Spiritual-Treatment Exemptions to Child Neglect Statutes—*State v. Crank*: Vagueness and Establishment Clause Challenges to Selective Prosecution of Faith-Healing Parents

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I. INTRODUCTION

Is justice served when a state statutorily protects parents who choose to treat their child's illness through prayer, rather than medical treatment, but then prosecutes the parents for child neglect—or worse—when their child suffers harm or dies as a result? Regardless of one's views of religion and medical science, the issue is a difficult one. Two foundational societal imperatives—the constitutionally enshrined freedom of religion and the duty of parents to protect their children from harm—can clash when parents

assert a faith-based right to choose spiritual means over medical care for their sick child.[1] In Tennessee, the child abuse and neglect statute exempts from liability parents whose faith leads them to choose "treatment by spiritual means through prayer alone" for their child, in lieu of medical care.[2] Similarly, nearly all states have a spiritual-treatment ("ST") exemption, though jurisdictions vary as to where the ST exemption fits in the overall statutory scheme, the scope of the exemption, and how courts have interpreted and applied the exemption—leading to confusion and controversy.[3]

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1. On religious freedom, see U.S. CONST. amend. I and TENN. CONST. art. I, § 3. On the universal legal duty of parents to care for their children, see *People v. Pierson*, 68 N.E. 243, 245–46 (N.Y. 1903). *See also* Baruch Gitlin, Annotation, *Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5th 253 § 2[a] (2004) (citing 40A Am. Jur. 2d *Homicide* § 83 (1964)).

2. Tennessee's spiritual treatment exemption was adopted in 1994 via amendment of the aggravated child abuse, neglect, and endangerment statute, TENN. CODE ANN. § 39-15-402 (2014), which was originally enacted in 1989. State v. Crank, 468 S.W.3d 15, 21 (Tenn. 2015).

3. *See generally* Gitlin, *supra* note 1 (analyzing criminal cases arising from failure of parents to obtain medical aid for their children); Shirley Darby Howell, *Religious Treatment Exemption Statutes: Betrayest Thou Me with a Statute?*, 14 SCHOLAR 945 (2012) (questioning the existence of statutory religious exemptions to medical treatment for children); Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269 (2003) (providing an overview of religious exemptions that exist in various states); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43 (1994) (analyzing the existing procedural due process doctrine as it relates to the prosecution of parents who engage in faith healing over medical treatment); Zaven T. Sa-

In *State v. Crank*, the Tennessee Supreme Court[4] *held,* first, that because the ST exemption applies only to members of the Christian Science and like churches, the statute gives fair notice of prohibited conduct and is not void for vagueness; and, second, that even if the ST exemption were held unconstitutional under the Establishment Clause, the exemption would be subject to elision and stricken from the statute—whose enforcement minus the exemption would leave the conviction standing and afford Defendant no relief. *State v. Crank,* 468 S.W.3d 15 (Tenn. 2015). The court in *Crank* was incorrect because the ST exemption leaves parents without fair warning of whether their decision to use spiritual treatment will be criminally prosecuted. Therefore, the court should have held the statute unconstitutionally vague, which would have been dispositive and led the court to vacate the conviction.[5]

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royan, *Spiritual Healing and the Free Exercise Clause: An Argument for the Use of Strict Scrutiny*, 12 B.U. PUB. INT. L.J. 363 (2003) (analyzing past United States Supreme Court decisions involving the Free Exercise Clause and suggesting the return of a strict scrutiny analysis in spiritual healing cases); Eric W. Treene, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135 (1993) (analyzing past Christian Science and faith healing cases).

4. References to the United States Supreme Court and to the high courts of Tennessee and other jurisdictions will be made explicit.

5. ST exemptions are also vulnerable to a powerful Equal Protection critique under the Fourteenth Amendment: on this view, such exemptions make children of parents who invoke a ST exemption a class of persons denied the protection afforded to other children. *See* Gregory Engle, *Towards a New Lens of Analysis: The History and Future of Religious Exemptions to Child Neglect Statutes*, 14 RICH. J. L. & PUB. INT. 375, 384–93, 395–98 (2010); Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEG. MED. 301, 324–28 (1996). *See generally* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996). Like concerns drive the work of Children's Healthcare Is a Legal Duty, Inc., an advocacy group founded in 1983 by former Christian Scientist Rita Swan, and the lead plaintiff in *CHILD, Inc. v. Vladeck*. *See* Children's Healthcare is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466, 1484 (D. Minn. 1996); CHILD, INC., http://childrenshealthcare.org (last visited Mar. 21, 2016). For information on Rita Swann, see Merrick, *supra* note 3, at 272 (citing Ramona Cass, *We Let Our Son Die: The Tragic Story of Rita and Doug Swan*, 6 J. CHRISTIAN NURSING 6 (1987)). *See also* Committee on Bioethics, American Academy of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS

While the court was right (if too tentative) in voicing concerns about the statute's constitutionality under the Establishment Clause, its application of the doctrine of elision so as to strike the entire ST exemption is a closer question; the case for more selective elision of that part of the exemption favoring certain religious faiths is at least tenable.

II. BACKGROUND AND ISSUES

To determine the constitutionality of Tennessee's ST exemption, the Tennessee Supreme Court evaluated the exemption, first, in the light of the Due Process requirement that a statute give clear notice to the public, or else fail for vagueness. The court then considered the exemption as it relates to the Establishment Clause, and finally determined how to apply the doctrine of elision. These issues are addressed below in the same order, followed by ST exemptions and pertinent case law.

A. Vagueness

The "void for vagueness" doctrine is grounded in fundamental notions of legality, anchored in the bedrock of the Fifth and Fourteenth Amendments' Due Process clauses.[6] The underlying policy is to avoid the twin dangers of a vague statute: failing to warn citizens of possible criminal liability, and leaving law enforcement too much room for arbitrary enforcement.[7] The United States Supreme Court ("U.S. Supreme Court") addressed the first, paramount, danger in *Lanzetta v. New Jersey*, a 1939 case involving a statute criminalizing "gang" membership without defining the term.[8] The Court declared, "[n]o one may be required at peril

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279, 279–80 (1997). From this standpoint, the holding in *Crank* is largely welcome. The Equal Protection argument, and the concern for the children of religious objectors, warrants the most serious consideration. However, these concerns lie outside the scope of this Comment, which assesses *Crank* with respect to vagueness, the Establishment Clause, and elision.

6. U.S. CONST. amends. V, XIV § 1.

7. *See* City of Chicago v. Morales, 527 U.S. 41, 52–56 (1999); Grayned v. City of Rockford, 408 U.S. 104, 108–13 (1972). *See generally* 16B AM. JUR. 2D *Constitutional Law* § 972 (2015). Another formulation of the vagueness doctrine posits a third danger, that of "proscrib[ing] conduct that . . . is normally innocent." State v. Sammons, 391 N.E.2d 713, 714 (Ohio 1979).

8. 306 U.S. 451, 453–54 (1939).

of life, liberty or property to speculate as to the meaning of penal statutes."[9] In the 1999 case, *City of Chicago v. Morales*, the U.S. Supreme Court struck down an ordinance barring "loitering" in any public place by "criminal gang members," whether with one another or with other persons, holding the ordinance triggered both dangers.[10] Justice Stevens, writing for the Court, criticized the ordinance's definition of "loiter" ("to remain in any one place with no apparent purpose") on the ground of vagueness:

> It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." . . . Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not.[11]

Similarly, in *Grayned v. City of Rockford*, the U.S. Supreme Court insisted laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[12] The Court overturned part of the defendant's conviction, holding the ordinance unconstitutionally vague, particularly because it involved First Amendment rights.[13]

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9. *Id.* at 453. The statute read, in part:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons . . . who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.

Id. at 452. (quoting New Jersey, § 4, c. 155, Laws 1934). The Court pointedly noted: "The phrase 'consisting of two or more persons' is all that purports to define 'gang.'" *Id.* at 453.

10. 527 U.S. at 64.

11. *Id.* at 56–57.

12. 408 U.S. 104, 108 (1972).

13. *Id.* at 108–09. The anti-picketing ordinance under which Grayned had been convicted stated that "[a] person commits disorderly conduct when he knowingly . . . [p]ickets or demonstrates on a public way within 150 feet of any

B. Establishment Clause[14]

The very first provision of the First Amendment to the U.S. Constitution, the Establishment Clause, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] The Establishment Clause clearly forbids states to sanction—that is, *establish*—an official church. But government is inevitably involved with religion in many lesser ways—for example, determining if an organization is a church and thus tax-exempt.[16] Such realities create the need for a test to identify when government becomes impermissibly enmeshed with religion. The U.S. Supreme Court has held that some degree of interaction between the state and religious groups, including regulation, is inevitable; "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause."[17]

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primary or secondary school building while the school is in session" but made an exception for pickets concerning a labor dispute. *Id.* at 107.

14. The Defendant in *Crank* also raised an Equal Protection challenge, arguing that allowing only certain religious groups to invoke the ST exemption denied members of other groups equal protection. The argument is closely related to that over the Establishment Clause. This Comment considers the latter but not the Equal Protection issue.

15. U.S. CONST. amend. I. Tennessee's equivalent is the "freedom of worship" provision of the State Constitution:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

TENN. CONST. art. I, § 3.

16. In *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, the Tennessee Court of Appeals upheld the Equalization Board's determination that a café/bookstore area within a church was "not . . . an integral part of . . . the recognized purposes of a church," and therefore that segment of the church's operations was taxable. 428 S.W.3d 800, 812 (Tenn. Ct. App. 2013). The court held that such government regulation of religion did not violate the Establishment Clause because it was completely indifferent to religious doctrine and practice, i.e., neutral as to religion. *Id.* at 821.

17. Agostini v. Felton, 521 U.S. 203, 233 (1997) (holding a program for public-school teachers to give remedial instruction to some children in parochial

The traditional Establishment Clause test is the three-part inquiry established by the U.S. Supreme Court in *Lemon v. Kurtzman*, which applies to laws benefiting religion generally.[18] The *Lemon* test requires a governmental involvement with religion to (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) avoid excessive entanglement with religion.[19] In *Lemon*, the Court held a Pennsylvania law authorizing state reimbursement of certain religious-school expenses "excessively entangl[ing]," in part because the scheme required the government to examine school records to determine the share of expenditures attributable to secular and religious instruction.[20] The *Lemon* Court noted, "This kind of state inspection and evaluation of . . . religious content . . . is a relationship pregnant with dangers of excessive government direction of . . . churches."[21]

On the other hand, courts have given constitutional sanction to such governmental interactions with religion as property tax exemptions for churches, determining taxability of churches' commercial operations, and scheduling different faiths' access to shared worship facilities. These involvements were held permissible as rationally furthering legitimate secular purposes and neither promoting nor impeding religion.[22] Courts have even validated

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schools was a legitimate purpose, and neither advanced nor inhibited religion); *see also id.* at 234–35 (utilizing *excessive* entanglement analysis).

18. 403 U.S. 602, 612–13 (1971); *see* Larson v. Valente, 456 U.S. 228, 252 (1982).

19. *Lemon*, 403 U.S. at 612–13 (citing Waltz v. Tax Comm'n of New York, 397 U.S. 664, 673 (1970); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

20. *Id.* at 603.

21. *Id.* at 620. The *Lemon* Court also struck down a Rhode Island statute authorizing state payment of a salary supplement, in certain statutorily prescribed circumstances, to teachers in religious schools. *Id.* at 607–09.

22. *See Walz*, 397 U.S. at 675–76 (property tax exemptions not a governmental involvement with religion but rather a decision to forego involvement); Thompson v. Kentucky, 712 F.2d 1078, 1082 (6th Cir. 1983) (the impartial apportionment of access to a prison chapel for inmates of varying faiths penalized no faith group); Christ Church Pentecostal v. Tenn. State Bd. of Equalization, 428 S.W.3d 800, 821 (Tenn. Ct. App. 2013) (determining whether the taxability of church's cafe-bookstore is legitimate and secular in purpose).

Sunday closing laws, originally religiously motivated, but now held to have a broad, secular purpose.[23]

The U.S. Supreme Court has applied the more rigorous standard of strict scrutiny where governmental action favors particular religious faiths. In *Larson v. Valente*, a decade after *Lemon*, the Court struck down a Minnesota statute requiring certain churches to register with a state regulatory agency and to report contributions received as "not closely fitted to the furtherance of any compelling governmental interest."[24] The Court held the statute, in favoring some churches, was "fraught with the sort of entanglement that the Constitution forbids."[25] At the state level, the Texas Supreme Court in *HEB Ministries v. Texas Higher Education Coordination Board* held unconstitutional the state's regulation of a religious institution's use of the term "seminary."[26] Such an inquiry, the court held, impermissibly invaded the religious realm. Justice Wainwright, concurring, cautioned that "[t]he Board can no more prohibit a church from calling its school a seminary than it can prohibit a religious congregation from calling itself a church."[27]

23. In *McGowan v. Maryland*, the U.S. Supreme Court held state regulations do not run afoul of the Establishment Clause merely because they "coincide or harmonize with" religious tenets or practices, and that the original religious motivation for Maryland's Sunday beer-sales ban had evolved into a secular purpose. 366 U.S. 420, 442, 444–45 (1961) (providing "a uniform day of rest for all citizens"); *see* Martin v. Beer Bd. of Dickson, 908 S.W.2d 941, 952–53 (Tenn. Ct. App. 1995). For an even more sharply-drawn Establishment Clause issue, see *State v. Solomon*, where a Jewish businessman was convicted for operating his store on Sundays, choosing to close on Saturdays instead, in keeping with his religious faith. 141 S.E.2d 818, 833 (S.C. 1965). The *Solomon* court upheld the constitutionality of the Sunday-closing law due to its broad, secular purpose. *Id.* at 827.

24. 456 U.S. 228, 255 (1982).

25. *Id.*

26. 235 S.W.3d 627, 657 (Tex. 2007).

27. *Id.* at 678 (Wainwright, J., concurring); *see also* Boone v. Boozman, 217 F. Supp. 2d 938, 947 (E.D. Ark. 2002) (noting that Arkansas's religious exemption to immunization violates the Establishment Clause despite not specifying particular faiths because it gives preferential treatment to "recognized churches").

C. Elision

The question of whether the valid remainder of a partly unconstitutional law may stand alone has long perplexed courts. The principle by which the invalid parts may be removed, and the rest enforced, is variously known as severability, separability, or elision. In the words of one of the signal students of the doctrine, John Copeland Nagle, "[s]everability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional."[28] Nagle cautions, however, that severability deserves close attention because "[t]he question is . . . ubiquitous . . . . [and] can have profound consequences."[29]

A presumption of severability appears to have been the rule in the early legal history of the United States: when the U.S. Supreme Court held, in *Marbury v. Madison*, that one section of the Judiciary Act of 1789 was unconstitutional, the Court left the rest of the statute intact.[30] The Supreme Judicial Court of Massachusetts made the first significant departure from that earlier doctrine in the 1854 case of *Warren v. Mayor of Charlestown*, when it held that an unconstitutional statutory provision rendered an entire statute invalid.[31]

The modern trend has swung back towards severability, but not without controversy. The two-part modern test is descended from the 1932 U.S. Supreme Court holding in *Champlin Refining Company v. Corporation Commission*.[32] The first part asks wheth-

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28. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 204 (1993).

29. *Id.* In the words of another legal scholar,

> Each time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision, or instead whether to invalidate the statute in its entirety or in substantial part. Severability is the doctrine of determining whether part or all of a statute can survive without the invalid provision.

Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 3 (2011).

30. *See* Marbury v. Madison, 5 U.S. 137, 162 (1803); Nagle, *supra* note 28, at 212.

31. 68 Mass. (2 Gray) 84, 99–100 (1854); *see also* Nagle, *supra* note 28, at 211–12 (citing *Warren*, 68 Mass. (2 Gray) at 99–100).

32. 286 U.S. 210, 234 (1932).

er the legislature would have enacted the statute with the offending provision removed; the second, whether the remaining statute is capable of enforcement.[33] The first question can potentially lead courts down a speculative, even hypothetical, path.[34] In Tennessee, the rule of elision is recognized in the severability statute, which states that "the sections, clauses, sentences and parts of the Tennessee Code are severable . . . and any of them shall be excinded if the code would otherwise be unconstitutional or ineffective."[35] In applying the rule, courts analyze the two *Champlin* questions.[36]

Elision can be seen as a last resort where a law's constitutionality is questioned. The principle of judicial restraint leads a court to consider a statute's constitutionality only when such consideration is absolutely unavoidable. When doing so, the court has an obligation to uphold a statute's constitutionality wherever possible.[37] In the 2003 case of *State v. Prater*, the Tennessee Court of

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33. *Id.*

> The unconstitutionality of part of an [A]ct does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. (citations omitted).

34. Nagle calls this speculative part predictive: "A court is . . . required to predict what the legislature would have done if it had known that part of the law it passed would be invalidated." Nagle, *supra* note 28, at 215.

35. TENN. CODE ANN. § 1-3-110 (2014); *see also* State v. Murray, 480 S.W.2d 355, 356 (Tenn. 1972).

36. *See* Davidson Cnty. v. Elrod, 232 S.W.2d 1, 3 (Tenn. 1950) (upholding statute despite its scope being broader than the caption, because after elision of the invalid parts, the law was capable of enforcement and its purpose of pensions for widows reflected legislative intent). *But see* Leech v. Am. Booksellers Ass'n, 582 S.W.2d 738, 755 (Tenn. 1979) (striking down the state obscenity statute as impermissibly vague because excision of the offending provisions would leave less than a whole, enforceable statute).

37. *See* State v. Lyons, 802 S.W.2d 590, 591–93 (Tenn. 1990) (reversing the criminal court's dismissal, for unconstitutional statutory vagueness, of indictment of Defendant on criminal trespass charges for preaching on high school grounds even after asked to leave by school superintendent, because superintendent's "lawful order" was clear and did not unlawfully impede protected conduct).

Criminal Appeals affirmed its duty "to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute when reviewing the statute for a possible constitutional infirmity."[38]

As befits a last resort, the Tennessee Supreme Court has held "[t]he doctrine of elision is not favored."[39] After all, a court's decision whether to elide part of a statute has huge implications: if a court refuses to elide at all, an entire statute can fall due to the unconstitutionality of one provision; elision could lead a court to usurp legislative power by "mak[ing] a new law, not . . . enforc[ing] an old one."[40] In the 1950 case of *Elrod v. Davidson County*, the Tennessee Supreme Court cautioned that, in applying the first part of the two-part test, the "conclusion . . . that the Legislature would have enacted the Act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation."[41]

Elision remains a difficult and controversial topic; the lack of agreement even on its name is symbolic of the deeper doctrinal disagreement that surrounds it. It remains today the "vast and troubling terrain" John Copeland Nagle surveyed nearly a quarter-

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38. 137 S.W.3d 25, 31 (Tenn. Crim. Ct. App. 2003) (citing *Lyons*, 802 S.W.2d at 592).

39. Smith v. City of Pigeon Forge, 600 S.W.2d 231, 233 (Tenn. 1980) (citing *Elrod*, 232 S.W.2d at 2).

40. United States v. Reese, 92 U.S. 214, 221 (1875); Klukowski, *supra* note 29, at 9. *See generally* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing the constitutional limits imposed on the doctrine of severability).

41. *Elrod*, 232 S.W.2d at 2. But one scholar cautions, "Severability doctrine should not confer on courts . . . a freewheeling remedial lawmaking power" and urges that the judicial power to sever be subjected to separation-of-power analysis. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 688 (2008). "For that reason, severability should not turn on legislative intent but on the extent of the rewriting necessary to save the statute." *Id.* Indeed, fear of the separation-of-powers danger lurking in severability has led some scholars to question the constitutional validity of the doctrine entirely. Tom Campbell argues that when a court, following a holding of unconstitutionality, "does anything more than [strike down the statute as unconstitutional], it is legislating." Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1496 (2011).

century ago.[42] As will be seen below, it plays an important role in the troubling case of *State v. Crank*.

D. Spiritual Treatment Exemptions

The story of religious claims to healing powers, and of popular belief in such powers, reaches back many centuries.[43] However, religiously-motivated parental decisions to forgo medical care for a child only began to come before the courts around the turn of the twentieth century—likely because before then, medical science was neither professionalized nor licensed by the state, and thus courts generally recognized no duty to obtain medical care for one's sick child.[44] Since the mid-1970s, most jurisdictions provide some form of statutory exemption from criminal liability for parents who choose religious, rather than medical, treatment for their sick child. The exemptions vary in scope and application, and there has been no simple trend over time. The following overview of early cases, the enactment of ST exemptions, and key subsequent cases from five states illustrates the difficulties courts have had with the exemptions and the sometimes contradictory outcomes that have emerged.

1. Early Cases

In the three quarters of a century before enactment of ST exemptions, parental spiritual-treatment defenses came before the courts on several occasions. An influential early test of the paren-

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42. Nagle, *supra* note 28, at 211 (quoting J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 456 (1990)).

43. *See* People v. Pierson, 68 N.E. 243, 245 (N.Y. 1903); Howell, *supra* note 3, at 950–52.

44. The New York Court of Appeals noted:

> Formerly no license or certificate was required of a person who undertook the practice of medicine. . . . [C]hapter 513 . . . of the Laws of 1880 [of New York] . . . is the first statute . . . we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical college conferring . . . the degree of doctor of medicine, or a certificate from the constituted authorities giving him the right to practice.

Pierson, 68 N.E. at 246.

tal assertion of religious freedom to forgo medical care for a child is the 1903 case of *People v. Pierson*. In *Pierson*, New York's high court reinstated a father's conviction for failing to obtain medical care for his infant daughter, whose untreated whooping cough developed into catarrhal pneumonia, causing her death.[45] In strong language, the court set forth a clear hierarchy in which religious freedom must defer to the "peace [and] safety" of the state.[46] Although unable to invoke an ST exemption, the father denied a parent had a common-law duty to provide medical care for his child, asserting a constitutional right to choose spiritual treatment for his daughter.[47] The court noted, "[w]e place no limitations upon . . . the power of faith to dispel disease. . . . We merely declare the law as given us by the Legislature."[48] The court then pointedly quoted the state constitution, which recognizes the right to "the free exercise and enjoyment of religious profession and worship" but with the limitation that "liberty of conscience . . . shall not be so construed as to . . . justify practices inconsistent with the peace or safety of this state."[49] *Pierson* stands for the proposition that absent any special statutory exemption to the contrary, freedom of religion does not relieve a parent of the duty to furnish his or her child with all the child's necessaries, including medical attention when the child's health so requires.[50]

Pierson exerted strong influence on the courts of other jurisdictions, though not without exceptions. In the 1911 case of *Owens v. State*, the Oklahoma Court of Criminal Appeals upheld the child-endangerment conviction of a father who had failed to obtain medical treatment for his daughter, who died of typhoid fever.[51] On appeal, the defendant argued the jury should have been allowed to determine if his religious belief was a valid defense.[52] The court reasoned, relying heavily on *Pierson*, that the parental duty to provide medical attention for their child was not subject to

45. *Id.* at 244–47.
46. *Id.* at 246.
47. *Id.* at 244–45.
48. *Id.* at 247.
49. *Id.* at 246 (quoting N.Y. CONST., art. I, § 3).
50. *Id*. at 246–47.
51. 116 P. 345, 348 (Okla. Crim. App. 1911).
52. *Id.* at 345–46.

religious belief.[53] A contrary holding came from the Supreme Court of Florida in *Bradley v. State*, where the Florida Supreme Court overturned a father's manslaughter conviction for not obtaining medical attention for his severely burned daughter.[54] The father testified that rather than calling a physician, he was "trusting to the Lord and . . . believing in divine healing," but the court was silent as to this defense.[55] The court held the manslaughter statute did not cover the father's conduct, which it concluded did not constitute "[t]he killing of a human being by . . . culpable negligence"—it was the burns caused by the flames, not the father, that killed the girl.[56]

2. ST Exemptions

The history of ST exemptions, though barely four decades old, is marked by complexity and contradiction. Their genesis lies in the federal Child Abuse Prevention and Treatment Act ("CAPTA") enacted in 1974 to create uniform national legal standards on child abuse and neglect, and to promote state study and prevention efforts on the topic.[57] The statute included no religious exemption, leaving the issue to the administrative discretion of the Department of Health, Education and Welfare ("HEW"), which issued a regulation including this provision: "However, . . . a parent or guardian legitimately practicing his 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."[58] The regulation made state receipt of federal

53. *Id.* at 346; *see Pierson*, 68 N.E. at 246. The same court followed the *Owens* rule in *Beck v. State*, upholding a father's conviction for failing to obtain timely medical care for his son, who died of tetanus. 233 P. 495, 495 (Okla. Crim. App. 1925).

54. 84 So. 677, 679 (Fla. 1920).

55. *Id.* at 680. The dissent by Justice West, on the other hand, addresses the religious defense at some length and explicitly rejects it, relying in part on *Pierson* and a common-law parental duty of care. *Id.* at 679–83 (West, J., dissenting).

56. *Id.* at 679 (majority opinion).

57. The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C.S. §§ 5101–5119c (1974)).

58. Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 43937 (Dec. 19, 1974) (to be codified at 45 C.F.R. § 1340 (removed and

assistance under the statute contingent upon acceptance of this provision—in effect, the federal government using its budgetary resources to push states to enact ST exemptions; most states did so.[59] In 1983, less than a decade after CAPTA's enactment, the Department of Health and Human Services ("HHS"), HEW's successor, adopted updated regulations removing the earlier requirement of an ST exemption.[60] Very few states repealed their exemptions, though, and a large majority of jurisdictions continue to retain them.[61]

A key beneficiary, and advocate, of ST exemptions has been The First Church of Christ, Scientist, commonly known as the "Christian Science Church," founded in Massachusetts in 1879 by Mary Baker Eddy.[62] Inspired in part by the New Thought movement which advocated metaphysical healing of illness, Eddy "discover[ed] . . . that Mind governs all . . . supremely" and the real

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reserved 80 Fed. Reg. 16577, 16579 (Mar. 30, 2015))). The quoted passage is in the section on harm to a child's health or welfare.

59. *Id.* CAPTA became law during the Nixon Administration; at least two prominent White House advisors, H.R. Haldeman and John Ehrlichman, were Christian Scientists, and are believed by some commentators to have influenced the HEW regulations. Caroline Fraser, *Suffering Children and the Christian Science Church*, THE ATLANTIC MONTHLY (Apr. 1995), http://www.theatlantic.com/past/docs/unbound/flashbks/xsci/suffer.htm.

60. *See* Engle, *supra* note 5, at 377 n.11 ("Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent or guardian practicing his or her religious beliefs does not . . . provide medical treatment for a child . . . ." (quoting 45 C.F.R. § 1340.2 (d)(3)(ii) (1983) (removed and reserved 80 Fed. Reg. 16579 (Mar. 30, 2015)). For comments on the change, see Child Abuse and Neglect Prevention and Treatment Program, 48 Fed. Reg. 3698 (Jan. 26, 1983), section on Definition of Negligent Treatment. Regarding the change from HEW to HHS, see U.S. Department of Health and Human Services, HHS HISTORICAL HIGHLIGHTS, http://www.hhs.gov/about/historical-highlights/index.html.

61. *See* Engle, *supra* note 5, at 377. As of February 2015, thirty-nine states, the District of Columbia, and Guam had some form of ST exemption. Nat. Ctr. for Prosecution and Child Abuse, *Religious Exemptions to Child Neglect*, NAT'L DIST. ATTORNEYS ASS'N (Feb. 2015), http://www.ndaa.org/pdf/2-11-2015%20Religious%20Exemptions%20to%20Child%20Neglect.pdf.

62. Hans A. Baer, *Christian Science*, ENCYCLOPEDIA OF RELIGION AND SOCIETY, http://hirr.hartsem.edu/ency/cscience.htm.

causes of disease were spiritual.[63] As suggested by the name Eddy chose for the church, Christian Science makes claims that its methods of healing are empirically verifiable. Eddy wrote that her system of treating disease "has proved itself, whenever scientifically employed, to be the most effective curative agent in medical practice."[64] Christian Science views the church's healing methods as incompatible with medical science, believing the two interfere with each other.[65]

3. Oklahoma

In *State v. Lockhart,* an Oklahoma appellate court upheld the jury instruction given by the trial court in a manslaughter case, where the parents' alleged failure to provide medical care for their 9-year-old son (who died of peritonitis) was a misdemeanor predicate offense to the first-degree manslaughter charge.[66] The jury instruction stated a parent could justifiably choose "not [to] provid[e] medical treatment for his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination" for the child.[67] Oklahoma's child endangerment statute in force at the time of the child's death protected parents' choice of "spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination," but with two provisos unlike Tennessee's exemption: the parental choice must be "in good faith" and "the laws, rules, and regulations relating to communicable diseases and sanitary matters" not violated.[68] The court found the ST exemption clearly induced reliance by the parents that choosing treatment by prayer would not lead to subsequent prosecution in the event treatment was unsuccessful.[69] The court found no

63. MARY BAKER EDDY, SCIENCE AND HEALTH: WITH KEY TO THE SCRIPTURES 13 (1888).

64. *Id.*

65. *See* Merrick, *supra* note 3, at 272.

66. 664 P.2d 1059, 1059–60 (Okla. Crim. App. 1983).

67. *Id.* at 1060.

68. *Id.* (quoting OKLA. STAT. tit. 21, § 852 (1975) (current version at OKLA. STAT. tit. 21, 852 (West 2002 & Supp. 2013)).

69. *Id.* at 1059.

vagueness in the ST exemption statute, but rather clear legislative intent to provide the protection.[70] *Lockhart* stands for the proposition that the ST defense will be allowed where the exemption induces reliance by parents. A 1988 amendment to Oklahoma's child endangerment statute narrowing the ST exemption by requiring provision of medical care "where permanent physical damage could result" provides a clear boundary line beyond which the ST exemption no longer protects parents.[71]

4. Ohio

In *State v. Miskimens*, where the parents chose prayer treatment for their thirteen-month old son's respiratory infection, of which he later died, both defendants and state attacked the state's ST exemptions as unconstitutional—the state on Establishment Clause grounds, among others, and the defendants on the ground of vagueness.[72] Ohio's ST exemption in force at the time included this proviso in the child-endangerment statute: "It is not a violation of a duty of care . . . when the parent . . . treats the . . . illness . . . of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body."[73] The trial court found the exemption, "based solely upon a religious preference of the accused," rife with Establishment Clause difficulties and held it unconstitutional on that ground.[74] In rejecting the defendants' free-exercise argument, the court relied on the 1944 U.S. Supreme Court case of *Prince v. Commonwealth* for the proposition that while religious freedom is absolute in matters of conscience, states may limit religious practice.[75] But the court also

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70. *Id.* at 1060.

71. OKLA. STAT. tit. 21, § 852 (1975) (current version at OKLA. STAT. tit. 21, 852 (West 2002 & Supp. 2013)).

72. 490 N.E.2d 931, 933–38 (Ohio Ct. Com. Pl. 1984).

73. *Id.* at 933 n.1 (quoting OHIO REV. CODE ANN. § 2919.21(A) (1984) (amended 2011)).

74. *Id.* at 934.

75. *Id.*; Prince v. Commonwealth, 321 U.S. 158, 166 (1944). In *Prince*, a guardian charged with violating the child-labor statutes by allowing a minor ward to distribute religious literature on the streets invoked a free-exercise First Amendment defense. *Id.* 160–64. The U.S. Supreme Court held that, as "*parens patriae*," the state may restrict religious conduct (though not belief) in order to protect a child's well-being. *Id.* at 166 (emphasis added). In the earlier

found the exemption irremediably vague, failing to define "tenets," "recognized," and other key terms whose determination would also "hopelessly involve the state" in entangling questions of religion.[76] Because the exemption's vagueness deprived the parents of fair notice (as well as leaving the state without clear guidelines for enforcement), the court voided the conviction.[77] *Miskimens* stands for the proposition that, even where the ST exemption invoked by parents is held unconstitutional on Establishment Clause grounds, statutory vagueness entitles the parents to relief.

5. California

In *Walker v. Superior Court,* the California Supreme Court upheld the denial of a motion to dismiss involuntary manslaughter and felony child endangerment charges against a Christian Scientist mother whose child died of medically untreated meningitis.[78] The court pointedly stated that "parents have *no* right to free exercise of religion at the price of a child's life."[79] California's ST exemption is in the child abuse and neglect statute, but the Walkers were prosecuted under manslaughter and felony child-endangerment statutes. The court rejected the argument that California law forced parents to guess when one statute's protections give way and the other statute's imposition of criminal liability become controlling; the law just required parents to "estimate rightly . . . the point at which their course of conduct becomes criminally negligent"—a requirement, and a kind of estimate, of

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case of *Reynolds v. United States*, the U.S. Supreme Court upheld a man's bigamy conviction in spite of his religious defense; the Court held that religious belief is no defense to violation of a criminal statute. 98 U.S. 145, 167 (1879). "To permit [the defense] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.*

76. *Miskimens*, 490 N.E.2d at 934.

77. *Id.* at 938–39. Because of the notice issue, the court expressly made its holding of unconstitutionality of the ST exemption prospective only. *Id.* at 936; *see also* State v. Hermanson, 604 So. 2d 775, 775–76 (Fla. 1992) (parents were unconstitutionally denied fair notice of when their choice of spiritual treatment for their child would lose statutory protection).

78. 763 P.2d 852, 873 (Cal. 1988).

79. *Id.*

which the law is "full of instances."[80] The *Walker* court strikingly asserted the primacy of parental duty over the tenets of religious faith: "Imposition of felony liability for endangering or killing an ill child by failing to provide medical care furthers an interest of unparalleled significance."[81] *Walker* stands for the continued vigor of *Pierson*, and for the limitation of an ST exemption's effects to the statute that contains it.

6. Minnesota

The ST exemption's interaction with other statutes proved difficult in the Minnesota case of *State v. McKown*, as well.[82] In *McKown*, Christian Science parents were charged with second-degree manslaughter for choosing spiritual rather than medical means to treat their son's diabetes, of which he died; the court rejected their invocation of the ST exemption because that exemption was located in the child neglect statute, not the manslaughter statute, and the two were not *in pari materia*.[83] The court found, however, that the ST exemption's "broad[] word[ing], stating that a parent may in good faith 'select and depend upon' spiritual treatment and prayer, without indicating a point at which doing so will expose the parent to criminal liability," deprived the defendants of their Due Process right to fair notice.[84] Persuaded by the defendant parents' argument that the exemption induced reliance on their part, the court upheld the voiding of their conviction.[85]

80. *Id.* at 871–72.

81. *Id.* at 869.

82. 475 N.W.2d 63, 65 (Minn. 1991).

83. *McKown*, 475 N.W.2d at 66.

84. *Id.* at 68.

85. *Id.* at 68–69. In another key case involving prosecution under a statute separate from the one containing the ST exemption, *Commonwealth v. Twitchell*, the court ruled that the exemption—phrased almost exactly like Tennessee's—was not intended by the legislature to serve as a defense to the involuntary manslaughter statute because the exemption was placed in the parental desertion and nonsupport statutory section. 617 N.E.2d 609, 615–16 (Mass. 1993). On statutory grounds, therefore, the court rejected the parents' "fair notice" argument for the spiritual-treatment defense. *Id.* at 615–17. However, the court reversed the conviction on the grounds the defendants might have relied on a misleading opinion by the state attorney general regarding the ST exemption. *Id.* at 618–20. A case where faith-healing parents obtained reversal of convic-

Like the *Walker* court, the *McKown* court refused to extend the ST exemption to a manslaughter statute via the canon of *in pari materia*; however, as in *Miskimens*, the court voided the conviction on grounds of vagueness.

7. Tennessee

Tennessee enacted its ST exemption in 1994, some two decades after most jurisdictions did so.[86] The exemption currently extends the following protection against prosecution for child neglect:

> Nothing in this part shall be construed to mean a child is abused, neglected, or endangered, or abused, neglected or endangered in an aggravated manner, for the sole reason the child is being provided treatment by spiritual means through prayer alone, in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner of the recognized church or religious denomination, in lieu of medical or surgical treatment.[87]

An early parental assertion of a religiously based right to forgo medical treatment for one's child, predating enactment of the ST exemption, was the 1983 case, *In re Hamilton*.[88] There, the father of a 12-year-old girl suffering from Ewing's Sarcoma refused to obtain medical care for his daughter, invoking his free-exercise rights under the First Amendment.[89] The court held Pam-

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tion, but not by application of the ST exemption's protections, is *Craig v. State*, 155 A.2d 684, 689 (Md. 1959). In *Craig*, the appellate court reversed the parents' involuntary manslaughter conviction over the death of their infant daughter, holding that the state failed to prove the parents' gross negligence was the proximate cause of the child's death. *Id.*

86. 1994 Tenn. Pub. Acts ch. 978 (current version at TENN. CODE ANN. § 39-15-402(c) (2014)).

87. TENN. CODE ANN. § 39-15-402(c) (2014).

88. 657 S.W.2d 425, 428–29 (Tenn. Ct. App. 1983).

89. *Id.* at 426–27. In a remarkable coincidence, Pamela Hamilton's affliction was the same one Jessica Crank would suffer some twenty-five years later.

ela was a dependent and neglected child under the relevant state statute, and that under the doctrine of *parens patriae* the state had the right to limit the father's free exercise of religion so as to protect the child's health and well-being.[90] Between enactment of the ST exemption in 1994 and Jacqueline Crank's 2007 indictment, no assertion of parental religious freedom to forgo medical care for a sick child reached Tennessee courts—making *State v. Crank* a case of first impression.[91]

III. *STATE V. CRANK*

A. *Background and History*

In *State v. Crank,* the Tennessee Supreme Court upheld the criminal conviction of a Lenoir City, Tennessee mother for child neglect for failing to obtain medical treatment for her teenaged daughter, who contracted bone cancer and died.[92] Defendant Jacqueline Crank ("Jacqueline") and her teenaged daughter Jessica Crank ("Jessica") joined the Universal Life Church congregation established by Ariel Ben Sherman ("Sherman") in April 2001.[93] A personal relationship developed between Jacqueline and Sherman.[94] When fifteen-year-old Jessica developed shoulder trouble,

90. *Id.* at 429. The conviction of Pamela's father in *In re Hamilton* came under then TENN. CODE ANN. § 37-202(6)(iv) (1994), which is now TENN. CODE ANN. § 37-1-102(b)(12)(D), and which in both cases defines a "[d]ependent and neglected child" as one "[w]hose parent, guardian, or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child." *Id.* § 37-1-102(b)(12)(D).

91. The statute previously survived a vagueness challenge, but not with respect to the ST exemption. State v. Prater, 137 S.W.3d 25, 32 (Tenn. Crim. App. 2003) (noting that because the statute's *mens rea* requirement of "knowing" conduct clearly applied to the verbs "treats" and "neglects," the child abuse and neglect statute provided constitutionally sufficient warning of prohibited conduct).

92. 468 S.W.3d 15, 17–18 (Tenn. 2015).

93. *Id.* at 18.

94. *Id.* at 20. On at least one occasion, Sherman identified himself to a health professional as Jessica's father. *Id.* Sherman is not the most sympathetic figure. News reports of his death noted that he sought medical treatment for his cancer and pneumonia, and one religious-news website termed him a "hypocrite" for that reason. *Faith Healer Convicted in Girl's Faith Healing Death was a Hypocrite*, RELIGION NEWS BLOG (Jan. 10, 2013), http://www.religionnewsblog.com/27016/ariel-ben-sherman-faith-healing; Bob

Jacqueline took the daughter to see a chiropractor and, several weeks later, a nurse practitioner; both health professionals urged Jacqueline to take Jessica to the local emergency room, but Jacqueline chose instead "to turn to Jesus Christ, [her] Lord and [her] Savior . . . for Jessica's healing" by prayer.[95] The nurse practitioner, who observed bone disintegration on an x-ray of Jessica's shoulder, became concerned, verified that Jessica was never taken to the emergency room, and notified the police.[96] This led to the Department of Children's Services taking custody of Jessica and having her admitted to a hospital, where a physician diagnosed her with Ewing's Sarcoma, a rare bone cancer.[97] Jessica received treatment, was later transferred to hospice care, and died within three months of her original hospitalization.[98]

Jacqueline and Sherman were indicted in April 2003 for neglect of a child under the age of eighteen, due to their failure to provide Jessica with adequate medical care.[99] The trial court dismissed Sherman's indictment but it was reinstated on appeal and remanded for further proceedings.[100] On remand, Sherman was convicted of child neglect; he died during the pendency of his appeal.[101] The trial court initially dismissed the charge against Jacqueline, relying on a 2005 amendment to section 39-15-401 that made the statute's child neglect portion applicable only to children younger than thirteen.[102] The Court of Criminal Appeals, however, reversed the trial court and reinstated the indictment because it held the 2005 amendment could not be applied retroactively.[103]

Fowler, *Faith-Healer Sought Medical Care While Recommending Against Same for Teen*, KNOXVILLE NEWS SENTINEL (Jan. 7, 2013), http://www.knoxnews.com/news/local/faith-healer-sought-medical-care-while-recommending-against-same-for-teen-ep-359205398-356276851.html.

95. *Crank*, 468 S.W.3d at 19.

96. *Id.* at 19–20.

97. *Id.*; *Ewing Sarcoma*, U.S. NAT'L LIBRARY OF MED. MEDLINEPLUS (Mar. 23, 2014), https://www.nlm.nih.gov/medlineplus/ency/article/001302.htm.

98. *Crank*, 468 S.W.3d at 20.

99. *Id.* at 18 (citing TENN. CODE ANN. § 39-15-401(a) (Supp. 2001)).

100. *Id.*

101. *Id.*

102. *Id.* (citing TENN. CODE ANN. § 39-15-401 (Supp. 2005)).

103. *Id.* (citing State v. Sherman, No. E2006-01226-CCA-R3-CD, 2007 WL 2011032, at *4–5 (Tenn. Crim. App. July 12, 2007)).

After a pre-trial hearing on the effect of the ST exemption on the child-neglect charge, the trial court dismissed Jacqueline's constitutional claims and denied her motion to dismiss.[104] In a bench trial, the court found Jacqueline guilty of child neglect and sentenced her to eleven months and twenty-nine days of unsupervised probation.[105] On appeal, the conviction and sentence were affirmed.[106] The Tennessee Supreme Court granted an appeal, in which it affirmed the lower court.[107]

B. The Tennessee Supreme Court's Decision

In *Crank,* the Tennessee Supreme Court considered vagueness and Establishment Clause challenges, preceding the analysis with an overview of the exemption's legislative history.[108] Importantly, Defendant's challenge to the ST exemption was facial, rather than as-applied. A facial challenge states, in effect, that there is no way to apply the challenged statute or provision that would be constitutional.[109] This sets a high bar for Defendant to overcome—which is one reason why, aside from First Amendment cases, such challenges are quite rare. The court allowed this challenge, precisely because the statute implicated Defendant's First Amendment religious rights.[110]

After reviewing the facts, the court began with an analysis of the statute for vagueness; if the exemption were found imper-

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104. *Id.* at 19.

105. *Id.* at 19–21.

106. *Id.* at 21 (citing *Crank*, No. E2012-01189-CCA-R3-CD, 2013 WL 5371617, at *6–8 (Tenn. Crim. App. Sept. 26, 2013), *aff'd* 468 S.W.3d 15).

107. *Id.* at 31.

108. *Id.* at 22–30. The Court also considered a third issue, outside the scope of this Comment: whether Defendant was entitled to a hearing pursuant to the State Preservation of Religious Freedom Act ("PRFA"), holding that she was not because there was no evidence of legislative intent to make the PRFA retroactive. *Id.* at 30–31

109. Dorf, *supra* note 40, at 236–37 ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))); City of Chicago v. Morales, 527 U.S. 41, 111 (1999).

110. *Crank*, 468 S.W.3d at 24–25.

missibly vague, Defendant's conviction would be overturned.[111] "[T]he determinative inquiry," stated the court, "is whether [the] statute's 'prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.'"[112] The court acknowledged the exemption "falls short of 'absolute precision.'"[113] However, the court resolved potential ambiguity, first, by construing statutory language "according to the fair import of its terms."[114] The court noted a dictionary defined "recognized" as "acknowledge[d] or treat[ed] as valid."[115] The court further found the term "duly accredited practitioner" pointed clearly to the Christian Science faith because that term is used by Christian Scientists to refer to a person within that church who is "authorized to practice healing."[116]

The legislative history of the ST exemption presented at the outset of the court's analysis included reference to the Tennessee House initial 93–0 vote in favor of a version of the 1994 Act with no ST exemption.[117] The court gave this fact considerable weight in its deliberation, reasoning that the unanimous approval of the earlier version made discernment of legislative intent less speculative than it might otherwise have been.[118] The court also noted statements by the ST exemption's primary legislative sponsors.[119] Particularly striking is State Senator Jim Holcomb's quoted remark: "The amendment was offered by the Christian Scientists,

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111. *Id.* at 22–23. The Court explicitly rejected the argument offered by the State, that if the ST exemption were found unconstitutionally vague, the proper remedy would be to excise it from the statute, "which would provide the [D]efendant no relief." *Id.* at 23 (alteration in original). The logic the Court rejected as to vagueness, it later employed in considering the Establishment Clause challenge.

112. *Id.* at 23 (quoting State v. Pickett, 211 S.W.3d 696, 704 (Tenn. 2007)).

113. *Id.* at 27 (quoting State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976)).

114. *Id.* (quoting TENN. CODE ANN. § 39-11-104 (2014)).

115. *Id.* at 26 (citation omitted) (alteration in original).

116. *Id.* at 27.

117. *Id.* at 21–22.

118. *Id.* at 22. The Court later looks to the 93–0 vote as a guide in how to apply the doctrine of elision with regard to the Establishment Clause challenge. *Id.* at 27–30.

119. *Id.*

and it ensures that they are protected. . . . [I]t was offered by that group, and that is the reason that I put it in."[120] The legislative history, the court reasoned, makes the term "recognized" "less vague" and makes it "apparent" that "the exemption is effectively limited to members of religious groups that closely resemble the Christian Science Church."[121] The court distinguished *Hermanson,* where the Florida Supreme Court found it unconstitutional that one statute permitted conduct that another statute forbade.[122] The *Crank* court, in contrast, held "it cannot be said that our statutes simultaneously authorize and prohibit the same conduct," thus disallowing the vagueness claim.[123]

Turning to Jacqueline's Establishment Clause challenge, the court first invoked the maxim of judicial restraint, which cautions against adjudicating issues of constitutionality unless doing so is absolutely unavoidable.[124] The court reasoned there was no need to rule on the Establishment Clause: in the event the ST exemption were held unconstitutional, the only remedy would be to elide the exemption because the legislature "enacted the child abuse and neglect statute in 1989 without a[n] . . . exemption."[125]

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120. *Id.* at 21–22 (quoting *Hearing on S.B. 2562*, 98th Gen. Assemb., Reg. Sess. 2 (Tenn. 1994) (statement of Sen. Jim Holcomb)). Similarly, the primary sponsor in the House, Representative J.B. Napier, "recognized the amendment as 'relative to the Christian Science religion, which I have no objection to.'" *Id.* at 22 (quoting *Hearing on S.B. 2562*, 98th Gen. Assemb., Reg. Sess. 2 (Tenn. 1994) (statement of Rep. J.B. Napier)). Senator Holcomb's remarks were made to the full Senate, Representative Napier's in committee hearings.

121. *Id.* at 27; *see also* Treene, *supra* note 3, at 143–44 (arguing that provisions which require spiritual treatment by a duly accredited practitioner in accordance with the tenets of a recognized church "effectively limit the exemption to Christian Scientists").

122. *Crank*, 468 S.W.3d at 25; State v. Hermanson, 604 So. 2d 775, 776 (Fla. 1992).

123. *Crank*, 468 S.W.3d at 27.

124. *Id.* at 27–29. "This Court will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation." State v. Murray, 480 S.W.2d 355, 357 (Tenn. 1972) (citing State ex rel. Loser v. Nat'l Optical Stores, 225 S.W.2d 263, 268 (Tenn. 1950)).

125. *Crank*, 468 S.W.3d at 29. Note how this is the same logic that, on the vagueness issue, the Court refused to accept from the State. *See supra* text accompanying note 111. In its review of the statute's legislative history, the Court

Enforcing the statute sans ST exemption, in the court's view, best honors legislative intent.[126] But what if elision were applied not to the entire exemption but just to the language referring to "a recognized church"? The court briefly considered this possibility, which would simply leave an ST exemption for any parent who "provide[s] treatment by spiritual means through prayer in lieu of medical or surgical treatment," but the court rejected this as "indulging in judicial legislation."[127] The court reasoned that even if such an elision might cure the statute's possible constitutional infirmity, "we cannot say that our legislature would have enacted an exemption so broad [as to] encompass all instances in which a parent claims reliance on prayer in lieu of medical treatment for a child."[128] The court cautioned that the doctrine of elision gives no license to "completely re-write or make-over a statute."[129] Hypothetically applying elision to the entire ST exemption, the court reasoned that the remaining child abuse and neglect statute would contain no protection for parents' choice of ST—leaving the conviction standing. Since the hypothetical elision would afford Jacqueline no relief, the trial court's judgment was affirmed.[130]

IV. ANALYSIS OF DECISION

The challenge of *Crank* lies not just in the two chief constitutional issues raised—vagueness and the Establishment Clause—but in the way the two issues interact, even intertwine with one another. The Tennessee Supreme Court refused to invalidate the Tennessee child abuse and neglect statute or its ST exemption provision for vagueness, finding that its key terms ("prayer," "tenets," "church," "recognized," and "practitioner") clearly expressed the legislative intent to extend the exemption's protections exclusively to "members of religious groups that closely resemble the Chris-

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also noted that, initially, the House had voted unanimously to pass a version of the 1994 Act with no ST exemption. *Crank*, 468 S.W.3d at 21.

126. *Crank*, 468 S.W.3d at 29–30.

127. *Id.* at 29 (quoting State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994)).

128. *Id.*; *see Tester*, 879 S.W.2d at 830; *In re* Swanson, 2 S.W.3d 180, 189 (Tenn. 1999); *see also* Davidson Cnty. v. Elrod, 232 S.W.2d 1, 2 (Tenn. 1950).

129. *Crank*, 468 S.W.3d at 29 (quoting Shelby Cnty. Election Comm'n v. Turner, 755 S.W.2d 774, 778 (Tenn. 1988)).

130. *Id.* at 30.

tian Science Church" and thus the statute met the Due Process requirement to give fair notice.[131] With that, the vagueness issue shades quickly into Establishment Clause concerns. It would seem, at first glance, that the statute has gone from the frying pan into the fire, constitutionally speaking—no sooner does it pass the vagueness test with ease, than Establishment Clause alarm bells go off. But then the Tennessee Supreme Court applied the doctrine of elision in a manner that rendered the Establishment Clause issue moot and afforded Jacqueline Crank no relief.

The court denied that "[Tennessee's] statutes simultaneously authorize and prohibit the same conduct"—yet the same omission (of medical treatment) is allowed to some, who are permitted to meet their duty of parental care via religious means alone, and denied to others.[132] Insofar as the Florida case of *Hermanson* involved two contradictory statutes, one permitting the conduct in question, and the other forbidding it, the court was correct to distinguish—*Crank* involves no such clash of statutes.[133] Yet the court was too quick to distinguish *Hermanson*, for vagueness can result not only from confusingly clashing statutes but also from the confusing operation of a single statute. The Court denied this, stating that the [ST] exemption merely "protects from prosecution individuals whose conduct would otherwise qualify as child abuse or neglect."[134] But omitting to obtain medical attention for one's sick child *is* both authorized and forbidden by the exemption—authorized to members of some religious faiths and forbidden to members of other religious faiths.

Leaving the Establishment Clause aside for the moment, the vagueness question is whether the statute puts citizens on clear notice as to the state's regulation of their conduct, or instead "require[s] [them] at peril of life, liberty or property to speculate as to the meaning of penal statutes."[135] This fundamental Due Process

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131. *Id.* at 26–27. For the "closely resembling" phrase, see *id.* at 27. The Court also relied on Treene, *supra* note 3, at 143–44 (arguing that the "duly accredited practitioner" and "recognized church" language of many ST exemptions effectively limits their protections to members of the Christian Science church).

132. *Crank*, 468 S.W.3d at 27.

133. *See* State v. Hermanson, 604 So. 2d 775, 775–76 (Fla. 1992).

134. *Crank*, 468 S.W.3d at 27.

135. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

question is in play—whether Tennessee's ST exemption is best understood as "simultaneously authoriz[ing] and prohibit[ing] the same conduct" or as "protect[ing] from prosecution individuals whose conduct would otherwise qualify as child abuse or neglect."[136] The persuasive authority of the *Miskimens* court furnishes valuable guidance, for there, as in *Crank*, there was no clash of statutes.[137] In *Miskimens*, the Ohio trial court correctly noted that the statute failed to define "tenets," "recognized," and other essential terms.[138] Tennessee's exemption similarly failed to define its key terms, and the Supreme Court's attempt to do so raised as many questions as it answered.[139]

The Tennessee Supreme Court relied on legislative history to further determine the statute's clarity. Resolving the vagueness issue with reference to legislative history imposes a questionable burden on citizens, imputing to citizens not only constructive knowledge of the law but also of committee debates and other steps of the legislative process. Certainly the court's reasoning is not without warrant: in *State v. Smith*, the Tennessee Court of Criminal Appeals held that "[t]he clarity in meaning required by due process may also be derived from legislative history."[140] However, the court's language in *Crank* is notably tentative at times regarding vagueness, as when it says that the legislative history makes the term "recognized" "less vague."[141] The modest

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136. *Crank*, 468 S.W.3d at 27.

137. *See supra* Section II.D.4.

138. State v. Miskimens, 490 N.E.2d 931, 934–35 (Ohio Ct. Com. Pl. 1984).

139. In attempting to show the ST exemption is not vague, the Court states that "the legislative intent was for the exemption to apply to members of religious bodies which, like the Church of Christian Science, are established institutions with doctrines or customs that authorize healers within the church to perform spiritual treatment via prayer." *Crank*, 468 S.W.3d at 27. But this language does not clarify what is meant by "established," for instance, or what practice qualifies as a "doctrines or customs."

140. 48 S.W.3d 159, 168 (Tenn. 2000); *see also* State v. Wilkins, 655 S.W.2d 914 (Tenn. 1983); State v. Hayes, 899 S.W.2d 175, 181 (Tenn. Crim. App. 1995). In *Walker v. Superior Court*, the California Supreme Court stated a similar expectation of the public with regard to legislative history. 763 P.2d 852, 872–73 (Cal. 1998).

141. *Crank*, 468 S.W.3d at 27. The Court also cites to Treene, *supra* note 3, at 143–44 (arguing that provisions which require spiritual treatment by a duly

assertion, "less vague," seems shaky ground to support a finding that the statute is not void for vagueness, and appears to contradict the court's language, elsewhere in its opinion, that the ST exemption clearly applied only to churches "closely resembl[ing] the Christian Science Church."[142] The Tennessee Supreme Court's affirmative answer, based on narrowing the exemption's scope to one faith, purports to resolve vagueness by leading us straight into the thickets of the Establishment Clause. This is because exempting "members of religious groups that closely resemble the Christian Science Church" raises the specter of *Larson*, or, worse yet, *HEB Ministries*-like inquiry into theological, liturgical, and other religious traits—not to mention the privilege inherent in setting one faith up as the yardstick against which to assess others' "close resemblance."[143]

Highly persuasive authority for viewing with serious misgivings the *Crank* court's acceptance of special statutory protection to one religious faith comes from a 1996 federal case, *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*.[144] The *Vladeck* court held making Christian Science "sanatoria" (the church's centers devoted to healing by prayer) eligible for Medicare reimbursement amounted to religious favoritism that failed strict scrutiny.[145]

Particularly troubling is the Tennessee Supreme Court's use of a dictionary definition to establish the clarity of the word "recognized" as applied to a church, when it states that the word "broadly refers to something that is 'acknowledge[d] or treat[ed] as valid.'"[146] A clearer infringement of the Establishment Clause would be hard to find: "valid," with its senses of "correct" and "proper," evokes just the sort of state review and approval (or rejection) of individual churches' doctrine and practice the *HEB Ministries* court held unconstitutional.[147]

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accredited practitioner in accordance with the tenets of a recognized church "effectively limit the exemption to Christian Scientists.").

142. *Crank*, 468 S.W.3d at 27.

143. *Id.*; *see supra* Section II.B (citing Larson v. Valente, 456 U.S. 228, 244–52 (1982); HEB Ministries v. Tex. Higher Educ. Coordination Bd., 235 S.W.3d 627, 656–57 (Tex. 2007)).

144. 938 F. Supp. 1466 (D. Minn. 1996).

145. *Id.* at 1472–73.

146. *Crank*, 468 S.W.3d at 27 (citation omitted).

147. *HEB Ministries*, 235 S.W.3d at 678.

Finally, the Establishment Clause issue is intertwined with the vagueness issue because the definition of terms like "tenets," "recognized," "prayer," "church," and the like would, in the words of the *Miskimens* court, "hopelessly involve the state" in entangling questions of religion.[148]

The Tennessee Supreme Court acknowledged serious Establishment Clause concerns in a lengthy footnote near the end of its opinion, which stated in part:

> [T]he Establishment Clause issue gives us pause, as the statutory text and the legislative history, taken together, appear to indicate that the spiritual treatment exemption was enacted for the benefit of the Christian Scientist denomination of the Christian faith. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion," and the corresponding provision in the Tennessee Constitution provides "that no preference shall ever be given, by law, to any religious establishment or mode of worship."[149]

The Tennessee Supreme Court was correct to look with concern on the Establishment Clause issues raised in *Crank*, though its language did not go far enough. It is not clear whether the tentative nature of the court's language had to do with uncertainty as to whether the statute violates the Establishment Clause, or rather with the principle of judicial restraint, which led the court not to rule on the issue.

Ultimately, the vagueness challenge having been rejected, the *Crank* holding turns on the court's use of elision. The court foreclosed the Establishment Clause issue by hypothetically applying elision to the entire ST exemption. Whether to apply elision as broadly as the court hypothesized, or by more narrowly pruning the exemption of its favoritism, is a closer question than the court allows. The severability statute allows selective elision. Applying elision more surgically by cutting the "established church" verbi-

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148. State v. Miskimens, 490 N.E.2d 931, 934 (Oh. Ct. Comm. Pl. 1984).

149. *Crank*, 468 S.W.3d at 27 n.8 (quoting U.S. CONST. amend. I; TENN. CONST. art. I, § 3).

age would leave a child abuse and neglect statute containing an exemption for spiritual treatment, but not an exemption tethered to a particular faith and others "closely resembling" it. It is not so manifest that this would have thwarted legislative intent. The Tennessee Supreme Court appeared to dismiss the possibility out of hand, thereby denying Jacqueline relief. In short, once it found the statute not vague, the court's use of elision became dispositive.

Had the Tennessee Supreme Court dwelt more thoroughly on the alternative elision hypothesis, it might have entertained the possibility that adjudicating constitutionality under the Establishment Clause *was* necessary to its determination of the case—as necessary as the constitutional examination it so readily undertook with regard to vagueness. Eliding the entire exemption would be the proper remedy where unconstitutionality lay in giving benefits to religion generally, but the court never raised the latter issue. If, on the other hand, the statute's Establishment Clause infirmity lies in favoring certain faiths, more selective elision would be appropriate. This much the court recognized, but it concluded that using elision in this way would rewrite the statute—impermissible "judicial legislation."[150]

V. CONCLUSION

The fundamental problem with the Tennessee Supreme Court's holding in *Crank* was that the statute, with its ST exemption, failed to give Jacqueline Crank fair notice of what conduct was prohibited and what conduct allowed. To paraphrase the U.S. Supreme Court in *Morales*, the vagueness that dooms the Tennessee statute lies in the uncertainty it creates about which prayers are protected by the statute and which prayers are not.[151] As such, the proper course for the court was to void the conviction on the Due Process ground of vagueness. The Establishment Clause infirmities of the statute were equally clear. Less so was the proper application of the doctrine of elision; it is at least tenable that a more selective striking of the statutory language favoring particular

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150. *See supra* Section II.C.

151. City of Chicago v. Morales, 527 U.S. 41, 57 (1999) ("The vagueness that dooms this ordinance is . . . the product of uncertainty . . . about what loitering is covered by the ordinance and what is not.").

churches would have been appropriate. The State's interest in protecting children is unassailable, an "interest of unparalleled significance" in the *Walker* court's eloquent phrase.[152] But in *Crank* the State asserted, and the court found, no warrant for the superior efficacy of Christian Science prayers over those of any other church, or, indeed, any mother or father, to heal an ailing child.

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152. Walker v. Superior Court, 763 P.2d 852, 869 (Cal. 1998); *see also* People v. Pierson, 68 N.E. 243 (N.Y. 1903); 118 A.L.R.5th, *supra* note 1.