1954

Criminal Liability in Faith Healing

C.C. Cawley

CRIMINAL LIABILITY IN FAITH HEALING

C. C. CAWLEY*

"The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

— Rutledge, J., in *Prince v. Massachusetts*[1]

I. INTRODUCTION

Some chronicled demonstrations of the Divinity's existence and power — e.g.: the Lord's changing Moses' rod into a serpent and back again, and turning his hand "leprous as snow," then whole again[2] — aim to bolster one's faith by no more than causing wonder. Others, besides being "wonders," also result in some immediate, personal benefit. Only such, strictly, are to be called "miracles."[3] Thus, with his shipload of disciples imperiled, Jesus in stilling the wind and waves performed a miracle.[4] Again, we distinguish between miracles which do not involve healing, and those that do. The healing miracles, in which disease is cured by faith and prayer, we call "faith healing." Faith healers are those who undertake to treat diseases by prayer and the exercise of faith.

Most Protestants and Catholics subscribe to the sound notion that "the Lord helps those who help themselves," and against their illnesses apply the same vigor and means by which they win for themselves food, clothing and shelter. From none of these tasks do they ask or expect to be relieved. Today, then, most people have their diseases treated by medical doctors; but the more serious a man's illness, the more likely it is that he and his friends will at the same time pray for his recovery. Thus, most religious people today might be called at least "part time" faith healers. With such people the law has no quarrel, and this study no concern. Certain sects, however, undertake to treat disease *solely* by prayer. These deny to themselves, and attempt to deny to their children, all the aids of modern medical science. In popular usage the term *faith healer,* and along with it, all too often, the headline expression, *faith death,* have come to refer only to members of such sects.

---

*Author of *Fool's Haven,* a novel reviewed in 38 Minn. L. Rev. 87 (1953).

1. Prince v. Massachusetts, 321 U. S. 158, 167 (1944).
2. Exodus 4:1-7.
3. This is the distinction made by the Encyclopaedia of Religion and Ethics (1928), Vol. VIII, p. 676, at "Miracles."
4. Matthew 8:26.

In any attempt to analyze the principles of law applicable to faith healers, one finds himself forced at the same time to consider sects — in particular the Jehovah's Witnesses, who are not at all a faith-healing sect — which deny themselves medical aid on grounds other than faith healing. For the faith healers' troubles arise not in their attempt to heal by faith and prayer, but over the corollary to that attempt — denial, at the same time, of medical aid; it is over this deadly corollary that society is moved to intervene. And today, by their spectacular attempts to deny blood transfusions to their children, the Jehovah's Witnesses are hastening acceptance of a swift, equity-type process, firmly grounded in the principle of *parens patriae,* whereby the court looks askance at the parent's claim to constitution-guaranteed religious freedom and resolutely steps in to save the child's life.

There remains the question of the Christian Scientists, who would tell us that disease — at least for those in the "know" — is but an illusion, but notwithstanding objections to the contrary, this sect is properly included in the camp of the faith healers. And as a practical matter, society is presented with the same tragic package of medical, legal and public health problems by the "true" faith-healing sects, the Jehovah's Witnesses and the Christian Scientists. This study examines the original situation which forced the federal courts to qualify the First Amendment's broad wording as to religious freedom. It traces the development and establishment, some fifty-odd years ago, of parent liability in instances where, because of religious belief, a child is harmed or dies through denial of medical care. It then describes the heartening exercise, during the last few years, of the *"parens patriae"* doctrine whereby the courts, no longer resigned to punishing the parent after the child is dead, instead take swift steps to keep the child alive. And finally, it considers the faith healer's right to practice, the adult's right to submit, and the touchy question of pastor liability as accessory to the parent's criminal act.

II. The First Amendment

Suppose that, in a certain state, a new sect arises, one divinely dedicated to hacking off non-members' heads. The state, with no statute against this unlikely practice, hastily enacts one. The sect members, however, continue to hack, and when the state remonstrates, they are indignant — for their practice is commanded by God, and therefore above earthly laws. Furthermore, the statute is unconstitutional, because it prohibits the free exercise of religion.

And they invite their would-be prosecutors to re-read the First Amendment to the Constitution of the United States: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."* If the example is too ridiculous, let us only change the state to a remote new territory, and the head-hacking to polygamy. The problem now is hardly hypothetical. Our grandfathers faced it. And in their solution, the above clause of the First Amendment came in for considerable re-assessment.

In 1847, the first of many well-organized Mormon caravans reached the Salt Lake region. In this remote Mexican province, unharassed by hostile "gentiles" and their profane state laws, the Latter-Day Saints aimed to set up a divine, priest-ruled church-state. But when, only a year later, the war with Mexico ended and the territory was ceded to the United States, their hopes of self-government went glimmering. In 1849, in a desperate effort to avoid territorial rule, Brigham Young set up the provisional "State of Deseret," which thereupon petitioned Congress for admission to the Union. But Congress, already legislating a territorial government, ignored the application.[5] In 1850, President Fillmore appointed Brigham Young territorial governor. In 1851, Utah's Mormon-dominated legislature confirmed Deseret's charter of the religious "Corporation of the Church of Jesus Christ of Latter-Day Saints" — Brigham Young, President. The following year, the Church officially proclaimed the doctrine of "plural marriage" as a right and duty. In 1862, Lincoln signed the Morrill Bill, "An Act to punish[6] and prevent the Practice of Polygamy in the Territories of the United States. . . ." Also provided: that no territorial religious corporation should acquire over $50,000 in real-estate holdings.

By 1867, not a single case had been tried under this law. By 1869, when, through Mormon pressure, the proposed anti-polygamy Cullom Bill failed of passage, the country was aroused. That year, President Grant appointed a governor and judges who dared to assert federal authority. These judges at once ruled that the United States—not the territorial—marshal should impanel federal court juries and that the U.S. attorney-general should prosecute federal court indictments. In 1871, under a territorial adultery statute,

5. One reason: a petition by the citizens of Lee County, Illinois, charging Deseret's organizers with treason, murder, robbery, the desire for kingly government, levying duties, and polygamy. See Linn, William A., The Story of the Mormons (1902).

6. Five hundred dollar fine and five years' imprisonment.

Brigham Young and others were indicted by a U.S. marshal-picked grand jury for lewdness and improper cohabitation. But in 1872, the United States Supreme Court reversed the judges' ruling. Young was released, and the Utah federal courts were left practically powerless. President Grant accordingly urged Congress to act, and, in 1874, against desperate Mormon pressure, the Poland Bill was passed. This removed all civil, chancery and criminal jurisdiction from Utah's probate courts, restored the U.S. marshal's and attorney's powers, and allowed the challenge of a juror for polygamous practice or belief. The stage was now set for a test case. That year, Brigham Young's private secretary, George Reynolds, was indicted for bigamy and convicted, but on appeal was freed because the grand jury had been illegally drawn. In 1875, Reynolds again was convicted, and in 1878, the Supreme Court sustained this conviction, holding that religious belief could not justify an act made criminal by law.[7]

During the four-year-long progress of the Reynolds case, no other attempt had been made to enforce the law; in 1878, a women's mass-meeting in Salt Lake City petitioned Congress to stop the growing evil, setting forth that during the previous year there had been more polygamous marriages than ever before. Presidents Hayes, Garfield, and Arthur all urged Congress, in the light of the Reynolds decision, to effectively implement enforcement. The Edmunds Act, passed in 1882, forbade polygamists to vote or hold office. Vigorous crusades against polygamy now began in Utah, Idaho and Arizona. There were three polygamy convictions in Utah in 1884, and 39 in 1885. But that year, the church's officers openly urged opposition to the new laws, reiterating that "celestial marriage" was divinely revealed and obligatory. Church leaders who accepted imprisonment were honored as heroes; others went into hiding or exile.

In 1886 there were 112 polygamy convictions. By then, about one marriageable Mormon in five was partner to a polygamous marriage, teachers and preachers were continuing to urge the practice, and the Church was doing nothing to stop them. By then, too, the church corporation, in violation of the 1862 act, had acquired some $2,000,000 in real estate. Accordingly, in 1887, Congress enacted the Edmunds-Tucker Act, dissolving the church corporation and directing legal proceedings for seizing its property and winding up its affairs. On September 30, 1887[8] the U.S. Attorney General

7. Reynolds v. United States, 98 U. S. 145 (1879).

8. Brigham Young had died a month earlier, on August 29, leaving 17 widows and 47 children.

filed a bill in the Territorial Supreme Court, in the name of the United States, against "the late corporation known and claiming to exist as the 'Corporation of the Church of Jesus Christ of Latter-Day Saints.' "[9]

This case went to the United States Supreme Court. While it was pending, the Idaho case of *Davis v. Beason*[10] posed a second grave threat to Utah's Mormons. An Idaho statute required of a prospective voter or office holder his oath that he was neither a polygamist nor a member of an order which taught, advised, counselled or encouraged the crime. This in effect barred even non-polygamist members of the Church from voting or holding office in Idaho. In 1889, one Davis and others, though church members, took this oath. They were indicted for conspiracy to pervert administration of the Territory's laws, and convicted. Davis obtained a writ of habeas corpus, contending that the facts in the indictment did not constitute an offense, since the statute was contrary to the First Amendment and therefore void. On appeal, on February 3, 1890, the Supreme Court held the statute constitutional. This decision inspired the governor of Utah to draft a similar bill for Utah. And with this bill—which would disfranchise and put out of office *all* Utah Mormons—under consideration in Congress, the Supreme Court, that May, affirmed the confiscation of the Mormon Church's property.

To church president Wilford Woodruff the price of polygamous belief finally appeared too high. He issued a manifesto announcing his intention to submit to the laws of the land in regard to plural marriage and advising all other Latter-Day Saints to do the same. He proclaimed: "We are not preaching polygamy, nor permitting any person to enter into its practice." A general readjustment followed. In 1896, Utah was admitted to the Union, its constitution declaring polygamous or plural marriage forever prohibited. Presidential pardon, on condition of future obedience to the law, was proclaimed for all polygamists, and Congress restored the escheated property to the church.

Faith-healing defendants invariably have raised the issue of constitutional religious freedom. And as invariably, the prosecution has cited the *Reynolds* case, and often the *Late Corporation* and *Davis v. Beason* cases as well. George Reynolds' defense was that the practice of polygamy was an accepted doctrine of his church,

9. Late Corporation of The Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1 (1890).

10. 133 U. S. 333 (1890).

and that the Morrill Act of 1862, since it presumed to prohibit the free exercise of his religion, was contrary to the First Amendment, and therefore invalid. The questions facing the Supreme Court were thus: 1) was the Act valid? and, 2) even if valid as to others, must those practicing polygamy as a religious belief be excepted? The Court, conceding that the First Amendment did not define the word "religion," examined its framers' earlier statements, and found therein the idea of allowing liberty of conscience but certainly no inclination to tolerate acts of licentiousness or acts against the peace and public safety. This also was the interpretation already expressed in thirteen state constitutions. The Court's conclusion: the First Amendment deprived Congress of all legislative power over mere opinion, but left Congress free to reach actions in violation of social duties or subversive of good order. Then, was polygamy licentious? The Court found the practice limited to Asiatic and African peoples, while odious in northern and western Europe. England from earliest times had treated it as an offense against society. In 1788, Virginia had made it punishable by death, and at that time it also was an offense in all other states. The Court therefore found polygamy licentious, and the statute valid:

> "This being so, the only question which remains is whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriage shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[11]

11. Reynolds v. United States, 98 U. S. 145 (1879).

III. Parent Liability

One hardly would question (although in Part VI I shall explore the possibility) that the faith-healing adult, *sui juris,* is free to submit himself at his own risk to any mode of ministration he chooses. But in its concern for children's welfare, the state has come to assert its right to interfere to a considerable extent with the rights of parenthood and of religion. In England, at common law, it was a misdemeanor for a parent to neglect to furnish his child necessary meat, drink, lodging, clothing or 'physic.' And if the parent's neglect caused his child's death, the parent was liable for involuntary manslaughter—under the common law formula, now incorporated into most modern statutes, that misdemeanor plus homicide equals manslaughter. But where a parent, acting in all good faith and doing the best he could according to his lights, resorted to faith and prayer instead of a medical practitioner to heal his sick child, his so omitting to provide 'physic' could hardly be held to contain a criminal intent, and neither was his omission considered negligence so gross and wanton as to be criminal. Thus, "under the common law no conviction of manslaughter predicated upon an omission to provide medical attendance upon conscientious motives has been reported, and none can probably be had or sustained."[12]

This was the status of the law in England in January of 1868, when, at the Wagstaffe trial, an attempt was made to convict a parent after his child, denied medical aid, died. Judge Willes instructed the jury, in effect: "If you find that the parent's refusal to call medical assistance was due to religious conviction that God will heal the sick, and not from the intention to avoid the duties due from a parent to a child, you may find the prisoner not guilty." The jury's verdict: not guilty.[13]

The result in this case finally impressed upon the legislature that infants were not adequately protected under circumstances such as these: In July of that same year, when the Poor Law Amendment Act was passed, section 37 made it a misdemeanor for a parent wilfully to neglect to provide necessary medical aid for his child. This Act was replaced by another in 1889, and by a third in 1894, the Prevention of Cruelty to Children Act. Section 1 of this Act provided: "If any person . . . who has the custody, charge, or care of any child . . . wilfully . . . neglects . . . such child . . . in a manner likely to cause such child . . . injury to its health . . . that person shall be guilty of a misdemeanor." Here the words, "medical aid," did not appear. Were they to be implied, and, if so, could a parent's reli-

12. 21 Am. & Eng. Enc. Law 199.
13. Reg. v. Wagstaffe, 10 Cox C. C. 530 (1868).

gious belief still justify his refusal to provide such medical aid? Lord Russell answered these questions in 1899, in the case of *Regina v. Senior,* which remains today the leading English decision on this point.

Senior was a member of the "Peculiar People," a faith-healing sect. When his 9-month-old infant contracted diarrhea and pneumonia, Senior called in the elders to pray and anoint the child with oil, and—though seven of his twelve children already had died under similar circumstances—refused to call in medical aid. The child died, and Senior was indicted for manslaughter under the Act. The trial judge directed the jury that, 1) they must, first of all, be satisfied that the death of the child had been caused or accelerated by the want of medical assistance, 2) that medical aid and medicine were such essential things for the child, and that reasonable care from the parents in general would have provided them, 3) that the prisoner's means would have enabled him to do so without an expenditure such as could not be reasonably expected from him, and 4) if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind. On this instruction, the jury convicted Senior. On appeal, Lord Russell, Ch. J., held the trial judge's instruction to be substantially correct, saying:

> "In the act now in force the expression 'medical aid' does not occur, and it becomes necessary to consider whether the omission of those words makes any difference with regard to the present case. It would be an odd result if we were obliged to come to the conclusion that, in dealing with such a subject as the protection of children, the legislature had meant to take what may be described as a retrograde step; for the course of legislation, and the provisions of the Act of 1894, show an increased anxiety on the part of the legislature to provide for the protection of infants. . . .
>
> "Whether the words in the statute, 'wilfully neglects,' are taken together, or, as the learned judge did in directing the jury, are taken separately, the meaning is very clear. 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. 'Neglect' is the want of reasonable care; that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind, that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing up that the standard of neglect varied as time went on, and that many

things might be legitimately looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. . . .

"At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect."[14]

Similar child protection statutes have been enacted in Canada and in all U.S. jurisdictions, and religious belief is uniformly denied as a defense. That Christian Science treatment is not a legal substitute for medical attendance was established in 1903 in the Canadian case of *Rex v. Lewis*.[15] Lewis, a Christian Scientist, was convicted of manslaughter under Section 210 (now 241) of the Criminal Code, after his six-year-old son, treated only by a "demonstrator," died of diphtheria. The court construed "necessaries of life" in this section to include medical aid, assistance, care, and treatment, in cases where ordinarily prudent persons would obtain them; and held that Christian Science treatment was not a lawful substitute for medical care, and that a belief in Christian Science was not a lawful excuse for omitting to provide medical aid. Said Moss, Ch. J. O.:

"I entirely agree . . . that, while the merits or demerits of the Christian Science or faith are things with which we have nothing to do as long as it does not transgress or lead to a transgression of the law, the law of the land is paramount, and it is not for people to set themselves up in opposition to it; that the law of the land must be obeyed, and it must be obeyed even though there be something in the shape of belief in the conscience of the person which would lead him to obey what in his state of mind he may consider a higher power or higher authority. And especially must there be obedience where, as in this instance, the subject of the judgment to be exercised is a child of tender years, unable to exercise any judgment of his own. In one form or another it has been frequently said by able judges, and it cannot be too widely known or too often repeated, that where an offense consists of a positive act, which is knowingly done, the offender cannot escape punishment because he holds a belief which impels him to think that the law which he has broken ought not to exist, or ought never to have been made."

In January of 1901, in Valhalla, New York, the 16-month-old adopted daughter of J. Luther Pierson contracted whooping cough. This condition continued until February 20, when pneumonia developed. Though dangerous symptoms were evident for 48 hours prior to the child's death—of "catarrhal pneumonia"—Pierson re-

14. Reg. v. Senior, 1 Q. B. Div. 283, 19 Cox C. C. 219 (1899).
15. 6 Ont. L. Rep. 132, 1 B. R. C. 732 (1903).

fused to call in a physician. He was indicted for misdemeanor for violating Section 288 of the New York Penal Code, which provided that a person who wilfully omitted, without lawful excuse, to furnish medical attendance to a minor was guilty of a misdemeanor. Pierson testified that he belonged to the faith-healing Christian Catholic Church of Chicago, and that he believed in divine healing which could be accomplished by prayer; that he did not believe in physicians, and that his religious faith led him to believe that the child would get well by means of prayer. The highest court, in sustaining Pierson's conviction, ruled out his excuse or justification for violating the statute. It defined "proper medical attendance" as that of a licensed physician, and held the statute not to violate Pierson's constitutional right to freedom of religious profession and worship.[16]

Rubenstein[17] lists the above three cases, *Senior* (1899), *Lewis* (1903), and *Pierson* (1903), as the leading English, Canadian and United States decisions, respectively, on the question of parent liability in faith deaths. Later cases (there are many) only define more sharply the criteria for liability set forth in *Regina v. Senior*. Since the turn of the century, then, it has been well established that a parent commits a misdemeanor when, due to religious belief, he denies his sick child the medical aid required by statute, and that, if the child consequently dies, the parent is liable for manslaughter. But what does society gain by so punishing the parent after his child is dead? Even the stern God of Israel, testing Abraham's faith, stopped him from sacrificing his son Isaac.[18] Must we, in our day, helplessly look on while a fanatical parent completes the sacrifice of his innocent child upon the altar of his religion? In recent years the states of Texas, Illinois, Missouri and New York have come to think otherwise.

IV. Parens Patriae[19]

Patricia Hudson was born in 1930 with a left arm nearly as big as the rest of her body. This monstrous arm, ten times normal size, and useless, continued to grow with her at the same rate. When she was about nine, she was taken to an orthopedic hospital in Seattle, Washington, where amputation was advised. But her father, an in-

16. People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903).
17. Rubenstein, *Criminal Aspects of Faith Healing,* New England Journal of Medicine, Feb. 6, 1941.
18. Genesis 22:12.
19. The writer is grateful to the editors of The New England Journal of Medicine, where it first appeared, for permission to re-use the present account of *Parens Patriae.*

valid, "bowed to the will of his wife," and she, because of the risk, chose to do nothing. Patricia was kept out of school, where the other children had jeered at her. She often cried, saying that the arm was "an awful load" and that she wished it were off. At 11, she was frail and weak, her chest and spine were becoming deformed from carrying the weight, and in nourishing the arm her heart was seriously overworked, leaving her highly vulnerable to such infections as pneumonia. The mother never had obtained any medical or surgical treatment for her, though for four years she employed a "Divine Healer" who undertook to cure the deformity by prayer —with obvious unsuccess. In January of 1942, on an adult sister's complaint, the mother consented to another examination in Seattle. There, two surgeons said that amputation, though involving a fair degree of risk of life, was imperative. When the parents refused either to provide or allow it, the juvenile court's chief probation officer petitioned for a hearing. On the above facts, the court found Patricia destitute of proper medical or surgical care and therefore under the dependency statute, and ordered amputation. But the Supreme Court of Washington reversed judgment, on the theory that the State had no power to order medical treatment for an infant against the wishes of its parents.[20]

In Texas, in August, 1946, Leroy Mitchell grew ill: his right knee swelled, his face turned pale, and he had to get about on crutches. Some days he was too weak to get out of bed. But his widowed mother, who believed in "Divine Healing," refused to consult a doctor. His condition had not improved, when, in February, 1947, the Chief Probation Officer filed suit as "next friend"; Mrs. Mitchell then called in a doctor who advised that Leroy probably was suffering from arthritis or complications following rheumatic fever, and advised her to secure the services of an orthopedist. She refused, and instead took the boy first to a chiropractor and then to an osteopath, both of whom failed to recommend a cure. On these facts, Leroy, then 12, was found to be a neglected child and was ordered placed in the custody of the Chief Juvenile Officer so that he might receive proper medical care. On appeal, affirming judgment, the mother's religious belief was held no defense.[21]

Cheryl Linn Labrenz was born in Bethany Hospital, Chicago, on April 11, 1951, with an RH blood condition which threatened her life. But her mother, 20-year-old Rhoda Labrenz, a Jehovah's Witness, refused to consent to a blood transfusion: "We feel that

20. *In re* Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942).
21. Mitchell v. Davis, 205 S. W. 2d 812 (Tex. Civ. App. 1947).

we would be breaking God's commandment, also destroying the baby's life for the future, not only this life, in case the baby should die and breaks the commandment, not only destroys [*sic*] our chances but also the baby's chances for future life. We feel it is more important than this life." Dr. Herman N. Bundesen, Health Commissioner, called in the child's father, Darrell, 25, and warned him of the seriousness of the child's plight and of the need for immediate action. "The sanctity of the blood is a thing we cannot tamper with," Darrell Labrenz replied. "Everybody knows that blood is the life force and we do not have control of life. Only Jehovah has that. Transfusion, which is a form of drinking or eating blood, is forbidden to us who are Jehovah's Witnesses."[22]

On Tuesday, April 17, a petition was filed in Family Court alleging the child to be dependent because she was without proper parental care and guardianship. Hearing was set for the following morning. At the opening of court, motions for a continuance and to dismiss as contrary to the Constitution were taken under advisement. A health department pediatrician gave his expert conclusion: "Without a transfusion, I will say absolutely, this child cannot live; or, if it should, could not live without permanent brain injury." Another expert testified that the child's blood count had dropped from the normal 5,000,000 at birth to 1,950,000. At the conclusion of the hearing, which took less than an hour, the motions under advisement were overruled. The Chief Probation Officer was appointed guardian, with the right to consent to necessary blood transfusions. An emergency ambulance was waiting at the courthouse. The transfusion apparatus already had been set up at Michael Reese Hospital. There, not a minute was wasted in giving baby Cheryl 60 ccs. of blood. Within three days, she was out of danger. On May 4, Cheryl was released from the hospital into the custody of her parents, with the provision that she was to be examined by a doctor every two weeks. On June 29, 1951, a final order released her from guardianship. Today, Cheryl Linn is healthy and leading a normal life with her parents.[23]

The case was brought to the Supreme Court of Illinois on a writ challenging the propriety of the lower court's action on constitutional grounds. Justice Schaefer, in affirming judgment, first ruled against the State's contention that the case was now moot and should be dismissed because the blood transfusion had been

22. "Flesh, with the life thereof, which is the blood thereof, shall ye not eat." Genesis 9:4.

23. According to advice received by the writer from an official source in April, 1954.

administered, the guardian discharged, and the proceedings dismissed:

> "We find that the present case falls within that highly sensitive area in which governmental action comes into contact with the religious beliefs of individual citizens. Both the construction of the statute under which the trial court acted and its validity are challenged. In situations like this one, public authorities must act promptly if their action is to be effective, and although the precise limits of authorized conduct cannot be fixed in advance, no greater uncertainty should exist than the nature of the problems makes inevitable. In addition, the very urgency which presses for prompt action by public officials makes it probable that any similar case arising in the future will likewise become moot by ordinary standards before it can be determined by this court."

Did the court below lack jurisdiction because the child was not a "neglected" or "dependent" child within the meaning of the statute?

> "So far as here pertinent, the statute defines a dependent or neglected child as one which 'has not proper parental care.' The record contains no suggestion of any improper conduct on the part of the parents except in their refusal to consent to a blood transfusion. And it is argued that this refusal on the part of the parents does not show neglect, or a lack of parental care. Neglect, however, is the failure to exercise the care that the circumstances justly demand. It embraces wilful as well as unintentional disregard of duty. . . . The question here is whether a child whose parents refuse to permit a blood transfusion, when lack of a transfusion means that the child will almost certainly die or at best will be mentally impaired for life, is a neglected child. In answering that question it is of no consequence that the parents have not failed in their duty in other respects. We entertain no doubt that this child, whose parents were deliberately depriving it of life or subjecting it to permanent mental impairment, was a neglected child within the meaning of the statute. The circuit court did not lack jurisdiction."

Were the parents merely exercising their right to avoid the risk of a proposed hazardous operation, a choice not indicative of a lack of proper parental care? To this proposition the court gave a short answer:

> "The facts here [as against those in the Patricia Hudson case] disclose no such perilous undertaking, but, on the contrary, an urgently needed transfusion—virtually certain of success, if given in time—with only such attendant risk as is inescapable in all the affairs of life."

Does the Juvenile Court Act as held to be applicable, deprive the parents of freedom of religion and of their rights as parents, in

violation of the Fourteenth Amendment to the Constitution of the United States and of Section 3 of Art. II of the Constitution of Illinois?

> "Because the governing principles are well settled, this argument requires no extensive discussion. Concededly, freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme. But neither rights of religion or rights of parenthood are beyond limitation [quoting *Prince* and *Reynolds,* and referring to *Jacobson v. Massachusetts*]."

Finally, did the trial court commit prejudicial error in excluding from evidence the religious magazine, *Awake*?

> "The contention is without merit. Except as it might bear upon the good faith of the parents' belief in the Scriptural prohibition against blood transfusion, it was inadmissible as hearsay. And since the sincerity of the parents' religious beliefs was not questioned, the exclusion of the magazine was not error."[24]

In Kansas City, Missouri, in 1952, baby Janet Lynn Morrison, the day after she was born, developed symptoms of erythroblastic anemia, with extreme jaundice and a perilously dropping blood count. There was no known remedy except blood transfusions, but to these her father, a Jehovah's Witness, refused to consent. A complaint accordingly was filed in Juvenile Court and the Labrenz-type of procedure afterwards followed, the State declaring the infant a neglected child and a ward of the court. There was no one-day delay as in Illinois; the cause was heard on the same day the complaint was filed. On appeal, affirming judgment, Commissioner Sperry said:

> "[T]he question presented is: Does the State have the power, under the above mentioned statute to take the custody of an infant child from its parents for the purpose of preserving its life? The question of the right of religious freedom of appellant is in no sense involved. This proceeding in no wise affects the right of appellant to believe, religiously, as he professes to believe, nor does it affect his right to practice his religious belief. It was not ordered that *he* eat blood, or that he cease to believe that the taking of blood, intravenously, is equivalent to the eating of blood. It is only ordered that he may not prevent *another* person, a citizen of our country, from receiving medical attention necessary to preserve her life.
>
> "The U. S. Supreme Court has held that the regulation, or suppression of religious *practices,* is not an invasion of religious belief and opinion [quoting *Reynolds* and *Prince*] . . . We be-

24. People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N. E. 2d 769 (1952); Time, April 30, 1951, p. 84. In October, 1952, the United States Supreme Court denied a writ of certiorari.

> lieve [referring to the Declaration of Independence] that every human being is endowed by God with the inalienable right to live. The fact that the subject is the infant child of a parent who, arbitrarily, puts his own theological belief higher than his duty to preserve the life of his child cannot prevail over the considered judgment of an entire people . . . The other rights, liberty and the pursuit of happiness, are of no benefit to a dead baby . . . Missouri has the power to interfere in the interests of one of its infant citizens, helpless in its own behalf, and to take such steps as may be necessary to preserve its life, over the protest of its father . . . society may punish a parent for dereliction in his duties; but society is not required to stand aside until the child is dead for want of care, but may take direct steps to preserve the life that the parents neglected to cherish."[25]

Thomas Grzyb, 20, and his wife Barbara, 18, lived with his parents in Cicero, a suburb of Chicago. All were Jehovah's Witnesses. Thomas and Barbara's first child, Thomas, Jr., was born on Wednesday, January 6, 1954, at St. Anthony's Hospital, with a very serious throat condition. When their physician told them the baby needed a blood transfusion, the parents refused to allow it. The following Tuesday, the boy was operated on for an abdominal obstruction, and afterwards was in a state of shock. Told their baby's life now depended on a transfusion, Thomas Grzyb said, "Our belief won't allow it. It's better to have a dead baby without the blood than a living baby with the transfusion." Desperate, the doctor and hospital officials appealed to Dr. Bundesen. He petitioned Chicago's Family Court to declare the Grzybs unfit parents and to make the infant a court ward. Wednesday morning the Grzybs were summoned to Family Court and urged, because of the baby's critical condition, to waive their right to delay the hearing one day. They refused. "If the baby dies," Barbara Grzyb said, "that is God's will. I have no fear. The blood won't make any difference. I am not going to hand him over to the court until I have to. The judge doesn't care what's in the Bible." Hearing was set for the earliest allowable time: the following morning, Thursday, at 9:30. At St. Anthony's, Wednesday afternoon, the doctor told reporters, "the baby is getting weaker by the minute. The best we are doing now is with transfusions of glucose." He stayed there into the night, hoping the parents would come or telephone. They never did. And just after midnight, at 12:30 a.m. Thursday morning, 8-day-old Thomas Junior died. At their home, early that morning, while Barbara repeated, "My baby, my baby!" and sobbed hysterically, Thomas Grzyb told reporters, "We want more children. But

25. Morrison v. State, 252 S. W. 2d 97 (Mo. App. 1952).

if such a thing happens again, and if I am called a murderer, that is God's will. I am sorry the child died. But if it is God's will that a life be taken, it must be taken." Later, at 9:30, at the now meaningless hearing, they stood dry-eyed and silent while an angry judge censured them. "You held everybody else from helping the child," he said, "—while its life was ebbing away."[26]

In January of 1954, in Children's Court, Erie County, New York, an order was sought to have performed—against the wishes of one Seiferth, the father—corrective surgery on a twelve-year-old boy who was severely afflicted with a congenital harelip and cleft palate. This gave him a "hideous" appearance and caused a marked speech defect, and the child was sensitive to his condition. The father's objections to court intervention: 1) the child's life or health was not in immediate danger, 2) the father objected on "religious" grounds to surgery, 3) the claimed benefits would be defeated by the child's fears of doctors, originating in the "religious" beliefs passed on to him by the father, and, 4) when old enough, the child could decide for himself. Ruled Judge Wylegala:

> [As to objection 1] "The effects of emotional and psychological factors during the childhood, adolescence and later formative years of a person are too well known to modern medical and social sciences to require discussion here. The law also is well established that the court has power to interfere not only in matters involving life, health and physical welfare, but also psychological well-being of children . . ." [As to objection 2] "The father's objections are based on a personal philosophy—not a religion—shared with him by a group of ten or fifteen friends . . . These people . . . believe there are "forces in the universe" which when available to a properly conditioned subject can cure him of disease, including the child's cleft palate and harelip. No evidence was offered that a cleft palate or harelip was ever cured by these forces. . . .
>
> "Objections 3 and 4 will be answered together . . . The child's handicap is of such nature as to unnecessarily seriously affect his future welfare. It can be improved to materially benefit him, with reasonable safety and certainty. It should still be ordered done in spite of the father's objections. But we are now dealing with a child over 12 years of age, of normal intelligence, who has been "conditioned" against the physicians tampering in any way with the human body . . . To arbitrarily force this child to submit to surgery, which he has been "conditioned" to fear, might do more harm than good. Fortunately the beliefs held by the father and passed on to the child are not "religious" and have nothing to do with moral right or wrong. It should, therefore, not strain the child's conscience, to set him

26. Chicago, Ill., all papers, Jan. 14, 15, 1954.

right about medical and scientific facts and progress. It is the studied conviction of this court . . . that the child should be given the opportunity of making his own decision. . . .

"It is, therefore, the judgment of this court that the father be restrained from in any way interfering with discussions between the child and such reasonable number of persons as this court may designate directed at acquainting the child with the benefits accruing to him from promptly submitting to the recommended operations. And it is the further judgment that just as soon as practicable after the child consents to submit to the operations and therapy, the same be done at the expense of the father, or in the event that all of such expense cannot be paid by the father, that prompt application be made to this court for financial assistance under the law governing such cases."[27]

V. The Right to Practice

Susie Jessel at 16 saw Jesus standing on a cloud. He told her: "Go and heal the sick." For 23 years, in Ashland, Oregon, she has prayed and passed her hands over the sick and crippled. She begins her 14-hour healing sessions with these words: "I dedicate my hands to the Lord . . . The Lord give me the gift, and He did not give it in vain. If He chooses at times to make it so that they don't heal, we must remember that we cannot be a winner all the time." The patient, sitting on a stool, slips into one of Susie's prominent apron pockets a $1 bill, a "voluntary contribution." Her average night's take: $500. Oregon's medical practice act, like that of most, if not all, other states, has a clause which excepts from the licensing requirements those persons who endeavor to treat human ailments by prayer or spiritual means exclusively. Faith-healer Jessel, with no medical training, is therefore within her legal rights. Susie's thousands of hopeful patients come from as far away as Texas and Canada to spend their money in Ashland's booming motels, stores and restaurants. "She's the biggest business in town for everybody," said an enthusiastic local undertaker, who last year buried 18 of Susie's patients.[28]

In December, 1953, "Rev." Martis C. Scalf, 45, evangelist and member of the Elijah Ministry, was under investigation by the State Health Department of Iowa, to determine whether he was violating the medical practice act. Scalf denied being a faith healer: "I have no power at all, personally. I do no diagnosing. Give the Holy Spirit the credit." Scalf usually met with groups in farm houses. When he prayed, the Holy Spirit told him what was wrong

27. *In re* Seiferth, 127 N. Y. S. 2d 63 (Childrens Ct. 1954). See Recent Case comment, *infra*, p. 318.

28. Time, Sept. 7, 1953.

with a person, and he then relayed the information—usually that the person had something serious, like heart disease or tuberculosis. He had told 600 people they had polio, and a much larger number they had cancer. He never asked for money; "free will" offerings supplied his needs. One farmer with a persistent cough, told by Scalf that he had cancer of the lungs, rushed to a hospital for X-rays, where doctors afterwards assured him that his lungs were perfect. Scalf maintained that, 1) at the time of his diagnosis, the farmer did indeed have cancer, but that, 2) in the interval between diagnosis and hospital, Scalf's prayers healed him.[29]

The many present-day cases of prosecutions of professed religious ministers under medical practice acts all agree in holding that where religion and medicine are practiced together, the constitutional right to the practice of religion does not justify the concurrent illegal practice of medicine. Among those whose ministrations overstepped the statutory bounds of medical practice, and who were convicted of practicing medicine without a license: one Smith (Colo., 1911), self-titled "Healer", who claimed to be a member of "The Divine Scientific Healing Mission," a corporate body, and maintained an office where he practiced healing "by the laying on of hands";[30] one Vogelgesang (N.Y., 1917), who claimed to be an ordained spiritualist healer and had an office where he dispensed ointments, patent medicines and "silent prayer" (said Judge Cardozo, "The meaning of the act is made plain . . . Immunity is granted to those who practice their religious tenets, but always in such a form as to confine the exemption to spiritual ministrations");[31] one Handzik (Ill., 1951), self titled "doctor," whose diagnosis was followed by treatment consisting of breathing exercises, drinking two glasses of water (one "holy," one "atomic"), the laying on of hands, and prayer, for all of which she accepted a "donation";[32] and William and Dora Estep (Ill., 1952), who organized the "Ministry of the Central Baptist Church of Chicago, Inc.," and embarked upon a grandiose program for the training of "psycho-physicians" who set about to cure their patients through the use of various machines invented by Estep, and through prayer. Here, the indictment was not for misdemeanor, but for conspiracy to violate the Medical Practice Act. William Estep's sentence: 3

29. Des Moines Register, Dec. 27, 1953.
30. Smith v. People, 51 Colo. 270, 117 Pac. 612 (1911).
31. People v. Vogelgesang, 221 N. Y. 290, 116 N. E. 977 (1917).
32. People v. Handzik, 410 Ill. 295, 102 N. E. 2d 340, *cert. denied,* 343 U. S. 927 (1951).

years in the penitentiary and a $2,000 fine; Dora received a term of 1 to 2 years and a $2,000 fine.[33]

In 1911, one Willis Cole, a Christian Science practitioner, was indicted for practicing medicine as defined by section 160 of New York State's Public Health Law (Cons. Laws, ch. 45), without being duly licensed therefor. Section 160 states that a person practices medicine when he undertakes to diagnose or treat any human disease by any method. The jury failed to agree and was discharged. At the second trial, in 1912, Cole was found guilty. In 1916, on appeal to the highest court, Judge Chase held that, on the evidence, Cole had not undertaken to "diagnose" disease as defined in Section 160. Cole had, however, by his own admission undertaken to "treat" by "any means or method," as defined in section 160, for his prayers were a treatment. Indeed, he had testified that prayer was a synonym for treatment. Section 160, however, contained the words "except as hereinafter stated," which concededly referred to section 173: *"This article shall not be construed to affect . . . the practice of the religious tenets of any church."* The case had reached the highest court on Cole's exception to the trial judge's charge to the jury: that if the evidence showed that Cole had practiced medicine as alleged in the indictment, it was no defense that his acts were intended to be the practice of the religious tenets of the Christian Science Church. Judge Chase held that the Legislature, in enacting section 173, had intended to exclude from the prohibition the practice of the religious tenets of any church, and that the question of fact for the jury should have been: "Was the defendant in good faith practicing the tenets of a church within the meaning of the statutory exception?" He reversed judgment and ordered a new trial. Judge Cardozo concurred. Said Chief Justice Bartlett: "I concur . . . But I would go farther. I deny the power of the Legislature to make it a crime to treat disease by prayer."[34]

Thus arises the anomaly of today's child protection and medical practice acts. The decisions hold that the faith healer's ministrations do not constitute "proper medical care" for a sick child, and the parent who calls in such people instead of a qualified physician is punished, or, if it is not too late, the court undertakes to place the child in wiser hands. But at the same time, the law does not enjoin these faith healers from holding themselves out to parents as proper

33. People v. Estep, 346 Ill. App. 132, 104 N. E. 2d 562, *appeal transferred,* 409 Ill. 125, 97 N. E. 2d 823 (1952).

34. People v. Cole, 219 N. Y. 98, 113 N. E. 790 (1916).

healers. And afterwards, only the parent of the dead child is hauled off to court, while the healer who urged upon that gullible parent a trust in his methods, and a distrust in those of the medical profession, goes free. The hard fact is that today, from the lone operator like Susie Jessel to a corporate entity such as the Christian Science Church—all such, so long as they confine themselves strictly to prayer and spiritual means, are free to practice their profitable trade, on children as well as adults, and whether they live or die.

VI. The Right to Submit

In 1951, Christian Scientist Cora Louise Sutherland, a teacher in the Los Angeles public schools, developed a hacking cough and began steadily to lose weight. To avoid the periodic chest X-rays required of public-school teachers, she submitted an affidavit stating that she was free of communicable disease. In the fall of 1953 she became too sick to teach. The Christian Science practitioner who treated her (for a fee of $62 per month) certified her condition as due to a "lung congestion aggravated by activity." In March, 1954, her brother finally insisted that she go to a hospital: her second day there, Cora Sutherland, 55, died of tuberculosis. The coroner's report: she probably had had the disease in an active, contagious form for at least two years—for two years she had exposed all her public school pupils (over 70, each term) to tuberculosis. The city health department now is trying to locate all exposed recent graduates, for chest X-rays.[35]

Granting (reluctantly) that the sincere faith healer is free to practice, is the ill adult at the same time entirely free to submit to his ministrations? Or more practically, under the "corollary": is the ill adult free to deny himself necessary medical aid?

Two circumstances occur. When the illness of the doctor-denying—and perhaps disease-denying—sick adult proves not only to be real but contagious as well, the state, with its overriding interest in the public health and safety, brushes aside the sick man's claims to constitution-guaranteed personal liberty and religious freedom, and at once steps in to apply quarantine regulations. Indeed, it has been some fifty years since the Supreme Court, in Massachusetts' *Jacobson* case,[36] upheld the state's right to go even farther, and, in the face of a threatened epidemic, to force vaccination upon its *well* citizens, regardless of their personal feelings. Had tuberculous Cora Sutherland's condition been discovered earlier, there

35. Time, May 24, 1954, p. 55.
36. Jacobson v. Massachusetts, 197 U. S. 11 (1905).

is no doubt that the state would summarily have forced her isolation to the extent that she no longer endangered others' health.

But could the state then have gone farther, and forced her to undertake proper treatment? This is the second circumstance. An adult is seriously ill but not endangering others. Can he elect to deny himself the necessary medical aid without which it is clear to a reasonable man that he will shortly die? The question appears to reduce to simpler form: is it unlawful to attempt suicide?

At common law, the completed act of suicide was a felony, and the attempt was a misdemeanor. In England, at one time, the dead offender was "punished" by the shame of unmarked burial in the highway and by his heirs forfeiting to the king their right to the deceased's lands and goods. But though this attempted punishment was abandoned, suicide thereafter was still held, though not punishable, to be very much a crime—to the practical end that attempted suicide should therefore remain a misdemeanor. Thus, one who persuaded another to commit suicide was still guilty of murder as a principal or accessory. Today, in at least eleven states, the common law of crimes, insofar as it defines and punishes offenses, has been completely abolished and replaced by statutes. In these states, no offense is punishable unless made so by statute. In Texas, the statute makes neither suicide nor furnishing the means a crime. In other states, the common law has in some particulars been repealed or superseded by statute but in all other respects remains in effect. Under such a statute in Missouri, one who assists another to commit suicide is guilty of manslaughter.[37]

But I hear the reader's voice objecting: "This is all very interesting, but I still have not quite managed to swallow your first premise—that refusal of necessary medical aid is identical with attempted suicide. In the former, where is the criminal intent?" Granting the objection, I would reply that, even so, the above paragraph has yielded an answer in part. The answer: in those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necessary medical aid, whether equal to or less than attempted suicide, must be conceded to be lawful.

This leaves the question of those states where the common law in this respect remains unchanged—where attempted suicide remains a misdemeanor. Here, I have no case to cite, and instead must submit a conjecture which leans on the significance of the Wagstaffe trial. In pre-Wagstaffe times, the faith-healing parent's

37. Clark and Marshall, Crimes, §§ 14, 35, 114, 245, 247 (1940).

religious belief negated any "negligence so gross and wanton as to be criminal," when he denied his child proper medical care, while in post-Wagstaffe times, the child protection statutes created a positive duty for the parent to furnish his child with proper medical care, against which a religious belief to the contrary was held to be no defense. Again, then, in pre-Wagstaffe times could the ill adult who relied on faith and prayer for his own cure be found to entertain the criminal intent required to make up the crime of attempted suicide? I think not, for his only intent was to get well. And since no present-day "adult protection statute" has appeared to complete the parallel, this status of the ill adult must remain unchanged.

Newspaper accounts appear to confirm this result. In Texas, in 1952, one Fred Newhouse, 24, a Jehovah's Witness, was badly injured in an auto accident, and in such a way that doctors dared not proceed with a necessary operation without a transfusion. But when Newhouse refused, on religious grounds, to allow the transfusion, the law did not intervene.[38] In Missouri, in 1952, an Ozarks minister, Rev. J. J. Ivie, tried in vain to obtain a "revelation of God's will," then vowed to pray and fast until God gave him a sign. After 51 days of fasting and praying, and still without the prayed-for sign, he died. During his fast, which received nation-wide publicity in the newspapers, no attempt at any time was made to stop him, even though, towards the end, Ivie's religion-motivated determination clearly was leading to his death.[39] Society and the courts seem to say: "We are determined that a child shall grow up safely and in good health to maturity, and we will intervene when his life or health is threatened by his parent's religious or other eccentricities. But having taken the trouble so to see him into manhood, why, if he thereafter chooses foolishly to endanger his own life—and does not at the same time endanger others—then we wash our hands of him."

VII. Pastor Liability

If the adult, *sui juris,* is free to choose a suicidal faith cure, one hardly would expect to find any criminal liability attaching to the friend who counsels him to such an undertaking. But what of the faith-healing friend, pastor or practitioner who persuades a parent to rely upon faith and prayer to cure his sick child? Here the parent, regardless of his belief, is under a statutory duty to furnish

38. Time, May 12, 1952, p. 55.
39. Boston Globe, June 9, 1952, p. 1.

such medical care, and is criminally liable if he does not. And is it not basic in criminal law that one who counsels another to a crime is also guilty as principal or accessory?

In Toronto, on October 28, 1895, six-year-old Percy Robert Beck complained of a mild sore throat. His parents, Christian Scientists, called in a practitioner, Mrs. Mary Ellen Beer, to treat him. Her treatment consisted "in simply sitting by the bedside, rarely saying anything, never prescribing, nor in any way touching the child, or making any examination or otherwise diagnosing the patient." But that same day, Percy died. A post mortem revealed "diphtheria of a non-malignant character, a disease rarely fatal." According to later medical testimony, the boy probably would have recovered if the disease had been treated properly; also, his death definitely had been accelerated by his not receiving proper medical attendance. Mrs. Beer was indicted for manslaughter and prosecuted on two theories: 1) for improper treatment of disease, and 2) as an accessory, in that she counselled or procured, or aided and abetted the father in his disregard of his legal duty to provide the child with medical attention. As to the first theory, a statute provided that everyone who undertakes, except in case of necessity, to administer surgical or medical treatments is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act. Judge Falconbridge held, however, that Mrs. Beer had not been retained, nor was she expected to, nor did she, come in as a medical attendant, and that the failure to examine the child in the manner in which a doctor would do, and which was the negligence relied on by the prosecution, was exactly what was expected of her as a Christian Science practitioner. As to the second theory, Judge Falconbridge first refused to accept the defense contention that there could be no accessory to manslaughter. But the court failed to find any evidence of "counselling or procuring," and further opined that it was impossible to "aid and abet" in another's doing *nothing,* i.e., in failing to provide medical attention. She therefore was acquitted.[40]

In Canada, in 1902, two of the children of one John Rogers, a member of the faith-healing "Catholic Christians in Zion," contracted diphtheria. Rogers, with the counsel of one Brooks—who apparently was only Rogers' friend, not his pastor—refused to call in medical attendance. Both children died. Rogers was indicted for manslaughter and convicted. Brooks was indicted at the same time as an accessory to the father's neglect. The indictment (in *Rex v.*

40. Reg. v. Beer, 32 Can. L. J. 416 (1895).

Brooks)[41] charged Brooks with being present, "unlawfully aiding, abetting, assisting, counselling and procuring John Rogers not to regard his duty to provide his child with medical attention, by reason of which neglect the child died." In convicting Brooks, the court noted that, by virtue of section 61 (now 69)[42] of the Code, he could just as well have been prosecuted as a principal.

In Winnipeg, on Wednesday, November 5, 1924, 12-year-old Doreen Watson, daughter of Mr. and Mrs. Robert Watson, Christian Scientists, complained of a headache. Mrs. Watson asked William Elder, a Christian Science practitioner, to treat her. The next morning, Doreen's neck started to swell; that afternoon, her nose was stuffed. Friday her breathing became more difficult. Sunday evening, Elder came to see her; after leaving, he told her mother he would go on with the treatment. Monday morning, November 10, Elder telephoned Mrs. Watson that Mr. Robb, who had been her special practitioner, had returned to Winnipeg. She then telephoned Robb and suggested that a medical doctor be called in. As Mrs. Watson later testified: "We did not know what the trouble was, and we wanted to know. I never heard of a Christian Scientist diagnosing any case." On Tuesday evening, November 11, a Dr. Fraser—Elder having that day asked him to see a case he was treating in order to make a diagnosis—came to the Watsons' house with Elder. At that time, Doreen's nostrils were completely obstructed so that she could not breathe through them, her lips and mouth were dry and cracked, her nostrils were red and irritated and there was an irritating discharge from them, her breath was exceedingly offensive, the glands of her neck on each side under the jaw were quite swollen and prominent, both tonsils were covered with a dense, heavy, gray membrane which extended across the uvula and up in the nasal cavities, and where her throat was not covered with membrane it was red and inflamed. Before leaving, Dr. Fraser took a swab of Doreen's throat.

Downstairs, Dr. Fraser told Mr. and Mrs. Watson that the child had nasal and pharyngeal diphtheria, a very serious attack, and that she was dangerously ill. He advised that antitoxin be given at once and that she should be sent to the hospital immediately. They refused. Mrs. Watson said, "I have no fear." She told of having for years suffered attacks of quinsy, and of being cured by

41. Rex v. Brooks, 22 Can. L. T. 105, 9 B. C. R. 13 (1902).

42. "Every one is a party to and guilty of an offense who, (a) actually commits it; or (b) does or omits an act for the purpose of aiding any person to commit the offense; or (c) abets any person in commission of the offense; or (d) counsels or procures any person to commit the offense. . . ."

Christian Science treatment for diphtheria. Elder told Mrs. Watson that he would immediately take steps to break up the disease. The following morning, Dr. Fraser telephoned Elder that the smear was reported suspicious, and to go carefully or he would have a tragedy on his hands. Elder replied that he was going carefully. On the morning of November 13, Dr. Fraser told Elder that the report on the swab was positive, confirming the diagnosis of diphtheria. Elder replied that he no longer was in charge of the case, but had turned it over to Robb. That afternoon, Robb called Dr. Fraser and both went to the Watsons' home. The doctor examined the child and found her condition worse. Doreen died on November 22.[43]

William Elder was indicted for manslaughter, charged with having actively aided, abetted, counselled, or procured Robert Watson to omit to supply his daughter with the necessaries of life. The jury found him guilty. On appeal, however, because the only direct evidence of counselling and abetting was that of a police constable who had taken down Elder's statement in a notebook and then lost it, the evidence was ruled inadmissible and judgment reversed.[44]

It is clear that, in Canada, criminal liability attaches to the pastor or other adult who actively counsels a parent against furnishing his child with necessary medical care. In the *Canadian Bar Review* for August-September, 1953, a Winnipeg attorney, Mr. Roy St. George Stubbs, indicates that *Rex v. Brooks* is followed there today:

> "No such anomaly [as in the United States] exists in Canadian law. If a pastor persuades one of his followers to rely on prayer, to deny medical aid to his child, and the child dies, and it can be established in evidence that the child would have survived under proper medical care, the pastor may be convicted of manslaughter—not as an accessory before the fact, which Mr. Cawley seems to think he is, but as a principal."

In the United States, I find no such case reaching the higher courts. I find, in fact, only one such attempt at a conviction, and this ended in the trial court. In Los Angeles, in 1938, Mrs. Lillian Volstad, a widow, attended a "mission" run by Apostolic preacher, Rev. Wilbur W. Alvis. When the Volstad family physician found

43. Earlier the same morning Mrs. Watson was taken ill. A Dr. Moody examined her, pronounced her illness to be diphtheria, and ordered antitoxin administered to her. After this was done, she was taken to the St. George Hospital, where she recovered after treatment. See Rex v. Elder, 35 Man. Rep. 161 (1925).

44. *Ibid.*

that Mrs. Volstad's 9-year-old son Francis had acute appendicitis, the doctor urged an immediate operation. Mrs. Volstad and the minister instead resorted to prayer. Five days later, officers arrived with a Juvenile Court order to remove the boy to the General Hospital for an operation, but before the operation could be performed, he died of peritonitis. Both Alvis and Mrs. Volstad were indicted for manslaughter. Mrs. Volstad was convicted. In acquitting Alvis, the judge at the same time excoriated him for his conduct and called him a "religious racketeer."[45]

At first thought, one might suppose that there never could be an accessory before the fact to manslaughter, since manslaughter implies lack of premeditation; and this is true for *voluntary* manslaughter. But it is not true for the *in*voluntary manslaughter, arising from criminal negligence, with which we are here concerned, for one may incite another to criminal negligence. Clark and Marshall make the point:

> ". . . if two men drive separate vehicles at a furious and dangerous speed along the highway, each inciting and abetting the other, and one of them drives over and kills a person, the one thus causing the death is guilty of manslaughter as principal in the first degree, and the other is guilty as principal in the second degree . . . If one should incite another to so drive, and should be absent when the latter runs over and kills a person, he would be guilty of manslaughter as accessory before the fact."[46]

One might ask, too, "Where a statute establishing a crime imposes punishment only on the person who actually commits the crime, and not in general terms upon those who are guilty according to common-law rules, are mere aiders and abettors within the act?" One Kentucky case held they were not, but this case was later overruled, and the rule established that, unless it is plain from the statute that its intent is to affect only the party actually committing the offense, aiders and abettors are punishable.[47] It would be hard to defend the premise that one who leads another to commit a crime should himself incur no liability.

But if the principles of law are sound, one still must consider that a state's criminal laws are prosecuted on but a county-wide scale, by the state's attorney for that county, who previously has faced the problem of getting himself elected by the voters of that county, and who later may be a candidate for re-election. His lack

45. See Los Angeles Times, Sept. 3, Nov. 18, 19, 22, 29 (1938).
46. Clark & Marshall, *supra* note 37, at § 157(d).
47. *Id.* at § 157(b).

of enthusiasm for initiating all-out prosecutions in this religion-mixed area of the law is understandable. It is significant that both in *People v. Pierson* and in *Owens v. State*[48] the indictment sought was only for misdemeanor, for violation of the "neglect" statute, though the records in both cases clearly show to be present all the elements necessary for a manslaughter conviction.

The situation in the United States today, then, is this: that all manner of faith healers are allowed to run around loose, free to persuade parents to rely on prayer alone for their children's ills, and free of liability for the tragic results. I submit that here is the glaring anomaly in our law: that the parent who denies a child medical aid is punished, while the pastor who counsels that denial goes free. Here, in this area, it is time to re-assess our existing legal boundary between religious freedom and fanatical religious irresponsibility.

48. 6 Okla. Cr. 110, 116 Pac. 345 (1911).