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Fetal Equality

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Fetal Equality

Shaakirrah R. Sanders*

I join Carliss Chatman’s call to fully consider the equal protection implications of the conception theory and raise an additional right to which a fetus may be entitled as a matter of equal protection: health care, which implicates state laws that provide civil and criminal exemptions to parents who choose religious healing instead of medical care for their children and minor dependents. The evidence of harm to children from religious healing is well documented.¹ Yet, currently, approximately forty-three U.S. states and the District of Columbia have some type of exemption to protect religious healing parents in civil and criminal cases.²

Religious healing is the belief that “prayer” or “spiritual means” rather than modern medicine can cure individuals. Criminal exemptions apply to prosecutions for murder and homicides, child abuse, child endangerment, child neglect, contributing to neglect or deprivation, criminal injury, cruelty, delinquency, failure to provide medical and surgical attention, failure to report suspected child neglect or abuse, manslaughter, nonsupport, and omission to provide for a child.³ Civil exemptions apply to claims for child abuse, child neglect, contributing to neglect, dependency proceedings, failure to provide medical care or adequate treatment, failure to report, maltreatment, negligence,

* Professor of Law, University of Idaho College of Law. Portions of this response originally appeared in the UC Irvine Law Review. Shaakirrah R. Sanders, *Religious Healing Exemptions and the Jurisprudential Gap Between Substantive Due Process and Free Exercise Rights*, 8 U.C. IRVINE L. REV. 633 (2018).

1. See Shaakirrah R. Sanders, *Religious Healing Exemptions and the Jurisprudential Gap Between Substantive Due Process and Free Exercise Rights*, 8 U.C. IRVINE L. REV. 633, 649–51 (2018) (discussing religious healing related deaths).

2. See *id.* at 645–46.

3. See *id.* at 647–48 (describing state law exemptions for religious healing parents).

nonsupport, and temporary or permanent termination proceedings.⁴

In *Cruzan v. Director, Missouri Department of Health*,⁵ the United States Supreme Court recognized the right to refuse medical treatment,⁶ but the question remains whether parents have the right to decline modern medicine for a fetus that suffers from a curable disease, illness, or injury. The Court has yet to analyze parental exemptions for religious healing. In 1968, the Court did affirm a federal district court's finding that the failure to provide an exemption did not violate the Free Exercise Clause.⁷ The Court's one sentence affirmance provided no guidance to the state legislatures that would later adopt exemptions.⁸ Perhaps as a result, state courts have inconsistently ruled on exemptions.⁹

Several years ago, I joined family law scholar Robin Fretwell Wilson to examine parental exemptions for religious healing from the perspective of the substantive due process right to care, custody, and control of minor children.¹⁰ This co-authored work considered how parental decisions to discipline one's child, like decisions to treat "by faith alone," run deep in religious and cultural belief systems.¹¹ This work also explored the limits of parental autonomy and showed that risks to children from corporal punishment are not as great as once feared, unlike the profound risks from faith healing.¹²

4. *Id.*

5. 497 U.S. 261 (1990).

6. *See id.* at 279 (noting that the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" and then discussing Missouri's procedural safeguards for incompetent individuals).

7. *See* *Jehovah's Witnesses in State of Wash. v. King Cty. Hosp. Unit No. 1*, 390 U.S. 598 (1968), *reh'g denied* 391 U.S. 961 (1968).

8. *See* Sanders, *supra* note 1, at 645.

9. *See id.* at 641 n.64, 651–52.

10. *See* Robin F. Wilson & Shaakirrah R. Sanders, *By Faith Alone: When Religious Beliefs and Child Welfare Collide*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 308 (Robin Fretwell Wilson ed., 2018); *see also* Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363 (2007).

11. *See generally* Wilson & Sanders, *supra* note 10.

12. *See id.* at 315–23 (discussing corporal punishment studies that suggest the effects of corporal punishment may depend on other factors and comparing

In a later work, I also hypothesized how exemptions for religious healing parents rely upon gaps in substantive due process and free exercise jurisprudence.¹³ Religious healing relates to parental rights as established in *Meyer v. Nebraska*¹⁴ and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*.¹⁵ But *Prince v. Massachusetts*¹⁶ appears to limit parental autonomy to dictate a child's religious training when such training threatens the health or safety of children.¹⁷ So too does *Wisconsin v. Yoder*,¹⁸ which affirmed substantive due process as a source of the right to religious childrearing and preserved the state's ability to interfere when children are potentially harmed.¹⁹ Neither *Meyer*, *Pierce*, *Prince* nor *Yoder* involved parental rights to make medical decisions on behalf of a minor dependent, but this jurisprudence demonstrates how physical and psychological harm have traditionally provided a baseline for terminating or interrupting parental rights. Parental exemptions for religious healing also occupy space in the First Amendment's Free Exercise Clause.²⁰ *Reynolds v. United States*,²¹ *Sherbert v. Verner*,²² *United States v. Seeger*,²³ and *Employment Division, Department of Human Resources of Oregon v. Smith*²⁴ establish the necessity and scope of religious exemptions in the administrative context. None of this

with studies showing death rates among children in faith healing homes).

13. Sanders, *supra* note 1, at 633–34.

14. 262 U.S. 390 (1923).

15. 268 U.S. 510 (1925).

16. 321 U.S. 158 (1944).

17. *See id.* at 167 (opining that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare”).

18. 406 U.S. 205 (1972).

19. *See id.* at 233–36 (discussing the potential limitation on free exercise when a child's health or safety is jeopardized, but finding that Wisconsin could not force its compulsory school attendance law on members of the Amish community).

20. U.S. CONST. amend. I.

21. 98 U.S. 145 (1878).

22. 374 U.S. 398 (1963).

23. 380 U.S. 163 (1965).

24. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Holt v. Hobbs*, 574 U.S. 352 (2015).

jurisprudence concerned an exemption for religious healing parents.

Exemptions for religious healing parents, like the issue of abortion, illustrates the “play in the joints”²⁵ between “the private realm of family life” and the exercise of a state’s police powers to protect life.²⁶ Religious healing parents have vexed state supreme courts for over a century,²⁷ but have recently also exposed an inconsistency in some states’ approach to protecting life altogether. Starvation and malnourishment of children are commonly prosecuted.²⁸ In one Idaho county alone, religious healing is suspected to have caused three child deaths in four months.²⁹

25. *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

26. *Prince*, 321 U.S. at 166.

27. *Sanders*, *supra* note 1, at 641 n.64.

28. See Marwa Eltagouri, *Parents Charged with Murder for Starving 6-Year-Old as Punishment, Police Say*, WASH. POST (Nov. 7, 2017, 10:01 PM), <https://perma.cc/NWT6-PTLE> (last visited Apr. 7, 2020) (charging the boy’s father and step-mother with first-degree murder and child endangerment) (on file with the Washington and Lee Law Review); Tara Fowler, *Pennsylvania Parents Accused of Starving Their 9-Year-Old Son to Death Plead Guilty to Murder*, PEOPLE (Oct. 26, 2015, 3:00 PM), <https://perma.cc/FWX7-CLQU> (last visited Apr. 7, 2020) (noting the parents were also found guilty of abusing their disabled daughter) (on file with the Washington and Lee Law Review); Taylor Rios, *Parents and Grandmother Allegedly Starved Nine-Year-Old to Death, All Three Charged with Murder in Hawaii*, INQUISITR (Jul. 16, 2017), <https://perma.cc/AUL8-7NQ3> (last visited Apr. 7, 2020) (noting that the parents and grandmother denied the child food, water, and medical care) (on file with Washington and Lee Law Review); Ashley Shook, *9-Year-Old Starved to Death*, WWLP NEWS (Feb. 23, 2017, 1:49 PM), <https://perma.cc/7HYX-VJH4> (last visited Apr. 7, 2020) (charging four individuals with various counts of neglect) (on file with the Washington and Lee Law Review).

29. See Nigel Duara, *An Idaho Sheriff’s Daunting Battle to Investigate When Children of a Faith-Healing Sect Die*, L.A. TIMES (Apr. 18, 2017, 3:00 AM), <https://perma.cc/WYV3-V5J9> (last visited Apr. 7, 2020) (highlighting Idaho’s “broad exemptions” from criminal prosecutions and civil liability for religious groups) (on file with the Washington and Lee Law Review); Betsy Russell, *Canyon Sheriff: ‘In My County Alone I’ve Had 3 Deaths in the Last 4 Months, One Yesterday’*, SPOKESMAN-REV. (Mar. 20, 2017), <https://perma.cc/8ZH5-SPS3> (last visited Apr. 7, 2020) (noting the Canyon County sheriff’s opposition to a faith-healing bill) (on file with the Washington and Lee Law Review); Carissa Wolf, *In Idaho, Medical-Care Exemptions for Faith Healing Come Under Fire*, WASH. POST (Feb. 19, 2018, 6:40 PM), <https://perma.cc/EB2C-6EKZ> (last visited Apr. 7, 2020) (stating that some estimate 183 Idaho children have died because of withheld medical treatment since the early 1970s) (on file with the Washington and Lee Law Review).

County prosecutors have filed no charges related to those incidents.³⁰

Should the conception theory extend beyond the abortion context, how does a religious healing state protect the “right to birth” when a parent chooses to forgo medical care for a fetus? *Planned Parenthood of Southeastern Pennsylvania v. Casey*³¹ identified the moment of conception as the start of the state’s compelling interest to protect life.³² In furtherance of their interest to protect life before birth, some religious healing states have imposed a multitude of regulations aimed toward those who seek to terminate a pregnancy³³—a right that has been deemed constitutionally fundamental.³⁴ At the same time, many religious healing states have declined to impose regulations to direct the behavior of religious healing parents, including those who are pregnant. Exemptions do not require religious healing parents to consult a doctor or obtain any information about fetal health. No

30. Compare Russell, *supra* note 29, and Duara, *supra* note 29 (discussing Canyon County Sheriff Donahue’s campaign to remove Idaho’s religious exemptions and his belief that the exemptions are in conflict with the rule of law and allow children to die without consequence), with *Kuna Couple Charged with Injury to Child in Starvation Case*, ASSOCIATED PRESS (Mar. 15, 2017, 2:58 PM), <https://perma.cc/SP4H-R8W3> (last visited Apr. 7, 2020) (detailing that a grand jury indicted an Idaho couple on charges of felony injury to a child and the infliction of bodily harm) (on file with the Washington and Lee Law Review); see also Sanders, *supra* note 1, at 652 (discussing prosecutions of religious healing parents outside of Idaho).

31. 505 U.S. 833 (1992).

32. See *id.* at 846 (noting that the state “has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child” while also recognizing that before viability, the state’s interests are not strong enough to ban or restrict a woman’s access to abortion procedures).

33. Compare Aleksandra Sandstrom, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws*, PEW RES. CTR. (Aug. 12, 2016), <https://perma.cc/ZJP3-KCZU> (last visited Apr. 7, 2020) (detailing various religious exemptions) (on file with the Washington and Lee Law Review), with *An Overview of Abortion Laws*, GUTTMACHER INST. (Apr. 1, 2020), <https://perma.cc/NQS9-3G49> (last visited Apr. 7, 2020) (comparing states’ abortion laws with regard to categories like licensure, where the procedure must be performed, public funding, and waiting periods) (on file with the Washington and Lee Law Review).

34. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (noting that the right of personal privacy includes the right get an abortion).

exemption imposes a waiting period that delays the exercise of the choice to pursue religious healing of a fetus. Nor do exemptions regulate religious practitioners or the facilities that attempt to heal a fetus.

An analysis of the disparity between religious healing parents and parents who terminate a pregnancy may cause discomfort, but as Chatman demonstrates, such discomfort results from extending the conception theory beyond the abortion context. The fact remains that in many religious healing states, abortive pregnancies are heavily regulated, but religious healing pregnancies completely escape the state's exercise of its *parens patriae* authority. The state declines to regulate even when the choice to forgo medical care prevents birth. If a fetus is a person, it should also get medical care in addition to support, due process, and citizenship.