

**SENATE BILL 384 SENATE HEARING
NOVEMBER 10, 2009**

I. BACKGROUND.

- My name is Jon Axelrod. I am a partner at DeWitt Ross & Stevens.
- We represent the Christian Science faith to address the legal issues pertaining to the various bills relating to prayer in lieu of medical treatment in the wake of the Neumann case.
- There are a few things you should know right off the bat.
- First, I am not a Christian Scientist. My testimony today is not motivated by personal religious convictions, but, rather, by my analysis of the law. I do not condone or oppose those who choose spiritual healing rather than medical treatment. Instead, I am a litigation attorney and appellate advocate who has handled a wide variety of constitutional cases in my practice, including cases, involving the free exercise of religion under the first amendment. I will tell you in a moment why I believe, in light of my legal analysis, that Senator Taylor's bill is a well-reasoned response to concerns about spiritual healing and parental neglect.
- Second, you should know at the outset, that the Christian Science Church strongly believes that child welfare should be of paramount importance and, further, that all parents should be held to the same standard of accountability as any other parents.
- Third, although the Neumann case has dominated the media discussion relating to these legal issues, you should know that the Neumanns are not Christian Scientists. That has not always been clear in the media coverage relating to this legislation, and I think it is important to note that at the outset.
- Fourth, the Neumanns were, in fact, convicted by a jury for their actions. That too, is sometimes lost in the discussion of these issues. Our justice system worked – but, that doesn't mean that we can't do better by addressing the laws that came into play during the Neumann trial. Senator Taylor has done that, in what we believe is a thoughtful and measured bill in a manner that comports with Wisconsin public policy, our system of justice and the constitution. We urge you to support this legislation. Please allow me now to tell you why.

- Fifth, I will attempt to present you with a balanced and reasonable approach to this issue without the emotional reaction which has characterized and exacerbated the debate so far.

II. SUPPORT FOR SENATOR TAYLOR’S BILL.

- With that introduction, we urge you to support Senator Taylor’s bill, Senate Bill 384. The Bill serves two important goals: it protects children and prevents religious discrimination:

1. First and foremost, Senate Bill 384 protects children.

- It has long been the policy of this state that there is no exemption from properly caring for a child.
- That duty extends to providing medical care for a seriously ill child.
- The Wisconsin Supreme Court has made this clear in a 1986 decision in the case of *State v. Williquette*, 129 Wis. 2d 239, 385 N.W.2d 145 (1986), *quoting* 39 Am.Jur. *Parent and Child*, p. 669, sec. 46.
- There, the court stated: “it is the right and duty of parents under the law of nature as well as the common law and the statutes to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the State, under its police powers, may prevent.”
- The Christian Science church supports senate bill 384 because it confirms the existence of that duty in two specific ways:
 - (1) Senate Bill 384 protects children by repealing Section 6 of Wis. Stat § 948.03 – this section is a part of the criminal child abuse law. It currently contains a provision that addresses “treatment through prayer.” Senate Bill 384 removes this section of the law and makes our child protection laws clearer.
 - (2) Senate Bill 384 also protects children by amending the medical practice act – which reaffirms the State’s ability to take immediate custody of an ill child and provide medical treatment with a court order.

- And under Senate Bill 384, no court order is necessary to provide medical attention for seriously ill children. Wis. Stat. § 48.19(1)d)5; 48.295; 48.345(6); and 48.20(4).
- And Senate Bill 384 protects children by not hindering the state's ability to prosecute a parent who neglects a child's medical needs. It repeals the religious accommodation in Wis. Stat. § 948.03(6) that the Neumanns claimed barred their prosecution altogether. The Neumanns lost on that claim -- they were prosecuted and convicted for their actions. However, we support making a change to the law that confirms that no parent should be able to evade prosecution for neglecting a child.

2. Second, Senate Bill 384 prevents religious discrimination. It promotes a fair trial and ensures that no one is discriminated against based on their religious beliefs in Wisconsin.

- The rights to a fair criminal trial and protections against discrimination of a criminal defendant have long been significant public policies in Wisconsin. These protections are embedded in our state and federal constitutions.
- The Court of Appeals of Wisconsin confirmed the importance of these public policy considerations, noting in a decision last year that "one of the essential ingredients of due process in a criminal trial is the right to a fair opportunity to defend against the state's accusations." This was the case of *State v. Jensen*, 2007 WI APP 256, ¶ 33, 306 Wis. 2d 572, 743 N.W.2d 468.
- Stated another way by our Wisconsin Supreme Court, "fair play is an important factor in the consideration of due process of law. Truly, the concern of due process is fundamental fairness." This was the case of *State v. Devalk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970).
- Regretfully, Christian Scientists have been discriminated against in criminal prosecutions. They have been denied the right to tell their side of the story and that is contrary to our system of justice. Everyone is entitled to a fair trial, regardless of their race, gender, or religious beliefs.
- Senate Bill 384 prevents religious discrimination and promotes a fair trial by allowing the presentation of evidence in support of an affirmative defense that parents' reliance on spiritual healing was reasonable.

- To be clear, this provision does not provide immunity against prosecution. In other words, this “affirmative defense” does not stop a person from being tried for their actions or inactions. It means only that in a criminal prosecution, the defendant will be able to put in evidence as to their behavior. A defendant cannot claim a right to have his or her case dismissed before trial just by raising an affirmative defense. Instead, Senate Bill 384 simply ensures the right of a criminal defendant to present his or her defense by prohibiting religious discrimination.
- The bill lists a number of factors that may be relevant to determine whether their behavior was reasonable, such as the seriousness and length of a child’s illness, the likelihood that medical treatment would have been effective in treating it and the family’s experience with medical treatment and religious healing.
- It is important to understand that even if a parent presents evidence about each and every one of these factors, it does not mean he or she will be found innocent. The judge or jury must determine that the parent’s actions in using prayer were reasonable for the affirmative defense to apply.
- This is a case-by-case determination – not a one size fits all approach.
- That is the nature of our legal system – we judge persons by their conduct and their motivation for that conduct. It is the only way our criminal justice system will ever work fairly.
- Allowing parents with religious convictions to tell their story in a criminal prosecution is not “new ground.” Twenty-eight (28) states currently have religious provisions in their criminal child protection laws. Our neighbors, Minnesota and Iowa, both have provisions in their criminal code to ensure against religious discrimination in criminal prosecutions.
- Eight states have affirmative defenses in their criminal law. Importantly, the language of those provisions is generally broader than the language of the affirmative defense proposed in this bill. In none of those eight states, has the affirmative defense been successfully challenged on constitutional grounds. It is good law.

- Senate Bill 384 merely makes clear that a criminal defendant may present evidence to a judge or jury at trial that explains his or her reliance on spiritual healing. The proposal is consistent with existing Wisconsin law relating to affirmative defenses.
- The concept of “reasonableness” is not new to judges and juries in criminal cases. They are often asked to determine whether criminal defendants behaved reasonably in the context of other defenses. See, e.g., Wis JI-Criminal, § 885 (asking whether a law enforcement officer acted reasonably in effectuating an arrest); or Wis JI-Criminal, § 951 (regarding reasonable use of discipline by a responsible person).
- In determining reasonableness, “[t]he standard is what an ordinary, prudent, and reasonably intelligent person would have believed in the position of the defendant, acting under the circumstances that existed at the time of the alleged offense.” *Id.* This same standard would apply to judges and juries’ determinations under Senate Bill 384.

3. Finally, Senate Bill 384 is constitutional. It promotes due process under the Wisconsin Constitution Article 1, § 8. It does not violate the establishment clause in the Wisconsin Constitution, which is in Article 1, § 18, or the US Constitution’s First Amendment protections for religion. Senate Bill 384 promotes the free exercise of religion without any of the problems attendant in the Neumann case.

III. CONCLUSION.

- I want to conclude then by stating that Senator Taylor’s Bill makes good sense from a public policy standpoint.
- Senate Bill 384 upholds the standard that parents have a duty in Wisconsin to provide for their children, including medical care.
- Senate Bill 384 confirms that in the battle between a child’s welfare and the right of that child’s parents to practice religion, the child’s welfare trumps.
- The State may take immediate custody of a child that is ill or injured or is in immediate danger. A child taken into custody may be immediately delivered to a hospital or physician if the child is believed to be suffering from a serious physical condition that requires prompt diagnosis or treatment.
- Senate Bill 384 does not create a bar to prosecution for failing to provide medical treatment.

- However, Senate Bill 384 also makes clear that that criminal prosecution must be fair, and it must be conducted in a manner that prevents religious discrimination, by allowing a parent to tell his or her side of the story. This is no different than the rights we afford criminal defendants to explain their conduct in a variety of other contexts, such as when a criminal defendant claims that his or her conduct was motivated by self defense, defense of others, defense of property, or the privilege of reasonable discipline with children. Wis. Stat. § 939.45. The parent's conduct is judged by an objective standard of reasonableness.
- In this way, Senate Bill 384 supports the principle that criminal defendants should be afforded a full and fair opportunity to explain their conduct, which is one of the hallmarks of our justice system.
- We urge you to support Senate Bill 384.