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Religion Is Not a Basis for Harming Others:

Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine

Erwin Chemerinsky* and Michele Goodwin**

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Increasingly, people are claiming that practicing their religion gives them a right to inflict injuries on others. Court clerks assert their religion gives them a right to refuse to give marriage licenses to same-sex couples.[1] Businesses claim that their owners' religious beliefs are a basis for refusing to provide services at same-sex weddings.[2] Employers demand the right to deny insurance coverage to employees for contraceptives.[3] Doctors maintain that they may refuse to

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1. Ann M. Simmons, *How a County Clerk Is Refusing to Issue Gay Marriage Licenses and Defying the Supreme Court*, L.A. Times (Aug. 18, 2015, 7:02 PM), http://www.latimes.com/nation/nationnow/la-na-nn-kentucky-marriage-license-20150818-htmlstory.html [http://perma.cc/TVM8-WY5J].

2. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013) (holding that a photographer could not refuse to take pictures at a same-sex wedding based on religious beliefs).

3. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (holding that the contraceptive requirement, as applied to closely held corporations, violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2000)).

provide assisted reproductive technology services to lesbians and same-sex couples.[4] Pharmacists want the right not to fill prescriptions that they see as violating their religious beliefs.[5] Parents profess a religious right to restrict their children from receiving medical care, opting instead for prayer. As we have written in the context of vaccinations, some states provide religious exemptions for parents who wish to withhold this important, basic preventative treatment from their children, placing not only their kids, but also others at risk.[6]

This is the context for Dr. Paul A. Offit's powerful new book.[7] He focuses on how children are suffering and dying because of their parents' religious beliefs. Dr. Offit's book is about medicine and how religious beliefs are preventing the administration of needed medical care to children. The book is replete with stories of children who died because their parents refused to provide medical care to treat illnesses based on religious beliefs.[8] Toward the end of the book, he quotes a study that found "twenty-three denominations in thirty-four states . . . practice faith healing" and "tens of thousands of Americans were refusing medical care for themselves and their children."[9] The study's authors found a strong likelihood that denial of medical care due to religious reasons led to the death of 172 children.[10] There is actually no way to count the number of children who suffer or die because they are denied medical care based on religion[11]—that is why Dr. Offit's book primarily contains stories of specific instances where this occurred.

Dr. Offit's discussion of the law is incidental to this, such as when he applauds court decisions requiring that children be given needed medical care or criticizes laws that create a religious exemption for medical treatment.[12] He surmises that the threat of criminal punishment may deter religiously motivated parents from denying medical care to their children. Dr. Offit also proposes statutory changes to laws creating religious exemptions.[13] We agree with Dr. Offit's analysis and recommendations. However, the book's legal analysis falls

4. *See* Benitez v. N. Coast Women's Care Med. Grp., 106 Cal. App. 4th 978, 988–89 (2003) (holding that ERISA did not preempt a patient's claims against her doctors alleging they refused to provide additional fertility treatments because of her sexual orientation).

5. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015) (holding that a regulation requiring pharmacies to timely deliver all prescription medications, even if the pharmacy owner had a religious objection, was facially neutral for purposes of the Free Exercise Clause and constitutional); *infra* notes 160–62 and accompanying text.

6. Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. (forthcoming 2016).

7. PAUL A. OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE (2015).

8. *See, e.g.*, *infra* text accompanying notes 21–29.

9. OFFIT, *supra* note 7, at 181.

10. *Id.* at 180 (describing children who had "died under suspicious circumstances," including a twelve-year-old girl whose bone cancer had grown to be "the size of a watermelon," among others).

11. *See id.* at 181 (describing the suspicion that "many more fatalities ha[d] occurred" than those they had discovered because "deaths in faith healing sects were often reported as due to natural causes . . . [or] never reported").

12. *Id.* at 183–84, 192–93.

13. *Id.* at 183–84, 192–93.

within just a handful of pages in a relatively short work (198 pages). He writes as a doctor and an expert on public health, not a lawyer, law professor, or judge.

In this Review Essay, we add a more explicitly legal framework. Our thesis is that free exercise of religion—whether pursuant to the Constitution or a statute—does not provide a right to inflict injuries on others. One person's freedom ends when another person will get hurt. Our position is not anti-religion and it does not deprive free exercise of religion of meaning. Free exercise of religion is a basic right, reflected in the First Amendment and federal statutes, such as the Religious Freedom Restoration Act of 1993 (RFRA). No one questions that. The relevant issue is whether a parent's free exercise of religion justifies denying needed medical care to children. We argue people still can believe what they want, worship as they choose, and follow their religious precepts—until and unless doing so would hurt someone else. It is for this reason that Dr. Offit is correct that parents have no right to inflict suffering or death on their children in the name of religion.

Our Review Essay proceeds in three parts. Part I provides a synopsis of Dr. Offit's book, particularly focusing on his discussion that children are hurt and die because of medical neglect in the name of religion. Part II summarizes the law concerning free exercise of religion. It specifically addresses the constitutional standards and analysis to be applied to our principal concern: the problem of parents denying medical care to their children. The current legal standards are an unusual, if not unique, amalgam of constitutional, federal statutory, and state constitutional and statutory law. In fact, as Dr. Offit points out, and as we discuss below, for a time federal law required that states give an exemption from prosecution and liability to parents whose children were hurt from the denial of medical care for religious reasons.[14]

Finally, Part III develops our thesis that free exercise of religion does not provide a right to injure others. We use this to support Dr. Offit's conclusion: parents do not have the right to deny needed medical care to their children. We favor laws that require access to needed medical treatment for children and require state governments to provide such medical care. Further, we believe these principles explain why the religious beliefs of some should never be the basis for denying medical care to others.

I. THE DENIAL OF MEDICAL CARE TO CHILDREN IN THE NAME OF RELIGION

The central thesis of Dr. Offit's book is that "children are suffering and dying because their parents are choosing prayer instead of modern medicine."[15] He especially focuses on religions, like Christian Science, which eschew medical

14. *See id.* at 168–72 (discussing the Child Abuse Prevention and Treatment Act (CAPTA) requirement that states, as a condition for receiving federal money, create such exemptions); *infra* notes 113–20.

15. *Id.* at 193.

care.[16] He tells the story of how Mary Baker Eddy, whose mother believed she was a "Divine Spirit sent by God," developed the religion in the nineteenth century.[17] Eddy, who suffered from numerous illnesses throughout her childhood and early adult life, came to believe that the power of suggestion could render miraculous medical benefits when combined with religious teachings.[18] Dr. Offit writes that "Eddy's healings resembled those of the psychics, spiritualists, and mediums of her day" at first, until she came to "believe[] that diseases were imaginary."[19]

He likens such religions to cults and describes the common characteristics of cults: they "control information," their leaders say that they are "chosen by God," they "demand purity," they "demand confession for imagined sins," they are "inflexible," they "load the language" with jargon, and their "doctrine trumps experience."[20] Dr. Offit's observations help to explain why parents, even highly educated ones, deny medical care to their children and watch them die as a result.[21] Such was the case with a twelve-year-old boy from California, Andrew Wantland, as reported in *The New York Times*.[22] Andrew was denied basic care for diabetes while his father kept him at home, choosing prayer over medicine—even as the child's condition worsened, according to the lawyer representing the boy's mother.[23] Andrew Wantland died before he reached a nearby hospital. Sadly, it was believed Andrew's life could have been spared even hours before had he been provided insulin.[24] Yet, his death was not an isolated occurrence.[25]

Elizabeth Ashley King, the daughter of a real estate executive in Paradise Valley, Arizona, suffered a similar fate. Elizabeth died when her parents denied medical care to treat her bone cancer, opting instead for prayer.[26] Other cases involve babies dying when their parents choose prayer over medicine and even hire Christian Science prayer practitioners, such as the case of Natalie Middleton-

16. *See* Caroline Fraser, *Suffering Children and the Christian Science Church*, ATLANTIC MONTHLY, Apr. 1995, at 105, 105 (providing a personal account of being a Christian Scientist and noting that had a child in her family "contracted a serious illness or met with a life-threatening accident while . . . growing up, we would have been . . . expected to heal ourselves of colds, flu, allergies, and bad behavior").

17. OFFIT, *supra* note 7, at 2–4.

18. *Id.*

19. *Id.* at 3–4.

20. *Id.* at 29–31.

21. *See, e.g.*, Fraser, *supra* note 15, at 113–14 (describing the failure of a father, who was a real estate executive, to treat his child's cancer that resulted in her death).

22. *Church Faces Suit Over Boy's Death*, N.Y. TIMES (Dec. 19, 1993), http://www.nytimes.com/1993/12/19/us/church-faces-suit-over-boy-s-death.html [https://perma.cc/C9X5-9Q3W].

23. *Id.*

24. *See id.* ("The boy . . . would have lived had he received routine treatment with insulin and fluids, said . . . the [mother's] lawyer.")

25. *See id.*

26. *See* Fraser, *supra* note 15, at 113–14; Tamara Jones, *Prayers, Parental Duty: Child Deaths Put Faith on Trial*, L.A. TIMES (June 27, 1989), http://articles.latimes.com/1989-06-27/news/mn-4359_1_christian-science-child-abuse-parents [https://perma.cc/G6W4-RJYT] (noting that in the five years before the article's publication, "seven cases . . . ha[d] come under public scrutiny").

Rippberger, who died before her first birthday.[27] Natalie's parents hired two people to pray for her rather than consult a doctor.[28]

Herbert and Catherine Schaible prayed while Brandon, their eight-month-old baby, died from pneumonia.[29] Rather than providing medical treatments, they prayed more fervently. This was the Schaible's second child to die from that illness; only a few years earlier, their two-year-old son, Kent, also died from pneumonia while they prayed.[30]

Ironically, in each case described above, the parents never claimed to be motivated by a desire to punish or harm their children. So what accounts for parents denying medical attention to their children, even while watching them suffer in pain and die? As Dr. Offit explains: "Members of faith healing cults like Christian Science aren't held at gunpoint or drugged or beaten into submission. All willingly stay and do what is instructed, even if it means watching their children die from treatable diseases."[31] Why? According to Dr. Offit, "If asked, most members . . . would probably say the same thing. Their leaders had correctly interpreted the Word of God. Therefore, they and they alone will be afforded eternal life in Heaven—a promise that causes some people to act in unimaginable ways."[32]

The book primarily consists of detailed stories of children who died of treatable illnesses—like bacterial pneumonia, bacterial meningitis, and infections—because parents denied their children essential, timely medical care on the basis of their religious beliefs.[33] Dr. Offit also tells of diseases spread through religious rituals.[34] For example, he discusses how some mohels, during circumcisions of Orthodox Jewish baby boys, use their mouths to suck blood and how this has spread herpes.[35]

A troubling aspect about these cases is that the illnesses from which the children died are treatable—in some instances with highly accessible, inexpensive medications like antibiotics. And, although it is difficult to know exactly how many children die each year while their parents choose prayer over therapy, we think the law should be clear that parents cannot use religion as a shield against providing their children urgently needed medical care.

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27. *See* Jones, *supra* note 25 (noting that in that case, the parents hired two prayer practitioners but never took the child to the hospital).

28. *Id.*

29. Eliana Dockterman, *Faith-Healing Parents Jailed After Second Child's Death*, TIME (Feb. 19, 2014), http://time.com/8750/faith-healing-parents-jailed-after-second-childs-death/ [https://perma.cc/Y9W7-BXTP].

30. Dave Warner, *Philadelphia Faith-Healer Couple Sentenced to Prison in Son's Death*, REUTERS (Feb. 19, 2014, 2:41 PM), http://www.reuters.com/article/us-usa-crime-faithhealing-idUSBREA1I1XJ20140219 [https://perma.cc/Y89Z-2UBK].

31. OFFIT, *supra* note 7, at 32.

32. *Id.*

33. *See id.* at 169, 178.

34. *See id.* at 67–73.

35. *See id.* at 69–73.

Only toward the end of the book does Dr. Offit relate this to the law. He discusses how states came to create exemptions to their civil and criminal codes to protect parents from liability when their children are injured from the denial of life-saving medical treatment.[36] He urges the repeal of such laws and the criminal punishment of parents who cause harm to their children in the name of religion.

What Dr. Offit does not discuss—and what is the key underlying issue—is whether free exercise of religion permits parents to make these choices. Analyzing this requires a consideration of the law of free exercise of religion. We turn to this in Part II.

II. THE LAW OF FREE EXERCISE OF RELIGION

Assessing the right of parents, on the basis of religion, to deny medical care to their children requires an examination of the current law protecting free exercise of religion. At this point in time, the law concerning free exercise of religion is an unusual combination of constitutional, federal statutory, and state laws. Interestingly, the Constitution provides no basis for a religious right to refuse medical care or for inflicting injuries on others in the name of religious beliefs, but federal and especially state laws can be used to justify this. After reviewing this law, we explain in Part III why it does not provide a legitimate basis for denying children needed medical care.

A. THE CONSTITUTION: THE FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment provides no basis for parents to deny medical care to their children or, more generally, for people to inflict other injuries in the name of religion. Prior to 1990, when the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*,[37] challenges to laws based on free exercise of religion under the First Amendment rarely prevailed. These challenges are even less likely to succeed after *Smith*, where the Court determined that the Free Exercise Clause is not violated by neutral laws of general applicability.[38] Thus, parents cannot claim a religious exemption from laws requiring medical care or avoid prosecution from the harms they cause by denying that care on the basis of their religion.

The Supreme Court's earliest treatment of free exercise of religion was in *Reynolds v. United States*.[39] A federal law prohibited polygamy in the territories, and a defendant argued that his Mormon religion required that he have multiple wives.[40] The Supreme Court rejected the Free Exercise Clause argument and the claim that the constitutional provision required an exemption from

36. *See id.* at 167–76; *infra* notes 113–20 and accompanying text.
37. 494 U.S. 872 (1990).
38. *Id.* at 878–89.
39. 98 U.S. 145 (1878).
40. *Id.* at 161.

otherwise applicable criminal laws.[41] Chief Justice Waite wrote:

> [A]s a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages 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 to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[42]

The Court thus drew a distinction between beliefs and actions; the Free Exercise Clause limited government regulation of the former, but not the latter. Chief Justice Waite said: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[43] This distinction between beliefs and actions has not been the basis for subsequent decisions because it is too simplistic. Free exercise of religion would have little meaning if it were limited to protecting just beliefs. There also must be some protection for the right to practice one's religion. The Court in *Reynolds* does not provide a useful test for evaluating when actions based on religion are constitutionally protected.

Prior to 1963, the Court had not articulated any test with regard to the Free Exercise Clause. But in *Sherbert v. Verner*, the Supreme Court expressly held that strict scrutiny was the appropriate test in evaluating government laws burdening religious freedom.[44] In that case, a state denied unemployment benefits to a member of the Seventh-day Adventist Church who had been discharged from her job because she would not work on the Saturday Sabbath.[45] The Court concluded that the denial of benefits imposed a substantial burden on religion:[46] the woman had to choose between an income and her faith.[47] The Court thus said that the issue was "whether some compelling state interest enforced in the eligibility provisions of the . . . statute justifies the substantial infringement of appellant's First Amendment right."[48] The Court found no such compelling interest and ruled that the denial of benefits constituted a violation of the Free Exercise Clause.[49]

41. *See id.* at 166–67.
42. *Id.*
43. *Id.* at 164.
44. 374 U.S. 398, 403, 406–07 (1963).
45. *Id.* at 399–400.
46. *See id.* at 406.
47. *See id.* at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").
48. *Id.* at 406.
49. *See id.* at 406–07 (finding that no requisitely grave danger "ha[d] been advanced").

Sherbert clearly stated that strict scrutiny must be applied in evaluating laws infringing on free exercise of religion. However, following *Sherbert,* the Court rarely struck down laws on this basis.[50] In fact, there were only two areas where the Court ever invalidated laws for violating free exercise: laws, like the statute in *Sherbert*, that denied benefits to those who quit their jobs for religious reasons;[51] and the application of a compulsory school law to the Amish.[52] In all other Free Exercise Clause cases between 1960 and 1990, the Court sided with the government and ruled against religious claims.

In *Wisconsin v. Yoder,* the Court held that the Constitution's protection of free exercise of religion required that Amish parents be granted an exemption from compulsory school laws for their fourteen- and fifteen-year-old children.[53] The Court noted:

> [The] Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs.[54]

The Court accepted this argument and found that requiring fourteen- and fifteen-year-old Amish children to attend school both violated the Free Exercise Clause and infringed on the right of parents to control the upbringing of their children.[55] The Court concluded that the effect of the compulsory-attendance law on the parents' practice of their Amish religion "is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with . . . their religious beliefs."[56] In fact, the Court went on to find that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[57]

50. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (rejecting Free Exercise Clause claim of a clinical psychologist in the military whose religion required wearing a yarmulke); United States v. Lee, 455 U.S. 252, 254, 261 (1982) (rejecting a Free Exercise Clause challenge to requiring a member of the Old Order Amish to pay Social Security taxes).

51. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 709, 720 (1981) (holding that denying unemployment benefits to a Jehovah's Witness who left his job because his religious beliefs forbade him from fulfilling his duties "constituted a violation of his First Amendment right to free exercise of religion").

52. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

53. *See id.* at 207, 234–36.

54. *Id.* at 210–11.

55. *Id.* at 214, 234.

56. *Id.* at 218.

57. *Id.* at 219.

The Court concluded that the "self-sufficient" nature of Amish society made education for fourteen- and fifteen-year-old children unnecessary.[58] The Court said that the lack of "two . . . additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."[59]

We disagree that denying education to children under sixteen is harmless and thus disagree with the Court's holding in *Yoder*, but it is crucial to note that *Yoder* is based on the Court's conclusion that exempting these children from the schooling requirement was *unlikely* to harm them.[60] This, of course, is quite different than the issue discussed in Dr. Offit's book: children being harmed, and even killed, because of their parents' decisions to deny medical care. *Wisconsin v. Yoder* thus does not provide support for interpreting the Free Exercise Clause to allow parents to deny life-saving medical treatment to their children.

Other than the employment compensation cases and *Yoder,* the Court during this period never found another law to violate the Free Exercise Clause. The Court was asked in many cases to allow an exemption to a law based on free exercise. In each, the Court rejected the constitutional claim.[61] As the Court noted in *Employment Division v. Smith*:

> We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.[62]

The cases rejecting free exercise challenges occurred in a wide variety of contexts, and most striking is that they often involved relatively insignificant government interests. For example, in *Braunfeld v. Brown*, the Supreme Court rejected a Free Exercise Clause challenge to Sunday closing laws.[63] In that case, Orthodox Jews challenged a criminal statute that required businesses to be closed on Sundays. They argued that the law interfered with their free exercise

58. *Id.* at 235.

59. *Id.* at 234.

60. *See id.* at 230 ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."). We also disagree about whether parents should be able to deny this fundamental educational benefit to their children. The children should be educated so that they can make their own choice about whether to stay in the Amish community or function outside of it. Parents should not be able to use their religious beliefs to inflict harm on their children, whether educationally, medically, or otherwise.

61. *See supra* note 49 and accompanying text.

62. 494 U.S. 872, 883 (1990) (citations omitted).

63. 366 U.S. 599, 600, 609 (1961).

of religion by imposing "serious economic disadvantages upon them" because their faith required "the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday."[64] They argued it was difficult for them to adhere to their religion if they also had to be closed on Sundays.[65] Chief Justice Warren, writing for the plurality, rejected this argument and reasoned:

> [T]he statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief . . . . To strike down . . . legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature.[66]

The Court accepted the state's argument that Sunday closing laws served the government interest of providing a uniform day of rest.[67]

In other cases, the Court rejected free exercise claims based on a conclusion that there was a compelling government interest. In many cases during this time period, the Court rejected challenges to tax laws based on free exercise of religion.[68] For example, in *United States v. Lee*, the Court rejected a claim by an Amish individual that Social Security taxes violated the Free Exercise Clause.[69] The argument was that "the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system."[70] The Court found, however, that this restriction on religious freedom was "essential to accomplish an overriding governmental interest."[71] The Court concluded that mandatory participation in the Social Security system was "indispensable to [its] fiscal vitality."[72]

In *Employment Division v. Smith*, the Court expressly changed the test for the Free Exercise Clause.[73] There, Native Americans challenged an Oregon law

64. *Id.* at 601.

65. *Id.* at 601.

66. *Id.* at 603, 606.

67. *See id.* at 607 ("[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility . . . ."). In his dissent, Justice Brennan clearly framed the majority's analysis as holding that a uniform day of rest was a compelling state interest. *Id.* at 613–614 (Brennan, J., dissenting) ("What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? . . . It is the mere convenience of having everyone rest on the same day.").

68. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 683–84, 700 (1989) (rejecting Free Exercise Clause challenge to payment of income taxes alleged to make religious activities more difficult).

69. 455 U.S. 252, 259–61 (1982).

70. *Id.* at 255.

71. *Id.* at 257–58.

72. *Id.* at 258; *see also Hernandez*, 490 U.S. at 683–84, 700 (rejecting Free Exercise Clause challenge to payment of income taxes alleged to make religious activities more difficult).

73. 494 U.S. 872, 879 (1990).

prohibiting use of peyote, a hallucinogenic substance.[74] Specifically, they challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.[75]

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise applicable law. Scalia wrote that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of [the Court's] free exercise jurisprudence contradicts that proposition."[76] Scalia thus declared "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[77]

Justice Scalia's opinion then reviewed the cases where Free Exercise Clause challenges had been upheld and found that none involved Free Exercise Clause claims alone. All involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children."[78] The Court held that *Smith* was distinguishable because it did not involve such a "hybrid situation," but was a free exercise claim "unconnected with any communicative activity or parental right."[79]

Moreover, the Court reasoned that the *Sherbert* line of cases applied only in the context of the denial of unemployment benefits; it did not create a basis for an exemption from criminal laws. Scalia wrote that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[80]

The Court expressly rejected the use of strict scrutiny for challenges to neutral laws of general applicability that burden religion. Justice Scalia wrote that:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[81]

74. *See id.* at 874.
75. *See id.*
76. *Id.* at 878–89.
77. *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).
78. *Id.* at 881 (citations omitted).
79. *Id.* at 882.
80. *Id.* at 884.
81. *Id.* at 888 (citation and emphasis omitted).

The Court suggested that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.[82]

Smith changed the test for the free exercise clause. Strict scrutiny was abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion. But in reality, *Smith* really just changed the phrasing of the doctrine of the Free Exercise Clause to reflect the actual pattern of decisions. As reviewed above, the Court had rejected all Free Exercise Clause claims since 1960 except for the employment benefit cases and *Yoder. Smith* provided a legal doctrine to explain this outcome: the Free Exercise Clause is not violated by a neutral law of general applicability.

The Free Exercise Clause of the First Amendment thus does not provide a basis for challenging laws that prevent harms to others—whether in the area of discrimination, provision of reproductive health care services, or ensuring needed medical treatment. As we discuss more fully in Part III, there is a compelling government interest in ensuring that children receive medical care so as to reach adulthood and make their own religious decisions.

B. FEDERAL STATUTES

RFRA was adopted to negate the *Smith* test and require strict scrutiny for Free Exercise Clause claims.[83] Indeed, the findings section of the Act notes that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”[84] The Act declares that its purpose is “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”[85]

The key provision of the Act states:

> Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . . it may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.[86]

In other words, Congress sought by statute to restore religious freedom to what it previously had been under the Constitution.

82. *Id.* at 890.
83. 42 U.S.C. § 2000bb (2012).
84. *Id*. § 2000bb(a)(4).
85. *Id.* § 2000bb(b) (citations omitted).
86. 42 U.S.C. § 2000bb–l(a)–(b).

Congress, through RFRA, thus sought to overrule *Smith* and make strict scrutiny the test for all Free Exercise Clause claims. In *City of Boerne v. Flores,* the Supreme Court declared RFRA unconstitutional as applied to state and local governments.[87] The Court, in a six-to-three decision, ruled that Congress exceeded the scope of its power under Section 5 of the Fourteenth Amendment in enacting the law.[88]

City of Boerne invalidated RFRA as applied to state and local governments, but its reasoning does not speak to the constitutionality of the law as applied to the federal government. The congressional authority to regulate state and local governments was claimed to be Section 5 of the Fourteenth Amendment; but this provision, like the entire Fourteenth Amendment, does not apply to the federal government.[89] Therefore, the constitutionality of RFRA as applied to the federal government was not resolved by *City of Boerne v. Flores.*

However, in subsequent cases, the Court applied RFRA to the federal government. In 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court used RFRA to unanimously rule in favor of a religion and against the federal government.[90] The case involved a small religion that used a controlled substance in making a tea used in its religious rituals.[91] The Court, in an opinion by Chief Justice Roberts, used strict scrutiny under RFRA and ruled in favor of the religion, concluding that the government failed to show that keeping this small religion from using the controlled substance would serve a compelling government interest.[92] The Court did not expressly consider the constitutionality of RFRA as applied to the federal government, but it assumed this in unanimously ruling in favor of the religious group.[93]

Most importantly, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that it violates RFRA to require that a closely held corporation provide insurance coverage for contraceptives in violation of its owners' religious beliefs.[94] A federal law required that the Department of Health and Human Services promulgate regulations requiring that health insurance provided by employers include preventative health care coverage for women.[95] These regulations mandated that employer-provided insurance include contraceptive coverage for women.[96] According to the law, religious institutions and nonprofit corporations affiliated with religious institutions may exempt themselves from this requirement; how-

87. 521 U.S. 507, 511 (1997).
88. *Id*. at 536.
89. *See* U.S. CONST. amend XIV, § 1 ("No state shall make or enforce any law . . . ."); *id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
90. 546 U.S. 418, 439 (2006).
91. *See id.* at 423.
92. *See id.* at 439.
93. *See id.*
94. 134 S. Ct. 2751, 2785 (2014).
95. *Id.* at 2762.
96. *Id.*

ever, for-profit corporations must comply.[97]

In a five-to-four decision, the Supreme Court held that it violated RFRA to require a closely held for-profit corporation to provide coverage for contraceptives that it says violate the religious beliefs of its owners.[98] Justice Alito wrote the majority opinion. The Court said that Congress "included corporations within RFRA's definition of 'persons'"[99] and that corporations can claim to have religious beliefs and religious free exercise.[100] It stated: "A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[101]

The Court had "little trouble concluding" that the contraceptive mandate substantially burdened the religious beliefs of owners of close corporations who opposed certain contraceptives.[102] The Court said that it would assume that the government has a compelling interest in ensuring the availability of contraceptives for women, but that there were less restrictive alternatives: Congress could directly pay for these contraceptives or Congress could allow for-profit corporations the same ability to opt out that it had given to nonprofit corporations that are affiliated with religions that oppose contraception.[103] The Court thus concluded that "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA."[104]

Problematically, the denial of medical care based on religious beliefs can be arbitrarily applied and enforced—even within the contexts of contraception—as in this case, where employers denied women the medications but covered vasectomy treatments for their male employees.[105] Justice Ginsburg wrote a vigorous dissent, joined by Justices Breyer, Sotomayor, and Kagan, and disagreed with every aspect of the majority's opinion. The dissent disagreed that for-profit corporations can have religious beliefs or religious free exercise and stated that "until today, religious exemptions had never been extended to any entity operating in the commercial, profit-making world."[106] The dissent also disagreed that there was a substantial burden on religious belief in requiring employers to provide insurance that includes coverage for contraceptives.[107] Justice Ginsburg wrote:

97. *Id.* at 2763.
98. *See id*. at 2785.
99. *Id.* at 2768.
100. *Id.*
101. *Id.*
102. *Id.* at 2775.
103. *Id.* at 2759.
104. *Id.* at 2785.
105. *See* Alexander C. Kaufman, *Hobby Lobby Still Covers Vasectomies and Viagra*, HUFFINGTON POST (July 2, 2014, 7:59 pm), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-viagra_n_5543916.html [http://perma.cc/KB7R-XUV3].
106. *Burwell*, 134 S. Ct. at 2795 (Ginsburg, J., dissenting) (citation omitted).
107. *See id.* at 2797–99.

> The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. . . . Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.[108]

The dissent also disagreed with the majority's conclusion that there are less restrictive alternatives.[109] Justice Ginsburg's dissenting opinion stressed that this will open the door to other claims under RFRA for exemptions to providing health insurance coverage.[110] She wrote:

> Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?[111]

Two other federal statutes are worth noting. In response to *City of Boerne v. Flores*, Congress adopted the Religious Land Use and Institutionalized Persons Act.[112] This law requires that the government meet strict scrutiny when it significantly burdens religion in two areas: land use decisions and institutionalized persons.[113] Congress justified the regulation of land use decisions under its commerce power and the regulation of institutionalized persons under its spending power as a condition on federal funds.[114] This statute is much less likely to be involved in issues concerning the denial of medical care on religious grounds. Neither land use decisions nor the treatment of prisoners are implicated when parents deny medical care to their children.

The other federal statute is much more directly relevant to Dr. Offit's book. In 1974, Congress passed CAPTA and appropriated funds to qualifying states to

108. *Id.* at 2799.
109. *See id.* at 2801–03.
110. *See id.* at 2802.
111. *Id.* at 2805. The dissent was concerned, too, that this could lead to claims for religious exemptions to other federal laws, such as antidiscrimination statutes. *See id*. at 2804–05. The majority opinion responded to this by denying this possibility because "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* at 2783 (majority opinion).
112. 42 U.S.C. § 2000cc (2012).
113. *See id.* § 2000cc(a)(1).
114. *See id.* § 2000cc(a)(2).

establish programs to reduce the incidences of child abuse and neglect.[115] The implementing regulations, however, contained a provision that appeared to require states to enact a spiritual treatment exception in order to receive federal funds.[116] The regulations also stated:

> [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; *However*, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.[117]

Dr. Offit describes how this provision was the result of the efforts of two key individuals in the Nixon Administration who were Christian Scientists: H.R. Haldeman, President Nixon's Chief of Staff, and John Ehrlichman, his Chief of Domestic Affairs.[118] Dr. Offit notes that "within a few years, forty-nine states (the exception being Nebraska) and the District of Columbia had laws protecting religiously motivated medical neglect."[119]

Within a decade, these regulations were changed. Dr. Offit writes: "By 1984, the Department of Health and Human Services, realizing the absurdity of the mandate, eliminated it. But it was too late. The damage had been done."[120] By that time, many children who were denied medical care in favor of prayer interventions had died.[121]

The new CAPTA regulations stated unambiguously: "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 . . . ."[122] Thus, the states were free to abolish their religious exemptions and still obtain CAPTA funding. Yet, most states left the exemptions in effect.[123]

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115. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5119c (2000)), *amended by* CAPTA Reauthorization Act of 2010, Pub L. No. 111-320 (2010); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 324 (1994).

116. 45 C.F.R. § 1301.31 App. A (1994).

117. 45 C.F.R. § 1340.1-2(b)(1) (1975).

118. OFFIT, *supra* note 7, at 170–71.

119. *Id.* at 171.

120. *Id.*

121. For example, Dr. Offit provides the example of Sarah Hershberger, a ten-year-old child with lymphoma that had an 85% chance of being cured, but who was denied treatment because of her parents' religious beliefs. *Id.* at 173–74.

122. 45 C.F.R. § 1340.2(d)(2)(ii) (1983).

123. Donna K. LeClair, Comment, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79, 96–97 (1987).

C. STATE LAWS

As of 2015, eighteen states have Religious Freedom Restoration Acts.[124] Although the phrasing of these state laws vary, they all require that the government meet strict scrutiny when substantially burdening religious freedom. Interestingly, these laws have not generally been used to provide protection for religious freedom. As Professor Christopher Lund summarized:

> [F]our states have never decided even a single case under their state RFRAs. Six other states have decided only one or two cases apiece. . . . And when state RFRA claims have been brought, they rarely win. In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment. . . . [S]ome states have seen significant state RFRA litigation and there have been some very important victories. But in many states, state RFRAs seem to exist almost entirely on the books.[125]

Professor Lund's conclusion was that "[i]n most places, state RFRAs simply have not translated into a dependable source of protection for religious liberty at the state level."[126] But they do exist and are likely to be invoked much more often in light of the increasing claims of religious exemptions to laws.

The other state laws that are relevant are those that create an exception to child abuse or other criminal prosecutions for parents who deny medical care to their children. As discussed above, forty-nine states adopted such laws in response to CAPTA, some have rescinded them, and others remain on the books. For example, Alabama law states:

> When . . . a parent or legal guardian legitimately practicing his or her religious beliefs has not provided specific medical treatment for a child, the parent or legal guardian shall not be considered a negligent parent or guardian for that reason alone. This exception shall not preclude a court from ordering that medical services be provided to the child when the child's health requires it.[127]

Delaware law similarly provides:

> Nothing in this chapter shall be construed to authorize any court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his or her child, in lieu of medical treatment, treatment by spiritual means alone through prayer in accordance with the tenets and practice of a recognized church or religious denomination. However, nothing

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124. Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions,* 38 HARV. J.L. & GENDER 35, 68 & n.156 (2015).

125. Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010) (footnotes omitted).

126. *Id.* at 468.

127. ALA. CODE § 26-14-7.2(a) (2013).

> contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his or her health and welfare.[128]

Dr. Offit argues strongly for the repeal of such state laws.[129] We agree and believe that such laws should be repealed for the reasons we have expressed throughout this review essay: the religious beliefs of a parent never justify denying medical care to a child.

III. PREVENTING HARMS INFLICTED IN THE NAME OF RELIGION

Our review of law concerning free exercise of religion leads us to the conclusion that the government may require medical treatment be provided to children, including over the parents' objections. Nothing in the Constitution or statutes requires an exemption from state laws creating civil or criminal liability for parents who harm their children based on religion. Moreover, we believe that free exercise of religion provides no basis for exemptions from laws that require that medical care be provided, including for reproductive healthcare.

These conclusions, of course, focus on what the government *may* do. We further believe that the government should not recognize religious exemptions to the provision of medical services to others. In other words, people should not have the right to inflict an injury on others based on their claim of free exercise of religion. As a descriptive matter, as shown in Part II, no Supreme Court case (at least until *Hobby Lobby* in 2014) has ever permitted people to inflict harm on others in the name of free exercise of religion.[130] It is striking that both before *Employment Division v. Smith* and under its holding, there is no constitutional basis for a religious exemption for laws requiring medical care for children.

As a normative matter, we believe that the freedom of one person ends when it inflicts an injury on another. As Justice Ginsburg observed, with respect to free exercise claims no less than free speech claims, "[y]our right to swing your arms ends just where the other man's nose begins."[131] This is especially so when the victims are children, as discussed throughout Dr. Offit's book.

In this Part, we discuss free exercise of religion in relation to the denial of medical care to children and argue that states can constitutionally pass laws requiring that children be provided needed medical care. We then focus on the larger question raised by Dr. Offit's book of when religion can be a basis for

128. DEL. CODE ANN. tit. 13, § 1103(c) (West 2009).

129. *See* OFFIT, *supra* note 7, at 183–84.

130. As we describe above, even in *Wisconsin v. Yoder*, the Court stressed that it did not perceive the children as being harmed by their exemption from the compulsory schooling requirement. *See* 406 U.S. 205, 230 (1972).

131. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (alteration in original) (quoting Zachariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

denying access to needed medical care, including reproductive health care. We believe that the religious beliefs of the parents never provide a basis for denying needed medical care to a child.

A. LAWS REQUIRE MEDICAL CARE FOR CHILDREN

Dr. Offit's book focuses on children who suffer and even die because their parents denied or otherwise withheld medical care they urgently needed. Our review of the law in Part II supports the conclusion that free exercise of religion is no obstacle to a state acting to require that medical care be provided to a child. In terms of the Free Exercise Clause of the First Amendment, state laws and state government actions to require the provision of medical care are "neutral law[s] of general applicability" under *Employment Division v. Smith*.[132] Therefore, there would be no basis for a First Amendment free exercise objection by parents to medical treatment being provided to their children.

That said, parents could bring a challenge in the eighteen states that have state Religious Freedom Restoration Acts. They could argue that provision of medical care to their children over their religious objections substantially burdens their religion. Further, they could claim that civil liability or criminal prosecutions violate their religious beliefs. If the federal government ever were to act to require provision of medical care, a similar challenge could be brought against it based on the federal Religious Freedom Restoration Act. But such federal action is much less likely in light of the long tradition of such matters being handled at the state government level.

Such statutory claims by parents should fail because providing medical care to children, to save their lives and prevent their suffering, meets strict scrutiny. No Religious Freedom Restoration Act gives an absolute right to practice one's religion; all allow limits where strict scrutiny is met. There is a compelling government interest in saving the lives and preventing the suffering of children like those described in Dr. Offit's book. There is no alternative or less burdensome choice but the provision of medical care.

Indeed, the law is clear and consistent: the government has a compelling interest in both mandating certain medical treatments for children, such as vaccines, and providing medical care to children. Courts have consistently rejected any claim of a right of parents, whether based on religion or control over the upbringing of their children, to deny needed medical care to their children.

Consider just a few of the illustrative cases. *Walker v. Superior Court* involved a child who died because of the parents' religious objection to medical care.[133] Defendant Laurie Grouard Walker was a member of the Church of Christ, Scientist. Her four-year-old daughter, Shauntay, developed meningitis and was ill for seventeen days until her death. Instead of taking Shauntay to a

132. 494 U.S. 872, 879 (1990).
133. 763 P.2d 852, 855 (Cal. 1988).

physician, Walker contacted a Christian Science prayer practitioner and a Christian Science nurse to try to heal Shauntay. The only treatment Shauntay received was prayer. Shauntay then died of acute meningitis. Walker was convicted of involuntary manslaughter and felony child endangerment because her criminal negligence proximately caused Shauntay's death.[134] Walker then appealed her sentence to the California Supreme Court.[135]

The issue was whether a prosecution for involuntary manslaughter and felony child endangerment can be maintained against the mother of a child who died of meningitis after receiving treatment by prayer instead of medical attention. The court ruled the prosecution is permitted by the California Penal Code because the involuntary manslaughter and child endangerment statutes impose liability for providing no medical care and letting one's child die.[136] California does not have a CAPTA-like exception in its laws. The court stressed that the Free Exercise Clause provides no constitutional protection to the parents because of the state's interest in keeping children alive.[137] The court explained that prayer "will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability."[138]

The court found that Walker's religious rights under the First Amendment do not trump the government's interest in keeping children alive.[139] The court explained: "[r]egardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect."[140]

The Wisconsin Supreme Court reached a similar conclusion in its holding and reasoning in *State v. Neumann*.[141] In that case, eleven-year-old Madeline Kara Neumann died from diabetic ketoacidosis resulting from untreated juvenile onset diabetes mellitus on Easter Sunday, March 23, 2008.[142] According to the court, "Kara died when her father and mother, Dale R. Neumann and Leilani E. Neumann, chose to treat Kara's undiagnosed serious illness with prayer, rather than medicine."[143] Each parent was charged with and convicted of violating Wisconsin's second-degree reckless homicide law, "in separate trials with different juries."[144]

Wisconsin does have a treatment-with-prayer exemption in its physical child abuse law, but the court said that does not mean that treatment with prayer

134. *Id.* at 855–56.
135. *Id.* at 856.
136. *Id.* at 873.
137. *Id.* at 866.
138. *Id*.
139. *Id.* at 869–70.
140. *Id.* at 870.
141. 832 N.W.2d 560 (Wis. 2013).
142. *Id.* at 570.
143. *Id.* at 567.
144. *Id.* (citing WIS. STAT. § 940.06(1) (2009–10)).

negates liability under its second-degree reckless homicide statute.[145] The court held that "when a parent fails to provide medical care to his or her child, creates an unreasonable and substantial risk of death or great bodily harm, is aware of that risk, and causes the death of the child, the parent is guilty of second-degree reckless homicide."[146]

Despite the fact that these two cases involved prosecution of parents after the deaths of their children, the law is similarly clear that the state may act to prevent such harm. *In re McCauley* involved Jehovah's Witness parents who objected to their daughter receiving blood transfusions.[147] Eight-year-old Elisha was diagnosed with leukemia, but in order for her to receive chemotherapy, she needed a blood transfusion due to her very low red blood cell count. Elisha's parents refused the blood transfusion for their daughter. Representatives of the hospital sought an order for the blood transfusion from a judge, who granted the order. Thus, the procedural posture of this case was different than the two decisions discussed above because it involved the state ordering medical treatment.

The court held that although parental rights and religious rights are important, those rights must yield to the state's interest in keeping a child alive when that child is dangerously ill.[148] The court conceded that the right of free exercise of religion and the right of a parent to control the upbringing of his or her child are fundamental rights. However, as the court stated:

> [T]hese fundamental principles do not warrant the view that parents have an absolute right to refuse medical treatment for their children on religious grounds. The State's interest in protecting the well-being of children "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . 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."[149]

Additionally, the court found that when a child is seriously ill, then the parents' rights are not the top priority; protecting the child is the highest interest.[150]

These cases exemplify many decisions in which courts reject a religious right of parents to withhold needed medical care from children. Saving a child's life, or preventing a child from suffering, is a compelling interest. Similarly, the cases are unanimous in upholding compulsory vaccination laws even when they

145. *See id.* at 583.
146. *Id.*
147. 565 N.E.2d 411, 412 (Mass. 1991).
148. *Id.* at 414.
149. *Id.* at 413 (quoting Prince v. Massachusetts, 312 U.S. 158, 166–67 (1944) (citations omitted)).
150. *Id.* at 414.

have no exceptions for denying vaccinations based on religion or conscience.[151]

We thus believe that states should intervene when possible to ensure the provision of needed medical care to children who are being denied it for religious reasons. We also agree with Dr. Offit that state laws providing an exemption to parents from criminal penalties or civil liability for the denial of medical care should be repealed.

B. THE RELIGIOUS BELIEFS OF SOME SHOULD NOT BE THE BASIS FOR DENYING MEDICAL CARE TO OTHERS

Our analysis of the law of free exercise of religion—constitutional and statutory, federal and state—leads us to the conclusion that the religious beliefs of some *never* provide them a right to deny medical care to others. In terms of the Free Exercise Clause of the First Amendment, laws requiring the provision of medical care are neutral laws of general applicability and no constitutional basis for a religious exemption exists in light of *Employment Division v. Smith*. In terms of federal and state Religious Freedom Restoration Acts, there is a compelling interest in ensuring the provision of medical care and there is no less restrictive alternative.

We expand the focus of our analysis beyond the parent and child context to argue that religious beliefs of some should not be the basis for denying medical care to others. We take up this broadened inquiry because this issue has arisen recently in the context of reproductive health care. Most notably, whether there is a right to deny medical care to others based on religious beliefs was the underlying issue in *Burwell v. Hobby Lobby Stores, Inc.*, discussed above. But it also has arisen in the context of state laws that require pharmacies to fill prescriptions even if the medication violates the religious beliefs of the pharmacists. Based on the analysis in Part II, we believe that *Hobby Lobby* was wrongly decided precisely because it allows employers, based on their religious beliefs, to deny medical care to others. At the same time, we agree with the court decisions that have upheld laws requiring that pharmacists fill prescriptions regardless of their religious beliefs.

151. *See, e.g.*, Zucht v. King, 260 U.S. 174 (1922) (finding that a city can impose compulsory vaccination for all children in school, even if there is no immediate threat of an epidemic); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding the constitutionality of compulsory vaccination laws); Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011) (holding that a West Virginia law requiring all school children to be vaccinated (with no exemption for religious reasons) is constitutional because compulsory vaccination laws are within the state's police power, even though there may not be an immediate threat of disease, and because a state is not required to have an exemption for religious reasons in such a law); Wright v. DeWitt Sch. Dist., 385 S.W.2d 644, 646 (Ark. 1965) (holding that it is within the state's police power to require school children to be vaccinated and that such a requirement "does not violate the constitutional rights of anyone, on religious grounds or otherwise" (quoting Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964))). These cases are discussed in Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 NW. L. REV. 589 (2016).

There is much that is troubling about the Supreme Court's decision in *Hobby Lobby.* This was the first time in American history that the Supreme Court held that for-profit corporations can have religious beliefs and can engage in free exercise of religion.[152] A corporation is a fictional entity. It cannot have a religion or engage in religious practices. It is deemed legally distinct from its owners in that they are not legally liable for its actions. But the Supreme Court, for the first time, said that the owners can attribute their beliefs to this separate entity.[153]

As we discuss above, this holding is also problematic because of its potential reach. Hobby Lobby is no small organization. It would be a mistake to construe closely held corporations as a small fraction of companies doing business in the United States. For example, "the overwhelming majority of U.S. corporations incorporate as 'closely held' businesses."[154] Hobby Lobby is incorporated "as a non-income tax paying 'S Corporation' similar to several million U.S. corporations."[155] According to the Pew Research Institute, in 2011, "there were 4,158,572 S corporations" operating in the United States.[156] In their much cited research study, Professors Morten Bennedsen and Daniel Wolfenzon noted that less than one quarter of 1% of U.S. corporations are publicly held.[157]

Hobby Lobby was the first time in American history that the Supreme Court found a substantial burden on free exercise of religion where a person is merely required to take action that might enable other people to do things that are at odds with the person's religious beliefs. Obviously, no one was required by federal law to use or refrain from using contraceptives. Hobby Lobby and its owners could speak out against contraception and abortion. In this case, the law simply required businesses like Hobby Lobby to provide insurance for their employees or pay a per-employee tax; if they provided insurance, contraceptive coverage for women had to be an included option. Hobby Lobby challenged the law based on religious grounds.

This decision will lead to much broader challenges. Christian Scientists, for example, will claim that they do not have to provide any health insurance to

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152. *See* 134 S. Ct. 2751, 2794–95 (2014) (Ginsburg, J., dissenting).

153. The Court's holding was limited to close corporations. *See id.* at 2775 (majority opinion). But nothing in the Court's reasoning would limit its holding to just these businesses. The Court stressed that owners of a business should not have to give up their ability to practice their religion by choosing to incorporate. *See id.* at 2767–68. The Court said that other types of businesses are "unlikely" to assert religious freedom, but not that they cannot do so. *See id.* at 2774.

154. Michele Goodwin & Allison Whelan, *Constitutional Exceptionalism*, U. ILL. L. REV (forthcoming 2016); Morten Bennedsen & Daniel Wolfenzon, *The Balance of Power in Closely Held Corporations*, 58 J. FIN. ECON. 113, 114 (2000).

155. Goodwin & Whelan, *supra* note 152. According to the Pew Research Center, S corporations "cannot have more than 100 shareholders (although all members of the same family are treated as a single shareholder)." Drew DeSilver, *What is a 'Closely Held Corporation,' Anyway, and How Many are There?*, PEW RES. CTR. (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/ [http://perma.cc/URF5-C285].

156. DeSilver, *supra* note 153.

157. Bennedsen & Wolfenzon, *supra* note 152, at 114.

their employees. In fact, why can't an employer, at least in a family-owned business, even require as a condition of employment that no money paid as salary be used to purchase contraceptives (or other medical treatments that violate the employer's religious beliefs)? If the employer does not have to have its money used for things deemed religiously objectionable, why would this be limited to dollars paid for employees' insurance and medical care?

Most importantly, *Hobby Lobby* was the first time in American history that the Supreme Court held that people, based on their religious practices, can inflict harm on others. As described above, the prior Supreme Court case involving the RFRA asked whether a small religion could use hoasca, a hallucinogenic substance, in its religious rituals.[158] The Court ruled in favor of the religion, noting that no one was injured by its practices.[159] The most important Supreme Court decision protecting free exercise of religion under the First Amendment involved a woman who was denied unemployment benefits by the state when she quit her job rather than work on her Saturday Sabbath.[160] The Court ruled that this violated her free exercise of religion by forcing her to choose between her income and her religion.[161]

However, in these and other cases, no one else was hurt. The effect of the Supreme Court's decision in *Hobby Lobby* is that many female employees will be seriously hurt in being denied insurance coverage for their contraceptives. This is inconsistent with our central premise: no one should be able to inflict an injury on another based on free exercise of religion. Put another way, the government has a compelling interest in ensuring that contraceptives are provided to women, and realistically, there is no other way to achieve the goal.[162]

In contrast to our strong disagreement with the Court's decision in *Hobby Lobby*, we agree with decisions holding that pharmacies must fill prescriptions for contraceptives, even if it violates the pharmacists' religious beliefs. For

158. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425–26 (2006).

159. *See id.* at 432, 439.

160. *See* Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

161. *See id*. at 404.

162. The Court in *Hobby Lobby* identified two other alternatives: Congress could provide funds to women directly for contraceptives or Congress could give for-profit corporations the same option it gave nonprofit corporations that are affiliated with religions. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780–82 (2014). Justice Ginsburg, in dissent, offers a persuasive refutation of the claim that these are less restrictive alternatives. She wrote:

> And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?

Id. at 2802 (Ginsburg, J., dissenting) (citations omitted). She also explained that the treatment of nonprofit corporations does not provide a basis for extending the same benefit to for-profit corporations. She referred to "the 'special solicitude' generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths." *Id.* at 2802–03.

example, in *Stormans, Inc. v. Wiesman*, the United States Court of Appeals for the Ninth Circuit recently upheld the constitutionality of a Washington regulation, promulgated by the Washington Pharmacy Quality Assurance Commission, requiring pharmacies to timely deliver all prescription medications, even if the pharmacist owner had a religious objection.[163] The regulation allowed for individual pharmacists with religious objections to deny delivery, so long as another pharmacist working for the pharmacy provided timely delivery of the medication.

The plaintiffs in this case were the owner of a pharmacy and two pharmacists who objected to delivering emergency contraceptives, such as Plan B, to patients based on religious beliefs. However, the reach of the pharmacists' withholding of medical devices extended beyond contraceptives. Evidence was presented before the Commission and at trial demonstrating that "pharmacists and pharmacies had refused to fill prescriptions for several kinds of medications other than emergency contraceptives," including refusing "to deliver diabetic syringes, insulin, HIV-related medications, and Valium."[164]

The Ninth Circuit rejected the Free Exercise Clause challenge based on *Employment Division v. Smith*, emphasizing that the Washington regulation was neutral and of general applicability.[165] The court explained that the regulations ensure that patients are not harmed by "being denied safe and timely access to their lawfully prescribed medications" regardless of whether the pharmacist or pharmacy owner's conduct was religiously motivated or otherwise.[166] The court thus concluded that the law met rational basis review.[167]

We agree because the religious views of some should not allow them to inflict injuries, such as the denial of needed prescription medicines, on others. Reproductive health care should be treated no differently than other kinds of medical care.

CONCLUSION

People can justify the most horrible of actions, including watching their children die from treatable illnesses, in the noblest of rhetoric. Many cases and anecdotes in Dr. Offit's book attest to this. Often these cases involve common illnesses for which the most accessible forms of medical care could spare their children's lives. In this Review Essay, we highlight a few such cases involving diabetes, meningitis, pneumonia, and cancer. In each case we describe, the children died. In these cases, the parents used religion to justify denying their children urgently needed medical care.

163. 794 F.3d 1064, 1071 (9th Cir. 2015).
164. *Id.* at 1077.
165. *Id.* at 1084–85.
166. *Id.* at 1078.
167. *Id.* at 1075, 1084–85.

Yet, increasingly, people are trying to use religion as the basis for inflicting harms.[168] Our focus has been on one such aspect that is discussed in Dr. Offit's book: the denial of life-saving medical treatment to children. But we believe that our analysis supports a larger proposition: people should not be able to use their religions to inflict injury on others, including in cases that involve corporations denying female employees access to contraceptive medicines, state-licensed pharmacists refusing to fill certain prescriptions, or county clerks withholding marriage licenses to same-sex couples.[169] In other words, people should not have the right to inflict an injury on others in the name of free exercise of religion.

168. *See, e.g.*, *supra* text accompanying notes 1–5.

169. Although it is beyond the scope of this paper, we believe that freedom of religion does not provide a basis for discriminating against others, such as in employment or in the provision of services. *See, e.g.*, Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No,* 38 HARV. J.L. & GENDER 177 (2015) (explaining why religious freedom does not provide a right to discriminate in public accommodations).