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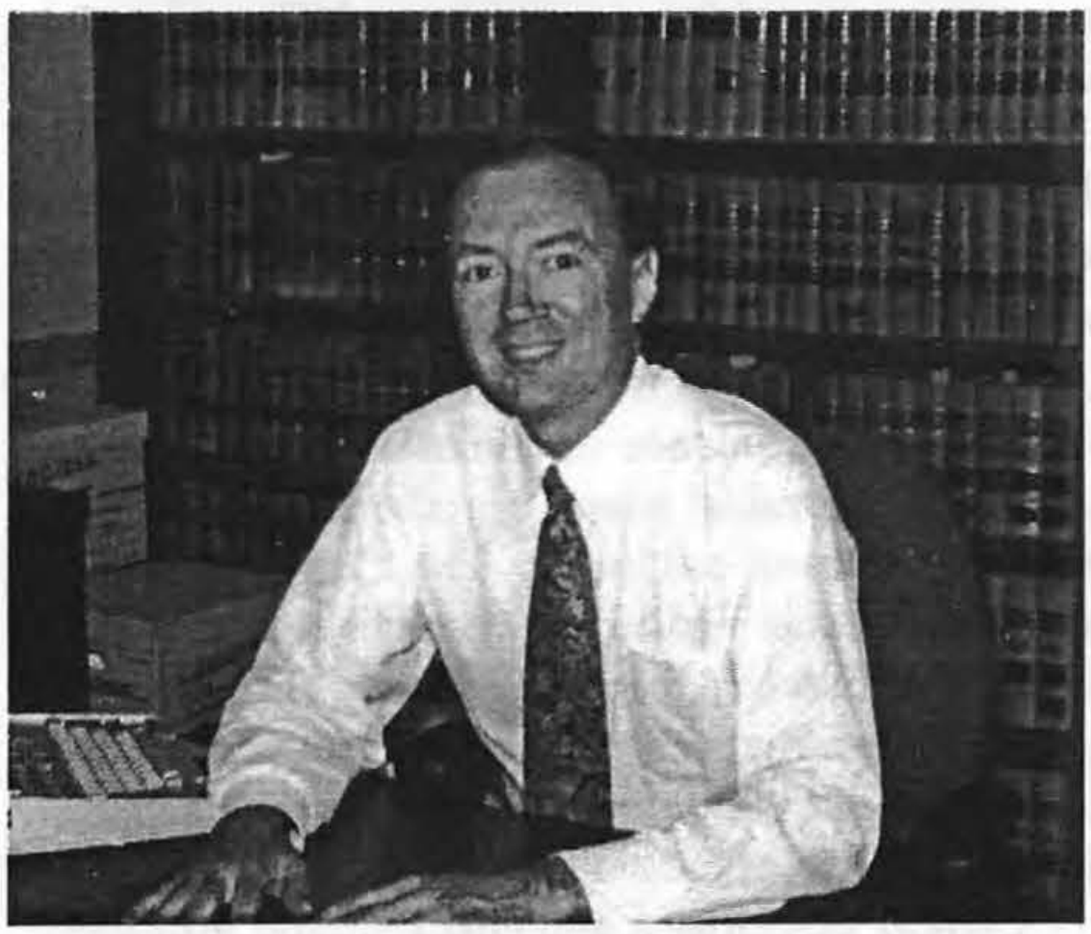
Equal rights for children under the law



Bob Bruno, Representing CHILD and Brown

Federal court grants standing for exemption suit

On July 11, the U. S. District Court in Cincinnati, Ohio, granted standing for a suit filed by Steven Brown and CHILD Inc. challenging Ohio's religious defense to child endangerment and manslaughter, and a religious exemption in the juvenile code.

Brown filed the suit on behalf of himself and his two minor children, Eve and Hillary, who live with their mother, a Christian Scientist, in Cincinnati.

He and CHILD are represented by Robert Bruno of Burnsville, Minnesota, and Scott Greenwood of Cincinnati.

They are asking the court for a ruling that the two religious exemption laws are unconstitutional, for injunctive relief to prevent Ohio officials from enforcing or granting recognition to the exemptions, and their costs of suit and attorneys' fees.

Class action sought

They are also asking the court to certify the suit as a class action on behalf of all Ohio children whose parents or caretakers rely exclusively on spiritual means for the treatment of the children's physical or mental illnesses or defects.

Their complaint charges:

> The exemptions provided by ORC2919.22(a) and 2151.03(b) from criminal prohibition against child endangerment and neglect, in favor of parents or custodians who treat physical or mental illnesses or defects by spiritual means through prayer alone, create a suspect classification of children whose parents have religious belief in and practice such spiritual treatment on them to the exclusion of reasonable medical care. Because of the exemption, such children will never have the protection of the criminal laws of Ohio from parental endangerment for lack of medical treatment.

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Equal protection denied children

Brown and CHILD further state that the denial of protection to one class of Ohio children "lacks a rational basis and does not further a compelling state interest, and thereby denies equal protection of the laws" to those children "in violation of the Fourteenth Amendment to the United States Constitution." This "legal disability. . . stigmatizes" the class of children, "diminishes the value of their very lives," and "encourages their neglect and endangerment," Brown and CHILD say.

The suit also charges that the exemptions discriminate against parents who lack belief in faith healing.

A third count charges that the exemptions encourage "government-sanctioned private interference" with the "lives, health, and family relationships" of some children and parents, thereby violating the due process clauses of the Fifth and Fourteenth Amendments to the Constitution.

A fourth count charges that the exemptions constitute "a preference, endorsement, and validation of the religious belief and practice of spiritual treatment of illness or defect, by the State of Ohio, in violation of the Establishment Clause of the First Amendment to the U. S. Constitution."

Defendants challenged standing

The defendants originally named in the complaint were the Hamilton County prosecutor, the Cincinnati city solicitor, judges of the Ohio Supreme Court and other state courts, and the Ohio Attorney-General. Judge Arthur Spiegel dismissed the judges from the suit. He also dismissed the Attorney-General because the plaintiffs had cited an inapplicable state law as the basis for her inclusion in the suit. Later, the plaintiffs named her as a defendant on the basis of federal law.

The remaining defendants argued that Brown and CHILD did not have standing to bring the action because they had "failed to allege" that the exemptions have "caused any particularized, cognizable injury" to them, could not establish that the exemptions have caused any injury to the Brown children, and could not establish that striking the exemptions would remove any threat to them. Because Brown cannot establish any actual or imminent threat to his children that would require action by this Court now," the defendants further argued, his claims are "also barred by the Article III doctrine of ripeness."

The defendants relied heavily on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), in which the U. S. Supreme Court ruled that the mother of a child born out of wedlock had no standing to sue a district attorney to force him to construe Texas's child support law to apply to the father of her child. The district attorney admitted that he interpreted the child support law as not applying to children born out of wedlock. The mother argued that her child was injured by this interpretation of the statute.

The U. S. Supreme Court ruled that in American jurisprudence "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." The Court also ruled that the mother had not established a direct connection between the injury to her child and the statute nor shown that the relief she sought, i.e. jailing the father, would result in child support payments to redress the injury.

CHILD and Brown submitted several affidavits averring that the exemption statutes had caused injuries to Ohio children. CHILD and Brown also pointed out that *Linda R.S. v. Richard D.* dealt with a prosecutor's interpretation of a statute, whereas they were challenging the Ohio statutes themselves as unconstitutional.

Judge ruled all tests for standing met

Judge Spiegel ruled that Steven Brown had met all three prongs of the test for standing to bring the action: injury, causation, and redressability. As to whether the injury to his children was actual or hypothetical, Spiegel wrote:

> While the Plaintiffs must present the Court with a threatened injury, "[o]ne does not have to await consummation of the threatened injury to seek relief." "The question becomes whether any perceived threat to [Plaintiffs] is sufficiently real and immediate to show an existing controversy. . . ." Several Ohio children have already died because they were denied adequate medical care due to their parents' religious beliefs. The threatened injury in the case at bar is real. Therefore, a denial of equal protection of the laws could injure, cripple

or in the worst case cause a child's premature death. The standing doctrine does not demand that a court wait until the injury is complete, but only until it is threatened. Accordingly, the Plaintiffs have alleged adequate injury in fact. (citations omitted)

With regard to causation, Spiegel wrote:

> A key principle behind criminal law is deterrence of illegal conduct. The Plaintiffs argue that the child endangerment statute would protect all children if no religious exemption existed. . . . The statute itself causes the immediate threat of injury. Therefore, the Plaintiffs' cause of injury correlates directly with the statute, and a sufficient nexus exists for the Plaintiffs to bring this claim.

"Finally," Spiegel wrote, "the Plaintiffs must show that a favorable decision will redress their injury. If this Court found that the statute is unconstitutional, the Plaintiffs threatened injury would subside. First, the children would no longer be treated differently under the law due to their parents' religion. Second, parents throughout Ohio would be on notice that denying their children adequate medical care is a punishable offense. Therefore, relief from injury will 'likely' follow from this court issuing a favorable decision, and thus, the Plaintiffs have standing to bring this lawsuit against the Ohio Attorney General." (citations omitted)

Ohio Attorney General left as defendant

Spiegel dismissed the Hamilton County Prosecutor and Cincinnati City Solicitor from the suit and did not rule on CHILD's standing to bring the suit. "Because we find that the Brown children, through their father, have standing, we do not consider the standing of the other plaintiffs," he wrote.

Ohio Attorney General Betty Montgomery has 30 days to respond to the complaint or to appeal the ruling to the Sixth Circuit Court of Appeals.

The action filed by CHILD and Brown is the first case in which a federal court has been asked to rule a religious exemption unconstitutional on fourteenth amendment grounds.

Taken from pleadings filed in *CHILD and Brown v. Deters et al.*, case # C-1-94-556, U.S. District Court, Southern District of Ohio, Western Division.

Charges filed in Oregon boy's death

Parents who withheld medical care from their 7-year-old son on religious grounds were charged with manslaughter and criminally negligent homicide in Linn County, Oregon, on March 20, 1995.

Anthony "Tony" Hays began complaining of stomach pain in September, 1994, and remained ill until his death on November 4. His parents, Loyd and Christina Hays of Brownsville, called upon fellow Church of the First Born members to anoint Tony with oil and pray for his healing, but did not take him to a doctor.

He died of acute lymphocytic leukemia, which is treatable. During the last days of his life, he had constant nosebleeds and red blotchy bruises all over his body because, in layman's terms, his blood vessels were exploding.

Deputy turned away

On November 3, a sheriff's deputy went to the Hays' home to check on the boy after a family member called authorities to say the couple had been calling relatives to come to Oregon for Tony's funeral. Loyd Hays refused to let the deputy in. He said his son was ill, and the family was praying for him.

A funeral home notified the sheriff's office of Tony's death on November 4.

7-year-old did not ask to see a doctor

Christina Hays told the police that she did not seek medical help for her son because he "did not ask" to see a doctor. His father hopes to meet him in heaven. He said, "The Lord didn't spare my son, but He knows what is best. If the Lord had spared him, maybe he wouldn't have walked with God."

He also says his daughter fell into a pool and died, but was brought back to life on the kitchen table. "If God healed us every time we were sick, we'd never die," said an elder. Several other members have also said that death is the will of God.

Doctors have been sought

Nevertheless, Loyd Hays has sometimes obtained medical care for himself. According to sworn court testimony, he saw a doctor because of

back pain. One of his daughters got a physical exam so she could play high school sports. Loyd also wears a hearing aid and glasses, but justifies them as merely mechanical aids.

The problem, he says, is when medicine cures, doing the work of the Lord. "I don't expect [outsiders] to understand what I believe," he says. "Let's put it this way, 'The carnal mind is not subject to the law of God.' They can't understand what we do."

Other First Born children endangered

Oregon children have been endangered by First Born beliefs several times before. In 1981, Tony's grandparents refused permission for brain surgery needed by their hydrocephalic baby, Sara Jensen. The Oregon Supreme Court and a federal court ordered the surgery over their religious objections. Sara is now 15 years old and doing well.

In 1976 Tony's uncle and namesake, Anthony Jensen, died at age 15 of meningitis. In 1974 Anthony Jensen had his face mangled in a car accident. A doctor acting on a court order treated the boy for his immediate injuries, but the parents would not allow any treatment beyond that. The portion of Jensen's skull between the sinuses and his brain cavity was permanently damaged. Some doctors said surgery would have saved his life and pushed for prosecution of the parents, but no charges were filed.

In 1987, the religious beliefs of Oregon First Born members kept them from summoning medical help after a car accident in which one child was killed and another seriously injured. Three-year-old Luke James and his 4-year-old sister Melinda were thrown from the car. Luke died of chest and abdominal injuries. A motorist called 911, but a relative came and took the family to their home before the police arrived at the scene. Eventually, the police located them at their home and took Melinda to a hospital.

Two years later Melinda was in the news again when a court ordered medical treatment for a kidney malfunction known as nephritic syndrome. Rather than comply, her parents, Daniel and Judith James, hid her in a secluded log house in Washington for nearly three months. The father and a church elder were jailed for contempt of court.

When found by sheriff's deputies, Melinda was pale and weak with a huge distended stomach. Her face and extremities were also swollen because of water retention caused by kidney failure. She was flown to a children's hospital in Portland. During treatment, her weight dropped from 72 to 39 pounds as the excess fluids were eliminated.

Mom ridicules medical care

Mrs. James later appeared on *Oprah Winfrey*. She belittled Melinda's medical care and claimed the treating physicians could not agree on a diagnosis.

While Oregon courts have ordered medical care for First Born children, the Hays case is, we believe, the first instance of criminal charges for the death of an Oregon child due to religiously-based medical neglect.

In death, Tony has become an issue and an icon for painful controversy. But perhaps he should be more accurately remembered as the lively first grader who loved Ninja turtles and had a flair for drawing them.

Taken in part from *The Oregonian*, 22 and 26 March 1995 and 13 July 1995.

Religious exemption laws in Oregon—bad and getting worse

Due process and fair notice are certain to be a main issue in the state of Oregon's case against Loyd and Christina Hays who let their son die without medical care because of their religious beliefs. Oregon laws recognize prayer as health care for children and allow parents to commit felonies on religious grounds.

The civil code has religious exemptions at Oregon Revised Statutes 419.b.005 and 419.500(1). The latter states that "the practice of a parent who chooses for himself or his child treatment by prayer or spiritual means alone shall not be construed as a failure to provide physical care within the meaning of [the child abuse and neglect laws]. . . ."

Existing religious exemptions to felonies

The Oregon penal code had religious exemptions to two felonies when Tony Hays died. ORS163.205 defines criminal mistreatment as "intentionally or knowingly" withholding "necessary and adequate food, physical care or medical attention" from a child or elderly person, while ORS163.206 states that the crime does not apply to those who provide "an elderly or dependent person with spiritual treatment through prayer from a duly accredited practitioner of spiritual treatment. . . in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which the elderly person or the parent or guardian of the dependent person is a member or an adherent."

This law was passed in 1993 despite all the national media attention to deaths of children from religiously-based medical neglect and to how religious exemption laws encourage it.

The other religious exemption in the penal code as of last year was ORS 163.555: "In a prosecution for failure to provide necessary and proper medical attention, it is a defense that the medical attention was provided by treatment by prayer through spiritual means alone by adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical attention." The statute is an exemption from the charge of nonsupport of children.

Thus, Oregon has laws designating prayer as "necessary and proper medical attention" and "physical care" of children.

Exemption added to murder by abuse

As if that were not unfortunate enough, this year the Oregon legislature added a religious defense to the definition of murder by abuse. The genesis of the bill was the death of 4-month-old Joshua Cowlishaw in 1994. His parents let him starve while working long hours to start a business in Salem.

The public was angered that the parents could not be charged with crimes carrying a long prison term, so HB2492 was introduced to expand the definition of murder by abuse to include deaths of children under 14 years old that are caused by "neglect or maltreatment "

Christian Science involvement

Soon the Christian Science church asked for a religious exemption. The bill sponsors added one, and, much to our dismay, the Oregon District Attorneys' Association agreed to it. The exemption states that a child under 14 years old "who is under care or treatment solely by spiritual means pursuant to the religious beliefs or practices of the child . . . or [his] parent or guardian shall not, for this reason alone, be considered to be subjected to neglect or maltreatment."

The Oregon Chapter of the American Academy of Pediatrics testified against the exemption, and a state senator on the Judiciary Committee had promised a local CHILD member that she would try to remove the exemption from the bill. But, with the prosecutors supporting the religious exemption, it was impossible to make any headway against it.

Passage of the new bill

HB2492 sailed through the legislature on "emergency" status and was signed into law by the governor.

Marion County District Attorney Dale Penn stoutly defends the prosecutors' position. He pointed out they got the exemption recast as an affirmative defense, which means one that the defendant has the burden of proving. In other words, the defendant will have to offer evidence of the "legitimacy" of his religious beliefs.

He also said that religiously-based medical neglect could not be prosecuted under the old murder by abuse statute, so we should not complain that it cannot be prosecuted under the new one. Parents who withhold medical care on religious grounds do not intend to harm the child and therefore the exemption is appropriate, he said.

Simultaneously, Penn claimed that HB2492 is a "tremendous leap forward" for all Oregon children because prosecutors will no longer have to prove intent when charging murder by abuse.

Finally, Penn states that parents who withhold lifesaving medical care on religious grounds can be charged with manslaughter in Oregon.

Comment

We find it astonishing that Oregon prosecutors agreed to add a religious defense to murder by abuse while criminal charges are pending against Oregon parents who let their child die for their religious beliefs. How will the prosecutors claim the moral high ground when and if the Hays case goes to trial?

No, parents who withhold medical care on religious grounds do not intend to harm their children, but neither did the Cowlishaws. Like many parents today, they had a totally unreasonable schedule. They were working 18-hour days to start a business, they had seven children, and they failed their obligations as parents.

That does not excuse the death of their helpless baby, and the Cowlishaws should be punished. But if "neglect" and "maltreatment" should be prosecuted as murder without regard to the intentions of the parents, there should not be an exemption for parents with certain religious beliefs.

Affirmative defense easy to claim

Making the religious exemption an affirmative defense contributes little to the protection of children. It will not be hard for those who belong to faith-healing churches to show that they are entitled to the defense.

The Oregon District Attorneys' Association thinks it is appropriate to have laws calling prayer "medical attention" and "physical care"—laws allowing parents to commit murder by abuse and criminal mistreatment on religious grounds— while the state prosecutes Loyd and Christina Hays for manslaughter and negligent homicide.

Taken in part from Rita Swan's phone conversation with Dale Penn, 25 May 1995.

Damages against church overturned

On March 29, the Minnesota Court of Appeals overturned both punitive and compensatory damages against the Christian Science church in the death of Ian Lundman. The Minnesota Supreme Court has refused to review the ruling.

Case history

Ian died in 1989 of untreated diabetes in suburban Minneapolis. His mother and stepfather, Kathleen and William McKown, withheld medical treatment because of their Christian Science faith. Ian's father, Douglass Lundman, had left Christian Science several years earlier, but he was not informed of the seriousness of his son's illness.

In 1991, Doug Lundman filed a civil suit charging that negligence and wrongful acts caused his son's death. In 1993, the case became the nation's first wrongful death suit against the Christian Science church or its agents to be presented to a jury.

The jury awarded $5.2 million in compensatory damages against the McKowns, Christian Science practitioner Mario Tosto, Christian Science nurse Quinna Lamb, a Christian Science nursing home, the Christian Science public relations manager for Minnesota, and the First Church of Christ, Scientist, in Boston. It also awarded $9 million in punitive damages against the church. Hennepin County Circuit Court Judge Sean Rice reduced the compensatory damage award to $1.5 million.

Church punished for beliefs, court rules

The Court of Appeals ruled unanimously that the damages were intended to punish the Christian Science church for its teaching of spiritual healing and thereby force it to abandon the central tenet of its religious beliefs.

As evidence, the Court cited closing arguments in which Doug Lundman's attorney, Jim Kaster, drew an analogy between pulling up weeds by the roots and changing the behavior of practitioners and nurses through punitive damages against the church.

Kaster did not ask the jury to punish the church's religious beliefs and, in fact, explicitly spoke of the church's *policies* on treatment of sick children. Nevertheless, the appeals court ruled that he encouraged the jury to punish the church for believing that prayer heals disease.

The Court further said that the church did not directly interfere in Ian's care and did not act "in conscious or intentional disregard of the high degree or probability of injury" to Ian.

No control over healers and nurses

"We also note," said the Court, "that the church teaches its members to 'obey' all laws, including the reporting of contagious diseases to local authorities. This, too, suggests the church lacked the malice required under Minnesota law for the imposition of punitive damages."

The Court also ruled 2-1 that the practitioner and nurse were not agents of the church. The courts are supposed to allow juries to decide whether an agency relationship exists, but the Court of Appeals found the jury's findings "perverse" and "palpably contrary to the evidence" and claimed that the church had no control over the "means and manner of Tosto's and Lamb's performances in caring for Ian" beyond allowing them to advertise in a church periodical.

Judge Klaphake dissented:

> It is clear that the First Church installed Lamb and Tosto as a Christian Science nurse and practitioner, and had the power to remove them from the Journal list for failure to follow church tenets. The First Church's removal of names from the Journal list would have ended Lamb and Tosto's careers as Christian Science nurse and practitioner. Under these facts, the jury could reasonably find that the First Church had control over them.

CHILD also notes that the First Church provided and controlled the training of both Lamb and Tosto.

Compensatory damage award upheld

The Court of Appeals upheld the $1.5 million compensatory damage award against the McKowns, Mario Tosto, and Quinna Lamb. The Court said that all of them had a duty to get medical care for Ian regardless of their religious beliefs. Tosto and Lamb claimed that Kathleen McKown had complete authority for Ian's care and their only professional duty was to follow "pure Christian Science doctrine" in carrying out her requests.

The appellate court disagreed. During their engagement, the practitioner and nurse were "obligated" to make Ian's welfare their "paramount interest." They cannot "yield to a parent's directions," for "protecting a child's life transcends any interest a parent may have in exercising religious beliefs." The Court also noted that "Tosto was hired and paid $446 by the McKowns," and therefore "accepted a professional's responsibility for Ian's health care."

Warning to faith healers

The Court emphasized that it was serving notice "to all professional Christian Science caregivers—be they practitioners, nurses, or others—that they cannot successfully disavow their professional duty to a child by deferring to the parent as the ultimate decision-making authority."

And so we are left with a published appellate ruling that a Christian Science practitioner and nurse have a duty under common law to get medical care for a sick child, but the church is not liable for its teachings or policies on sick children. The Court explains this distinction as follows:

> A church is not a lawn mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blades. . . . The constitutional right to religious freedom includes the authority of churches—not courts—to independently decide matters of faith and doctrine, and for a church as an institution to believe and speak what it will. When it comes to restraining religious conduct, it is the obligation of the state, not a church and its agents, to impose and communicate the necessary limitations—to attach the warning sticker. A church always remains free to espouse whatever religious belief it chooses; it is the practices of its adherents that may be subject to state sanctions.

Historic victory for children

The court's plain statement that "protecting a child's life transcends any interest a parent may have in exercising religious beliefs" is a significant victory for kids. While it simply restates a long line of court rulings, including the U. S. Supreme Court's holding in *Prince v. Massachusetts*, 321 U.S. 158 (1944), it is important to have this principle stated as a basis for tort liability of spiritual healers and those representing themselves as "nurses."

Furthermore, the $1.5 million award upheld in *Lundman* is the largest award for the wrongful death of a child in Minnesota history. State law does not

allow recovery for the emotional distress caused by a child's death. Losses which juries can compensate include the value of a minor child's earnings and services up until s/he would have been 18 and loss of companionship. Juries can try to put a monetary value on the counsel, guidance, comfort, and companionship the decedent would have brought to the next of kin and award compensation for them. But wrongful deaths of adult wage earners are usually given much larger awards in civil suits than deaths of children—especially when a parent cannot recover for his grief in losing a child.

Churches enter as amici

Americans United for Separation of Church and State and virtually every Christian denomination signed an amicus brief arguing that punitive damages should not be assessed against the Christian Science church. These denominations included the Roman Catholic Archdiocese of St. Paul and Minneapolis, Christian Church (Disciples of Christ), Church of Jesus Christ of Latter-Day Saints, Church of the Nazarene, Evangelical Lutheran Church of America, Lutheran Church-Missouri Synod, Orthodox Church in America, United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, National Association of Evangelicals, which includes 50,000 churches from 74 denominations; and National Council of Churches, which includes the United Methodist Church, Presbyterian Church, and 30 other Protestant denominations.

The amici wrote that:

> All religious bodies have a deep and direct interest in contending that no one of them should be subjected to punitive damages for teaching and practicing its religious doctrines, which is what churches exist to do. There is no evidence in the record in this case that the "Mother Church" played any direct causative or contributory part in the death of the decedent at issue here, let alone that its members at large throughout the country and the world—upon whom the burden of the punitive damages awarded would fall—did so. The Church's only putative connection to the case is the possibility of a 'deep pocket' that plaintiff seeks to reach by allegations so tenuous that no church is safe if it can be found culpable for misfortunes that occasionally befall its members while trying to practice their faith.

"Will the Catholic Church be liable if one of its parishioners, urged by a priest to forego an abortion, dies in the delivery room? Will an Orthodox kibbutz be liable if a member dies from eating contaminated Kosher food? Will the Assemblies of God be liable if someone drowns in a river during a baptismal ceremony of bodily immersion?" they asked.

"Amici have not examined all aspects of the record," they wrote, "and therefore cannot take a position on matters other than those discussed in this brief." Indeed, they never once mentioned what the case was about—the death of a child from untreated diabetes.

Punitive damages upheld against Catholic church

Minnesota appellate courts had already upheld a punitive damage award against the Archdiocese of St. Paul and Minneapolis for allowing a priest to sexually molest children, but had reduced it from $2.7 million to less than $200,000 on the rationale that the church had already been punished by the bad publicity.

The Minnesota Trial Lawyers Association, American Academy of Pediatrics, American Medical Association, and the Minnesota chapters of these associations submitted amicus briefs supporting the punitive damage award.

The medical organizations' brief, written primarily by Donna Boswell of Hogan & Hartson in Washington DC, argued that the Christian Science church was not being punished for its teachings on spiritual healing, but for involving itself in Ian's care and encouraging its agents and Ian's caretakers to disregard his rights and safety.

Policy: serious illnesses reported to church

"In promulgating First Church policy regarding sick children," wrote the AAP and AMA, "principals of the First Church Committees on Publication authorized the withholding of life-saving care from seriously ill or injured children, and sanctioned their agents' failure to seek medical care when consulted about such children. Moreover, with respect to Ian, the local CoP was consulted multiple times in a single day concerning Ian's condition, and the local

CoP reported to principals in Boston that he had been consulted about a sick child. Consistent with Church policy, such reports are an indication to principals of First Church that the child's condition is serious, that he is not responding to Christian Science care, that the Church's CoP has been consulted by the parent or practitioner regarding the child's condition, and, consistent with the principles of Christian Science, that he will not be receiving medical care."

Church preoccupied with subterfuge

The actions of First Church agents in implementing Church policy reflected "a preoccupation with attempting to avoid the unwanted scrutiny of those who might exert the state's *parens patriae* authority in Ian's interest," the medical organizations continued. Indeed that First Church policy "is devoid of any consideration of what would be in Ian's best interest," they charged.

For further discussion of how Mother Church policies contributed to Ian's death, see the CHILD newsletter #3, 1993. These policies are plainly written in *Legal Rights and Obligations of Christian Scientists in Minnesota* and *Handbook of Policies and Procedures for Christian Science Committees on Publication*. They were plainly condemned by the trial judge, Sean Rice, as "a grave hazard to the public."

In arguing that the church's actions represented the "deliberate disregard" for Ian's welfare that was necessary for assessment of punitive damages, Lundman's attorney, Jim Kaster, asked, "What is more deliberate than writing a policy?"

The Minnesota Court of Appeals, however, ruled that the punitive damages were an unconstitutional attack on the church's religious beliefs—because Kaster used a metaphor about pulling up weeds by the roots.

Oklahoma parents convicted in medical neglect death

On March 17, Stephen and Tammie Wallace of Aline, Oklahoma, pled no contest to manslaughter in the death of their 18-month-old son Kyle Evangle to untreated meningitis. The Wallaces belong to True Followers of Christ Church, which discourages medical care.

They were sentenced to six months in jail each and an additional three years of probation. They were also ordered to perform 100 hours of community service and pay $200 in fines.

Prolonged illness before death

Their baby was sick for 19 days before his death in July, 1994. Dr. Fred Jordan of the medical examiner's office described the amount of infection throughout the child's body and surrounding his brain as being one of the worst cases he had observed in his medical career. Another doctor who examined the body two hours after death said the temperature was still 101 degrees.

The Wallaces told investigators they thought their son was teething and not seriously ill. But they admitted that they called in church elders four times to anoint him with oil and pray over him.

The boy's hemophilus influenzae meningitis has been vaccine-preventable for about ten years. After his death the Wallaces got vaccinations for themselves and their surviving children still living at home.

Previous faith death prosecuted

The case was prosecuted by Hollis Thorp, Major County Assistant District Attorney, in Fairview, Oklahoma. Thorp said Mr. Wallace and his first wife got some types of medical care for themselves and their children despite their church membership.

Thorp also won a manslaughter conviction of Gale Riggs, a member of the True Followers of Christ, who refused to get medical care for his 17-year-old daughter Melonie in 1986. She had run away from home and had complained to school officials that her father would not allow her to have medical care. Nevertheless, the police notified her father to pick her up. Three days later she died at home of a ruptured appendix.

Taken in part from *The Daily Oklahoman*, 8 Sept. 1994, and *The Fairview Republican*, 16 March 1995.

HHS withdraws appeal

On September 27, 1994, the U. S. Department of Health and Human Services (HHS) withdrew its appeal in *People v. Shalala*, U.S. Ct of Appeals, 9th Circuit, case #93-15700 and -15936, a lawsuit filed by the state of California over religious exemptions and other features of its child abuse and neglect laws. With this withdrawal, amicus briefs filed by CHILD Inc. and other parties also became moot.

In 1991 HHS ruled California out of compliance with federal regulation. HHS ruled that its religious exemption statutes "set up a different and higher standard" for state intervention to protect children than that permitted by their regulations. (Letter from JoAnne Barnhart to Theresa Parker 27 January 1992.)

CHILD urged the California Department of Social Services (DSS) to seek repeal of the religious exemption statutes. But the DSS felt it was politically impossible to get repeal. They also felt that the federal government was discriminating against California and that its policy on religious exemptions was incomprehensible.

HHS sued by California

In September, 1992, California filed suit against HHS to compel release of federal funds from the Child Abuse Prevention and Treatment Act (CAPTA) to California. California pointed out that HHS's predecessor, the U. S. Department of Health, Education, and Welfare, had required the states to pass religious exemption laws from 1974 to 1983 and that virtually all states had them. California argued that HHS had been arbitrary and capricious in first requiring, then approving, and then selectively disapproving of state laws. It is impossible to believe that nearly all states are still out of compliance twenty years after CAPTA was first enacted, California said.

HHS argued that its position had been consistent. CAPTA regulations had never allowed a religious exemption from reporting or investigation nor could parents' religious beliefs be a factor in a court's decision of whether to order medical care for a child, HHS said. The only acceptable religious exemption, HHS said, was one exempting the parents from an adjudication of negligence.

Ruling in California's favor

In February, 1993, U. S. District Court Judge Vaughn Walker granted injunctive relief to California, ruling that HHS was arbitrary, capricious, in abuse of its discretion, and in excess of its statutory authority in denying the money to California. HHS appealed on two of the four issues on which HHS had found California out of compliance: religious exemptions and use of the word "serious" to qualify the harm to a child that is the threshold for state intervention.

CHILD enters as amicus

CHILD decided to file an amicus brief asking the court to take up the issue of the constitutionality of the exemptions and to rule them unconstitutional on first and fourteenth amendment grounds.

Michael Botts

CHILD's brief was prepared by Kansas City attorneys Michael Botts and Peter Healy. Botts is a member of CHILD's board of directors and donated many hours of work to this project.

CHILD argued that California's religious exemptions to child neglect charges violated the first

amendment of the Constitution in giving a privilege to certain churches. The laws extend the exemption only to those who obtain "treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof."

CHILD relied heavily on *Larson v. Valente*, 102 S.Ct 1673 (1982) in which the U. S. Supreme Court ruled unconstitutional a Minnesota law requiring only religious groups which received more than 50% of their funds from non-members to register with the state. "The clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another," said the high court.

A "state law granting a denominational preference" must be treated as "suspect" and "invalidated unless it is justified by a compelling government interest," the Court said.

Support for the unconstitutional argument

CHILD pointed out that California Supreme Court Judge Mosk in his concurring opinion in *Walker v. Superior Court*, 763 P.2d 852 (1988), had called California's penal code religious exemption unconstitutional. The law, Mosk wrote, "allocates its religious benefit on a selective basis."

"By sparing the favored from criminal liability while condemning others for failure to cloak identical conduct in the mantle of a sanctioned denomination or procedure," Mosk continued, "the religious exemption of section 270 operates without neutrality 'in matters of religious theory, doctrine, and practice,' and thus cannot survive in the absence of a compelling state interest in its discriminatory effect."

"To apply section 270, law enforcement officials and courts are required to evaluate 'the tenets and practices' of various religions, searching for a doctrinal sanction of 'spiritual treatment by prayer alone'; they are called upon to consider whether individual healers have been 'duly accredited' by a particular denomination; and most disturbing, they are required to ascertain whether a particular religious group is 'recognized.' This last inquiry requires prosecutors and law enforcement officials to judge in their discretion whether a particular religious group has reached the critical mass of size and acceptance necessary for statutory protection, and leaves courts with nothing but subjective experience and belief to guide the required determination," Mosk wrote.

Fourteenth amendment also violated

CHILD also argued that the California statutes denied to children the equal protection of the laws in violation of the fourteenth amendment:

> Statutes which discriminate against a particular class of children are routinely struck down by equal protection analysis. See, e.g., *Trimble v. Gordon*, 97 S.Ct. 1459 (1977) (children committed to state mental facilities); *Weber v. Aetna Cas. & Sur. Co.*, 92 S.Ct. 1400 (1972) (workers' compensation statute that denied recovery to illegitimate children); *Levy v. Louisiana*, 88 S.Ct. 1509 (1968) (wrongful death statute that prohibited parents from recovering for death of illegitimate child). These cases have all applied a rational relationship test to determine if the statute in question is constitutional.
>
> California's child abuse and neglect statutes have the primary purpose of protecting children from abuse and neglect. The religious exemptions are not rationally related to the goal, but in fact clearly thwart the purpose of the statutes. They encourage parents to believe that the state has recognized prayer as a legal substitute for the medical care needed by a sick child. . . .
>
> Statutory discrimination against one class of children cannot be considered rational unless it furthers some substantial goal of the state. *Plyler v. Doe*, 102 S.Ct. 2382 (1981). California's religious exemptions do not further a substantial goal of the state. They have instead contributed to confusion among parents and harm to children.

CHILD also pointed out that the constitutional issue was "wholly dispositive" of the issue before the court in *People v. Shalala* in that ruling the laws unconstitutional would preclude them being a basis for withholding of federal funds.

"In order to truly protect children," CHILD concluded, "there must be one standard that is neutral on religion. A parent should be legally required to seek medical attention for a child because of the nature of the child's condition or

situation—not because the parent is or is not praying. When the ailment is minor, the parent, regardless of religious affiliation or lack of religion, is not required to bring the child to medical attention. Likewise, when the condition of the child presents harm or threatened harm, the child should be entitled to medical care, and the parent should be legally required to furnish the care, regardless of religious affiliation or lack of religion."

Support for CHILD from other organizations

The American Academy of Pediatrics wrote a letter in support of CHILD's amicus brief, and the California Medical Association (CMA) submitted an amicus brief that incorporated CHILD's primary arguments by reference.

CHILD felt that a ruling on constitutionality was in the best interest of both California and HHS. If the laws were ruled null and void, California would be in compliance with federal standards and would get its grant moneys. And HHS would have much stronger authority to press for statutory reform with a court ruling on the constitutionality of the laws.

Opposition to the brief

The parties disagreed however. HHS urged the court to disregard our amicus brief because it dealt with issues not raised in the court below. (Our references indicated that a constitutional issue could be raised at any point.)

The Attorney-General, representing California, did not express direct opposition to CHILD's position and certainly should not have for the Attorney-General's office itself had argued in *Walker*, *supra*., that California's penal code religious exemption was unconstitutional. See Answer to Petition for Review in *Walker v. Superior Court*. But California's ally, the Children's Advocacy Institute (CAI) in San Diego, attacked the amici from CHILD and the CMA.

"Amicus CMA's primary purposes," wrote the CAI, "include promoting the science and art of medicine and the betterment of the medical profession. Its members are doctors, not children or people primarily concerned about protecting children from abuse. Indeed, if the CMA were truly an advocate for California's children, it would join Appellee in urging this court to ensure that federal funds come to California for child abuse prevention and treatment. Instead, the CMA seeks to protect the domain of traditional medical practice for the betterment of its members. The court should not permit the CMA to bootstrap its unrelated agenda to this appeal about getting California's children more funds for prevention and treatment of child abuse."

The CAI's criticism of CHILD's position included the following points:

> CHILD asserts that parents who withheld medical treatment for their children said that statutes "led them to believe" the state "recognized prayer as a legal substitute for medical care." CHILD presents this assertion as evidence supporting statutory change. However, individual subjective beliefs about the relationship of statute to religious practice are a tangential issue. . . . The solution would be to educate the public regarding the intent, scope and meaning of the law as written and interpreted, not to deny funds because of one person's convenient misinterpretation of an isolated phrase. . . .
>
> CHILD would prefer to blame statutes when adults are culpable. No doubt many parents are anguished after the death of their child, especially when their action or inaction is, or could be, faulted. The [CAI] contends that no objectively reasonable parents would watch their child deteriorate and die due to reliance (misplaced or not) on selected words in a statute. . . .
>
> The CHILD position only considers words and proposes a black-and-white logic of "change the statutes and children won't die." But the statutes, as interpreted and applied, already conform substantially to the CHILD position. Cases and the enforcement of the law are published far more than are isolated statutory words. Brief for Amicus Curiae California Consortium to Prevent Child Abuse in *People v. Shalala*, U. S. Court of Appeals Ninth Circuit #93-15700 and 93-15936: 25-27.

As usual, the reality was more complex. California is correct that its laws have been interpreted by the courts to provide a high degree of protection for children. The California Supreme Court's 49-page *Walker* ruling found that parents who withhold necessary medical care can be charged with child endangerment and manslaughter regardless of their religious beliefs and that the civil

laws require reporting, investigation, and intervention of medical neglect regardless of religious beliefs. The only concession by the *Walker* Court was the ruling that the religious exemption in Sec. 270 prevents prosecution for the misdemeanor of non-support.

Deaths continue after convictions

It is incomprehensible that any Christian Science parents in California would not get medical care for a seriously ill child after two convictions of California Christian Science parents have been upheld on appeal in recent years.

And yet it happens. California children Ian Burdick and Andrew Wantland died of diabetes and Kristin Wingert died of a brain tumor after their Christian Science parents withheld medical care on religious grounds. Burdick died three years after the indictments; Wantland and Wingert died years after the convictions.

One can understand the CAI's position that the laws and court rulings make no difference to a few stubborn, antisocial people. Nevertheless, CHILD feels that the laws should be as clear and fair as possible. Devotees of faith healing do not let their children suffer and die solely because of a statute, but because of many pressures in their subculture in addition to a statutory exemption which they and their leaders seize upon as validation of their vision and their fear.

Moratorium thwarts judicial ruling

We also wish to point out that some law review articles argue that the *Walker* holding does not give adequate weight to the fair notice rights of parents and that the Christian Science church is still attempting to challenge the ruling. See, for example, John 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," *Cumberland Law Review* 19 (1988-89): 585, 608-14; JoAnna Gekas, Notes, "California's prayer healing dilemma," *Hastings Constitutional Law Quarterly* 14(Winter 1987): 395-19; Janna Merrick, "Christian Science healing of minor children: spiritual exemption statutes, first amendment rights, and fair notice," *Issues in Law & Medicine* 10 (1994): 321-42.

In 1994, the Christian Science church persuaded Congress to impose a temporary moratorium on HHS efforts to limit the scope of state religious exemption laws. HHS then decided pursuing judicial clarification of its policy on these laws was pointless and withdrew its appeal in *People v. Shalala* a few days before oral arguments were to be held.

RFRA ruled unconstitutional

On March 13, a U. S. District Court in Texas ruled the Religious Freedom Restoration Act (RFRA) unconstitutional. Passed by Congress in 1993, RFRA was openly acknowledged to be a means of negating the U.S. Supreme Court's ruling in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990). Judge Lucius Bunton III, however, has now ruled that Congress cannot undo a U.S. Supreme Court ruling by passing a law. An appeal has been filed.

The case before Bunton's court, *Flores v. City of Boerne*, involved a Catholic church that applied for a permit to enlarge its building. The city denied the permit request on the basis of a landmark preservation law. The church argued that RFRA required the city to grant the permit.

In *Smith* two Native Americans argued that they had a first amendment right to use peyote for religious practices. The Supreme Court ruled that the Constitution did not require granting a religious exemption for any criminal conduct and that the state did not have to demonstrate that it had a compelling interest in regulating religious practice before restricting it.

RFRA prohibits the state from substantially burdening a person's free exercise of religion unless the state can show that the burden furthers a compelling government interest and is the least restrictive means of furthering that interest.

CHILD Inc. takes the position that RFRA, as its name indicates, simply restores the courts' interpretation of the first amendment that prevailed before the *Smith* ruling. In a nutshell, that interpretation

was that a person has the freedom to act out his religious beliefs until he compromises another person's rights.

We believe that the health of children has always been ruled a compelling state interest, and we further believe that laws requiring parents to get necessary medical care of children without exception for religious belief are the least restrictive means of accomplishing that interest.

CS interpretation

The Christian Science church, however, has been having a field day with RFRA. The church promotes RFRA to legislators as evidence that they must enact and retain religious exemptions from parental duties of care.

The church testified before U.S. Senate Labor Committee staff that RFRA was "easily. . . the most significant law" to protect "religious freedom passed in this century" and "maybe since the passage of our First Amendment in the Constitution." The church acknowledged that the health of children was a compelling state interest, but complained that the U.S. Department of Health and Human Services (HHS) was attempting to make *medical care* of children required in state laws without evidence that medical care would contribute to their health.

"Absolutely no evidence exists showing Christian Science care and treatment to be any less effective for the health of a child than conventional medical treatment," the church told the Senate staff.

In a lead editorial the church has asked all members to pray about the court's ruling against RFRA. The church claims that its members have a "compelling interest" in withholding medical care, which is protected by the Constitution:

> The Christian Scientist has determined that in his or her own worship of God, the daily living of that worship naturally includes the ministry of Christian healing—the healing of sickness, sin, and every distress of human experience, through prayer alone.
>
> The political, financial, and secular interests of the state may not always comprehend and thereby agree with an individual's own compelling interest in spiritual healing. Yet it is even more than a farsighted guarantee granted by wise Founding Fathers that is at issue here. It is in fact a *divine* right that we are to demand courageously and cherish in prayer.

This all-too-familiar rhetoric may very well lead to more deaths of children. The "wise Founding Fathers" did not guarantee parents a religious right to withhold medical care from their children, and no court has ever ruled that they did.

Taken in part from *The Christian Science Sentinel*, 15 May 1995, and testimony of Philip Davis to Senate Labor Committee staff, 8 June 1995.

Child support held compelling state interest

The Vermont Supreme Court has upheld the state's interest in requiring child support against a defendant's claim that support payments violated his religious beliefs. The defendant, Eugene Hunt, belongs to a religious commune in Island Pond, Vermont, which received much media attention a decade ago for alleged brutal beatings of children that were justified on scriptural grounds. Formerly known as Northeast Kingdom Community Church, the commune is now called the Messianic Community.

Hunt was ordered by Vermont Human Services to pay $50 a month in support for each of his children. He did not contest the amount, but the fact that any support at all was ordered.

"In keeping with their faith in an 'everlasting covenant' with God," said the state Supreme Court, "members of the Church lead an ascetic communal existence. Members eschew all personal possessions and work for the benefit of the community, often in one of the various Church-run business enterprises that offer goods to the public and provide income to the Church. A recognized nonprofit corporation, the Church pays taxes and meets all other obligations to the State. Defendant files tax returns reporting dividend income from the Church, but has no access to the funds themselves, which apparently are retained in the Church treasury. In return, the Church provides for each member's housing and living necessities. The Church does not believe in no-fault divorce, and forbids a member to support an

estranged spouse or children who live outside the community."

Hunt maintained that he could not sanction his wife's leaving him "without just cause in the eyes of the Church" and therefore could not support his children outside the commune. He also contended that, "because he himself [owned] nothing and [could not], consistent with his faith, work outside the community, he [could not] earn money to meet a support obligation."

The Vermont Supreme Court disagreed, holding "that the child support order, though a substantial burden on defendant's rights to free exercise of religion under the United States and Vermont constitutions, is the least restrictive means of furthering a compelling governmental interest."

The Court did, however, vacate the contempt of court order because the State did not demonstrate that contempt and incarceration were the means to enforce the support order that would impose the least restriction on Hunt's rights to free exercise of religion. The Court remanded the case for a hearing to determine the least restrictive means to enforce the support obligation.

One justice recommended collecting the support from the church itself, which was acting as "the custodian" of money held for Hunt's benefit.

It appears to some outsiders that the church could readily afford to provide financial support for Hunt's children. Church elders say that their membership has grown from a few hundred to about 2,000 worldwide in the past decade. They have recently established households and businesses in Brazil as well as Providence, Rhode Island; Bridgeport, Connecticut; Monticello, New York; Dorchester, Massachusetts; and other New England cities.

Taken from *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994) and *The Boston Globe Magazine*, 12 March 1995.

Swan named as distinguished alumna

CHILD President Rita Swan was selected by Emporia State University to receive a distinguished alumna award during the fall 1994 homecoming festivities. Each year the university in Emporia, Kansas, chooses from among its 37,000 alumni a maximum of five people to receive the award.

The work of CHILD Inc. was explained and applauded several times during this happy occasion. Swan was nominated for the award by fellow ESU alumna and CHILD member Janet Simek of Tucson, Arizona. One of Swan's talks was introduced by ESU Professor Bill Simpson, who has published two groundbreaking articles on longevity of Christian Scientists. In addition, a sizable passel of CHILD members attended the awards dinner, including board member Peg McLaughlin, Doug Swan, Rita's brother, sister, aunt, and uncle.

Swan graduated from ESU in 1963 with a B. A. in English.

Other awards

Ellen Mugmon, whose successful work to remove religious exemptions in Maryland has been featured in past CHILD newsletters (see #3, 1994 issue), was honored this spring in Chicago by the National Association of School Psychologists as a "Special Friend of Children."

CHILD board member Ford Cauffiel was named as Entrepreneur of the Year for Northwest Ohio by Merrill-Lynch and Ernst & Young. He was also designated the only Master Entrepreneur of Ohio in 1994.

Atlantic article on CS deaths

The April 1995 issue of *Atlantic Monthly* has one of the most powerful articles on deaths of Christian Science children to be published in a widely-circulated magazine. Entitled "Suffering Children and the Christian Science Church," Caroline Fraser's article is 15 pages long and loaded with facts that should shock the conscience of church members and public policy makers.

Fraser discusses several of the deaths that have led to criminal charges, the history of the Christian Science church, the dissidents' quarrels with church

Science church, the dissidents' quarrels with church leadership, the work of Rita Swan and Suzanne Shepard (formerly a church healer), and her own upbringing in the faith.

The only advertiser willing to have its copy appear with the article was the National Audubon Society, a point which indicates to us that businesses are very reluctant to be associated with any criticism of religion. *The Atlantic Monthly* deserves credit for its commitment to this hard-hitting, informative, and poignant article.

The July and August issues carry letters of response.

Due process weighed by legal scholar

Jennifer Rosato, a professor at Brooklyn Law School, has published an article on the due process/fair notice problems created by religious exemptions in child abuse and neglect laws and criminal statutes. It is entitled "Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents," and appears in the *University of San Francisco Law Review* 29 (Fall 1994) 43-119.

She finds flaws in the reasoning of four state supreme courts on due process rights of parents who raise defenses based on religious exemption statutes and recommends eliminating all exemptions in reporting statutes, among other legislative reforms.

What about the children?

by Scott Sokol, M.D.

The Republican Party has its own "New Deal" —the Contract with America. Everyone with a stake in it has his own agenda: college students, social security recipients, taxpayers, religious groups, gun owners and so on. What about the children? Where is their clause in this alleged grand contract?

The Christian Science church spends millions of dollars lobbying federal and state legislators to permit religious exemptions to medical care, but who stands for the children and their right to have access to that care?

Residents of a small town in upstate New York empathized with Waneta Hoyt as one of her children after another succumbed to SIDS. Recently a jury of her peers belatedly stood for these children and convicted her of multiple counts of murder. Why did the suspicion that these alleged SIDS cases were actually deaths by smothering occur too late to save their lives? How many more Waneta Hoyts are there?

Why have the courts allowed Baby Richard to be ripped from the arms of his adoptive parents and the only family and life that he knew?

It is no coincidence that the name of our organization is CHILD Inc. We intend to get the rights of children on the books and into the hearts of our society.

Sokol, a New York pediatrician, is a member of the CHILD board of directors.

In memoriam

CHILD wishes to express our appreciation for a generous gift from members Pat and Larry Mahon of Portland, Oregon, in memory of Larry's parents, Doris and William Neil Mahon III.

William Mahon was a painter and paper-hanger. He was working to support his mother and sisters even before adolescence.

Doris Mahon worked as a seamstress from age six on and spent most of her adult working years making custom draperies.

She cared deeply about children. She taught neighbor children to do needlework and invited them to come into her home while their mothers were working.

After the murder of their son Neil, who was a CIA agent working on drug interdiction, the elder Mahons moved back to Portland to be close to Larry and Pat.