Compulsory Medical Treatment and the Free Exercise of Religion

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NOTES

COMPULSORY MEDICAL TREATMENT
AND THE FREE EXERCISE OF RELIGION

Recent cases involving refusals of blood transfusions by Jehovah's Witnesses raise the difficult constitutional issue of compulsory life-saving medical treatment. The Jehovah's Witnesses religion prohibits the giving or accepting of blood transfusions as a violation of God's law, and consequently judicial intervention has been sought to compel medical treatment for children and for adults.

I. COMPULSORY MEDICAL TREATMENT: THE CASES

Medical treatment has often been ordered for children over the religious objection of parents, but the constitutionality of compulsory


2. No cases have been found involving the Christian Science religion. One explanation for this might be the fact that the religion does not require refusal of all medical treatment:

   There are a few exceptions to the rule that a Christian Science practitioner and a doctor may not be employed on the same case. As required by law, a doctor or qualified midwife is employed in childbirth. Where bones have been broken, a surgeon is sometimes employed to set the bones, if the patient so desires, since no medication is involved. Where medical treatment for minor children is required by law, Christian Scientists are, as always, strictly obedient to the requirement; but in such areas they seek eventual recognition by law of their right to rely wholly on Christian Science healing for themselves and their children. . . .


3. The belief is based on portions of the Bible which forbid the "eating of blood." "Every moving animal that is alive may serve as food for you. As in the case of green vegetation, I do give it all to you. Only flesh with its soul—its blood—you must not eat." Genesis 9:3. WATCH TOWER BIBLE AND TRACT SOCIETY OF NEW YORK, BLOOD, MEDICINE AND THE LAW OF GOD (1961). See also How, Religion, Medicine and Law, 3 CAN. B.J. 365 (1960).

treatment for adults remains undecided. In *Application of President & Directors of Georgetown College*, a single member of the three-judge court of appeals issued an order for the needed blood transfusion. Avoiding the constitutional claim of religious freedom, the judge based his decision on common law grounds. First, he described the patient as “*in extremis*” and thus non compos mentis, giving the court the duty of guardianship. Second, relying on the state’s *parens patriae* power to prevent the abandonment of children, he concluded that since the patient was the mother of a minor child the state could prevent “this most ultimate of voluntary abandonments.” Third, the judge stressed the legal dilemma of hospital administrators and doctors who must decide whether to treat an objecting patient or let him die, risking civil or criminal liability in either case. Then, looking beyond these traditional considerations, the judge concluded that “a life hung in the balance” and announced that he “was determined to act on the side of life.”

In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*.

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5. 331 F.2d 1000, *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1965). After unsuccessfully seeking permission from the district court for an emergency transfusion, the hospital sought an emergency writ from the court of appeals. The patient, mother of a seven-month-old child, was suffering from massive internal bleeding and the need for the transfusion was immediate. The case is discussed in Note, 18 U. FLA. L. REV. 591 (1966); Comment, 53 CALIF. L. REV. 860 (1965); Note, 60 NW. U.L. REV. 399 (1965); 18 VAND. L. REV. 772 (1965); 10 CATHOLIC LAW. 260 (1964); 26 MONT. L. REV. 95 (1964); 40 NOTRE DAME LAW. 126 (1964); 16 S.C.L. REV. 552 (1964); Note 39 TUL. L. REV. 125 (1964); 113 U. PA. L. REV. 290 (1964); Comment, 9 UTAH L. REV. 161 (1964). The procedural aspects of *Georgetown* and similar cases are analyzed in 77 HARV. L. REV. 1539 (1964); Note, 39 N.Y.U.L. REV. 706 (1964).

6. In Collins v. Davis, 44 Misc. 2d 622, 254 N.Y.S.2d 688 (Sup. Ct. 1964), the wife of a comatose patient refused to consent to surgery upon her husband who had voluntarily submitted himself to the hospital’s care. The court ordered the needed treatment on the ground that the patient and his wife could not put the hospital in this impossible position.


8. Treatment without the patient’s consent may lead to a suit or prosecution grounded on battery. See Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962). In *Georgetown* the court cited *Jones* and said that “whether or not a waiver signed by a patient in *extremis* would protect the hospital from civil liability, it could not be relied on to prevent criminal prosecution.” Application of President & Directors of Georgetown College, 331 F.2d 1000, 1009, *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1965). “This case does not involve a person who, for religious reasons, has refused to seek medical attention. . . . Mrs. Jones sought medical attention and placed on the hospital the legal responsibility for her proper care.” Id. at 1007.

9. Application of President & Directors of Georgetown College, *supra* note 8, at 1009. The court rejected the possibility of ordering treatment to prevent “suicide” on the grounds that the patient, unlike the perpetrator of a suicide, did not want to die.

the patient was pregnant. The Supreme Court of New Jersey, in a unanimous decision, held that the "welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them." Thus, the case was decided on the basis of the state's power to intervene for the welfare of the child and again the constitutional issue was not reached.

In *United States v. George*, the court ordered the necessary transfusions relying heavily on the rationale of the *Georgetown* case with the exception of the *in extremis* argument (since the patient in *George*, although in serious condition, was found to be "rational and coherent."). The court also discussed the ethical problem raised by the doctors' professional oath. "To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified. . . . The patient may knowingly decline treatment, but he may not demand mistreatment." The court also authorized the required transfusions; the judge was convinced that the patient desired the treatment but that she could not bring herself to sign the order for religious reasons. As in *Georgetown*, the judge acted on the side of life.

Two recent cases have held that treatment may not be ordered. In *Erickson v. Dilgard*, the court rejected the county's contention that a refusal to consent to a life-saving blood transfusion was tantamount to suicide. Asserting that "it is always a question of judgment whether the

sought authority to administer blood transfusions to the defendant in the event such transfusions should be necessary to save her life and the life of her unborn child. The evidence established a probability that at some point in the pregnancy the defendant would hemorrhage severely and that both she and the unborn child would die unless a transfusion were given. See Comment, 10 VILL. L. REV. 140 (1964); 40 NOTRE DAME L. 126 (1964); 33 FORDHAM L. REV. 80 (1964).


12. "We have no difficulty in so deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life." *Ibid.*

13. 239 F. Supp. 752 (D. Conn. 1965). This was a motion by the government to dissolve a temporary restraining order. The patient had voluntarily submitted himself to the hospital for treatment of a bleeding ulcer but refused blood transfusions on the ground that he was a Jehovah's Witness. See Comment, 41 WASH. L. REV. 124 (1966); 34 GEO. WASH. L. REV. 159 (1965).


16. "This woman wanted to live. I could not let her die!" *Id.* at 216, 267 N.Y.S.2d at 452.

17. 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). The patient, suffering from internal bleeding caused by an ulcer, agreed to submit to the needed operation but refused to consent to a blood transfusion without which, according to the attending physicians, there was little chance of recovery. See 33 FORDHAM L. REV. 513 (1964).
medical decision is correct,' the court concluded that the individual has the final determination. No religious objection was made by the patient, and as a result there was no discussion of religious freedom.

The constitutional issue was squarely presented in In re Estate of Brooks, where the state contended that society has an overriding interest in protecting the lives of its citizens and the patient resisted treatment on religious grounds. The court, recognizing the individual's right to refuse treatment, distinguished those cases in which courts had intervened. Georgetown was found to be inapposite because in Brooks the patient was neither in extremis nor the parent of a minor child. The basis of the court's decision was that although religiously-motivated actions are not totally immune from regulation, the patient's refusal to consent to the transfusions was not an "overt or affirmative act . . . [constituting] any clear and present danger to society."

These cases, with the exception of Brooks, were not decided on the basis of determining whose interest is paramount: society's, in attempting to preserve the lives of its citizens, or the individual's, in seeking to exercise his religion unfettered by state interference. And Brooks, in which the court attempted to balance the relevant interests, illustrates the characteristic superficiality of the courts' evaluation of these interests and the difficulty of applying the "clear and present danger" test to the area of religious freedom.

18. Erickson v. Dilgard, supra note 17, at 28, 252 N.Y.S.2d at 706. The court also placed heavy emphasis on the fact that the patient was competent.

19. "[I]t is the individual who is the subject of a medical decision who has the final say and . . . this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires." Ibid.

20. 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The lower court had ordered the appointment of a conservator and allowed him to consent, in the patient's behalf, to the necessary transfusion. After the transfusion had been given, the patient appealed, seeking to have the conservatorship proceedings expunged and the petition dismissed. Despite its mootness, the case was heard by the supreme court because of the substantial public interest involved. See Note, 7 Ariz. L. Rev. 315 (1966); 79 Harv. L. Rev. 675 (1966); 64 Mich. L. Rev. 554 (1966); 68 W. Va. L. Rev. 65 (1966); 41 Wash. L. Rev. 124 (1966); 15 Am. U.L. Rev. 110 (1965); 34 Geo. Wash. L. Rev. 159 (1965); 44 Texas L. Rev. 190 (1965).

21. Compulsory vaccinations, said the court, are based on the right of society to protect itself; polygamous marriages may be prevented since they are overt acts deleterious to public morals and welfare; and the snake handling cases involve "affirmative action deemed detrimental to public welfare." In re Estate of Brooks, supra note 20, at 367-68, 205 N.E.2d at 439.

22. Id. at 369, 205 N.E.2d at 442. The state may interfere with religious activities only "when religious principles break out into overt acts against peace and good order." Id. at 373, 205 N.E.2d at 440. See test at notes 38-41 infra.
The Regulation of Religious Exercise

Theories of Regulation

Several state interests have been held sufficient to meet the various constitutional standards. The most important of these are the police power and the power of parens patriae.

Many matters have been held to fall within the reach of the state's police power—the power to regulate for the general welfare. These include polygamy, palmreading and fortune-telling, unlicensed practice of medicine, snake handling, compulsory education, and compulsory vaccination. This broad authority to regulate even religiously-motivated conduct is generally claimed to be derived from the power of the state to protect society, and is manifested both in general health regulations and in regulations protecting the general morals of the community.

The state's authority under the doctrine of parens patriae to protect

23. The police power has been defined as "the power inherent in the state to prescribe . . . reasonable regulations necessary to preserve the public order, health, safety or morals." Tighe v. Osborn, 149 Md. 349, 356, 131 Atl. 801, 803 (1925). See also Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E.2d 52 (1938); Central Clay Drainage Dist. v. Booser, 143 Ark. 219 S.W. 336 (1920); City of Cincinnati v. Harth, 101 Ohio St. 344, 128 N.E. 263 (1920). The cases involving floridation are also in point. See De Aryan v. Butler, 119 Cal. App. 2d 674, 260 P.2d 98 (1953), cert. denied, 347 U.S. 1012 (1954); Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (1954); Bear v. City of Bend, 206 Ore. 221, 292 P.2d 134 (1956); see also Nichols, Freedom of Religion and the Water Supply, 32 So. Cal. L. Rev. 158 (1959); Comment, 13 Wash. & Lee L. Rev. 38 (1956). The cases have been decided in favor of the state upon the ground that the fluoridated water is not being forced upon the dissenters; they have the choice of importing bottled water if they wish. Another case involving the "choice" analysis is Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934).

24. See Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 319 U.S. 624 (1942). But see People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), where a statute forbidding the drinking of peyote was declared unconstitutional when applied to the members of a religious group believing in "Peyotism." See note 99 infra.


30. [Parens patriae is a] right of sovereignty and imposes a duty on the sovereign to protect the public interest and . . . such persons with disabilities who have no rightful protector. . . . [It] extends to the personal liberty of persons
children and incompetent adults has been invoked frequently to require medical treatment for children over their parents' religious objections;\textsuperscript{51} this intervention has been justified on the grounds that the lives of society's "youth, who constitute the hope of racial survival and progress, [are] of vital concern to the very life of the nation."\textsuperscript{32} It has long been recognized that this doctrine extends to incompetent adults.\textsuperscript{38}

**Development of a Standard**

The first amendment's broad provision that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,"\textsuperscript{4} has been given a "preferred position" among constitutional rights.\textsuperscript{8} However "preferred," the right to the free exercise of religion is not absolute,\textsuperscript{3} and has often been subjected to that reasonable regulation which is essential to the safety and welfare of society.\textsuperscript{7}

who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc. . . . This jurisdiction is called into play when it is found that such persons could be a danger to themselves or to the public if they were not taken and held under protective custody.


32. Morrison v. State, supra note 31. See also 13 Wyo. L. J. 88, 89 (1958): "The greater concern of the courts today in the health and well-being of infants is not evidence of increasing socialistic tendencies, but is rather an emphasis on benefit to the individual, with a benefit to the state accruing only as a secondary and inevitable result." Cf. Elow, *Religion, Medicine and Law*, 3 Can. B.J. 365, 385 (1960): "It is a Nazi-Spartan theory that children belong to the state. . . ." See also In re Clark, 90 Ohio L. Abs. 21, 185 N.E.2d 128 (C.P. 1962): "The child is a citizen of the state. While he 'belongs' to his parents, he belongs also to his state. . . ." A second rationale for the doctrine of *parens patriae* is the unwillingness of the state to allow children to make unwise decisions. See text at note 67 infra.

33. "In England, the King was the *parens patriae*—the general guardian of all infants, incompetents, and insane persons. . . . When the United States achieved its independence, this sovereign power of guardianship over persons under a disability devolved upon the states." 64 Mich. L. Rev. 554, 555 n.5. See Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952).


constitutes reasonable regulation and thus justifies interference with religious freedom is far from clear.

One of the earliest cases upholding a regulation of religious exercise was Reynolds v. United States, in which the Court said that while religious beliefs of any kind are beyond regulation, actions in violation of the social order may be restrained despite their religious motivation. This distinction has been widely used to uphold the constitutionality of various restrictions upon religiously-motivated conduct. However convenient, it provides little guidance for the courts in their efforts to decide which actions may be restrained; quite clearly not all actions are outside the protection of the free exercise clause. Thus, this distinction has quite properly been criticized as lacking constitutional basis.

The authoritativeness of the action-belief dichotomy was undermined by West Virginia Board of Education v. Barnette, which made it clear that not all actions are regulable. The standard of clear and present danger, developed in the area of freedom of speech, was used to determine which religiously-motivated acts could be legitimately regulated. This standard, however, has also been seriously questioned.

The most compelling criticism is that the test, however appropriate it may be for the regulation of speech, is not applicable in the area of health and morals... forbids the easy assumption that there is an unqualified right of religious liberty against the community and the state.”

38. 98 U.S. 145 (1878). This case sustained a law prohibiting polygamy enforced against a Mormon. “Congress was deprived of all legislative power over mere opinions, but was left free to reach actions which were in violation of social duties or subversive of good order.” Id. at 164.


40. The Court in both Davis v. Beason, 133 U.S. 333 (1890), and Cantwell v. Connecticut, 310 U.S. 296 (1940), saw the need for a more refined distinction. “In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” Cantwell v. Connecticut, supra, at 304. Other cases hold that activity is within the protection of the first amendment, e.g., Taylor v. Mississippi, 319 U.S. 583 (1943); Marsh v. Alabama, 325 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946). See also cases collected in Antieau, supra note 39, at 227 n.34.

41. See KURLAND, OF CHURCH AND STATE AND THE SUPREME COURT 7 (1951); Milhollin, The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals, 10 NATURAL L.F. 202, 205 (1960). Comment, 26 U. CHI. L. REV. 471 (1959), points out that (1) the language of the amendment makes no such distinction; (2) “exercise” is not normally thought of as limited to belief; and (3) such a restriction defeats the purpose of the guarantee.


ligious freedom. Full public discussion was thought to be sufficient to overcome any threat posed by dangerous speech, and the Supreme Court held state regulation justifiable only where the danger was of sufficient immediacy and gravity "to preclude the remedial effects of further discussion." No such countervailing force is thought to restrain religious exercise.\textsuperscript{46}

A more recent formulation is generally accepted as the current standard.\textsuperscript{47} In \textit{Sherbert v. Verner},\textsuperscript{48} the Court held that indirect burdens on the free exercise of religion can be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate."\textsuperscript{49} The Court indicated what this "compelling interest" must be. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . . only the gravest abuses, endangering paramount interests, give occasion for permissible regulation."\textsuperscript{50}

\textsuperscript{44} "Freedoms of speech . . . and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1942) (emphasis added). It is notable that \textit{Barnette} involved the freedom of speech as well as that of religion. An argument can be made that the clear and present danger test was applied only to the speech aspect of the case, and that Mr. Justice Jackson's "begin to affect" doctrine, generally attributed to his concurring opinion in Prince v. Massachusetts, 321 U.S. 158 (1944), was the basis of upholding freedom of religion in \textit{Barnette}. "The freedom asserted does not bring [those asserting it] into a collision with rights asserted by any other individual. It is such conflicts which frequently require intervention of the State to determine where the rights of one end and another's begin." West Virginia Bd. of Educ. v. Barnette, \textit{supra}, at 630. In Brownfeld v. Brown, 366 U.S. 599, 604 (1961), the Court referred to the \textit{Barnette} decision, relying on Mr. Justice Jackson's "collision" principle rather than on "clear and present danger." See Note, 44 \textit{Texas L. Rev.} 190 (1965).

\textsuperscript{45} Note, 44 \textit{Texas L. Rev.} 190, 194 (1965) makes the following points: (1) It is a more rigid test than is currently being applied by the Supreme Court; (2) There are many social interests which, while of compelling importance, would not warrant protection under clear and present danger; and (3) The mechanical application of the test tends to obscure the judicial process of weighing and balancing values and interests. See also Mr. Justice Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494, 542 (1941): "No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what it is, is the complexity of the strands in the web of freedoms which the judge must disentangle." See Antieau, \textit{The Rule of Clear and Present Danger, Its Origin and Application}, 13 U. Det. L. Rev. 198, 211 (1949); Comment, 26 U. Chi. L. Rev. 471 (1959).

\textsuperscript{46} See Note, 44 \textit{Texas L. Rev.} 190, 192 (1965).

\textsuperscript{47} \textit{Ibid.}


\textsuperscript{50} \textit{Id.} at 406, citing \textit{Thomas v. Collins}, 323 U.S. 516, 530 (1945). The quoted passage indicates the failure to reject completely the \textit{Barnette} "clear and present danger" test, and if "compelling interest" is to be equated with "grave and endangering," there
Failure to Apply a Standard

Dicta in several cases have led to the generally accepted principle that, absent any danger to other members of society, an individual is free to do with himself as he likes. The most often quoted statement of this position is that of Judge Cardozo in Scholendorff v. Society of New York Hospital: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." However, these assertions were not based upon analysis of the conflicting interests of the state and the individual and are seldom supported by reason or argument.

The principal reason for the lack of a clear standard is the failure of the courts to deal directly with the constitutional issue. Those cases that actually involve the issue of compulsory medical treatment for adults have, with but few exceptions, avoided the issue either by finding distinguishing facts that bring the case within common law doctrine allowing intervention, or by holding that the common law requirement of consent to medical treatment is universally applicable.

The Georgetown case exemplifies the use of factual distinctions. The judge avoided the constitutional issue by finding that the patient was non compos mentis and also by finding that the patient, as the parent of a minor child, could be treated under the doctrine of parens patriae.

is no new standard at all. In Brownfeld v. Brown, 366 U.S. 599 (1961), a similar standard was used, indicating that if the state's goal is secular, the regulation is within the state's power, and if there is no other way to accomplish the purpose, the regulation is valid despite its indirect burden on religious observance. "The United States Supreme Court has not made these determinations often enough to adduce a standard, and the disparity of its decisions, even upon similar interests within a short number of years, demonstrates the absence of any standard that might aid the interested citizen or lawyer. . . ." Comment, 48 MINN. L. REV. 1165 (1964).

51. "A religious zealot may have the right to fast until death. . . . Such a doctrine may be upheld on the theory that society's loss of such an adult is slight." Morrison v. State, 252 S.W.2d 97, 103 (Mo. Ct. App. 1952). "Parents may be free to become martyrs themselves." Prince v. Massachusetts, 321 U.S. 158, 170 (1944). "An adult person, if he be of sound mind, is considered to have the right to determine for himself whether a recommended treatment or surgery shall be performed upon him, and to have the right even to expressly prohibit life-saving surgery or other medical treatment." Woods v. Brumlop, 71 N.M. 221, 227, 377 P.2d 520, 524 (1962). "Each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." Natanson v. Kline, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1960).

52. 211 N.Y. 125, 105 N.E. 92 (1914).
53. Id. at 129-30, 105 N.E. at 93.
54. Much of this dicta is found in decisions which uphold the state's protective power over children. After reaching the conclusion that religious objections of the parents or children cannot prevent the state's intervention, the courts continue by indicating that similar restrictions would not apply to adults. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944).
55. See text at notes 6-7 supra. This point was used by the court in Brooks to distinguish Georgetown. In re Estate of Brooks, 32 Ill. 2d 361, 369, 205 N.E.2d 435, 440
These distinctions, however, are not capable of general application to this problem. Not all patients refusing life-saving treatment are non compos mentis. Moreover, the probable effect of this approach—waiting until the patient is *in extremis* before seeking to compel treatment—is objectionable.56

It has been uniformly held that treatment without consent is unlawful and subjects the doctor to civil liability for battery.57 Despite these cases, no clear answer to the constitutional question is presented. Those cases which firmly assert the necessity of consent raise a basic question: whether consent need be obtained in the life-and-death situation where its effect would be to relegate society's interest in the lives of its members to a place of secondary importance. The common law principle of consent was not formulated to deal with the life-and-death situation,58 but to protect the patient from treatment which in his judgment is not medically necessary or desirable. Treatment that is unquestionably necessary to save his life presents a different case.

The courts, of course, are justified in avoiding constitutional issues. Unfortunately, however, writers have also become entangled in the problems of factual distinctions and common law doctrines, and consequently they have not squarely faced the basic issue of whether an adult's religious convictions may override the state's interest in preserving his life—in other words, whether there is a right to die.

56. See 64 MICH. L. REV. 554, 559 (1966); Comment, 9 UTAH L. REV. 161 (1964). The doctrine of non compos mentis would probably not be sufficient to overcome a request not to be treated made before becoming *in extremis*. This avenue was not explored in *Georgetown*. See *In re Church*, 141 F. Supp. 703 (D.D.C. 1956).
58. Consequently, there has arisen an "emergency" exception to the requirement of consent. See, e.g., *Jakovach v. Yocom*, supra note 57; *Franklyn v. Peabody*, 249 Mich. 363, 228 N.W. 681 (1930).
III. The Right to Die

Society's Interest in Life

In spite of the lack of case authority, several arguments have been made to support the proposition that protection of an individual's life is a strong societal interest. One author has said that “since the preservation of human life is obviously one of the most important interests of society—if not the most important—it is certain that religious convictions cannot be permitted to stand in the way.”

The analogy of refusal to accept medical treatment to suicide has been criticized on the ground that in the former case there is no intent to die. But the question of intent is not so easily dismissed. While there may be no intent to die, there is an intent to refuse the needed treatment, and this refusal is known by the patient to be tantamount to death. One author has defined suicide as any death that results from the actions of a victim “who knew that it was bound to produce this result.”

The analogy to suicide has also been challenged by distinguishing misfeasance from nonfeasance, i.e., by pointing out that the patient does not actively bring about his death, but dies as a result of inaction. This distinction, primarily a tort concept, has been criticized, and several

60. PFIFER, THE LIBERTIES OF AN AMERICAN 55 (1963), citing as examples the state's power to prevent the religious suicide and the handling of dangerous snakes.
62. DURKHEIM, LE SUICIDE 5 (1897). See United States v. George, 239 F. Supp. 752, 753 (D. Conn. 1965) where the patient stated that “he would rather die than agree to a transfusion.” His actions were referred to by the attending physicians as a “variant of suicide.” Criminal liability is not dependent upon intent to achieve specific results. “[Recklessness] is thus a form of intentional harm-doing in that it, too, is volitional in a wrong direction. But, as noted, recklessness differs from intention in that the actor does not seek to attain the harm.” HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 115 (1960).
63. WILLIAMS, CRIMINAL LAW—THE GENERAL PART 731 n.7 (1961):
There is a general liberty to prevent a felony, and suicide is a felony; therefore anyone may interfere to prevent suicide. But it seems that suicide cannot be committed by mere omission, like an omission to eat. Otherwise a person who refused a necessary medical operation because he wished to die would be guilty of attempting suicide, and the operation could be performed on him by force in order to prevent him succeeding in the felony of suicide; which is absurd.
Which is, in turn, circular.
64. See Comment, 53 Calif. L. Rev. 860, 870 (1964); CARDOZO, THE PARADOXES OF LEGAL SCIENCE 25 (1928); BUT see Comment, 9 Utah L. Rev. 161, 166 (1964). Durkheim defined suicide as “any cause of death which results directly or indirectly from
writers have asserted that refusal to accept necessary treatment is suicide.\textsuperscript{65}

More fundamentally, the laws and moral prescriptions against suicide illustrate society's concern for the lives of its citizens. Even conceding the technical absence of intent, it is difficult to accept the conclusion that society is so concerned with intent that it is willing to defer to the individual who refuses his only chance at survival, yet willing to sanction criminally an "intentional" suicide.\textsuperscript{66}

The limitation of the state's power under the doctrine of \textit{parens patriae} to the protection of children and incompetents seems to be inconsistent with its underlying rationale.\textsuperscript{67} It is illogical and arbitrary to refuse to extend the societal protection now afforded children to an adult simply because he has reached majority\textsuperscript{68} or has no children.\textsuperscript{69} Certainly society's concern for life is more than a detached unwillingness on the part of the state to allow children to make "unwise" decisions. On the other hand, intervention to protect an adult from his own foolish actions

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\item \textsuperscript{66} Comment, 53 \textit{Calif. L. Rev.} 860, 871 (1965): "Take for example, two hospital patients both in dire need of blood transfusions. One rejects them because of a desire to die, the other because of religious conviction. Should the law allow the patient wishing to live but preferring death to breach of religious faith, to die, while forcing the one wishing to die, to live? To ask the question is to answer it." See Comment, 113 \textit{U. Pa. L. Rev.} 290, 296 (1964): "Arguably, there exists a theory that suicide, while not criminal, is a 'grave public wrong.'" \textit{Cf.} note 86 \textit{infra.}
\item \textsuperscript{67} The problem of euthanasia is closely related to refused medical treatment. In both situations the action taken or not taken is in accord with the individual's wishes, and it has been argued that if an individual may choose death, the means employed to effectuate that choice should not be determinative. Comment, 53 \textit{Calif. L. Rev.} 860, 867 (1965). The law prohibiting euthanasia also illustrates society's commitment to the principle of the sanctity of life. ". . . [A] murderer who acts only upon the consent, and maybe the request, of his victim is no menace to others, but he does threaten one of the great moral principles upon which society is based, that is, the sanctity of human life." \textit{Devlin, The Enforcement of Morals} 6 (1965).
\item \textsuperscript{68} See note 32 \textit{supra.}
\item \textsuperscript{69} See Cawley, \textit{Criminal Liability in Faith Healing}, 39 \textit{Minn. L. Rev.} 48, 69 (1954): We are determined that a child shall grow up safely and in good health to maturity, and we will intervene when his life or health is threatened by his parents' religious or other eccentricities. But having taken the trouble to see him into manhood, why, if he thereafter chooses foolishly to endanger his own life—and does not at the same time endanger others—then we wash our hands of him.
\end{itemize}
\end{footnotesize}
is not unknown. Refusal to enforce contracts that unduly restrict future business activities of a party, laws against dueling, compulsory social security savings, and the recent safety statutes and ordinances prescribing seat belts and requiring cyclists to wear protective headgear are illustrative, albeit lacking constitutional weight.

Of course, not all aspects of parens patriae should be uniformly applied to adults, but the very essence of parens patriae is society's concern for the lives of its members. Parens patriae should not be viewed, as it has been, as a limitation upon state power but as the embodiment of a worthy social value deserving extension.

It has been asserted that the state's power does not extend to protection of the individual from his own acts. Yet in at least two instances courts have upheld restrictions upon the free exercise of religion where the "protection" was for the sole benefit of the individual being restricted. The statutes prohibiting the handling of poisonous snakes in religious ceremonies are directed in part, if not totally, toward insuring the safety of the handler. In Harden v. State, the court, dismissing the argument that proper precautions were employed for observers, stated that "such precautions do not protect those who are actually handling these

70. This is not applicable to the question of whether or not a particular religious belief is "religious" within the meaning of the first amendment. The reasonableness of religious belief is not justiciable. United States v. Ballard, 322 U.S. 78, 86 (1944). See generally Lake, Freedom to Worship Curiously, 1 U. FLA. L. Rev. 203 (1948); Rabin, When Is a Religious Belief Religious: U.S. v. Seeger and the Scope of Free Exercise, 51 CORNELL L.Q. 231 (1966).

71. "There are at least two principal grounds on which the doctrine is founded.... One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation...." Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68 (1874).

72. See Comment, 53 CALIF. L. Rev. 860, 867 (1965). The author also suggests that much of the narcotics legislation is designed to "protect" the user. Id. at 866. LSD legislation may also be in point.

73. See 26 MONT. L. Rev. 97, 98 (1964).

74. TENN. CODE ANN. § 39-2208 (Supp. 1964) (emphasis added) provides that "it shall be unlawful for any person or persons, to display, exhibit, handle, or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person." Similarly, N.C. GEN. STAT. §§ 14-416, -418 (1953) (emphasis added) provide:

The intentional exposure of human beings to contact with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence in and inducement to such exposure is hereby declared to be a public nuisance.

It shall be unlawful for any person to intentionally handle any reptile... by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be...

75. 188 Tenn. 17, 216 S.W.2d 708 (1948).
poisonous snakes." It has also been pointed out that had the intent of the legislature been to protect only the general public, it could have drafted the statute to protect only non-participants.

Unlike the examples of intervention for the protection of the individual from his own actions enumerated above, the snake handling statutes squarely present the constitutional issue, and it is difficult to distinguish the snake handling cases from those involving refused medical treatment except on a misfeasance-nonfeasance basis, which is untenable. In fact, the only valid distinction is that in the snake cases death is far from certain, while in the transfusion cases it is inevitable—a distinction supporting intervention in the latter cases.

It has also been suggested that the compulsory vaccination laws, while designed for the protection of the community, in reality protect only those who refuse the vaccinations since all non-objectors are immunized.

Although these examples of intervention fail to establish with certainty the principle that the state may override an individual's religious objections for his own protection, they do serve to illustrate the lack of any cogent standard for intervention and to show the absence of a universal principle that the individual is exempt from the state's power to intervene for his protection.

The Value of Life

The Christian attitude is based on the principle of the sanctity

76. Id. at 24, 216 S.W.2d at 710.
77. "The purpose of this statute is to protect the life and health of all people from exposure to the stated danger. There is nothing in the language of that statute from which it might be inferred that the legislature intended to exempt anyone from its provisions." Id. at 21-22, 216 S.W.2d at 710. See Comment, 26 U. Chi. L. Rev. 471, 482 (1959). These examples of restrictions of religious activity are further significant in that in the case of the snake handler, death is far from certain, and the activity is an integral part of the ritual of the Holiness Church.
78. See Comment, 53 Calif. L. Rev. 860, 868 (1965). The distinction was, however, found to be significant in In re Estate of Brooks, 32 Ill. 2d 361, 368, 205 N.E.2d 435, 439 (1965), and it is advocated by Milhollin, supra note 41, at 209.
79. Apart from these distinctions, at least one case holds that the state may protect the individual from his own folly. In State v. Congdon, 46 N.J. Super. 493, 185 A.2d 21 (App. Div. 1962), members of a pacifist group seeking to dramatize the futility of civil defense were convicted of the crime of failure to take cover during an air raid drill:
A civil defense drill is much more than an enforced ritual. It is potentially a matter of life and death. As we have already pointed out, the basis of the State's police power is the protection of its citizens. This protection must be granted irrespective of the fact that certain individuals may not wish to be saved or protected. Just as the State may require persons to be vaccinated or to be quarantined, so may it, as here, take steps to reduce the exposure of the citizens to the dangers of a possible war, including atomic radiation.
Id. at 511-12, 185 A.2d at 31.
of life. . . . [L]ife is not at the absolute disposal of the holder but is a gift of God in whose control it lies. Man has no absolute control over his own life but holds it in trust. He has the use of it and therefore may prolong it, but he may not destroy it at will.80

Society's interest in the preservation of a single life is difficult to express. It can be characterized in either utilitarian or moral terms. The utilitarian viewpoint would stress the effect of the individual's death on others in society in terms of grief, shock, or despair,81 while the moral viewpoint would emphasize the sacredness of the human life and its spiritual value. The value of human life has been extolled both in religion and in philosophy. Larremore characterized the sentiment against suicide as "one of the most signal accomplishments of Christianity,"82 and Blackstone praised the English law for preventing (or at least proscribing) self-destruction.83 Others, including Aristotle and Aquinas, argued to the same effect.84

Even one who questions the efficacy of a criminal sanction against acts of self-destruction need not reject the values implicit in the law's rationale. Thus the present trend away from such sanctions85 seemingly does not stem from any diminution of the moral commitment to the sanctity of life, but from the failure of such laws to deter the evil to which they are addressed.86

81. "Suicide shows a contempt for society. It is rude. As Kant says, it is an insult to humanity in oneself. This most individualistic of all actions disturbs society profoundly. Seeing a man who appears not to care for the things which it prizes, society is compelled to question all it has thought desirable. The things which makes [sic] its own life worth living, the suicide boldly jettisons." PEDDEN, SUICIDE 42 (1936).
82. Larremore, Suicide and the Law, 17 Harv. L. Rev. 331 (1904).
83. 4 BLACKSTONE, COMMENTARIES *189.
84. Aquinas argued that man does not have a right to deprive society of his presence and activity by suicide. SUMMA THEOLOGICA, Part II, Second Number, Question 59, Art. 3. Moore said that "man does not know the importance of his life; even if his life will always continue so, and he may be counteracting by his abrupt departure some design of providence." A FULL INQUIRY INTO THE SUBJECT OF SUICIDE 38 (1790). Aristotle condemned suicide as an offense against the state. ST. JOHN-STEVAS, op. cit. supra note 80, at 56.
86. "Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed." N.Y. Pen. Law § 2301.
It is impossible to define the extent of society's interest in human life in terms of other interests. Merely because society's interest in compelling jury duty or the saluting of the flag is insufficient to justify interference with the freedom of religion, it does not follow that society has an insufficient interest in the preservation of life. However, by comparing society's interest in preserving life to interests that have been held sufficient to warrant intervention in the past, it may be possible to determine whether the interest in life should be within the boundaries of legitimate intervention. It would seem anomalous to hold that freedom of religion cannot prevail over society's insistence on monogamy, but could bar the state from saving a life, or that although a child must go to school despite his parents' religious objections, his mother may die if she chooses. To hold that society cannot intervene to prevent the death of an adult is to suggest that life is less important to society than the morality of marriage, or the value of education, when, in fact, human life is society's ultimate value and indispensable resource—the most compelling of state interests.

Balancing the Interests

Constitutional rights do not exist in a vacuum, and when conflicts arise among them a balance of their respective values must be struck. In the area of compulsory medical treatment, the significant factors include the patient's right to the free exercise of his religion, the state's interest in the preservation of life, and the medical profession's interest.

87. The uniqueness of the value of life as a legal concept has caused judges to ignore precedent from other areas of religious freedom and to treat the transfusion cases as sui generis. This is well illustrated by the remarks of Justice Jacob Markowitz in the Powell case. "I ... was convinced of the proper course from a legal standpoint. Yet, ultimately, my decision to act to save this woman's life was rooted in more fundamental precepts." Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 216, 267 N.Y.S.2d 450, 451 (Sup. Ct. 1965). "I was reminded of 'The Fall' by Camus, and I knew that no release—no legalistic absolution—would absolve me or the court from responsibility if I, speaking for the court, answered 'No' to the question 'Am I my brother's keeper?' This woman wanted to live. I could not let her die!" Id. at 216, 267 N.Y.S.2d at 452.

88. See In re Jenson, 265 Minn. 96, 120 N.W.2d 515, vacated, 375 U.S. 14 (1963).


90. "If the State may punish a preacher for using language calculated to insult and offend the sensibilities of a congregation and thus breach the peace, preachers and members of his [sic] congregation may be prohibited by penal statutes from committing acts which are calculated to endanger the safety and lives of themselves and others." Lawson v. Commonwealth, 291 Ky. 437, 445, 164 S.W.2d 972, 976 (1942).

91. See Reynolds v. United States, 98 U.S. 145 (1878).


93. "Characteristically, courts weigh societal utilities and interests, when, on occasion, the societal and individual interest in freedom of religion clashes with some other social interest and the need of reconciliation or delimitation arises." Antieau, supra note 39, at 224.
in a definite standard.

Although least significant, the plight of the administrators and doctors is worthy of some consideration. Faced on one hand with the likelihood of being charged with battery if they act, and on the other hand with the possibility of being charged with manslaughter if they do not, their dilemma is substantial. This is accompanied by the problem of the physician's ethical responsibilities.

In evaluating the state's interest and the individual's right it is significant that in the transfusion cases the restriction upon the patient's religious exercise is relatively slight. The doctrine forbidding transfusions does not appear to be a fundamental belief in the Jehovah's Witnesses religion. It is not part of the religious ceremony, and its absence will not prevent continued practice of the religion. Furthermore, the state's interest in these cases is not effectuated by a continuing regulation circumscribing the individual's day to day religious practice, but by sporadic restrictions of his actions only on those rare occasions when a transfusion is necessary.

94. See note 57 supra.
96. "Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and, if he remains and relieves him by physical touch, hold him guilty of assault?" Meyer v. Knights of Pythias, 178 N.Y. 63, 67, 70 N.E. 111, 112 (1904). See also Regan, Doctor and Patient and the Law 71 (1956).
97. The Hippocratic Oath requires that a physician "give no deadly medicine to anyone if asked, nor suggest any such counsel." Maloy, Medical Dictionary for Lawyers 372 (3d ed. 1960). Similarly, the International Code of Ethics, adopted by the World Medical Association in Geneva in 1949, states that "a doctor shall not in any circumstances do, authorize to be done or condone anything that would weaken the physical or mental resistance of a human being, except for the prevention and treatment of disease. . . . A doctor must always bear in mind the importance of preserving human life from the time of conception until death." Hadfield, Law and Ethics for Doctors 41 (1958). But see 64 Mich. L. Rev. 554, 559 (1966), where it is argued that a violation of medical ethics is not a danger sufficiently "grave and immediate" to withstand a first amendment challenge.
99. This is not to say that the state is unable to prohibit any activity which happens to be a central tenet of a particular religion; the snake handling statutes forbid the fundamental ceremony and form of worship of the Holiness Church. On the other hand, the use of peyote is basic to the doctrines of the Native American Church, and a statute prohibiting the possession of the drug was held unconstitutional by the Supreme Court of California because "to forbid the use of peyote is to remove the theological heart of peyotism." People v. Woody, supra note 98, at 722, 394 P.2d at 813. The court, however, also emphasized that peyote is not a harmful narcotic and that its use does not lead to harmful narcotics nor hinder enforcement of the narcotics laws. See
Another factor to be considered is the objectors' desire to live notwithstanding his objection to treatment on religious grounds. In Powell the patient was not opposed to receiving the necessary treatment but would not direct it because of her religious convictions. In Georgetown, the patient indicated that she would not consent to the transfusion, but that if the court allowed it, it would not be her responsibility. In George, the patient "would not agree to be transfused but would in no way resist a court order permitting it because it would be the court's will and not his own. His 'conscience was clear,' and the responsibility for the act was 'upon the court's conscience.'" These cases suggest that although these individuals were unwilling to contravene their religious beliefs, they nevertheless wanted to live, and that instead of resenting society's interference, they welcomed it.

V. CONCLUSION

Society has a great interest in the lives of its members, manifested by its laws against suicide, its vigilance through the doctrine of parens patriae over the welfare of its children, and the great value accorded life by all of its citizens. On the other hand, the individual has a great interest in practicing his religion freely, an interest which has been accorded express constitutional protection.

In balancing these interests, it should be remembered that the interest society seeks to protect does not result in the total deprivation of religious freedom. The individuals are free to continue to practice their religion as they wish without interference from society with the exception that they are not free to choose death.

Too often courts assume that all acts committed under the aegis of religious freedom are to be accorded the same weight. The problem is also Shapiro v. Lyle, 30 F.2d 971 (W.D. Wash. 1929) (prohibition law inapplicable to sacramental use of wine).


101. The court asserted that by "authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious beliefs." Application of President & Directors of Georgetown College, 331 F.2d 1000, 1009, rehearing denied, 331 F.2d 1010 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1965).


103. "Nor are we faced with the question of whether the state should intervene to reweigh the relative values of life and death, after the individual has weighed them for himself and found life wanting. Mrs. Jones wanted to live." Application of President & Directors of Georgetown College, 331 F.2d 1000, 1009, rehearing denied, 331 F.2d 1010 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1965). The official position of Jehovah's Witnesses remains, however, one of antagonism to these intrusions. See, e.g., Do Hospital Patients Have Rights?, AWAKE!, Sept. 8, 1964.
seen as a battle between the existence of free religion and the intermeddling of society. There is a general failure to balance the conflicting interests involved, and as a result the interests of society are, as a matter of course, accorded a lesser weight. When a human life is endangered, society’s interest is of such paramount importance that the lesser religious interest must give way and the balance must be struck in favor of life.

104. "I think the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage." Holmes, The Path of the Law, 10 Harv. L. Rev. 467 (1897).