DISCRIMINATION DE JURE: RELIGIOUS EXEMPTIONS FOR MEDICAL NEGLECT

—by Rita Swan

Laws that discriminate against certain classes of adults are rare in the United States today. They offend the American spirit of fairness. But a large body of laws that discriminate against certain classes of children is accepted as perfectly normal by most policy makers and the child welfare bureaucracy.

Among these discriminatory laws are religious exemptions from parental duties of medical care. These exemptions are found in the child abuse and neglect laws of 43 states and in the criminal codes of 20 states.

Forty-eight states have religious exemptions from immunization laws, despite the increased risks and costs to the public. There have, for example, been four large-scale measles outbreaks at Christian Science schools in the St. Louis area during the past nine years. The first took the lives of three young people. The fourth spread to the general population, became the largest measles outbreak in the country during the past two years, and cost St. Louis County $100,000.

The Centers for Disease Control and Prevention reported that over 50% of the measles cases reported to it between January 1 and May 21, 1994, were among two groups of persons claiming a religious or philosophical objection to immunizations (King, 1994).

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The majority of states have religious exemptions from metabolic testing of newborns. Some states have religious exemptions from prophylactic eyedrops for newborns; some even offer religious exemptions from tuberculosis testing of public school teachers.

No court has ruled that these religious exemptions are mandated by the Constitution. In 1903, the conviction of a parent who withheld lifesaving medical care on religious grounds was upheld by the highest court of New York in *People v. Pierson*. In 1944, the U.S. Supreme Court ruled in *Prince v Massachusetts* that "the right to practice religion freely does not include liberty to expose the community or child to communicable disease, or the latter to ill health or death." Twice in recent years the U.S. Supreme Court has declined to review convictions of parents who withheld lifesaving medical care from their children on religious grounds (Commonwealth v. Barnhart, 1985).

Nevertheless, policy makers have given what courts and case law do not give. In 1974, at the urging of the Christian Science Church, the U. S. Department of Health, Education, and Welfare (HEW) placed the following regulation under federal mandate:

> A parent or guardian legitimately practicing religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian; however, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it (Code of Federal Regulations, 1974).

All states had to enact a religious exemption from child abuse and neglect charges in order to receive federal money for abuse and neglect prevention and treatment programs.

Arriving at the same time as a revitalization in charismatic faiths, the religious exemption laws have contributed to many preventable deaths of children. Parents and public officials have assumed that parents had the right to withhold medical care on religious grounds.

In 1983, the U.S. Department of Health and Human Services (HHS) required that states add failure to provide medical care to their definitions of child neglect and removed the religious exemption from federal mandate (Code of Federal Regulations, 1983). By then, however, virtually every state had passed a religious exemption to child abuse and neglect charges.

Since 1987, HHS has required about a dozen states to make changes in their religious exemption laws. The HHS viewpoint is that states can have a religious exemption from adjudicating the parent as negligent, but cannot have an exemption from finding the child to be neglected. Furthermore, the statutes must not have even an implicit exemption from reporting, investigation, or court ordering of medical treatment for a child in need (Moman, 1987).

Many child advocates find this posture confusing. If a child is neglected, someone is neglecting the child. A religious exemption from a negligence charge indicates to a mandatory reporter that parents have the right to withhold medical care on religious grounds and there is no abuse or neglect to report. Such a law creates an implicit exemption from a duty to report.

Even if a reporting requirement clearly applied to children deprived of medical care on religious grounds, many would still consider religious exemptions offensive. Parents have custody of children and therefore should have a legal duty to care for them. A law that exempts one group of parents from the general duty to provide necessary medical care makes a group of children second-class citizens. These children have no right to medical care unless a report is made to protective services and even then the agency might not have a legal duty to provide it (DeShaney v Winnebago, 1989).

HHS's stated policy is, to say the least, conceptually awkward. Madeline Nesse, an attorney with the HHS Office of General Counsel, has testified to the U.S. Advisory Board on Child

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Abuse and Neglect that the Child Abuse Prevention and Treatment Act (CAPTA) requires that children be provided with medical care in situations of harm or threatened harm, but is "silent" on "the status of the parent" (U.S. Advisory Board on Child Abuse and Neglect, 1993). But how can a definition of child abuse and neglect be "silent" about parents? Our society cannot provide for children without asking their parents to assume some responsibility for them. Indeed, HHS itself does not allow exemptions from parental duties in any area but religiously based medical neglect. For example, HHS tells states that they cannot have religious exemptions from abuse unless the abuse exemption is clearly limited to medical neglect. Parents cannot beat or molest children in the name of religion, but they can withhold medical care on religious grounds. As an example, HHS wrote to the Mississippi Department of Human Services that "the state's definition of 'abused child,' in section 43-21-1-5(m) of the Mississippi Code, includes an exemption for religiously motivated conduct in the context of abuse, whereas federal standards allow for such a provision only in the context of medical neglect" (Horn, 1993).

Not only is there no constitutional mandate for the exemptions, they may also be themselves unconstitutional. Several courts have ruled that a religious exemption for one type of religion offends the Establishment Clause.

Even the modest improvements in the religious exemption laws that HHS has called for in recent years have been met with strong protest. Rather than making any effort to obtain statutory changes requested by HHS, the California Department of Social Services filed suit against HHS for injunctive relief (People v. Shalala, 1993).

On June 29, 1994, the U.S. House passed an HHS appropriations bill with the following section promoted by the Christian Science church:

> None of the funds made available by this Act may be used to require States as a condition of receiving funding under the Child Abuse Prevention and Treatment Act to restrict, condition, or otherwise qualify a State's authority to determine (i) whether and under what circumstances a parent's decision to provide non-medical health care for a child may constitute negligent treatment or maltreatment, and (ii) the circumstances under which it is appropriate to order medical treatment for a child who is receiving non-medical health care (Congress HR4606).

Thus, the House bill broadens the exemption to include anything that a parent or lawyer wishes to characterize as "non-medical health care" for all diseases of children. The bill prevents the federal government from requiring medical care of children, even through court order. Although the religious exemptions were imposed on the states by the federal government to the detriment of a certain class of children, the House bill prohibits the federal government from taking any action to protect these children. The U.S. Senate dropped the section, but imposed a moratorium on HHS policy pending congressional hearings on the reauthorization of CAPTA in 1995.

The reach of religious exemption laws varies widely from state to state. Between 1974 and 1982 no charges were filed involving religiously based medical neglect of children, in part because some public officials believed the exemptions prohibited prosecution. From 1982 to 1993, however, criminal charges were filed in 42 such cases. To date, convictions have been won in 32 of these cases, with eight upheld on appeal and four overturned on appeal. Among the remaining ten cases, there have been six acquittals and three dismissals of charges, while one case awaits trial. All of the dismissals, three of the appellate overturns, and some of the acquittals were due to religious exemption laws.

Some state courts have ruled that the religious exemptions did not obviate the parents' duty to care for their children by reasonable community standards because the exemptions were not in the criminal code or were not exemptions to the crimes charged (Walker v. Superior Court, 1988). Other courts have ruled that the exemptions violate the fair notice rights of the parents (Hermanson v. State, 1992). Only two states, Iowa and Ohio, have a religious defense to manslaughter, but exemptions in other states have, nevertheless, been held to violate fair notice rights of parents when children die because of religiously-based medical neglect (State v. McKown, 1991).

CHILD Inc., a private organization headquartered in Sioux City, Iowa, has 166 cases in its files of children who died since January, 1975, after medical care was withheld on religious grounds. These include 27 stillbirths in sects that avoid prenatal care and medical attendance at childbirth. Some of the deaths might not have been preventable with appropriate medical care, but many of the children died of diseases that physicians have treated successfully for generations. The actual number of deaths since the federal government began requiring religious exemptions may be much higher.

Beyond the unknown numbers are the grisly facts of how these children die. Ashley King, age 12, died of bone cancer in Phoenix in 1988. She was out of public school for seven months. School officials knew she was sick and knew the family were Christian Scientists, but let them set up a home study program for her. Finally, neighbors alerted child protective services. The agency obtained a medical examination by court order. A tumor on Ashley's leg had grown to about 41 inches in circumference. Her skin was stretched so thin around the tumor that she bled almost from

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being touched. Her genitalia were partially rotted away from lying in her own excrement. Because the disease was by then terminal, the state allowed her to be placed in a Christian Science sanitarium staffed by unlicensed providers. She received no sedatives and died three weeks after her arrival (People v. King, 1988).

Sometimes the intervention process breaks down after the case is reported to protective services. In 1991, a principal in Olathe, Colorado, promptly reported when seven-year-old Angela Sweet, whose parents belonged to a Pentecostal faith-healing sect, stayed home sick from school. Her appendix ruptured and peritonitis set in. A protective services worker visited the emaciated child at home three times during her six-week illness, but did not seek a court order because of his understanding of Colorado's religious exemption statute. She died without medical care (People v. Sweet, 1991)

The religious exemption laws are an injustice both to parents and children. Parents do not comprehend the risk they are taking with their child's life when they believe that the state has endorsed their behavior. The Christian Science church, in particular, tells parents that legislatures gave them the exemptions because Christian Science heals all disease just as effectively as medical care (Christian Science Board of Directors, 1959).

The religious exemption laws are an injustice both to parents and children. Parents do not comprehend the risk they are taking with their child's life when they believe that the state has endorsed their behavior.

Not only is there no constitutional mandate for the exemptions, they may also be themselves unconstitutional. Several courts have ruled that a religious exemption for one type of religion offends the Establishment Clause (Dalli v. Board of Education, 1971). Four state courts have ruled religious exemptions from parental duties of care unconstitutional on Fourteenth Amendment grounds because they deny one class of children "the equal protection of the laws" (Brown v. State, 1979). Only one of the four rulings was at an appellate level.

Despite the deaths and suffering of children, the misleading messages to parents, the confusion among public officials, and the lack of constitutional foundation for the exemptions, many policy makers support them. Having one group of children designated in law as second-class citizens does not offend them. Some rationalize that it is a "price we pay for religious freedom" and conveniently overlook the fact that it is children who pay the price. Some argue that the state will still be able to intervene and provide the care that the parents have no legal obligation to provide, but do not explain how the state will become aware of the needs of these children in a timely manner.

Legislatures would not enact a religious defense to manslaughter that allowed others to recklessly cause the deaths of adults. But some allow it when children die painful and preventable deaths. Resistance to repealing religious exemptions is strong; eight years of child advocacy work in Ohio and Iowa failed to get such defenses repealed.

Our society needs more respect for the awesome responsibilities of parenthood. Children cannot assert their own civil rights. Parents have custody of children up to 24 hours a day. They must, therefore, have a legal duty to care for them. This simple truth—what the Pierson Court called a "law of nature" in 1903—should not be so difficult for policy makers to understand.

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