. See, e.g., Yoder, 406 U.S. at 215-19; Sherbert, 374 U.S. at 399 n.1, 403-04. For the purposes of this Article, I am assuming that these threshold requirements are met in the faith healing context.

166. See supra note 74; see also Walker v. Superior Court, 763 P.2d 852, 870 (Cal. 1988), cert. denied, 491 U.S. 905 (1989); Massie, supra note 15, at 739; cf. Treene, supra note 28, at 159-60.

167. See Prince v. Massachusetts, 321 U.S. 158, 166-70 (1944). In an oft-quoted phrase, the Court stated:

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.

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.

Id. at 166-67, 170; see also Massie, supra note 15, at 742-45; Monopoli, supra note 10, at 344 ("[T]he protection of the health and welfare of children through child abuse and neglect statutes should still rise to the level of a compelling state interest."); Scheiderer, supra note 75, at 1439-40 ("The safety and well-being of children is one of the most compelling interests that a government can assert."); Edward E. Smith, The Criminalization of Belief: When Free Exercise Isn’t, 42 Hastings L.J. 1491, 1503, 1509-10 (1991) (courts faced with issues regarding children’s health and well-being in the past have found states to meet a compelling state interest standard).

168. See Massie, supra note 15, at 745-46; Monopoli, supra note 10, at 344. But see Smith, supra note 167, at 1522 (if a state imposes criminal liability based on an objective criminal negligence standard when a child suffers serious illness or death, the state’s purpose is not narrowly tailored because prosecution does not serve to interfere with religious conduct; rather, it effectively takes the parents’ belief from the child).
Therefore, the prosecution of faith healing parents does not violate the First Amendment.

If such a prosecution satisfies the strict scrutiny standard, it a fortiori satisfies the less rigorous standard adopted in Employment Division v. Smith,169 which the United States Supreme Court decided in 1990. If RFRA is found unconstitutional,170 the courts will probably continue to apply Smith. In Smith, the Court held that a defendant’s free exercise rights are not violated when the state regulation at issue is a “valid and neutral law of general applicability”171 that incidentally burdens religious practices.172 The state statute at issue in Smith was a general drug possession statute, which had been applied to the sacramental use of peyote by the

169. See Massie, supra note 15, at 746.  
172. The constitutional problem presented by RFRA is whether Congress has the power under Section 5 of the Fourteenth Amendment to effectively overrule a constitutional decision by United States Supreme Court. Because the Court has been considered the final arbiter of the Constitution’s meaning since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), RFRA could be interpreted as a usurpation of the Supreme Court’s power. See Lupu, Orbits, supra, at 58-62, 66. Some commentators, however, have found the express congressional power to “enforce” the Fourteenth Amendment in Section 5 to be broad enough to allow RFRA-like legislation. See Laycock, supra, at 245-54; Lee, supra, at 90-95; Pawa, supra, at 1095-99. At least one court has intimated that RFRA is constitutional. See Campos v. Coughlin, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994).  
respondents. Although the state did not prosecute the respondents, their religious activity caused the state to deny them unemployment benefits.\textsuperscript{173} The Court concluded that the state could constitutionally apply its criminal laws to this religious activity, and thus could deny unemployment benefits on that basis.\textsuperscript{174}

The \textit{Smith} Court suggested that it would apply a more rigorous standard of scrutiny in three limited circumstances: (1) if the state attempts to regulate religious beliefs or intends to burden religious practices;\textsuperscript{175} (2) if the regulatory scheme has provided a system of individual exemptions, but fails to consider religious claims without a compelling reason;\textsuperscript{176} or (3) if a constitutional right other than free exercise is also at stake, thus constituting a "hybrid" claim.\textsuperscript{177}

A manslaughter or homicide statute that imposes criminal liability on persons other than those who practice faith healing is a valid and neutral law of general applicability. As such, the First Amendment is not violated unless the statute falls under one of the three exceptions described in \textit{Smith}, which would then require application of the strict scrutiny standard.

The prosecution of faith healing parents under a manslaughter or homicide statute does not fit under either of the first two exceptions. First,

\textsuperscript{173} Id. at 878.
\textsuperscript{174} Id. at 874.
\textsuperscript{175} Id. at 890. The United States Supreme Court concluded that, because the prohibition of the sacramental use of peyote was a "valid and neutral law of general applicability," the denial of the respondents' unemployment benefits did not violate the free exercise clause, even though it may have significantly burdened the practice of their religious beliefs. \textit{Id}. In reaching this conclusion, the Court did not appear to balance the state's interests at all, even under the rational basis test. \textit{See} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2242 (1993) (Souter, J., concurring in part and concurring in the judgment); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991); Miller v. Civil City of South Bend, 904 F.2d 1081, 1102-03 (7th Cir. 1990) (Posner, J., concurring); United States v. Boyll, 774 F. Supp. 1333, 1341 (D.N.M. 1991); Lukaszewski v. Nazareth Hosp., 764 F. Supp. 57, 61 (E.D. Pa. 1991); United States v. Philadelphia Yearly Meeting of Religious Soc'y, 753 F. Supp. 1300, 1303 (E.D. Pa. 1990). \textit{But see} Alabama & Coushatta Tribes v. Big Sandy Sch. Dist., 817 F. Supp. 1319, 1330-33 (E.D. Tex. 1993) (applying rational basis standard).

The \textit{Smith} opinion has been widely criticized, particularly regarding the degree which it diverged from previous precedent. \textit{See Babalu}, 113 S. Ct. at 2240-50 (Souter, J., concurring in part and concurring in the judgment); Yang v. Stumer, 750 F. Supp. 558, 559-60 (D.R.I. 1990); \textit{see also} Massie, \textit{supra} note 15, at 740 n.74.

\textsuperscript{176} \textit{Smith}, 494 U.S. at 877. In \textit{Babalu}, the Court concluded that animal cruelty ordinances were intended to suppress the practices of the Santeria religion and thus were neither neutral nor of general applicability. 113 S. Ct. at 2226-33. On this basis, the Court concluded that strict scrutiny was applicable. The First Amendment was violated because the ordinances were not supported by a compelling state interest, and because the ordinances were not narrowly tailored to serve such interests. \textit{Id}. at 2233-34.

\textsuperscript{177} \textit{Smith}, 494 U.S. at 884.
prosecuting these parents does not restrict religious beliefs and is not intended to burden religious practices. Second, manslaughter or homicide statutes do not provide a system of individual exemptions to their application.

Third, it is unclear whether the parents’ claim would be a hybrid claim subject to strict scrutiny. The parents would assert that they have a hybrid claim because prosecuting them burdens their religious practices and interferes with their right to control the raising of their children. Although the Smith Court stated that a claim involving a parent’s right to direct the upbringing of a child is an example of a hybrid claim, it later warned against creating constitutionally mandated religious exemptions “to health and safety regulation such as manslaughter and child neglect laws.” Even if the parents’ claim is a hybrid one, the result under the First Amendment probably would be the same as the result under RFRA: the strict scrutiny standard would apply, and that standard would be satisfied. Consequently, the parents’ First Amendment rights would not be violated.

b. Parents’ First Amendment Rights Implicated

Although prosecuting faith healing parents probably does not violate their First Amendment rights, these rights are at least implicated. The parents’ First Amendment rights are implicated because the type of conduct that would be chilled by a lack of fair notice would be the exercise of their religious practices.

In particular, the protected conduct that would be chilled by a lack of fair notice would be interference with faith healing practices when the child is not at risk of serious bodily harm. When no risk of serious bodily harm

178. Id. at 882.
179. But see Smith, supra note 167, at 1518-21.
180. See Robinson, supra note 2, at 429; Smith, supra note 167, at 1503, 1509-10; cf. Vandiver v. Hardin County Board of Educ., 925 F.2d 927, 933 (6th Cir. 1991) (parents’ constitutional claims barred by statute of limitations and lack of standing; therefore, hybrid claim hinged on whether their son’s free exercise challenge was joined with other constitutional concerns).
181. The parents’ right to exercise their religious beliefs freely is set forth in cases such as Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972), and Prince v. Massachusetts, 321 U.S. 158, 165 (1944). The parents’ constitutional right to the care, custody, and control of their children is also well-established. See, e.g., Prince, 321 U.S. at 166; Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
182. Smith, 494 U.S. at 888-89. One commentator has suggested that a faith healing parent does not have a hybrid claim because no parental right is violated when the child’s health is at great risk. Robinson, supra note 2, at 429.
exists, the state does not have a compelling interest that justifies interference with the parents’ religious practices. For example, a faith healing parent with a child who has a cold and a fever of 101 degrees for two days has a First Amendment right to provide faith healing exclusively because the child probably is not at risk of serious bodily harm. However, if the parent does not know whether this conduct is protected because the scope of the exemption is unclear, the parent may feel compelled to take the child to the doctor rather than risk prosecution. Like the booksellers in Winters, the parents’ constitutionally protected conduct may be deterred.

3. Inexplicably Contradictory Commands

The United States Supreme Court has not yet addressed the adequacy of notice provided by the intersection of two separate statutes. The closest the Court has come to addressing this issue has been to determine the adequacy of notice provided by the intersection of two sections of the same statute, in a context in which no constitutional rights were implicated.

Some faith healing parents have argued that the faith healing exemption and the manslaughter or homicide statutes create “inexplicably contradictory commands” and thus are void for vagueness. This standard was set forth in United States v. Cardiff, a case decided in 1952 in which the Court concluded that a defendant failed to receive fair notice when statutory provisions set forth inexplicably contradictory commands. The Cardiff standard is inapplicable to the faith healing context for a number of reasons: Cardiff involved vagueness created by contradiction, not omission; Cardiff involved provisions of the same statute, not separate statutes; and Cardiff involved commercial, not constitutional concerns. The first two reasons suggest that the Cardiff standard is too strict, and the third reason suggests that it is too liberal. Regardless of the reason, the inexplicably contradictory command standard is a square peg in a round hole.

The statute at issue in Cardiff, section 301(f) of the Food, Drug, & Cosmetic Act, prohibited the refusal to permit entry or inspection as author-

183. See supra notes 167–69 and accompanying text. Some uncertainty exists as to the level of scrutiny a court would apply to freedom of religion claims following RFRA: pre-Smith scrutiny or Sherbert/Yoder scrutiny. See supra note 171; cf. Smith, supra note 167, at 1509 (after Smith, court will give hybrid claim heightened protection, but not as rigorous as strict scrutiny). Regardless of which level applies, the parents’ claims should fail. See supra note 75.

184. The state only has a compelling interest in protecting the child from serious bodily harm or death. See, e.g., In re Appeal in Cochise County Juvenile Action, 650 P.2d 459, 467 (Ariz. 1982); see also In re Green, 292 A.2d 387, 392 (Pa. 1972) (court refused to intervene where child’s life not immediately imperiled by the child’s physical condition).

185. See supra notes 156–62 and accompanying text.

ized by section 704.\textsuperscript{187} Section 704 authorized federal officers "after first making request and obtaining permission of the owner,"\textsuperscript{188} to enter and inspect the establishment at reasonable times.\textsuperscript{189} The defendant refused to allow federal agents to inspect his factory after the agents had requested permission to do so. Based on the defendant's refusal to permit the inspection, he was convicted of violating section 301(f).\textsuperscript{190} The Court summarily concluded that these statutory provisions of the Food, Drug & Cosmetic Act were vague because they made the officials' inspection of the owner's premises dependent on the owner's consent, but then made the failure to consent criminal.\textsuperscript{191} Because one provision of the statute allowed the defendant to withhold his consent without incurring criminal liability but the other provision did not, the prospective defendant did not know how to act to avoid liability. The Court expressed its concern that the statute's language set up a "trap for the innocent."\textsuperscript{192}

Except for citing Cardiff for the general proposition that inexplicably contradictory commands may violate due process,\textsuperscript{193} the Court has not applied the Cardiff standard in any other case. Even if the standard were more extensively applied, it still would be inapplicable to the faith healing context. First, the standard would be too strict because any vagueness created in this context is caused by omission, not contradiction: the omission is that neither the criminal statute nor the faith healing exemption give the parent sufficient notice that faith healing is unlawful.\textsuperscript{194}

Second, the Cardiff standard would be too strict because Cardiff involved provisions of the same statute, not provisions of separate statutes. Separate statutes are presumed to operate independently,\textsuperscript{195} and thus contradiction is less likely when separate statutes are involved. For example, in Betchelder v. United States,\textsuperscript{196} the Court analyzed two criminal statutes that proscribed the same conduct—receipt of firearms by convicted felons—but that set forth different maximum sentences.\textsuperscript{197} After applying the general

\textsuperscript{187} Id. at 176.
\textsuperscript{188} Id. at 174 (quoting 21 U.S.C. § 331(f)).
\textsuperscript{189} Id. at 174-75 (quoting 21 U.S.C. § 704) (emphasis added).
\textsuperscript{190} Id. at 175.
\textsuperscript{191} Id. at 174.
\textsuperscript{192} Id. at 176.
\textsuperscript{193} Id.
\textsuperscript{196} See supra notes 105-08 and accompanying text.
\textsuperscript{197} 442 U.S. 114 (1979).
principles of fair notice, the Court concluded that due process was not violated. The Court appeared to focus on the notice provided by each statute rather than the notice provided by their intersection: "The provisions at issue here . . . unambiguously specify the activity proscribed and the penalties available upon conviction . . . . So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied."198 Although the degree of notice required for determining the proper sentence is less than the notice required for defining the prohibited behavior,199 the Batchelder decision indicates that the Court is more likely to find the fair notice requirement satisfied when separate statutes are involved.

Finally, and most significantly, the Cardiff standard would be too broad because the parents' constitutional rights are implicated. As discussed above,200 the faith healing parents' constitutional rights are implicated when they are prosecuted. These rights include the parents' right to freely exercise their religious beliefs, and their right to control the raising of their children.201 The fair notice requirement is most rigorous when constitutional rights are implicated.202 However, the Cardiff case did not implicate any such rights and apparently did not apply a sufficiently rigorous standard.

198. The two statutes proscribed essentially the same conduct, but provided different maximum penalties. One statute prohibited four categories of individuals (those under indictment for, or convicted of a crime punishable for more than one year in prison, fugitives from justice, drug users, or those adjudicated as a mentally defective) from "receive[ing] any firearm or ammunition which has been shipped or transported in interstate . . . commerce." 18 U.S.C. § 922(b) (1988). The maximum penalty for this crime was a $5,000 fine and five years imprisonment. 18 U.S.C. § 924(a) (1988).

The other statute prohibited five categories of individuals (those convicted of a felony, discharged from Armed Forces under dishonorable conditions, adjudged as being mentally incompetent, United States citizens who have renounced their citizenship, and illegal aliens) from "receive[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." 18 U.S.C. app. § 1202(a), repealed by Firearms Owners' Protection Act of 1986, Pub. L. 99-308, § 104(b), 100 Stat. 449, 459. The maximum penalty for this crime was a $10,000 fine but only two years imprisonment.

199. Batchelder, 442 U.S. at 123.

200. The notice required for determining the proper sentence is less because criminal sanctions will be imposed regardless of which statute is imposed; the only question is how lengthy the sentence will be. Notwithstanding this difference, courts have applied general fair notice principles to penalty provisions. See United States v. Colon-Ortiz, 866 F.2d 6, 9 (1st Cir. 1989); United States v. Preston, 739 F. Supp. 294, 301-02 (W.D. Va. 1990); Commonwealth v. Gagnon, 441 N.E.2d 753, 755 (Mass. 1982); cf. United States v. Tai-Hsing, 738 F. Supp. 389, 392 (D. Or. 1990) (applying Batchelder to definition of crime).

201. See discussion supra part III.B.2.b.

202. See supra note 180 and accompanying text.
4. The *Bouie* Principle

As part of the argument that their prosecution violated due process, the Twitchells asserted that the trial court unexpectedly concluded that the narrowly and precisely worded faith healing exemption did not apply to a manslaughter prosecution. This aspect of the Twitchells' argument is based on the *Bouie* principle announced in *Bouie v. City of Columbia*. The *Bouie* principle prohibits a court from broadening the meaning of a statute that is narrow and precise on its face because such a broadening is unforeseeable and thus violates due process. At least one commentator has already argued that the *Bouie* principle applies to the prosecution of faith healing parents. Specifically, he argues that "these [faith healing] exemptions are worded in such a way that they lull potential defendants in a manner prohibited by *Bouie*." For the reasons that follow, application of the *Bouie* principle is not proper in this context. It is another square peg in a round hole.

In *Bouie*, the United States Supreme Court determined that the defendants did not receive fair notice of the prohibited conduct when their convictions for criminal trespass were based on a state court's broad interpretation of the trespass statute. The defendants, who were participating in a sit-in demonstration, were arrested for remaining at a restaurant counter after they were asked to leave. The language in the criminal trespass statute only prohibited entering the premises after being told not to enter. Therefore, under the statute’s plain language, the defendants’ conduct was not criminal because the defendants were never told that they were prohibited from entering the premises.

After the defendants were arrested, however, the state supreme court broadened the scope of the statute to include the defendants’ conduct of failing to leave. The United States Supreme Court concluded that due process is violated where "a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction". The Court reasoned that:

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203. See supra note 137 and accompanying text.
205. *Id.* at 347 (1964).
206. See Treene, supra note 28, at 176-79.
207. *Id.* at 179.
208. *Id.* at 348.
209. *Id.* at 349-50.
210. *Id.* at 350.
When a statute on its face is narrow and precise... it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.\textsuperscript{211}

The Court held the statute unconstitutional on due process grounds because it did not provide potential violators with notice that their conduct would be construed as illegal.\textsuperscript{212}

There are three reasons why the \textit{Bouie} principle is inapplicable in the faith healing context. First, the concern for retroactivity expressed in \textit{Bouie} is not posed when the issue is whether the statutes themselves provide fair notice. The concern in \textit{Bouie} was that the state court was making the defendants’ conduct a crime \textit{after} they acted.\textsuperscript{213} The gravamen of the faith healing parents’ argument, in contrast, is that the statutes that were in effect at the time the parents failed to act were not clear.

Second, even if retroactivity generally were a concern, the faith healing exemptions do not “lull the defendant into a false sense of security.” In \textit{Bouie}, the statute that formed the basis for the trespass convictions was narrow and precise.\textsuperscript{214} In this context, however, the manslaughter or homicide statute that forms the basis for the parents’ conviction does not narrowly and precisely protect their conduct: the statute does not even have a faith healing exemption. To find the exemption, the parent must examine a separate statute and determine that its “narrow and precise” exemption also applies to manslaughter or homicide.

Therefore, the language of the manslaughter or homicide statute should not lull parents like the Twitchells into thinking that the exemption applies. Even if the faith healing exemption is broadly worded, its location in a separate statute with a different purpose ordinarily should prevent the parents from being lulled.\textsuperscript{215} The parents’ subjective belief that the exemption applies is insufficient to find a due process violation under the \textit{Bouie} principle.\textsuperscript{216}

\textsuperscript{211} \textit{Id.} at 352.
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 355.
\textsuperscript{214} \textit{Id.} at 356-57; see Sloop v. California, 431 U.S. 595, 601 (1977) (\textit{Bouie} applies where courts subsequently change the elements of a statutory offense); cf. Commonwealth v. Twitchell, 617 N.E.2d 609, 617 n.12 (Mass. 1993) (\textit{Bouie} applies when the court changes or eliminates a longstanding common law rule).
\textsuperscript{215} \textit{Bouie}, 378 U.S. at 351.
\textsuperscript{216} \textit{See Twitchell}, 617 N.E.2d at 617 (conclusion that the spiritual treatment provision did not apply to common law involuntary manslaughter is not a “surprise judicial interpretation”); cf. supra notes 109-17 and accompanying text (similar reasoning used in determining incorporation of exemption).
Finally, the Bouie principle is simply not sufficiently comprehensive to analyze the fair notice issue in this context. As discussed in more detail below, a number of factors contribute to the determination whether parents have fair notice that failing to provide faith healing may be a crime. These factors include the language and purposes of the statutes; the nature of the statutes; any scienter requirement imposed by the statutes; and the ability of the legislature to draft narrower language. Applying the singular Bouie principle simply does not permit adequate consideration of these factors.

5. Arbitrary Enforcement

Parents like the Twitchells have argued that the existence of the faith healing exemptions in one statute and not another gives the prosecutor too much discretion, and thus poses a risk of arbitrary enforcement of the laws. Because the risk of arbitrary enforcement is minimal, this doctrine is also another square peg in a round hole.

Due process not only protects defendants from statutes that fail to give them fair notice of what conduct is criminal, but it also protects defendants from arbitrary enforcement of the statutes by those who are charged with their administration. The United States Supreme Court has articulated this concern for arbitrary enforcement as follows: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Preventing arbitrary enforcement has become the primary purpose of the void for vagueness doctrine.

The Court has struck down statutes based on arbitrary enforcement when standardless statutes give too much discretion to the officials charged with enforcing the statutes. For example, in Kolender v. Lawson, the

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217. See Bouie, 378 U.S. at 355-56 n.5 ("The determination whether a criminal statute provides fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants."); cf. infra notes 283-87 and accompanying text (discussing mistake of law).

218. See discussion infra part IV.B.


220. Grayned, 408 U.S. at 108-09; see also Kolender, 461 U.S. at 358 (where legislature fails to provide minimal guidelines, a criminal statute may not permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections") (quoting Goguen, 415 U.S. at 575).

221. See Kolender, 461 U.S. at 358; Kucharek v. Hanaway, 902 F.2d 513, 518 (7th Cir. 1990); see also Herbert L. Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107.
Court concluded that a statute requiring persons to give "credible and reliable" identification to a police officer "when requested" was void for vagueness.\textsuperscript{222} The Court concluded that because the statute was standardless, it vested virtually complete discretion in the hands of the police.\textsuperscript{223}

The same danger of unlimited discretion does not exist here. The prosecutor must determine whether the faith healing exemption prevents parents from being convicted of crimes such as manslaughter and homicide, which do not contain a faith healing exemption. This determination is essentially a legal one, based on the statutes' language, context, purposes, legislative histories, and previous interpretations.\textsuperscript{224} Moreover, this determination does not depend on the facts of the particular case. Once the prosecutor determines that the exemption does not extend to a manslaughter or homicide prosecution, this determination should apply to all faith healing parents.\textsuperscript{225} Although prosecutors retain some discretion in determining whether to bring charges against particular parents, the existence of faith healing exemptions in one statute but not another does not permit prosecutors to pursue their own "personal predilections" in determining which parents will be prosecuted for failing to provide medical care.\textsuperscript{226}

6. Reasonable Reliance

Faith healing parents like the Twitchells have contended that they reasonably relied on the faith healing exemption and the manslaughter or homicide statute, which together assured them that they could engage in faith healing without incurring any criminal liability.\textsuperscript{227} According to the

\textsuperscript{222} 461 U.S. 352 (1983).
\textsuperscript{223} Id. at 361.
\textsuperscript{224} Id. at 360; see also Goguen, 415 U.S. at 578-79 (statute provided no standard for "contemptuous treatment" of the flag); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."" (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (statute making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in an "annoying" manner, defines no standard because some people are annoyed more easily than others).
\textsuperscript{226} Of course prosecutors will retain the discretion to prosecute some parents and not others, depending on the facts of the case. This discretion exists regardless of the applicability of the faith healing exemption. A prosecutor's determination that the faith healing exemption does not apply simply subjects faith healing parents to the same standard as non-faith healing parents.
\textsuperscript{227} Cf. Kucharek v. Hanaway, 902 F.2d 513, 519 (7th Cir. 1990) ("A statute that contains one or several ambiguities that can be dispelled at a stroke by interpretation is not open to [the arbitrary enforcement] objection and therefore is not vague in the constitutional sense.".)
parents, such reasonable reliance on this official statement of the law provides a defense to their prosecution.

Although most faith healing parents contend that they reasonably relied on the language of the statutes, the Twitchells contended that they reasonably relied on an opinion by the Attorney General of Massachusetts, which purportedly assured them that they would not be subject to criminal liability.\textsuperscript{228} For the reasons that follow, the reasonable reliance doctrine is not applicable in the faith healing context, except in limited circumstances. It is another square peg in a round hole.

The reasonable reliance doctrine\textsuperscript{229} enables a prospective defendant to rely on an official's erroneous interpretation of a criminal statute without subjecting himself to criminal liability.\textsuperscript{230} Although the concerns underlying reasonable reliance are similar to those underlying fair notice—to insure fairness\textsuperscript{231} and to provide adequate warning to the defendant as to what conduct is prohibited—the United States Supreme Court has consistently recognized that these doctrines are distinct.\textsuperscript{232} The reasonable reliance doctrine specifically applies when an official has misinterpreted a statute, or when a statute permits the defendant's conduct but the statute is later found unconstitutional.\textsuperscript{233}

\textsuperscript{228} Walker, 763 P.2d at 871; State v. McKown, 475 N.W.2d 63, 67-69 (Minn. 1991), cert. denied, 112 S. Ct. 882 (1992); see also Treene, supra note 28, at 188-92 (discussing reasonable reliance).


\textsuperscript{230} Recently, courts have begun calling this doctrine "entrapment by estoppel." See United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992) (citing cases); see also Treene, supra note 28, at 190.

\textsuperscript{231} Specifically, the doctrine is designed to prevent "sanction[ing] the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." Raley v. Ohio, 360 U.S. 423, 438 (1959).


\textsuperscript{233} See Pennsylvania Indus. Chem. Corp., 411 U.S. at 673-74 (defendant did not contend that the statute was impermissibly vague, but rather that he was affirmatively misled by the agency); United States v. Laub, 385 U.S. 475, 487 (1967) ("criminal sanctions are not supportable . . . if the Government's conduct constitutes "active misleading"); Raley, 360 U.S. at 438 ("Here there were more than commands simply vague or even contradictory. There was active misleading."). This distinction makes sense. The fair notice doctrine focuses on a reasonable defendant, whereas the reasonable reliance doctrine focuses on the particular defendant. The fair notice doctrine addresses the validity and enforceability of the statute as it applies to all potential defendants,
The reasonable reliance doctrine has three primary requirements: (1) an erroneous interpretation of the statute by an official;\textsuperscript{234} (2) affirmative misleading by the official;\textsuperscript{235} and (3) actual reliance on the erroneous interpretation by the defendant.\textsuperscript{236} The classic case of reasonable reliance is found in \textit{Raley v. Ohio}.\textsuperscript{237} In \textit{Raley}, the defendants were asked to testify before a legislative commission.\textsuperscript{238} During their testimony, the defendants declined to answer certain questions because answering them would have violated the defendants' privilege against self-incrimination.\textsuperscript{239} The members of the commission led the defendants to believe that they could assert the privilege, even though the defendants' assertion of the privilege violated state law.\textsuperscript{240} Because the members of the commission permitted the defendants to believe that they could assert the privilege, the United States Supreme Court reversed the defendants' convictions for failing to answer the questions.\textsuperscript{241} The three requirements of the doctrine were clearly met in \textit{Raley}: the officials erroneously interpreted the state law; the officials affirmatively misled the witnesses; and the witnesses actually relied on the officials' erroneous interpretation of the law. Since the Court decided \textit{Raley}, the reasonable reliance doctrine has been extended to a number of other officials.\textsuperscript{242}

The reasonable reliance doctrine generally is not applicable in the faith healing context for four different reasons, any one of which would be sufficient to preclude the doctrine's applicability. First, most parents are relying on the language of the statute itself, not an erroneous interpretation of the

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\item[236] Id.; see also Cox v. Louisiana, 379 U.S. 559, 569-71 (1965); Raley v. Ohio, 360 U.S. 423, 426-29 (1959); United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991) (in these cases officials made clear affirmative statements to the defendants, which they relied on). An omission is inadequate to satisfy the affirmative misleading requirement. See United States v. Lichenstein, 610 F.2d 1272, 1280 (5th Cir. 1980).
\item[237] Smith, 940 F.2d at 714; see also United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992) (four requirements of entrapment by estoppel are: (1) government must have announced that charged criminal act was legal; (2) defendant relied on the government announcement; (3) defendant's reliance was reasonable; and (4) given the defendant's reliance, the prosecution would be unfair). \textit{cf. Model Penal Code} § 2.04(3)(b) (1985) (defendant must "act in reasonable reliance on an official statement of the law").
\item[238] 360 U.S. 423 (1959).
\item[239] Id. at 424.
\item[240] Id.
\item[241] Id. at 425, 432.
\item[242] Id. at 442.
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law. Statutes, by their very nature, are not erroneous interpretations of the law, but are valid and enforceable statements of the law. Reliance on a statute itself provides a reasonable reliance defense only when the statute permits the defendant’s conduct but the statute is later found to be unconstitutional. The parents here are not arguing that a statute is unconstitutional; rather, the essence of the parents’ argument appears to be that they were led to believe that the scope of the faith healing exemption was broader than its actual scope. This argument is simply a version of a mistake of law defense, which is generally not a defense to a criminal prosecution.

Second, the statutes do not affirmatively mislead the parents; if anything, the statutes simply have omitted language that would have set forth the scope of the exemption more clearly.

Third, the parents usually have not relied on any official misinterpretation of the statute. If the parents actually rely on any interpretation of the statute, it is usually a subjective interpretation of the statute by church officials. Except when a church publication copies significant portions of an official interpretation verbatim and clearly conveys to the parents that the interpretation was made by an official, church interpretations cannot be reasonably relied on. They are issued by an official of the church who neither drafted the law nor possesses the power to enforce it, and the interpretations are inherently biased. These interpretations are similar to interpretations of the law made by an attorney, which courts do not consider official statements of the law. Such a strict definition of an official interpretation of the law is necessary to avoid difficult problems of determining when a subjective interpretation of the law is sufficiently official, and to create incentives to ascertain the law from official sources.

243. See Treene, supra note 28, at 191 nn. 343-47.
244. See Walker v. Superior Court, 763 P.2d 852, 872 n.18 (Cal. 1988), cert. denied, 491 U.S. 905 (1989); Treene, supra note 28, at 192.
245. Walker, 763 P.2d at 872 n.18.
247. See discussion infra part IV.B.1.b.
248. For example, the statutes do not include language explicitly stating that the exemption does not extend to circumstances in which the child is seriously ill. See Okla. Stat. Ann. tit. 21, § 852(A) (West Supp. 1994).
250. If the church interpretation does more than copy the official statement—for example, by characterizing the law or providing advice—the publication cannot be reasonably relied on. See discussion infra notes 379-83 and accompanying text (applying standard to the Twitchell case). Therefore, the defendant will be protected by the reasonable reliance doctrine only when the church simply “passes on” the official statement with attribution.
Fourth, in most instances the parents have only constructively relied on an official interpretation: they have not actually relied on it.\textsuperscript{251} The Court has applied the reasonable reliance doctrine only where the defendant actually relied on an official's misrepresentation.\textsuperscript{252}

In sum, the reasonable reliance doctrine does not apply because the parents do not actually rely on an affirmative misrepresentation of the laws by state officials, but instead constructively rely on an omission in the laws themselves or actually rely on an unofficial, subjective interpretation of the law. The parents' concern seems to be that the exemption is misleading because the parents do not know their conduct is criminal, but this concern is already addressed by the fair notice doctrine. Applying the reasonable reliance doctrine in this context is not only erroneous, it is redundant.

7. Lenity

Finally, faith healing parents in at least one case have argued that the existence of the exemption in one statute but not in another creates an ambiguity that should be interpreted in favor of the parents.\textsuperscript{253} Resolving ambiguities in criminal statutes in favor of the defendants is an application of the lenity principle.\textsuperscript{254} Although this principle may be helpful as an aid in ascertaining the meaning of a statute, it is not applicable when the issue is whether procedural due process has been violated. In this instance, the lenity principle simply duplicates the fair notice requirement.\textsuperscript{255} The due process concern for providing the defendant with sufficient warning of the prohibited conduct is the concern behind both fair notice and lenity.\textsuperscript{256} Any distinctions between these doctrines do not mask this essential similarity.

\textsuperscript{251} See LaFave & Scott, supra note 118, § 5.1(e)(4), at 419-20.

\textsuperscript{252} See State v. McKown, 461 N.W.2d 720, 725 (Minn. Ct. App. 1990) (stating that parents "may have specifically relied upon official pronouncements of the state," but citing no evidence indicating that parents ever read the exemption), aff'd, 475 N.W.2d 63 (Minn. 1991), cert. denied, 112 S. Ct. 882 (1992); cf. Twitchell, 617 N.E.2d at 618-19 (parents relied on interpretation of statute by Christian Science officials).


\textsuperscript{254} McKown, 461 N.W.2d at 725.


\textsuperscript{256} This conclusion is reinforced by the court of appeals decision in McKown. To determine whether the defendants' due process rights were violated, the Minnesota Court of Appeals in McKown relied, inter alia, on the doctrine of lenity. 461 N.W.2d at 725. Even the court had trouble integrating the lenity principle with the due process doctrine. The court stated: "We turn next to a related doctrine of criminal law [lenity], one not specifically grounded in the fourteenth amendment, but one which we believe buttresses and supports the due process argument." Id. The court's confusion was highlighted by its discussion of lenity with fair notice, rather than
Therefore, use of the leniency principle in this context is simply a make-weight argument that does not add anything to the fair notice analysis.\textsuperscript{257} It is yet another square peg in a round hole.

IV. Building on Fair Notice: A Factor Analysis

The foregoing discussion demonstrates that the existing doctrines provide inadequate guidance for lower courts to determine intersectional fair notice. Because of the need for flexibility, no comprehensive framework realistically can be developed.\textsuperscript{258}

However, United States Supreme Court decisions have suggested how the fair notice doctrine might be developed further. Based on these decisions, this section of the Article proposes a framework for determining fair notice that would provide more guidance to the state courts and lower federal courts.

A. A Threshold Inquiry: Application of the Presumption of Constitutional Validity

As stated previously, one of the most important considerations in the fair notice determination is whether any constitutional rights are implicated.\textsuperscript{259} In fact, the primary purpose undergirding fair notice is the protection of these rights.\textsuperscript{260} If constitutional rights are implicated, then more notice is required than if constitutional rights are not implicated. One way this additional notice can be ensured is by declining to apply the traditional presumption of constitutional validity of duly enacted statutes when the defendant might be deterred from exercising a constitutional right.\textsuperscript{261}

\textsuperscript{257} Compare Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning.") with Liparota, 471 U.S. at 427 ("[L]enity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.") and Hustlestone, 415 U.S. at 831 ("This rule of narrow construction [leniency] is rooted in the . . . belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property.").

\textsuperscript{258} See generally John C. Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 198-99 (1985) ("Today, strict construction survives more as a make-weight for results that seem right on other grounds than as a consistent policy of statutory interpretation.").

\textsuperscript{259} See supra note 133 and accompanying text.

\textsuperscript{260} See sources cited supra note 137.

\textsuperscript{261} See id.
constitutional right is implicated in this manner,\textsuperscript{262} then the application of
the statute(s) is not presumed valid; if a constitutional right is not im-
licated, then the application of the statute(s) is presumed valid and the
defendant must overcome that presumption.

B. Defining the Factors

Once the court determines the degree of notice required, the court
should then engage in a comprehensive factor analysis to determine
whether the statutes, read together, provide the parent with fair notice.\textsuperscript{263}
This analysis can be used to determine fair notice in a single statute or to
determine intersectional fair notice. This factor analysis is shaped by two
well-established principles: ignorance of the law is no excuse and mistake
of law is not a defense.

1. “Interpretive” Factors: Integrating the Principles of “Ignorance of the
Law” and “Mistake of Law”

The factors for determining whether statutes provide fair notice cannot
be defined without considering other legal principles that are inextricably
intertwined with fair notice.\textsuperscript{264} Most significantly, the principles of “ignor-
ance of the law is no excuse” and “mistake of law is not a defense” exist
fundamentally in tension with the fair notice requirement.\textsuperscript{265} The fair no-

\textsuperscript{262} See NAACP v. Button, 371 U.S. 415, 432 (1963); Robert B. McKay, The Preference for
(7th Cir. 1972) (concluding that, where First Amendment concerns are involved, presumption
of validity does not apply in overbreadth analysis).

\textsuperscript{263} See supra notes 156-62 and accompanying text.

\textsuperscript{264} Some courts already have attempted to apply a factor analysis in the fair notice context.
For example, in Landry v. Daley, 280 F. Supp. 938, 952-53 (N.D. Ill. 1968), the court listed the
following factors that courts should consider when determining whether the defendants were pro-
vided with fair notice:

(1) whether a substantial interest worthy of protection is identified or apparent from the
language of the statute; (2) whether the terms of the regulation are susceptible to objective
measurement by men of common intelligence; (3) whether those charged with its
enforcement are vested only with limited discretion; (4) if penal, whether some element
of knowledge or intent to obstruct a state interest is required; and (5) whether its clarity
is dependent upon manifold cross-reference to interrelated enactments or regulations.
part on the persons to whom and the setting in which the statute is applicable.”). See generally
Collings, supra note 133, at 223-32 (discussing various rationales the court has applied to deter-
mine adequacy of notice); Jeffries, supra note 258, at 196-97 (describing a number of factors used
in determining fair notice).

\textsuperscript{265} For example, Amsterdam examined the fair notice doctrine as it relates to other consti-
tutional doctrines, particularly “standing” and “scope of review.” Amsterdam, supra note 132, at
96-114, 116. This Article focuses on fair notice as it intersects with the “ignorance of the law”
and “mistake of law” doctrines.
tice requirement imposes an obligation on the state to warn citizens as to what the law forbids, whereas the ignorance of law and mistake of law principles place limits on that obligation. The resolution of this tension is an uneasy one. A defendant is entitled to fair notice of what the law prohibits, but this notice is provided to a hypothetical defendant who is presumed to know the law that an ordinary person would know and who would correctly interpret that law. Also, this tension is exacerbated because the Supreme Court has not effectively integrated these principles. This section of the Article discusses the ignorance of law and mistake of law principles, and integrates them into the definition of the “interpretive” factors.

a. Ignorance of the Law Is No Excuse

Although a number of commentators have suggested that the “ignorance of the law is no excuse” principle should be abolished, it continues to be cited approvingly. Certainly a persuasive argument could be made that, even assuming that the law is objective and knowable, ordinary per-

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266. A number of commentators have discussed the relationships between fair notice and the ignorance principle. See Ronald A. Cass, Ignorance of the Law: A Maxim Reexamined, 17 WM. & MARY L. REV. 671, 680-81, 683 (1976) (blaming adherence to ignorance maxim for lack of coherence in the vagueness doctrine); cf. Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea, 8 U. CHI. L. REV. 641, 667 (1941) (arguing that the expansion of vagueness doctrine may absorb mistake of law defense).

267. See Cass, supra note 266, at 680-81. All of these doctrines assist in balancing the power of the state against the individual. See id. at 674 n.23 (vagueness doctrine balances the power of the state against individuals’ private interests).


269. See Cass, supra note 266, at 680-83 (concluding that inconsistencies exist in Supreme Court decisions because of the struggle to balance fair notice with the concept that ignorance of the law cannot be excused); cf. Packer, supra note 221, at 107-08 (United States Supreme Court has inadequately addressed mens rea issues).

270. See Cass, supra note 266, at 672; see also Treene, supra note 28, at 185 (positing that to “[m]aintain[] this harsh common law rule” is inconsistent with today’s procedural due process doctrine). Some commentators also have noted that the maxim was mistakenly taken from Roman law. See Hall & Seligman, supra note 266, at 646; Edwin R. Keedy, Ignorance and Mistake In the Criminal Law, 22 HARV. L. REV. 75, 77-78 (1908); Paul K. Ryu & Helen Siliving, Error Juris: A Comparative Study, 24 U. CHI. L. REV. 421, 425-27 (1957).

271. As recently as 1994, the United States Supreme Court cited the maxim with approval. See Ratzlaf v. United States, 114 S. Ct. 655, 663 (1994) (“We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge.”). See generally Keedy, supra note 270, at 88 (courts have refused to accept ignorance of law as a defense); Packer, supra note 221, at 145 (“The principle that ignorance of the law is no excuse is deeply embedded in our criminal law.”). But see Cass, supra note 266, at 689 (concluding that ignorance of law maxim is inconsistent with “basic notions of fairness”).
sons do not really know the law and cannot be expected to know it. However, this principle continues to be justified by a number of rationales: that the reasonableness of a defendant’s lack of knowledge may be an issue too difficult for the court to determine; that allowing ignorance to be a defense would encourage ignorance of or impunity for the law; and that allowing ignorance to be a defense would threaten legality because the law cannot be defined subjectively by what the defendant thinks the law means.

These rationales justify the application of the ignorance of the law principle in the faith healing context. Faith healing parents assert that

Although ignorance of the law is generally not a defense, the United States Supreme Court has held that it may be a defense where Congress so provides. See Ratzlaf, 114 S. Ct. at 663.

272. This assumption of an objective and knowable law undergirds the ignorance maxim. See Jerome Hall, Ignorance and Mistake in Criminal Law, 33 Ind. L.J. 1, 15-16 (1957); see also Keedy, supra note 270, at 78 (questioning this assumption). However, a number of contemporary scholars have questioned whether the law is capable of an objective meaning, even if knowable. See, e.g., David Millon, Objectivity and Democracy, 67 N.Y.U. L. Rev. 1, 4 (1992) (critical legal studies movement “seeks to demonstrate the inevitability of subjective judgment in the application of legal rules”); Joseph W. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 25-26 (1984) (positing that legal rules and reasoning do not have an objective meaning).

273. See Kucharek v. Hanaway, 902 F.2d 513, 518 (7th Cir. 1990); Cass, supra note 266, at 691; Hall, supra note 272, at 14, 16, 42; Keedy, supra note 270, at 91. In the past, citizens may have been better able to ascertain the law because they were guided by the moral sense of the community as to what behavior was criminal. See Hart, supra note 227, at 420; Graham Hughes, Criminal Omissions, 67 Yale L.J. 590, 615-16 (1958); cf. Gerhard O.W. Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1060 (1958) (arguing that because morals no longer serve as a guide to ascertaining what actions are unlawful, knowledge or awareness of unlawfulness of act should be required before person is prosecuted).

274. Hall, supra note 272, at 16-17; Hall & Seligman, supra note 266, at 646-48. The determination whether ignorance of law is a defense involves two inquiries: whether the defendant was in fact ignorant of the law; and whether the ignorance “was inevitable or was due to his own fault.” See Hall & Seligman, supra note 266, at 647 (integrating mistake of law and ignorance of the law doctrines). The latter inquiry poses greater difficulty.

Justice Holmes did not believe that these inquiries were too difficult for the court to determine. Oliver W. Holmes, The Common Law 48 (1881); see also Ryu & Silving, supra note 270, at 470 (explaining that knowledge of the law is no harder to prove than any other required “mental element”); Henry W. Seney, “When Empty Terrors Overawe” — Our Criminal Law Defenses, 19 Wayne L. Rev. 1359, 1367-68 (1973) (arguing that knowledge of the law can be proved).

275. See Hall & Seligman, supra note 266, at 648-49 (refusal to recognize ignorance of law defense is necessary to effectively enforce law and adjust mores in community); see also Holmes, supra note 274, at 48 (allowing ignorance of law as a defense would encourage people to be ignorant of the law). But see Seney, supra note 274, at 1375-76 (accepting ignorance of the law as an excuse would not harm legal structure).

276. One noted commentator has stated:

If [the plea of ignorance] were valid, the consequence would be: wherever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, i.e., the law actually is thus and so. But such a doctrine would contra-
they are ignorant as to the scope of the exemption because of an intersec-
tional lack of fair notice. But this ignorance should not provide them with a
defense to prosecution. First, courts would find it difficult to determine
whether the parent’s failure to know the scope of the exemption was rea-
sonable. The court would have to provide answers to questions such as: Is
the excuse for the parent’s ignorance a reasonable one?; By whose stan-
dards—that of a reasonable parent or of a reasonable faith healing parent?;
Did the parent try to ascertain what the statute meant?; By what means?; Is
the failure reasonable if elders or officials of the church assure the parent
that spiritual healing is permissible or if she reads materials (written by the
church) that purport to interpret the law?; and what kind of proof should
the court accept to excuse her failure to know (e.g., if she firmly believes
that her behavior was protected, how can this belief be disproved)?

Second, allowing the excuse of ignorance of the law would, by its very
nature, provide little incentive for parents to ascertain the law. Further-
more, at least from the parents’ perspective, the law would become
whatever they thought or hoped it was, thus making it more difficult to
enforce.277 Parents would be able to argue that their subjective beliefs as to
what the law means should excuse their otherwise impermissible conduct.

Conversely, precluding ignorance of the law as an excuse would give
parents an incentive to ascertain the actual scope of the faith healing ex-
emption and to comply with it to avoid prosecution.278 The parents’ desire
to avoid prosecution would encourage them to seek medical care for their
child when the faith healing exemption no longer protected them.279

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dict the essential requisites of a legal system, the implications of the principle of
legality.

Hall, supra note 272, at 19; see also id. at 39 (arguing that the penal law cannot accept a defend-
ant’s own interpretation of the law). But see Cass, supra note 266, at 694-95 (Hall’s fear of the
law becoming “what anyone thought it was” is overstated); George P. Fletcher, The Individualiza-
tion of Excusing Conditions, 47 S. CAL. L. REV. 1269, 1298-99 (1974) (positing that the law does
not change based on a person’s own interpretation of the law); Seney, supra note 274, at 1376
(excusing a person for “misinterpretation of a rule surely doesn’t amount to recognizing his inter-
pretation as correct”).

277. None of the exceptions to the ignorance maxim are applicable to the faith healing con-
text. First, the parents’ ignorance does not negate their intent because the crimes for which they
are charged are not specific intent crimes. See Keedy, supra note 270, at 89. Second, this context
does not involve circumstances similar to those in Lambert v. California, 355 U.S. 225, 228
(1957), in which the defendant was passive, she was unaware of her duty, and it was improbable
she would become aware of that duty. See also Mueller, supra note 273, at 1101-04 (discussing
the Lambert decision).

278. See supra note 276 and accompanying text.

279. The widely publicized prosecutions of faith healing parents should also provide incen-
tives for parents to ascertain the scope of any applicable faith healing exemption. See Rita Cioli,
(Twitchell); Robert Dvorchak, Blind Faith: Teen-Age Boy Starves to Death as Parents Wait for
Although the ignorance of the law principle appears to treat defendants harshly, it is tempered because the defendant is only presumed to know the law that an ordinary person would know. Specifically, the hypothetical defendant presumed to know the law is a layperson of ordinary intelligence who is exercising a duty of due care in reading the law. Moreover, ignorance is an excuse if the circumstances do not permit a layperson to obtain the law. This authority suggests that the law an ordinary person should know is law that is reasonably accessible to the ordinary person.

b. Mistake of Law Is Not a Defense

A principle closely related to ignorance of the law is that a mistake of law ordinarily will not provide a defense to a criminal prosecution. Thus, a defendant’s good faith belief that he was following the law does not afford a defense if the defendant’s good faith belief was mistaken. For example, in


280. See Newmark v. Williams, 588 A.2d 1108, 1110 (Del. 1991) (Christian Scientist parents initially took sick child to hospital because they feared prosecution). But see supra note 28 (prosecutions would not deter some faith healing parents).

281. See Grayed v. City of Rockford, 408 U.S. 104, 108 (1972) (The Supreme Court “insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); Colten v. Kentucky, 407 U.S. 104, 110 (1971) (“We agree with the Kentucky court when it said: ‘We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . .’”) (quoting Colten v. Commonwealth, 467 S.W.2d 374, 378 (1971)); United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that a criminal statute is unconstitutional if it does not provide fair notice to “a person of ordinary intelligence”); Winters v. New York, 333 U.S. 507, 515 (1948) (“Men of common intelligence cannot be required to guess at the meaning of the enactment.”); United States v. Petroillo, 332 U.S. 1, 6 (1947) (holding that inquiry is whether persons of ordinary intelligence are able to know what the statute means); Bynum v. State, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989) (holding that “the inquiry must be whether the ordinary, law-abiding individual would have received sufficient information as to whether conduct violated criminal law); see also N.J. STAT. ANN. § 2C:2-4(c)(3) (West 1982) (ignorance of law a defense if “law-abiding and prudent person” would conclude that conduct not a criminal offense after “diligently pursu[ing] all means available to ascertain the meaning” of statute). Significantly, the layperson is exercising due care in reading the law, but not reading the law with the expectation that the law will protect them. But see Hall, supra note 272, at 18 (no evidence that men study criminal law “‘to know and obey it’”).
People v. Marrero. The defendant argued that mistake of law provided him with a defense to a weapons possession charge because he believed that his conduct was lawful. The defendant read two criminal statutes together and mistakenly thought that he was permitted to carry the weapon because he was protected by a "peace officer" exemption. The Court of Appeals of New York rejected the defendant's mistake of law defense. The court reasoned:

[T]he whole thrust of this exceptional exculpatory concept [mistake of law], in derogation of the traditional and common law principle, was intended to be a very narrow escape valve. Application in this case would invert that thrust and make mistake a generally applied or available defense instead of an unusual exception. The court concluded that any protection that the defendant needed was provided by the fair notice requirement. Thus, the principle that mistake of law is not a defense should be integrated into any definition of fair notice.

2. Defining the Interpretive Factors

After the court determines whether the statutes are presumptively valid, the court should weigh what I have termed the "interpretive" factors. Interpretive factors set forth the applicable law for the ordinary layperson and are the most significant factors in the fair notice analysis. The definition of these factors is influenced by the principles of ignorance of law and mistake of law discussed above. As such, the interpretive factors include all of the authorities that are "reasonably accessible to an ordinary person." These authorities include the statutory language and its context, reasonably ascertainable statutory purposes, statutory canons, case law interpreting the statutes, and published interpretations by administrative agencies or officials in charge of interpreting the statutes. The court will need to exercise

282. See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 36(4)(A) (West 1983); N.J. Stat. Ann. § 2C:2-4(c)(1) (West 1982); see also Model Penal Code § 2.04(3)(a) (1985) (stating that ignorance may be a defense to a criminal charge when the defendant does not know about the statute and the statute "has not been published or otherwise reasonably made available prior to the conduct alleged"); LaFave & Scott, supra note 118, at 416 (recognizing ignorance as a defense where the statute is not published or reasonably made available). See generally Hall & Seligman, supra note 266, at 656-62 (concluding, inter alia, that defendant should be able to use ignorance of law as a defense where the defendant can prove that "neither he, nor any member of the community in his part of the world, could possibly have learned of the enactment of the new law under which he was being prosecuted," or where it is "physically impossible" for defendant to know the law).


284. Id. at 1070.

285. Id. at 1068.

286. Id. at 1070.
its discretion to determine whether a particular authority is reasonably accessible.\textsuperscript{287} Only after determining which authorities would be reasonably accessible can the court then determine whether those authorities, considered together, provide the defendant with fair notice.\textsuperscript{288}

First, the court should consider the language of the relevant statute(s), their context, and the subjects with which they deal.\textsuperscript{289} The words in the statutes should be given their common and ordinary meanings.\textsuperscript{290} To ascertain these meanings, the court may examine any technical,\textsuperscript{291} common law,\textsuperscript{292} or dictionary definitions.\textsuperscript{293}

Second, the court should consider judicial decisions that have interpreted the relevant statutory language. The Supreme Court has concluded that decisions interpreting a statute are relevant to determining whether it provides fair notice.\textsuperscript{294} Interpretations of the statute by officials or agencies that are charged with enforcing the statute also are relevant to the fair notice determination.\textsuperscript{295}

\textsuperscript{287} Id. at 1072-73.

\textsuperscript{288} The court making this determination should be adequately equipped to ascertain whether certain authority is reasonably accessible to a layperson because the court ordinarily must research this authority to determine the intent of the statute. The court also could obtain affidavits from the parties regarding the accessibility of the law.

\textsuperscript{289} Cf. Hall & Seligman, supra note 266, at 662 (to determine if ignorance of commission regulations provides a defense, a number of factors should be considered, including publicity surrounding the making of the regulation, and whether text of regulation is "reasonably available").


\textsuperscript{292} See, e.g., Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

\textsuperscript{293} Id.; Cline v. Frink Dairy Co., 274 U.S. 445, 459 (1927); see also Lanzetta v. New Jersey, 306 U.S. 451, 454-55 (1939) (stating that the meaning of a provision in the statute at issue was not "derivable from the common law").

\textsuperscript{294} See, e.g., Flipside, 455 U.S. at 501; Lanzetta, 306 U.S. at 454 n.3; see also United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991) (using dictionary definitions to interpret a penal statute).

Third, the court should consider the statutes' purposes, if they are reasonably ascertainable. These purposes can be found in the statute itself, in case law interpreting the statute, or in general community notions of the meaning of the statute. In limited circumstances, they also can be found in an analogous statute in another jurisdiction.

Fourth, the court should consider canons of statutory construction if the statutory language is not clear. Because canons have been published in a number of legal sources, they are reasonably accessible. If contradictory canons are equally applicable, this contradiction should weigh in favor of finding inadequate notice.

The United States Supreme Court has even considered interpretations of the statute after the defendant has committed the crime, as long as such interpretations were foreseeable when the defendant allegedly committed the crime. See, e.g., Osborne v. Ohio, 495 U.S. 103, 115 (1990); Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965); cf. Hamling v. United States, 418 U.S. 87, 116 (1974) (subsequent interpretations that make statute "more definite" may be considered). But see Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) (discussing retroactivity problems of subsequent interpretation).

Judicial interpretations may increase or decrease the degree of vagueness provided by a statute. See United States v. L. Cohen Grocery Co., 255 U.S. 81, 89-90 & n.1 (1921) (varying interpretations of relevant language by lower courts may evidence vagueness, but are not conclusive evidence).


Using an official interpretation to determine whether adequate notice has been provided to a defendant is different from using it to determine whether a defendant reasonably relied on a misinterpretation of the statute. See discussion of reasonable reliance supra part III.B.6. The differences between these uses are significant. Most notably, in the fair notice context, the interpretation is not erroneous but becomes part of the meaning of the statute, and the prospective defendant constructively but does not actually rely on this interpretation. The focus is on the reasonable defendant, not the particular defendant. See also supra note 233.

In both circumstances, however, subjective interpretations of the law by the defendant or relied on by the defendant should not be considered official. See supra notes 249-51 and accompanying text; cf. Bouie v. Columbia, 378 U.S. 347, 355 n.5 (1964) (defendant’s subjective motivations are irrelevant to the meaning of the statute).


299. Cf. Rose v. Locke, 423 U.S. 48, 53 (1975) (considering interpretation of same statutory language in other jurisdictions); Fleuti v. Rosenberg, 302 F.2d 652, 657 (9th Cir. 1962) (suggesting that interpretation of term in other federal statutes could be considered to determine statute’s vagueness). But see Bouie, 378 U.S. at 359-60 ("It would be a rare situation in which the meaning of a statute of another state sufficed to afford a person ‘fair warning’ that his own State’s statute meant something quite different from what its words said."); Hall & Seligman, supra note 266, at 671-73 (discussing limits to using interpretations by sister states).

300. See Singer, supra note 105, §§ 47.17-26, 51.02-06 (citing state and federal courts that have used statutory canons in the construction of statutes). Contra Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.6 (1982); Levas & Levas v. Village of Antioch, 684 F.2d 446, 452 (7th Cir. 1982).
A court should not consider a statute's legislative history, however. Unlike the other interpretive factors set forth above, legislative history generally is less accessible because much legislative history—particularly of state statutes—is unpublished and difficult to obtain. For example, legislative history of state statutes is often inaccessible even to lawyers because relevant history may not be reported or compiled at all, or may be located in only a few places in the state. It would be difficult for a court to ascertain how many locations make a source reasonably accessible. Moreover, even if the legislative history can be found, it often is not an authoritative source as to the meaning of the statute. Committee reports may be

301. The late Professor Karl Llewellyn posited that, for every statutory canon used in the construction of a statute, there is an opposite but equally applicable statutory canon that could be used by the court. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed, 3 Vand. L. Rev. 395, 401 (1950); see also Richard Posner, Statutory Interpretation, 50 U. Chic. L. Rev. 800, 806-07 (1983) (agreeing with Llewellyn and positing that the canons are wrong in a number of respects). Although this conclusion may be an overstatement because canons may not always be equally applicable, a clash of contradictory statutory canons should be considered relevant to the fair notice inquiry. An interpretation of a statute that depends on contradictory but equally applicable canons may provide inadequate notice as to what conduct is prohibited by the statute because a court could construe the statute in numerous ways, depending on which statutory canon the court followed.


In Colon-Ortiz, a case relied on by the McKown court, the First Circuit declined to consider legislative history to determine whether the defendant had been given fair notice in a sentencing provision. The court reasoned:

To satisfy due process notice requirements, a penal statute must be clear on its face . . . .

It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. No amount of explicit reference in the legislative history of the statute can cure this deficiency.

866 F.2d at 9.

Although the court properly declined to consider the statute's legislative history, it went too far in suggesting that only the statute's language is relevant to determining fair notice. This suggestion is contrary to precedents of the Court. See supra notes 295-301. More importantly, it is contrary to the general principle that the defendant is charged with knowing all of the reasonably accessible law. Notably, although the court in Colon-Ortiz would not allow the legislative history to be used to determine whether fair notice was provided or not, the court did conclude that the ambiguous language in the statute should be disregarded as legislative inadvertence or mistake.

866 F.2d at 10-11.

303. For example, New York only keeps records of debates from the last ten years. In California, reports of committee hearings are rarely transcribed.
equivocal or even contradictory, and debates and hearings embody the intent of particular legislators.

3. Other Factors

In addition to the interpretive factors, the court should weigh other relevant factors to determine whether the defendant has been provided with fair notice. Although the interpretive factors are the most weighty, these factors can make a difference in a close case. These factors include:

**Nature of Statutes:** To further determine whether the notice is adequate, the court should determine whether the statute(s) are criminal or civil, and whether they affect economic or noneconomic activity. If the statute(s) are criminal, or if the statute(s) affect noneconomic activity, more notice should be necessary.\(^{304}\)

**Scienter:** It is well established that a scienter requirement can alleviate a statute’s vagueness,\(^{305}\) even though scienter cannot save a statute that initially has no meaning.\(^{306}\) A scienter requirement can alleviate vagueness because a defendant who knowingly violates a statute cannot be heard to complain that she did not know her conduct was prohibited.\(^{307}\) However, the scienter required to alleviate vagueness is extensive: “not only a knowing what is done but a knowing that what is done is unlawful or, at least, so ‘wrong’ that it is probably unlawful.”\(^ {308}\)

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\(^{304}\) For example, the legislative history considered by the California Supreme Court in Walker v. Superior Court, 736 P.2d 852, 857-58, 861-62 (Cal. 1988), cert. denied, 491 U.S. 905 (1989), can be obtained in only two places in the state, the State Archives or the State Law Library, which are both in Sacramento. A layperson could obtain this history through the mail, but would have to first obtain the bill number, the year, and the committees sponsoring the bill. Moreover, the person would have to pay to reproduce any of the documents.  

\(^{305}\) See supra notes 138-41 and accompanying text. In contrast, cases involving a regulated industry should require less notice because prospective defendants generally map out their behavior based on applicable law and regulations. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 & nn. 11-12 (1982); United States v. Freed, 401 U.S. 601, 609-10 (1971) (citing United States v. Balint, 258 U.S. 250, 253-54 (1922)). These prospective defendants are ordinarily corporate defendants who consciously govern their business practices in accordance with the applicable law.  

\(^{306}\) See *Flipside*, 455 U.S. at 499; *Screws* v. United States, 325 U.S. 91, 101-03 (1945) (plurality opinion); see also Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502-03 (1925) (statute requiring “specific intent to defraud” reduces the vagueness of statute); Omaechavarria v. Idaho, 246 U.S. 343, 348 (1918) (statute reduces vagueness claim because it requires specific intent); Amsterdam, supra note 132, at 87 n.98 (noting that courts have used the scienter component of a statute to clarify the vagueness of the statute).  


\(^{308}\) See, e.g., *Screws*, 325 U.S. at 101-02; see also *Flipside*, 455 U.S. at 499 (“[S]cienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952) (requirement of knowledge does much to destroy argument of vagueness); United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988) (scienter requirement may alleviate “a
Ability of the Legislature to Draft Narrower Language: If, as a practical matter, the particular legislature were unable to draft narrower language that would have clarified the statute’s meaning, the court should be less likely to find a lack of fair notice. On a number of occasions, the United States Supreme Court has concluded that the legislature need not clarify a statute if it would be onerous to do so.309 Although the ability of the legislature to draft narrower language is not determinative,310 it is a relevant factor in a close case.311

State or Federal Statute: Whether the federal court is reviewing a state or federal statute should be given little if any weight in the fair notice analysis.312 In practice, the courts appear to review state and federal statutes similarly for purposes of fair notice.313

The factors set forth above, which have been implicitly used by the Court in previous procedural due process cases,314 should provide more guidance to the lower courts than the existing framework. Because of their current lack of guidance, state courts have issued the inadequately reasoned decisions set forth in the following section.

C. The Current Cases

The United States Supreme Court’s lack of a comprehensive approach for determining fair notice, particularly where two separate statutes inter-

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309. Amsterdam, supra note 132, at 87 n.98.
310. See Jordan v. De George, 341 U.S. 223, 231 & n.15 (1951); United States v. Petrillo, 332 U.S. 1, 7-8 (1947); see also LAFAYE & SCOTT, supra note 118, at 95 n.54 (“The Court has often noted that ‘the Constitution does not require impossible standards.’”); TRIBE, supra note 133, at 1034 (second inquiry for determining whether statute is void for vagueness is whether it is practical for the legislature to draft the statute more precisely); cf. United States v. Powell, 423 U.S. 87, 94 (1975) (“The fact that Congress might, without difficulty, have chosen ‘[c]learer and more precise language’ equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague.”); Rose v. Locke, 423 U.S. 48, 49 (1975) (“[T]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.”).
311. See, e.g., Powell, 423 U.S. at 94 (statute is not vague even though Congress might have “chosen ‘[c]learer and more precise language’ equally capable of achieving the end which it sought”).
312. See, e.g., Kolender v. Lawson, 461 U.S. 352, 361 (1983) (in determining statute’s vagueness, Court noted that further precision in the statutory language was neither impossible nor impractical); Smith v. Goguen, 415 U.S. 566, 581-82 (1974) (finding that the legislature could have drafted flag contempt statute more precisely); see also Kelman, supra note 142, at 661.
313. Of course, the federal courts should defer to any state court interpretation of its statute. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 58, at 370-71 (4th ed. 1983).
sect, has made it difficult for the state courts to ascertain whether the prosecution of faith healing parents violates due process. Thus far, four state supreme courts have addressed the issue of intersectional lack of fair notice in this context—California, Minnesota, Florida, and Massachusetts. Two courts found that due process was violated; two did not. Although the Supreme Judicial Court of Massachusetts concluded that due process did not bar the parents' prosecution, it concluded that the parents may have reasonably relied on an official misinterpretation of the law and thus remanded for a new trial on that basis.\(^{315}\) These decisions reflect the difficulties of applying the Supreme Court's fair notice jurisprudence and demonstrate the need for reshaping the fair notice doctrine into the comprehensive factor analysis set forth above.

1. **Walker v. Superior Court**

The Supreme Court of California in *Walker v. Superior Court*\(^{316}\) did not follow United States Supreme Court precedent in reaching the conclusion that procedural due process was satisfied when a faith healing parent was prosecuted for her failure to provide medical care to her child. The faith healing exemption at issue was located in California's criminal non-support statute,\(^{317}\) but the parent was charged with felony child endangerment\(^{318}\) and involuntary manslaughter.\(^{319}\) The court addressed two due process arguments raised by the defendant: first, that the statutes failed to give her any notice as to when "lawful prayer treatment becomes unlaw-

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315. *See supra* notes 290-314 and accompanying text.
318. *Id.* at 856. The criminal nonsupport statute read, 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 . . . .
   
   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.

*Id.* at 856 n.3 (quoting CAL. PENAL CODE § 270 (West 1988)).
319. *Id.* at 855. The felony child endangerment statute read, in pertinent part:
   
   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 thenceon unjustifiable physical pain or mental suffering, or . . . willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment . . . .

*Id.* at 879 n.3 (Broussard, J., concurring and dissenting) (quoting CAL. PENAL CODE § 273a (West 1988)).
ful’; 320 and second, that the statutes created "inexplicably contradictory commands" by authorizing faith healing in one statute and criminalizing it in another. 321 In rejecting the defendant’s first argument, the court concluded that the manslaughter and child endangerment statutes gave her adequate notice that faith healing may be unlawful. Even though the precise point at which faith healing becomes unlawful is not clear, “[t]he ‘matter of degree’ that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more.” 322

In rejecting the defendant’s second argument, the Walker court presumed that the statutes were valid; 323 it did not determine that more rigorous notice was required because constitutional rights were implicated. Instead, the court simply concluded that the defendant’s providing of faith healing instead of medical care to a seriously ill child was not protected by the First Amendment. 324 The court then analyzed a number of interpretive factors: the language of the relevant statutes, their legislative histories, their legislative purposes, 326 and the case law interpreting the statutes. 327

320. Id. at 855. California defined involuntary manslaughter as: “the unlawful killing of a human being without malice in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.” Id. at 861 n.8 (quoting Cal. Penal Code § 192(b) (West 1988)).
321. Id. at 871.
322. Id. at 872 (quoting Raley v. Ohio, 360 U.S. 423, 438 (1959)). The court did not consider whether a standard other than “inexplicably contradictory commands” was applicable. Id. at 872-73.
323. Id. at 872 (citing Burg v. Municipal Court, 673 P.2d 732 (Cal. 1983)).
324. Id. at 872-83.
325. Id. at 873 n.19; see also People v. Rippberger, 283 Cal. Rptr. 111, 123 (Ct. App. 1991) (prosecution of faith healing parents does not violate First Amendment).
326. The court cited two California cases to support the proposition that legislative history is relevant to the due process determination. Walker, 763 P.2d at 872 (citing People v. Mirmirani, 636 P.2d 1130 (Cal. 1981), and Pryor v. Municipal Court, 599 P.2d 636 (Cal. 1979)). The court considered the following legislative history to be relevant: the notes of the Code Commission of 1870-1872; the Senate Commission on the Judiciary, Analysis of Assembly Bill, Senate Republican Caucus, third reading analysis of Assembly Bill No. 3843; Staff Analysis for Assembly on Criminal Justice; third reading analysis of the Bill prepared by the Assembly Office of Research; and the Senate Committee on the Judiciary, Analysis of Assembly Bill No. 3843. Walker, 763 P.2d at 857-62. The court did not discuss whether an ordinary person would have been able to obtain access to these legislative materials. See supra note 304 and accompanying text (concluding that legislative history not reasonably accessible).
327. “‘Rather than punishment of the neglectful parents, the principal statutory objectives [of the nonsupport statute] are to secure support of the child and to protect the public from the burden of supporting a child who has a parent able to support him.” Walker, 763 P.2d at 859 (quoting People v. Sorensen, 437 P.2d 495 (Cal. 1968)). The purpose of the nonsupport provision is to “supplement civil statutes for effective enforcement of child support obligations.” Id. (quoting Kirsten Howe, Note, Criminal Nonsupport and A Proposal for an Effective Felony-Misdemeanor Distinction, 37 Hastings L.J. 1075, 1079 (1986)).
Based on these interpretive factors, the court concluded that the existence of the exemption in the criminal nonsupport statute did not create inexplicably contradictory commands when read with the child endangerment and manslaughter statutes. The court emphasized that the purposes of the statutes were different: the purpose of the nonsupport statute is to "assure[ ] the routine provision of child support at parental expense," but the purpose of the manslaughter and child endangerment statutes is to protect the child against "grievous and immediate physical harm." Moreover, the court found that the legislative history of the nonsupport statute demonstrated that the legislature did not intend to incorporate the exemption into the manslaughter or child endangerment statutes.

The Walker court failed to follow the United States Supreme Court's precedent in a number of ways. First, although it concluded that the defendant's First Amendment rights were not violated, the court failed to address whether those rights were implicated. Because the defendant's First Amendment rights were implicated, the court erred in relying primarily on Supreme Court cases in which constitutional rights were not implicated. The court should have at least recognized this material distinction and imposed a more rigorous notice requirement.

Second, the Walker court erred in using the statutes' legislative histories to determine whether fair notice was provided. Significantly, the Walker court cited only California cases in reaching the conclusion that it

328. Walker, 763 P.2d at 872 (citing People v. Grubb, 408 P.2d 100, 105 (Cal. 1965)) (including subsequent judicial construction).

329. Id. at 873. In reaching this conclusion, the Walker court first cited Raley v. Ohio, 360 U.S. 423 (1959), as an "inexplicably contradictory command" case, Walker, 763 P.2d at 872, even though Raley is a "reasonable reliance" case and thus is inapplicable to this context. See discussion supra part III.B.6. Then the court applied the following standard based on California law: "[a presumption exists that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A statute . . . cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.']" Id. at 872-73 (quoting Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 23-24 (Cal. 1946)). The standard from Lockheed, however, is not applicable in this context because the Lockheed case did not involve a criminal statute or constitutional rights, two reasons for requiring that a statute provide a defendant with greater notice. See supra notes 137-39 and accompanying text. The Lockheed case involved a suit by employees for wrongful discharge, in violation of section 1101 of the California Labor Code. Lockheed, 171 P.2d at 23.


331. Id.

332. In its due process discussion, the Walker court simply referred to its previous discussion, in which it concluded that the conviction did not violate the defendant's First Amendment rights. Id. at 869-70, 873 n.19.
should consider the statutes’ legislative histories. For the reasons set forth above, a court should not consider legislative history.333

2. *State v. McKown*

In *State v. McKown,*334 the Supreme Court of Minnesota reached the opposite result as that found in *Walker* and held that a prosecution of faith healing parents violated due process.335 Based on this finding, the court affirmed the dismissal of the indictment. The court examined the presence of the faith healing exemption in Minnesota’s criminal child neglect statute336 and its absence in the manslaughter statute,337 and concluded that the defendants had received insufficient notice that faith healing could result in liability under the manslaughter statute.338 According to the court, the faith healing exemption in the criminal child neglect statute equated spiritual healing and health care, so that the use of spiritual healing was not considered a deprivation of medical care.339

In contrast to the court in *Walker,* which relied on the full range of interpretive factors, the court in *McKown* relied exclusively on the statutes’ language to determine whether the parents received fair notice that faith healing could result in liability under the manslaughter statute. The court did not consider the statutes’ purposes or their context.340 The Minnesota Supreme Court concluded that the exemption failed to give the parents fair

333. For example, the *Walker* court relied on the *Nash* and *Cardiff* cases, which are discussed supra notes 146-55, 186-203 and accompanying text.
334. See supra notes 302-04 and accompanying text.
336. Id. at 69.
337. See id. at 64 n.3 (citing MINN. STAT. § 609.378 (1988)).
338. The Minnesota second degree manslaughter statute 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 for not more than seven years or to payment of a fine of not more than $14,000, or both:

1. by the person’s culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another...

Id. at 65 n.4 (quoting MINN. STAT. § 609.205 (1988)).
339. Id. at 67.
340. Id. at 68-69. The exemption in the child neglect statute reads as follows:

(a) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child’s age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and which deprivation substantially harms the child’s physical or emotional health, is guilty of neglect of a child...

If 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 shall constitute ‘health care’ as used in clause (a).

Id. at 64 n.3 (quoting MINN. STAT. § 609.378 (1988) (emphasis added)).
notice because it failed to indicate the point at which relying on faith healing would give rise to criminal liability.\footnote{Id. at 67. Specifically, the McKown court relied on United States v. Colon-Ortiz, 866 F.2d 6 (1st Cir.), cert. denied, 490 U.S. 1051 (1989), in which the First Circuit Court of Appeals concluded that a statute prohibiting the sale of cocaine violated due process where the language was unclear. McKown, 475 N.W.2d at 68. For a critique of the Colon-Ortiz opinion, see supra note 302.} Furthermore, the court suggested that “unambiguous notice” of the prohibited conduct was required.\footnote{McKown, 475 N.W.2d at 68. The court also concluded that the exemption explicitly informed the defendant-parents that spiritual healing was permitted and thus the state could not prosecute them thereafter for engaging in this conduct. Id.} Under this standard, one of the statutes would have to state affirmatively when faith healing becomes unlawful.\footnote{Id. (referring to “concern that individuals be given unambiguous notice of the boundaries within which they must operate”).} Finally, the court concluded that the state affirmatively misled the defendants by assuring them (in the exemption) that faith healing was permissible, and then prosecuting them for it.\footnote{Id. (exemption must indicate point at which relying on spiritual healing will result in criminal liability). As an example, the McKown court cited a statute that specifically provides an exemption from criminal liability unless “permanent physical damage could result to [the] child . . . .” Id. at 68 n.8 (quoting OKLA. STAT. tit. 21, § 852 (1988)).}

The McKown court’s analysis of the fair notice issue is inadequate primarily because the court did not consider all of the relevant interpretive factors. In particular, the court should have considered the disparate purposes of the child neglect and manslaughter statutes—purposes that are constructively known to an ordinary person exercising due care to know the law.\footnote{Id. at 68. The decision of the Minnesota Supreme Court differed in significant ways from the decision of the court of appeals. In particular, the supreme court did not find that the statutes created the danger of arbitrary enforcement, and did not apply the principle of lenity. Id. at 67. For a discussion as to why these doctrinal categories do not apply, see discussion supra parts III.B.5, B.7.} The court also failed to consider how the defendants’ First Amendment rights were implicated, which is a relevant inquiry for determining the degree of notice required. Furthermore, the court went too far in suggesting that “unambiguous notice” of the prohibited conduct is required to satisfy due process. Unambiguous notice is not required. Although due process requires statutes to provide a standard that an ordinary person can follow, due process does not require the legislature to state explicitly what conduct is prohibited as well as what conduct is not prohibited.\footnote{See supra notes 297-99 and accompanying text.} Such a standard would impose an onerous burden on the legislature.

Moreover, the McKown court failed to rely on the unique aspects of Minnesota’s faith healing exemption in reaching its conclusion that due process was violated. The exemption is located in a criminal statute and is
broadly worded: it essentially equates faith healing with health care for purposes of criminal liability. The location of the exemption in a criminal statute and the breadth of its language may lead parents to expect that faith healing is always lawful.\textsuperscript{347} Such an expectation is not necessarily created by other faith healing exemptions—an analysis of the interpretive factors for those exemptions may in fact lead to the opposite conclusion. Because the result in \textit{McKown} may have been justified by the language of Minnesota's exemption and its location in a criminal statute, the \textit{McKown} decision need not be broadly read to require that any exemption must indicate the precise point at which a parent will be subject to liability, or else violate due process.

Finally, the \textit{McKown} court inaccurately relied on the reasonable reliance doctrine because the defendants did not actually rely on a misrepresentation by an official.\textsuperscript{348}

3. \textit{Hermanson v. State}

In \textit{Hermanson v. State},\textsuperscript{349} the Supreme Court of Florida held that due process prevented the prosecution of faith healing parents where the exemption was located in the state's child protection statute. This statute adjudicates the status of children\textsuperscript{350} and has the salutary purposes of reporting, investigating, and preventing child abuse.\textsuperscript{351}

\textsuperscript{347} \textit{See supra} text accompanying notes 132-55.

\textsuperscript{348} On the other hand, the statutory language states that faith healing constitutes health care only for purposes of that section. \textit{McKown}, 475 N.W.2d at 64 n.3. At best, the language is equivocal and may mislead parents.

\textsuperscript{349} \textit{Id.} at 68; see \textit{also} discussion \textit{supra} part III.B.6 (discussing inapplicability of reasonable reliance doctrine in the faith healing context).

\textsuperscript{350} 604 So. 2d 775 (Fla. 1992).

\textsuperscript{351} The relevant definition provided that:

(1) "Abused or neglected child" means a child whose physical or mental health or welfare is harmed, or threatened with harm, by the acts or omissions of the parent or other person responsible for the child's welfare.

(7) "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.

The Hermansons were charged and convicted of child abuse resulting in third degree murder for failing to provide their daughter with medical care. The statute under which they were convicted did not contain a faith healing exemption. Reversing the district court of appeal, the Supreme Court of Florida concluded that the statutes, read together:

are ambiguous and result in a denial of due process because the statutes in question fail to give parents notice of the point at which their reliance on spiritual treatment loses statutory approval and becomes culpably negligent. We further find 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 under the subject statutes. The statutes have created a trap that the legislature should address.

The Hermanson court concluded that Florida’s faith healing exemption was similar to Minnesota’s exemption, and followed the reasoning of the Minnesota Court of Appeals in McKown. The Hermanson court explicitly rejected the reasoning of the Walker court that parents must “guess rightly” as to when the failure to provide medical care may become criminal. The Hermanson court also concluded that the statutes failed to fairly notify the parents of their potential liability: “In this instance, we conclude that the legislature has failed to clearly indicate the point at which a par-

352. The legislative intent of the child protection statute is:

353. William and Christine Hermanson were convicted of third-degree murder after their daughter, Amy, died in 1986 from untreated juvenile diabetes. Hermanson, 604 So. 2d at 775, 778. Instead of conventional medical treatment, the Hermansons, who are members of the First Church of Christ, Scientist, provided Amy with spiritual treatment. Id. at 778. According to expert testimony at trial, Amy’s death could have been avoided by medical treatment up to several hours before her death. Id. at 777.

354. Hermanson, 570 So. 2d at 330.
355. Hermanson, 604 So. 2d at 776.
356. Id. at 781. Minnesota’s exemption is set forth supra note 340.
357. The Florida Supreme Court noted that the Minnesota and Florida exemptions are analogous. Hermanson, 604 So. 2d at 781. Specifically, the court stated that the issue in both cases was to determine whether the religious exemption in the child abuse statute was to be construed in conjunction with the manslaughter statute. The court quoted the Minnesota Court of Appeals’ decision, which stated that a state cannot constitutionally “attempt[ ] to take away with the one hand by way of criminal prosecution that which it apparently granted with the other hand, and upon which defendants relied.” Id. at 781 (quoting State v. McKown, 461 N.W.2d 720, 725 (Minn. Ct. App. 1990), aff’d, 475 N.W.2d 63 (Minn. 1991), cert. denied, 112 S. Ct. 882 (1992)).
ent’s reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct. . . . [T]he legislature must clearly indicate when a parent’s conduct becomes criminal.”

The court did not rely on the Cardiff standard, but cited Cardiff for the proposition that inconsistencies in the lower courts evidence a lack of fair notice.

The reasoning in Hermanson is flawed in a number of respects. First and most fundamentally, the Hermanson court did not adequately consider the interpretive factors. The court failed to recognize that the child protection statute serves distinctly different purposes than the felony child abuse and third degree homicide statutes. Therefore, an ordinary person should not have expected protection from criminal liability for felony child abuse or third degree homicide if he exclusively provided faith healing to the child. The court also ignored the plain language of the exemption, which limited the application of the exemption to the child protection statute.

Second, the Hermanson court’s reliance on the McKown decision is misplaced because the Minnesota and Florida exemptions are significantly different. The broad exemption in Minnesota may be read as considering spiritual healing a proxy for health care in a criminal statute imposing liability on parents. In contrast, the Florida exemption may only be read as applying to the specific child protection statute.

Third, by requiring the legislature to “clearly indicate” when a parent’s conduct becomes criminal, the Hermanson court acted contrary to the due process principles set forth above. Due process requires only that statutes should not create a “trap” for the parents, and the exemption in Florida’s child protection statute does not create such a “trap.” Florida’s statutory scheme provides that if a faith healing parent fails to seek medical care for his child’s nonserious illness, the child cannot be considered “neglected” for purposes of a juvenile court proceeding. However, if the child becomes critically ill and subsequently dies, a greater wrong has been com-

358. Hermanson, 604 So. 2d at 782.
359. Id. (emphasis added) (footnote omitted).
360. Id. at 781. The Cardiff decision does not even stand for this proposition. See United States v. Cardiff, 344 U.S. 174 (1952).
361. See discussion supra parts IV.B.2. (discussing interpretive factors).
362. See supra notes 111-14 and accompanying text.
363. Section 415.503 of the Florida child protection statute, which defines “neglect” and other terms, limits the applicability of the exemption to sections of the protection statute: “[a]s used in § 415.502-415.514 . . . .” Fla. Stat. ch. 415.503 (1992); see supra note 351.
364. Moreover, the Hermanson court relied on the rationale of the Minnesota Court of Appeals, which was not followed by the Minnesota Supreme Court. See supra note 345.
365. See discussion supra part III.B.1.
mitted and the parents can be prosecuted for crimes that arise from their failure.

4. *Commonwealth v. Twitchell*

In *Commonwealth v. Twitchell*, the Supreme Judicial Court of Massachusetts concluded that due process did not bar the Twitchells' prosecution, but that a new trial was warranted because the Twitchells may have reasonably relied on an official misinterpretation of the exemption. The court properly dismissed the due process defense, but improperly considered a Christian Science manual as an official interpretation of the exemption's scope.

Ginger and David Twitchell were charged with involuntary manslaughter for failing to provide medical care to their two-year-old son, Robyn. The Twitchells argued that they could not be prosecuted for manslaughter because of the existence of a faith healing exemption in Massachusetts' criminal nonsupport statute. The exemption, which was not contained in the manslaughter statute, provided that """[a] child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof."" Although the Twitchells had never read the exemption themselves, David Twitchell had consulted with the Christian Science Committee on Publication and had read a Christian Science manual explaining that the exemption protected parents from criminal liability if they relied exclusively on spiritual healing. The manual quoted from an Opinion of the Attorney General of Massachusetts, which purportedly stated that faith healing parents were protected from any criminal liability.

The trial court ruled that evidence regarding the faith healing exemption could not be admitted. Apparently the trial court concluded that the exemption did not apply to a manslaughter prosecution. Based on the evidence presented, the jury convicted the Twitchells of involuntary manslaughter. On appeal to the Supreme Judicial Court of Massachusetts, the Twitchells made three arguments: (1) that the *Bouie* principle barred their prosecution; (2) that Massachusetts' statutory scheme set forth contradic-

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366. See supra note 193 and accompanying text.
368. Id. at 612.
369. Id. at 613.
370. Id. at 612 n.4 (quoting Mass. Gen. L. ch. 273, § 1 (1992)). This exemption was recently repealed. See supra note 87.
371. Id. at 612, 618.
tory commands; and (3) that they were officially misled by the written Opinion of the Attorney General regarding the scope of the exemption.\textsuperscript{372}

The Supreme Judicial Court rejected the Twitchells’ first two arguments.\textsuperscript{373} The court did conclude, however, that the Twitchells may have been misled by the Attorney General’s Opinion and by the church’s publication of a part of that Opinion, and remanded the case for a new trial.\textsuperscript{374} The court reached this conclusion even though there was no evidence in the record that the Twitchells actually relied on the Attorney General’s Opinion.\textsuperscript{375} The only evidence was that the Twitchells relied on the church’s interpretation of that opinion.\textsuperscript{376}

The \textit{Twitchell} court properly did not consider the Attorney General’s Opinion when analyzing the due process issue. Assuming that the Opinion can be read to preclude all criminal liability, it constituted a misinterpretation as to the scope of the exemption. For the reasons set forth below, the faith healing exemption only protected parents from liability under the criminal nonsupport statute.\textsuperscript{377} Thus, the Opinion was not an authoritative interpretation of the statute.

The \textit{Twitchell} court may have erred, however, in remanding the case for a new trial based on the reasonable reliance doctrine. There was no evidence in the record that the Twitchells actually relied on the Opinion; rather, they relied on a Christian Science publication that purportedly interpreted that Opinion and that generally advised parents as to their obligations under Massachusetts law. The publication, a manual entitled the \textit{Legal Rights and Obligations of Christian Scientists in Massachusetts}, quoted the exemption and two sentences of the Opinion. It quoted the Opinion without citation or attribution.\textsuperscript{378} This quotation is in a section of the publication entitled “Reporting Child Abuse,” under a larger heading of the “Rights of Minors and Young People.” The manual cites the child abuse and neglect reporting statute, then suggests that the term “proper physical care” in the nonsupport statute (which contains an exemption) applies to the reporting statute. The relevant section concludes: “[The nonsupport statute] is a criminal statute and it expressly precludes imposition of criminal liability as

\textsuperscript{372} The trial court also did not permit the Twitchells to introduce the manual on which they relied. \textit{Id.} at 618.

\textsuperscript{373} \textit{Id.} at 616.

\textsuperscript{374} \textit{Id.} at 617.

\textsuperscript{375} \textit{Id.} at 619-20.

\textsuperscript{376} \textit{Id.} at 618.

\textsuperscript{377} \textit{Id.} at 618-19. Notably, the Massachusetts Supreme Judicial Court concluded that, on remand, the trial court should admit the relevant portion of the Christian Science manual even though, on appeal, the defendants did not object to the trial court’s failure to admit the manual. \textit{Id.} at 618, 620.

\textsuperscript{378} See infra notes 384-400 and accompanying text.
a negligent parent for failure to provide medical care because of religious beliefs. But this does not prohibit the court from ordering medical treatment for children.\footnote{379}

Because the manual did not copy significant portions of the official interpretation verbatim and clearly attribute its source,\footnote{380} the court should not have considered the manual an "official" interpretation of the law.\footnote{381} The manual simply paraphrased two sentences of the three-page Opinion without attribution or citation.\footnote{382} The manual also did not recognize the limited purposes of the Opinion. The question proposed to the Attorney General related to eligibility under the Child Abuse Prevention and Treatment Act, and the issue of criminal liability was limited to liability under the nonsupport statute. Finally, the purpose of the manual was to provide the church's subjective interpretation of the law and its implications for Christian Scientists.

D. Application of the Factor Analysis

The \textit{Twitchell} court's analysis would have been enhanced if it had been guided by the factor analysis set forth above. This section of the Article applies the factor analysis to the facts in \textit{Twitchell}, and concludes that the prosecution of the Twitchells did not violate due process.

1. Statutory Language and Context

In applying the factor analysis to the \textit{Twitchell} case, the court must consider whether the language and context of Massachusetts' faith healing exemption or of the involuntary manslaughter statute appear to limit the scope of the exemption; for example, whether the exemption refers to a particular statute, whether the exemption is contained in the definitional section of a particular statute(s), or whether the exemption provides that faith healing satisfies the parents' duty to furnish medical care.\footnote{383} The court also must consider whether the exemption is located in another crimi-

\footnote{379} \textsc{Christian Science Comm. on Publication, Legal Rights and Obligations of Christian Scientists in Massachusetts}, Sept. 1983, at 19.

\footnote{380} \textit{Id.}

\footnote{381} \textit{See supra} note 250 and accompanying text.

\footnote{382} \textit{Twitchell}, 617 N.E.2d at 621 (Nolan, J., dissenting).

\footnote{383} The relevant portion of the Opinion reads:

General Laws, c. 273, § 1 is a criminal statute and it expressly precludes imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs. However, the intent of Chapter 119 is, clearly, to require that children of such parents be provided services whenever the need arises. Clearly under Chapter 119 children may receive services notwithstanding the inability to prosecute parents in such cases.

nal statute, in a reporting statute, or in a statute adjudicating the status of children. 384

Massachusetts' faith healing exemption was located in its criminal nonsupport statute. 385 Massachusetts' involuntary manslaughter statute neither contained a faith healing exemption nor referred to the nonsupport statute. Conversely, the nonsupport statute made no reference to the manslaughter statute or to manslaughter liability. The exemption did not expressly limit itself to situations involving nonsupport: it referred to when a child will be "deemed to be neglected or lack proper physical care." 386 However, this exemption apparently referred to neglect and improper physical care because the previous version of the statute encompassed such parental conduct before it was limited to nonsupport. Moreover, the exemption was implicitly limited to nonsupport situations because of the disparate purposes of the statutes.

2. Statutory Purposes

Because the purposes of the nonsupport and involuntary manslaughter statutes are different, it would not be reasonable for an ordinary person to conclude that the exemption in the nonsupport statute was incorporated into the manslaughter statute, absent evidence to the contrary. 387 As the Supreme Judicial Court of Massachusetts concluded, these statutes are entirely separate and have different purposes. 388 The purpose of the criminal nonsupport statute is to "motivat[e] parents to fulfill their natural obligations of support," 389 whereas the purpose of the manslaughter statute is to ensure that "persons within its territory should not be killed by the wanton and reckless conduct of others." 390 Massachusetts case law provides ordinary persons (or their lawyers) the opportunity to ascertain these purposes. 391

384. See discussion supra part II.
385. See id.
386. The exemption provided:
A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof.
387. Id.
388. See supra notes 111-14 and accompanying text.
389. Twitchell, 617 N.E.2d at 614-16.
390. Id. at 615.
391. Id. (quoting Commonwealth v. Godin, 371 N.E.2d 438, 442 (Mass. 1977)).
3. Previous Interpretations of the Statute

The court must also consider any interpretations of the relevant statutory language by the courts or by officials charged with interpreting the statutes.\textsuperscript{392} Exemptions similar to the one in Massachusetts have not been given a consistent interpretation by the courts. The Massachusetts exemption provided that "[a] child shall not be deemed to be neglected . . . for the sole reason that he is being provided [spiritual healing] . . . ."\textsuperscript{393} The phrase "for the sole reason that" is significant because it limits the scope of the exemption. However, it is not entirely clear to potential defendants what those limits are. One interpretation of this phrase is that when the child is seriously ill, the severity of the child's illness is another "reason" that renders the exemption inapplicable.\textsuperscript{394} Another interpretation of this phrase is that the parent is protected from liability if their wrongful conduct is limited to the good-faith provision of faith healing; the parents would be liable only if they harmed the child and then tried to immunize their conduct by providing faith healing.\textsuperscript{395} In spite of this lack of clarity as to the meaning of "for the sole reason that," the interpretive factors weigh in favor of finding that the Twitchells received fair notice as to their potential criminal liability if Robyn died.

4. Other Factors

Although the remaining factors weigh against a finding that the Twitchells received fair notice, they do not weigh heavily against that finding. The relevant statutes are criminal statutes that affect noneconomic activity, which require more notice than civil laws affecting economic activity.\textsuperscript{396} The manslaughter statute also does not have a scienter requirement,\textsuperscript{397} and thus the scienter factor cannot alleviate any lack of notice created by the statute.\textsuperscript{398} Finally, the ability of the Massachusetts legislature to draft clearer language weighs in favor of finding a lack of notice. The Mas-

\textsuperscript{392} See id. (citing cases).
\textsuperscript{393} See supra notes 295-96 and accompanying text.
\textsuperscript{395} See Walker v. Superior Court, 763 P.2d 852, 863 & n.11 (Cal. 1988), cert. denied, 491 U.S. 905 (1989). The Attorney General argued that "the phrase 'for that reason alone' [ ] denotes that a child receiving prayer treatment can still fall within the reach of the statutory definitions if the provision of such treatment, coupled with a grave medical condition, combine to pose a serious threat to the physical well-being of the child." Id.
\textsuperscript{396} See Clark, supra note 7, at 571 n.71 (another reason would be found where the parents exhibited willful disregard for child or they prevented authorities from discovering signs of physical abuse).
\textsuperscript{397} See supra note 305 and accompanying text.
sachusetts legislature could have drafted or later amended its faith healing exemption to preclude its application if a child risked serious bodily harm or death.\footnote{399} However, this case is not close enough for this factor to make a difference. Overall, the Twitchells received fair notice.

Notwithstanding this result, the potential notice problems inherent in the exemptions illuminate the need for statutory and regulatory reform, which is addressed in the following section. With the reauthorization of the Child Abuse Prevention and Treatment Act scheduled for 1995, now is the time for the states and HHS to implement reform to protect parents and children.

V. Legislative and Regulatory Reform

The previous sections demonstrate that the faith healing exemptions, in their current form, inadequately protect both parents and children. Parents are inadequately protected because in some states the exemptions fail to give the parents fair notice that the failure to provide medical care may give rise to criminal liability. In addition, ill children are inadequately protected because the exemptions lack uniformity and prevent intervention before the child dies. Statutory reform is needed to avoid further due process challenges. Any statutory reform should also improve the balance between the competing rights of parent and child, and favor intervention before death. Although intervention before death may be more intrusive than punishment after death,\footnote{400} the additional intrusion is justified by the state’s compelling interest in protecting gravely ill children.

To achieve these due process and public policy objectives, the following three statutory changes are proposed.\footnote{401}

\footnote{399} See generally supra notes 306-09 and accompanying text.  
\footnote{401} \textit{Cf.} Walker v. Superior Court, 763 P.2d 852, 870 (Cal. 1988), \textit{cert. denied}, 491 U.S. 905 (1989). In determining that criminal prosecution was the least restrictive alternative, the court stated that "it 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." \textit{Id. But see} Clark, supra note 7, at 580-81 (neglect/abuse proceedings less intrusive than criminal prosecution). In my view, criminal prosecution protects the autonomy of the parents’ decision marginally better than an abuse or neglect adjudication. In such an adjudication, treatment is forced on the child against the parents’ religious beliefs. The child may even be removed from the home. The parents are not provided with the opportunity to weigh the consequences and make their choice. In a criminal prosecution, however, the parents have decided to provide faith healing instead of medical care, and to suffer personally the consequences of that decision. Needless to say, this is a Hobson’s choice for the parents.
A. Eliminate All Exemptions Contained in Reporting Statutes

As discussed previously,402 faith healing exemptions in reporting statutes prevent ill children from coming to the attention of medical and legal authorities because the failure to provide medical care may not be considered a suspected incident of neglect or abuse and thus may not be reported.403 Elimination of all exemptions in reporting statutes should make it clear that any failure to provide medical care, even by faith healing parents, could constitute a suspected incident of abuse or neglect and thus must be reported.404 This statutory reform simply ensures that incidents involving children who have faith healing parents are reported pursuant to the same criteria as children who do not have faith healing parents. Ultimately, it should be the judge who determines whether the statutory definitions of abuse or neglect have been satisfied. This reform will be a more effective solution than requiring HHS to determine, state-by-state, whether statutes conform to the existing requirements of the Act.

B. Statutory Authorization to Order Medical Treatment

Although the current HHS regulations provide that the denial of medical care constitutes neglect,405 and that medical care must be ordered when harm or threat of harm to a child exists, not all states specifically authorize a court to order necessary medical treatment, or the scope of the authorization is unclear.406 Such a specific authorization should be included in all statutes adjudicating the status of children, and all existing ambiguities should be eliminated. HHS should withhold funding for child protection programs if the specific authorization is not included. States should not even be permitted to weigh the parents’ or child’s religious beliefs to determine if necessary treatment should be ordered. For this purpose, faith healing cannot be considered a substitute for medical treatment.

These statutory reforms not only provide clarification to parents, but also ensure that a denial of medical care that could constitute abuse or ne-

402. This Article proposes general rather than specific changes in statutory language because the state statutory schemes are sufficiently diverse and will need to be adapted to a particular scheme. See supra part II.
403. See supra note 100.
404. See Massachusetts Committee Report, supra note 83, at 6-11. Children’s illnesses were not being detected prior to death due to: (1) the insular nature of religious groups; (2) church members and healers failing to report in part because they do not believe child to be neglected; and (3) a lack of knowledge of child’s condition.
405. I do not address the issue whether spiritual healers, such as practitioners, should be required to report a parent’s failure to provide medical care. See generally Mitchell, supra note 44; O’Brien & Flannery, supra note 44.
406. See supra notes 84-85 and accompanying text.
glect is reported to authorities. They further ensure that necessary medical treatment is provided expeditiously to these children, regardless of whether the court ultimately decides that the children are neglected.

C. Unavailability of Exemption if the Child Risks Serious Bodily Harm or Death

Faith healing exemptions in statutes adjudicating the status of children or in criminal statutes protecting children are justified only if the child is suffering from an injury or illness that does not pose a risk of serious bodily harm or death. When a risk of serious bodily harm exists, the state has a compelling interest to protect the child’s life and health. Therefore, any exemption should explicitly and unambiguously provide that parents are not exempted when “serious bodily harm or death” could result.  

Placing an explicit limitation on the faith healing exemption not only will protect children’s health, but also will alleviate the fair notice problems that currently exist. Moreover, unlike complete abolition of the exemptions, this reform should not be resisted by the Christian Science lobby because it supported similar legislation in Hawaii.  

In sum, these statutory reforms will ensure fair notice, and better protect children’s health. The faith healing exemptions will be permitted to remain in statutes adjudicating the status of children and in criminal statutes, provided that the child does not risk serious bodily harm or death. The exemptions also will strike the proper balance between the rights of children and the rights of parents. The most effective way to achieve these reforms would be to urge HHS to condition further funding on the adoption of these specific reforms, without qualification.

407. See supra note 101 and accompanying text.
408. It would also be advisable to define “serious bodily harm or death” in the definitional section of the relevant statute(s). For example, “serious bodily harm” could be defined as: “any impairment of the physical condition which creates permanent harm; protracted loss or impairment of any body part, including a limb or organ; or a substantial risk of death.” Cf. MASS. ANN. LAWS ch. 265, § 131(a) (Law. Co-op. Supp. 1994) (defining “substantial bodily injury” for purposes of child assault and battery statute); OKLA. STAT. tit. 21, § 852(A) (Supp. 1994) (exempting faith healing unless “permanent physical damage could result to [the] child”); Lybarger v. People, 807 P.2d 570, 579 (Colo. 1991) (defining “substantial risk of serious bodily harm”).
409. If “serious bodily harm” is comprehensively defined in a definitional section of the statute, any vagueness challenge to that phrase should be overcome.
410. See Hawaii Standing Committee, supra note 87, at 1.

If the legislature were to amend its faith healing exemptions, one more change should be considered that is not directly related to enhancing protection for children. References to “Christian Scientists,” “recognized religions,” “duly accredited practitioners,” or a “proven record of success” pose establishment of religion problems because they appear to favor Christian Scientists over other religions. See, e.g., Newmark v. Williams, 588 A.2d 1108, 1113 n.8 (Del. 1991). Such language should be replaced by language that would be applicable to all religions, such as ex-
VI. Conclusion

With these statutory reforms in place and the obligations of faith healing parents clear, a child would be taken to the doctor or hospital when the parent perceives that the child has become seriously ill. When the doctors ascertain what is wrong with the child, the parents then would refuse treatment based on their good faith religious beliefs. If necessary to the child’s health, the medical authorities would file a report with child protective services, or file a neglect petition with the appropriate court and seek compelled treatment for the child. The court then would decide—based on a careful balancing of interests—whether to order treatment, whether to adjudicate the child abuse or neglect, or whether to allow the parents to refuse treatment. 411

When the child does not face serious harm or death, the child’s ultimate fate should rest with his parents and their faith. However, when serious harm or death may result, limited intervention is necessary to preserve the health and lives of our children.

411. See Malecha, supra note 2, at 261-62; Monopoli, supra note 10, at 352.