

# Children's Healthcare Is a Legal Duty, Inc.

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*Equal rights for children under the law*

## Review: Paul Offit's 'Bad Faith'

by William Bynum  
The Wall Street Journal, April 12, 2015  
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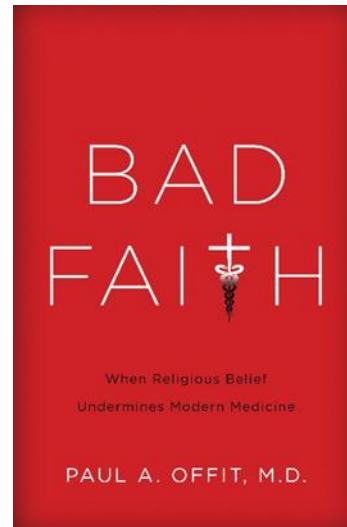
The Victorian polymath Francis Galton (1822-1911) loved measuring things. He examined weather patterns, looked at the relationships between the physical characteristics of parents and their offspring, and worked out the unique patterns in fingerprints. He also wondered if prayer could lead to long life. He reasoned that clergymen pray more than other people and that one of the things they pray for is health and longevity. Consequently, if prayer is answered, clergymen ought to live longer. But when he compared the mortality statistics of clergymen with those of doctors, lawyers and others in similar socioeconomic circumstances, he found no difference.

Paul Offit doesn't mention Galton's tongue-in-cheek experiment in "Bad Faith," but he forcefully demonstrates that the children of people in faith-healing groups have higher mortality rates than those whose parents have their children vaccinated and seek medical help when they fall ill. Dr. Offit, a pediatrician at the University of Pennsylvania School of Medicine, is primarily concerned with the health of children who are the victims of their parents' misplaced faith.

Dr. Offit has no problem with religion: Indeed, he insists that it is also the hero of his tale of neglect and premature, unnecessary death. He knows his Scripture, his Jewish doctrine and his theology. Good faith is good, bad faith is bad. And, to his medical eyes, the bad faiths are those that either deny the existence of disease (Christian Scientists) or believe that when disease strikes it is a sign of sin or failing and therefore properly "cured" by prayer and repentance. His volume is a catalog of tragedies, some from his own practice, most from the public record, that need not have happened. For

him, the old Puritan mantra of praising the Lord but keeping your powder dry is the sensible way.

Most of Dr. Offit's analysis is devoted to Christian sects, of which Christian Science is merely one. Thus the Faith Tabernacle Congregation in Philadelphia, the Faith Temple Church of



Apostolic Faith in Milwaukee and other individual congregations, as well as larger groups such as Jehovah's Witnesses and Seventh-Day Adventists, all receive Dr. Offit's attention. The stories are depressing: children with diabetes who are required to abandon their insulin for prayer, children with bacterial meningitis prayed for but not sent to the hospital for antibiotics, hemophiliacs not receiving their blood transfusions, children exposed to lethal measles because they are unvaccinated. Sometimes the "therapy" is more aggressive: Terrance Cottrell Jr., an 8-year-old boy with autism, died of asphyxiation in August 2003 while being exorcised for his condition by the pastor of the Faith Temple Church.

Although fundamentalist Protestant groups get the most attention, Dr. Offit does not confine himself to them. He recounts a horrifying story from 2009 of a 27-year-old mother of four, 11 weeks pregnant with a failing heart exacerbated by

### INSIDE

Tenn. Supreme Court upholds religious defense....	3
CHILD's work in Washington State.....	5
Religious exemption landscape.....	6
Q&A on Washington bill.....	Addendum

her pregnancy. Sister Margaret Mary McBride, director of the ethics board in a Roman Catholic hospital in Phoenix, allowed the woman to have her pregnancy terminated. To withhold consent would have been to orphan four living children, and the pregnancy would not have resulted in a live birth had the mother survived. For her decision, Sister McBride was excommunicated (though she was later reinstated), and the hospital chapel denied the right to celebrate Mass.

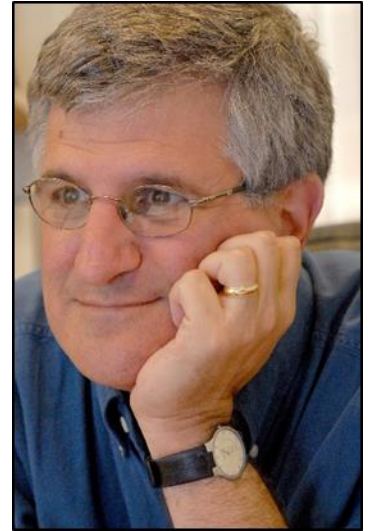
On a lighter note, Dr. Offit doubts the reality of faith healing at Lourdes, but he accepts that pilgrims generally come away feeling better. The shrine is also good for the local economy in southwest France.

Most medical evidence suggests that circumcision has positive benefits, both for the male and for his sexual partners. A Jewish ritual, *metzitzah b'peh*, dictates that the officiating rabbi suck the blood from the infant's wound with his mouth. The procedure can and has spread syphilis and, more commonly, herpes to the infant. The ritual is practiced about 3,600 times each year in New York City. Because in this context it is a religious ritual, not a medical procedure, some Jewish doctors nevertheless defend it, despite its risks.

Given this catalog of wastage, what is to be done? Dr. Offit has far too much respect for religious belief and practice to suggest, like some aggressive atheists, that the world would be better off without its religions. Freedom of religion is of fundamental importance to the fabric of American life. Consequently, he sees hope in the law. Parents should not be able legally to deny their children proper medical care. Much of the last part of "Bad Faith" is about this issue. Richard Nixon's Watergate henchmen Bob Haldeman and John Ehrlichman (both Christian Scientists) managed to smuggle a religious-belief exemption into child-protection legislation in the 1970s, Dr. Offit recounts, and the consequences continue to surface. The pediatrician in Dr. Offit simply wants better legal protection for his patients.

A second way forward is for individual changes of heart. The heroine of this powerful book is Rita Swan, a former Christian Scientist who watched her son sicken with a bacterial meningitis as she, her husband and fellow Christian Scientists prayed. She had already fallen afoul of her church for having an emergency gynecological operation, which saved

her life, and when her son Matthew was at death's door, she again broke ranks and took him, too late, to a hospital. Five years after Matthew's death in 1977, she and her husband founded a child protection organization (Children's Healthcare Is a Legal Duty) that has continued to work toward protecting children from religiously motivated medical neglect. Like many contentious issues, and any that involve the courts, this one is unlikely to disappear in the near future and certainly not before many more children will needlessly die.



*Mr. Bynum is the author, with Helen Bynum, of "Remarkable Plants That Shape Our World."*

Other notable reviews of *Bad Faith*:

[The New York Times, Science](#)  
[The New York Times Review of Books](#)  
[NBC News](#)

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Paul Offit is Chief of the Division of Infectious Diseases and Director of the Vaccine Education Center at Children's Hospital of Philadelphia as well as a professor of Pediatrics at the University of Pennsylvania's Perelman School of Medicine.

*Bad Faith: When Religious Belief Undermines Modern Medicine* has been widely reviewed and praised. Amazon.com has links to many of the reviews. Dr. Offit is donating all the royalties from this book to CHILD.

He has written seven books and more than 130 papers in medical and scientific journals.

An August, 2015, interview with Dr. Offit and CHILD President Rita Swan entitled "[God Is My Doctor: When Religious Clashes with Modern Medicine](#)" can be heard online on the web site for the NPR program, "Interfaith Voices."

## State Supreme Court upholds constitutionality of religious defense

On February 13 the Tennessee Supreme Court upheld a mother's conviction for withholding medical care from her daughter and rejected the mother's claim that the state's religious defense to aggravated child abuse, neglect and endangerment should have insulated her from criminal charges.<sup>1</sup>

In 2002 Jessica Crank died of Ewing's sarcoma at 15 years old in Lenoir City. For about four months during her illness her mother and Ariel Sherman, whose followers called him "Lord Ariel Christ," refused to provide recommended medical care for the girl. Eventually the family was located by the police and then medical treatment was provided by court order.

Sherman and her mother Jacqueline Crank were charged with child neglect. They argued that they had relied on prayer to heal the girl and that this statute gave them the right to do so:

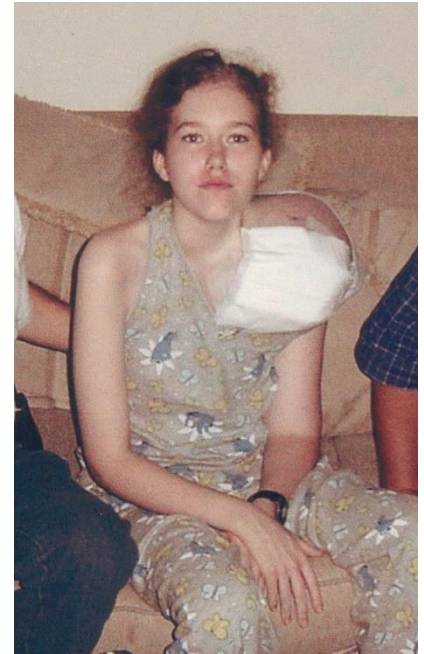
Nothing in this part shall be construed to mean a child is abused, neglected, or endangered in an aggravated manner for the sole reason the child is being provided treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment." Tenn. Code 39-15-402(c)

They also charged that the statute was a privilege just for Christian Scientists and therefore violated the Constitution's ban on government favoritism toward a particular religion and that it was unconstitutionally vague.

### AG's confidential memo: exemption unconstitutional

In 2002 Assistant Attorney General Braden Boucek sent a confidential memo to the Loudon County prosecutor's office. Boucek wrote that the spiritual treatment exception "is unconstitutional as a violation of the Establishment Clause, Free Exercise Clause, and on the grounds of vagueness."<sup>2</sup>

It violates the Establishment Clause, he explained, because it prefers one religion over another, exempting some parents from criminal liability while "persons who treat their children in an identical fashion but embrace a faith that is not 'recognized' or does not duly



*Jessica Crank*

accredit practitioners are criminals." It violates the Free Exercise clause because it is not neutral on religion and regulates practices "because of their religious motivation."

Boucek also wrote that the religious defense was unconstitutionally vague in privileging a "recognized church." There is no "case law, statutory guidance or even consensus among citizens" about which churches are "recognized." A court's inquiry "would almost certainly constitute an excessive interference or entanglement with religion" and therefore violate the Establishment Clause, Boucek said.

Furthermore, he continued, "the exemption cannot be avoided;" "the constitutional problems [are] impossible to dodge" if "aggravated child abuse is charged."

Therefore, Boucek concluded, the prosecutor should dismiss the abuse charges and instead file charges for second-degree murder, which has no exception for spiritual treatment.<sup>3</sup>

The Loudon County prosecutor, Frank Harvey, decided against charging homicide because he could not prove that optimal medical treatment would have saved Jessica from dying of cancer.

<sup>1</sup>*State of Tennessee v. Jacqueline Crank*, Tenn. Supreme Court E2012-01189-SC-R-11-CD (2015)

<sup>2</sup>Asst. Attorney General Braden Boucek to Dist. Attorney General J. Scott McCluen, "Confidential Memorandum," Sept. 30, 2002.

<sup>3</sup>*Loc cit.*

### **Prosecutor hoped court would rule law unconstitutional**

Furthermore, Harvey hoped that appellate courts would rule the statute unconstitutional. Given the memo, Harvey believed the Attorney General himself would, like the defense, argue to the court that the law was unconstitutional.

Harvey and the defense petitioned the courts to rule on the statute but the courts refused to do so until there was a conviction. After years of briefing and argument over several issues, but mainly the meaning of the religious defense, Jacqueline Crank and Ariel Sherman were convicted of misdemeanor neglect by agreement and sentenced to probation in 2012.

They appealed, charging that the religious exemption was vague, violated the Establishment Clause, and violated their fair notice rights.

### **AG reverses position on law**

To our great disappointment, the Attorney General defended the religious exemption, arguing that it was not vague and in fact had a clear meaning to insulate from criminal liability parents who rely on prayers by “practitioners” accredited by recognized churches. The state was silent on whether the law violated the Establishment Clause.

Defense attorney Gregory Isaacs did not submit the state’s confidential memorandum to the court, and we were asked to keep silent about it also. Isaacs did not respond to our question on why he did that.

The Court of Appeals upheld Crank’s conviction. Sherman died before the ruling came down.

The Tennessee Supreme Court granted review, specifically saying it wanted briefs focused on Crank’s constitutional rights and the constitutionality of the exemption statute.

### **Prosecutor not allowed to argue the case**

Harvey asked the Attorney General to let him present the oral argument and argue that the statute was unconstitutional. The Attorney General refused, saying that his office was obligated to get criminal convictions upheld and to defend the laws.

### **Establishment Clause not mentioned**

Again, the state’s brief argued that the statute had a clear meaning and was not unconstitutionally vague but was glaringly silent on whether it violated the Establishment Clause.

At oral argument a judge asked the defense how ruling the religious exception unconstitutional would help his client. Another opined that the exception was just for the Christian Scientists, so Mrs. Crank should have known she could not claim it.

Another judge charged that the defense was trying to “have it both ways” in claiming both that Crank had relied on the statute and that it was unclear.

### **Court: exemption adequately clear**

The Tennessee Supreme Court’s ruling against Mrs. Crank held, as the state’s briefs argued, that the meaning of the statute was adequately clear. It applies “to members of religious bodies which, like the Church of Christian Science, are established institutions with doctrines or customs that authorize healers within the church to perform spiritual treatment via prayer in lieu of medical care. Because the exemption is effectively limited to members of religious groups that closely resemble the Christian Science Church, the terms at issue are not so vague that the scope of the exemption ‘cannot be ascertained,’” the Court wrote.

### **No ruling on Establishment or Equal Protection**

The Court declined to rule on whether the exemption violated the Establishment and Equal Protection Clauses. Instead, the Court held that the child abuse and neglect statute could be enforced without the exemption and therefore Crank’s conviction should be upheld.

In a footnote, the Court did “acknowledge that the Establishment Clause gives us pause, as the statutory text and the legislative history, taken together, appear to indicate that the spiritual treatment exemption was enacted for the benefit of the Christian Scientist denomination.”

The Court said the defense raised only a “facial challenge” to the statute and had not argued that it was unconstitutional as applied particularly to Mrs. Crank. The Court pointed out that claiming a statute is on its face unconstitutional requires the highest standard of proof and that courts are obligated to find statutes constitutional unless invalidating them is “absolutely necessary for the determination of the case” and the rights of the parties.

Of course CHILD hoped that the Court would rule the statute unconstitutional. We submitted amicus briefs both to the Court of Criminal Appeals and the Tennessee Supreme Court (see the Policy

and Legal section of our webpage [www.childrenshealthcare.org](http://www.childrenshealthcare.org)). We agreed with the challenges the defense raised but also argued that it violated equal protection rights of children.

### **Privilege for “recognized” religions approved**

Instead we have a ruling that makes the situation worse. Laws privileging “recognized” churches and their members have been stricken by other courts because in America the government cannot “recognize” certain faiths or promulgate criteria by which a person would know his church was among the “recognized.”<sup>4</sup> The Tennessee Supreme Court, however, thought it was fine for the legislature to define the recognized churches as those meeting Christian Science criteria and since Crank should have been able to understand she did not qualify, she had no right to raise a religious defense.

### **Legislation may be only remedy**

The ruling appears to indicate that our laborious work in state legislatures is the only way to get rid of religious exemptions. We see gays, racial minorities, and women winning equal protection rights in the courts but most courts refuse to rule on whether children have equal protection rights.

Unlike the adults winning civil rights in the courts, children cannot bring lawsuits to assert their own rights.

The Tennessee legislature passed the religious defense to aggravated child abuse, neglect and endangerment unanimously with no discussion and certainly no concern for children whatsoever.<sup>5</sup> But only the legislature can rectify the injustice it created.

### **U.S. wary of giving children rights**

If the U.S. ratified the United Nations Convention on the Rights of the Child, American children would be rights-bearing persons and we might have a way to get court rulings striking down laws that allow one group of persons to withhold medical care from their children. The United States and the new country of South Sudan are the only countries not to ratify the convention.

## **Defeat in Washington again**

In 2015 we again worked for a bill to repeal Washington State’s religious exemptions on medical care of sick children, but again our bill was not scheduled for a floor vote. We include with this mailing the q&a we distributed.

Washington’s religious defense to criminal mistreatment of dependents was added in 1997. It was not in the health care bills as passed by either the House or Senate. No committee hearings discussed it. Nevertheless, a conference committee of six legislators tasked with reconciling the two versions added a religious exemption to criminal mistreatment that neither chamber had voted on. When the reconciled bill adopted by the conference committee returned to the House and Senate, it was accepted *pro forma*.

### **Legislature decrees: prayer is medical care**

The new law stated:

It is the intent of the legislature that a person who, in good faith, is furnished Christian Science treatment by a duly accredited Christian Science practitioner in lieu of medical care is not considered deprived of medically necessary health care or abandoned. Revised Code of Washington 9A.42.005

In Washington first-degree criminal mistreatment is recklessly causing great bodily harm to a child or dependent adult by withholding the basic necessities of life.

However, Washington parents and caretakers of frail and helpless elderly are allowed to cause great bodily harm by withholding what most of us think of as medical care if they retain a Christian Science practitioner to give prayer-treatments. Indeed, the legislature has decreed that prayers by Christian Science practitioners are “medically necessary health care” for children sick with any disease whatsoever.

Washington also has a religious exemption in its chapter on the duty to report child abuse and neglect at RCW 26.44.020(18).

**Washington is the only state that explicitly gives Christian Scientists a religious defense in the criminal code.** Some other states, such as Tennessee, however, have criminal laws with

<sup>4</sup>e.g. *Davis v. State*, 451 A.2d 107 (Md. 1982); *Dalli v. Board of Education*, 267 N.E.2d 219 (Mass. 1971); *Boone v. Boozman*, 217 F. Supp. 2d 938 (Ark. 2002).

<sup>5</sup>See the CHILD newsletter issue #2, 2014.

Christian Science code words in them as the previous article discusses.

In 2014 and again this year, Senator Mark Mullet, D-Issaquah, sponsored a bill to repeal those two religious exemptions. (See the addendum for a q&a on his bill, SB5408.)

Also this year CHILD hired its first professional lobbyist, Emily Murphy. With Emily's work we got identical bills introduced in the House and Senate. In the House the prime sponsor was Jay Rodne, R-Snoqualmie. We had eight cosponsors of the House bill and seven of the Senate bill, with a goodly mix of Republicans and Democrats.

The bills were supported by the Washington State Medical Association, Washington Chapter of the American Academy of Pediatrics, Washington State Hospital Association, Washington Association of Registered Nurse Practitioners, Washington

Association of Prosecuting Attorneys, and the Senior Citizens Lobby.

The only witnesses against the bills were two Christian Scientists who said they were speaking only for themselves. The church's official spokesman did not testify.

The Senate bill passed the Human Services committee unanimously. The House bill passed Judiciary by 10-3. Both bills were approved by their Rules Committees for floor votes yet neither was scheduled for a floor vote. The failures were not an oversight but rather the result of political infighting.

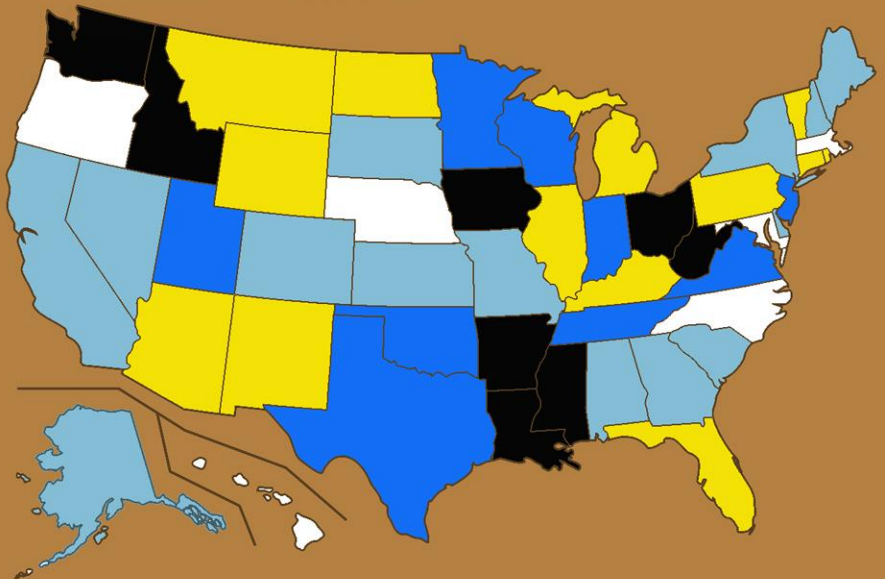
We especially want to thank Senator Mullet, who has worked his heart out for the bill two years running plus the CHILD members who contacted their state legislators and testified at the capitol.

We are weighing whether to try again in 2016, another election year.

## Religious Exemptions to Medical Care of Sick Children

Most states offer some level of exemption for parents who withhold medical care from their children on religious grounds, but the scope of the exemptions varies widely

-  Allows religious exemptions for negligent homicide, manslaughter or capital murder.
-  Allows religious exemptions for felony crimes against children, including child endangerment and neglect.
-  Allows religious exemptions only in misdemeanor crimes against children, including endangerment and deprivation.
-  Allows no criminal exemptions but does allow civil exemptions to medical neglect and failure to report, which can thwart intervention by Child Protective Services
-  Allows no religious exemptions from criminal or civil charges.



## QUESTIONS AND ANSWERS ON SB5408

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### **1. Are religious exemptions mandated by the First Amendment?**

No. The courts have never ruled that freedom of religion gives anyone the right to cause or allow injury to a child. Courts have consistently ruled that freedom of belief is absolute, but freedom to act out religious beliefs can be limited by vital state interests. The issue here is not an adult's freedom of religion, but whether an adult can impose his or her religion on a child to the child's detriment.

70 years ago the United States Supreme Court ruled in *Prince v. Massachusetts*, "The right to practice religion freely does not include liberty to expose the community or child communicable disease, or the latter to ill health or death. Parents may be free to become martyrs themselves. But it does not follow their free, in identical circumstances, to make martyrs of their children before they reached the age of full and legal discretion when they can make that choice for themselves."

### **2. But does SB5408 stop the Christian Scientists from practicing their religion?**

The bill closes a loophole in the child protection laws so that all parents will have to obtain medical attention for a child when a reasonable person would recognize that the child was at risk of serious harm.

The bill certainly does not stop parents from having prayers for healing nor from relying exclusively on prayer until the child's illness reaches that threshold of seriousness when any other parent would have a legal duty to take a child to a doctor.

### **3. Does the bill require that Christian Scientists and other believers in faith healing be prosecuted if their child is harmed by medical neglect?**

Criminal charges are always a decision for a prosecutor to make based on the facts and the law. The *mens rea* of the parents will always be a high burden for the prosecutor to prove; the prosecutor probably would not file charges if s/he did not have evidence that the parents comprehended the seriousness of the child's illness and had made a conscious decision to nevertheless withhold medical care from the child.

SB5408 changes the law so that all parents have a duty to get medical care for seriously ill children, but the prosecutor also has to have appropriate facts in an individual case before s/he can file charges.

### **4. Does the bill indicate disapproval of prayer or ritual?**

The bill does not indicate disapproval of anybody's prayers. It is a religion-neutral law of general applicability.

**5. But these believers love their children and think they are acting in the child's best interest. Should we be making criminals of them?**

Actually many people who abuse or neglect children love them and claim they did not intend the harms.

The criminal code should have a range of penalties. The most severe penalties should be for those who commit crimes with malicious, depraved intent.

But we also need penalties for those who recklessly cause harm without intent to do so.

To establish a legal duty, the state has to spell out a penalty for failure to obey. That is the only way laws establish a duty, and that is true for everything from running a red light to murder.

Because children are helpless, we must require parents to provide them with what society broadly recognizes as necessities of life. To impose that duty on parents, we have to set forth a penalty in law for failure to perform the duty.

Religious exemptions put the state in the position of announcing in advance that parents have the right to withhold lifesaving medical care on religious grounds. This is a death sentence for children. The state must have the option of prosecution available to create a parental duty to care for the child.

**6. Will repeal of these exemptions cause excessive state intrusion in families?**

Repeal should not cause harassment of parents by the state. Repeal would simply establish a uniform standard. All parents would be required to provide necessary medical care. The state has no right to investigate parents because of community prejudice against their religion. The state must have reason to believe that a specific threat to the welfare of a child exists before it can investigate an allegation of child abuse or neglect.

**7. Are court orders adequate to protect children associated with faith-healing sects?**

No. Court orders have worked fairly well to protect children of Jehovah's Witnesses because the Witnesses object only to blood transfusions. They take their children regularly to doctors, who know when a transfusion is needed and quickly get the courts to order the procedure.

Several sects, however, object to nearly all medical treatment and diagnosis. When their children are ill, parents and fellow church members are usually the only ones who know about it. The courts have no reliable way to learn the illnesses of these children in time to save their lives.

Children are helpless. They cannot assert rights for themselves. Someone must have a legal responsibility to care for them. Parents have custody of children and should therefore have a duty to provide needed medical care. The state cannot monitor children's health continuously.



### **8. Can the state set a clear standard on when to seek medical care?**

The state should not require anyone to seek medical treatment for trivial, self-limiting illnesses nor to continue with medical treatment that does not have a good probability of preserving life or enhancing quality of life. Many child protection laws require parents to provide “adequate food, clothing, shelter, and medical care.” There are variations in what is considered adequate in each of these areas; the state allows a range of behavior. But there is also a point at which a reasonable, prudent parent would recognize that a child might be seriously ill or injured. At that point the state should require the parents to seek medical attention.

### **9. Should medicine have “a monopoly” on treating children? Does repeal of religious exemptions outlaw spiritual healing?**

Faith-healing churches cite the failures of medicine and ask if medicine should be the only legal health care. While medicine is not perfect, it is a state-licensed system accountable to its patients and the state. Its successes and failures are public information. The medical profession is obligated to select treatments which scientific data shows to be effective and to alter treatments in response to data.

Religious exemptions make prayer a legal substitute for the medical care needed by a sick child. But the state has no ability to scrutinize the results of faith healing or to set standards for faith healers. The state has no evidence that prayer heals juvenile-onset diabetes or bacterial meningitis, for example. The state, therefore, should not recognize prayer as a legal substitute for necessary medical care of children. Parents should not be allowed to deprive a sick child of all the vast resources of twentieth-century medicine. State-licensed, secular health care should be recognized in law as the standard of care with parents having freedom to try other remedies including prayer in addition.

### **10. Doesn't faith healing have evidence that it works?**

Faith healing has thousands of anecdotal accounts of healing. The body has a rich array of processes for healing itself. Also, the mind and spirit do impact upon disease and health. But religious healing does not have controlled studies or statistical data to indicate that it can heal diseases that ordinarily require medical intervention. It usually lacks appropriate documentation for its anecdotal accounts.

### **11. Can the law change behavior motivated by religious belief?**

It has in Oregon. Oregon has repealed all religious exemptions from providing medical care for sick and injured children. One Oregon congregation who believed in relying only on prayer and ritual for healing had 85 children buried in its cemetery, but no child has died of medical neglect in that church since 2009.

And in Washington's other neighbor, Idaho, the state's religious exemptions appear to encourage parents to let their children die without medical care. In one cemetery owned by an Idaho church that objects to medical care 206 of the approximately 600 graves are

of minor children or stillbirths. The deaths of children go back to 1924, but 149 of them occurred after Idaho enacted a religious defense to criminal injury and manslaughter in 1972.

We believe SB5408 will save lives of children.

**12. Is this a Washington problem? Only a small number of children are at risk in faith-healing sects. Is it worth the effort to repeal religious exemptions?**

No matter how few in number, these children have a right to live. We believe they have a Fourteenth Amendment right to equal protection of the laws. Our form of government is supposed to stand up for the individual.

CHILD has information on seven Washington children who died because of religious beliefs against medical care between 1979 and 2009. One was a Christian Science child. In the 2009 case the parents were charged. They tried to raise the defense to criminal mistreatment, arguing that their Pentecostal faith should have the same exemption as the Christian Scientists. Ultimately, the parents in Okanogan County accepted a plea bargain, but the case rather glaringly illustrates the constitutional problems posed by current law.

We urge Washington to join Oregon in setting forth a clear standard that all parents must provide children with necessities of life.