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Refusal of Blood Transfusions by Jehovah's Witnesses

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REFUSAL OF BLOOD TRANSFUSIONS BY JEHOVAH'S WITNESSES†

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JEHOVAH'S WITNESSES generally refuse to take blood transfusions even when these are judged by physicians to be absolutely necessary for the preservation of life and health. They believe that taking such transfusions is "eating blood," contrary to the prohibition of Leviticus, 3:17, and Acts, 15:29. Furthermore, Witnesses who are parents of young children often refuse to allow the children to be given blood transfusions under any circumstances. And Witnesses sometimes stipulate, before undergoing an operation or delivery, that they will not consent to a blood transfusion for any reason whatever.

This attitude raises various questions: first, as to the Scriptural basis of their beliefs; second, as to the moral obligations of the parties concerned; third, as to the legal liability of physicians and hospitals; and fourth, as to the public policy which should be formulated for handling this type of problem.

I. Scriptural Basis

Jehovah's Witnesses base their practice on a Biblical prohibition against eating blood. Leviticus, 3:17 reads: "By a perpetual law for your generation, and all your habitations, neither blood nor fat shall you eat at all." (Cf. also Leviticus, 7:26-27; 17:10-14; 19:26.) It is the position of the Witnesses that a blood transfusion violates this law of Jehovah.[1]

If it is objected that this was a *dietary* law, having nothing to do with the medical use of blood, they reply that a transfusion is the equivalent of eating; it is intravenous feeding. If it is objected that the Biblical prohibition had to do with *animal* blood, they reply that since the prohibition is based on the sacred, life-giving character of the blood, it applies *a fortiori* to human blood. If it is objected that the law also forbade fat,

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[1] *The Watchtower*, 72 (July 1, 1951) n.13 pp. 414-416, published at Jehovah's Witnesses' headquarters in Brooklyn, gives a rather complete exposition of the Witnesses' teaching about blood transfusions.

they say that that part of the law ceased with the New Testament, while the law against blood did not.

For they do not admit that the Biblical prohibition of blood was merely a Mosaic law. They say that this particular law antedated Moses by centuries, citing Genesis, 9:4; and that it was enforced anew in New Testament times, citing Acts, 15:29. This is the famous passage which records the decision of the Council of Jerusalem, given for certain new Christian converts among the Gentiles: "That you abstain from things sacrificed to idols, and from blood, and from things strangled, and from fornication. . . ."

Whatever may have been the meaning of the decree of the Council of Jerusalem, and whatever its force (there are uncertainties on both points), it is clear from the whole history of Christendom that the eating of blood is no longer forbidden. From very early times the whole Church has proceeded on the assumption that this law was abrogated with the coming of the Gospel. It is futile to cite a New Testament passage of uncertain meaning in the face of this universal tradition.

Exegetes take two general courses in explaining the passage from Acts, 15:29. Most of them admit that the decree was concerned with dietary law, but hold that it was a temporary, local ordinance.[2] They point out that it was addressed to the brethren of Gentile origin in Antioch, Syria and Cilicia (Acts, 15:23), and that its motivation was to avoid shocking the Jewish converts who had been brought up for generations in the Mosaic tradition (Acts, 15:19-21). This view is confirmed by the practice of St. Paul who, though present at the Council, and one of the messengers sent to announce the decision, did not enforce it himself a few years later in another part of the world. Writing to the Corinthians a few years after the Council of Jerusalem, he gives a decision permitting one of the things the decree had forbidden, namely, the eating of meat offered to idols (1 Corinthians, 10: 25-30). If one of these dietary prohibitions was not of universal obligation, then it is improper to urge that the others were.

Another explanation, followed by a few, is based on a good, early manuscript which omits the prohibition against "things strangled." If this is omitted, then the other three prohibitions bear a meaning which is not dietary at all. They would refer to the three great sins of idolatry, murder and impurity. The prohibition of blood would merely be a prohibition of murder. These interpreters believe that moral precepts harmonize better with all the circumstances than mere dietary laws.[3]

Whatever the meaning and force of the decree, the thing that is clear from tradition and from the teaching of the Church is that there is no longer any law of God that forbids "eating blood." The Scriptural interpretations of the Jehovah's Witnesses suffer not only from a lack of general principles of scholarly exegesis, but also from the fundamental defect of looking to the Bible as if it were a guide in a vacuum, independent of the teaching of the Church, and independent of the whole history of Christian tradition. Christendom did not have to await the coming of the Witnesses to learn that "eating blood" has been forbidden to Christians all along. And if it had been, it would still be

[2] Cf. E.B. Allo, O.P., *Première Épitre aux Corinthiens,* (Paris, 1934) p. 247.

[3] Cf. *Expository Times,* 41 (Dec., 1929) pp. 128-129; and Westminster Version, III, p. 221 n. The shorter text is favored by Allo with Harnack. Cf. Allo, *op. cit.,* p. 196.

a long jump to conclude that to take a blood transfusion is to "eat blood."[4]

II. Moral Questions

Is a blood transfusion an ordinary means of preserving life and health?

The terms *ordinary* and *extraordinary* do not always mean the same thing to doctors and theologians. Sometimes a procedure which any physician would call ordinary would be considered extraordinary in the theological sense.[5] There is no doubt that a blood transfusion is an ordinary means of preserving life and health as far as the physician is concerned. And it would seem, nowadays, that in most circumstances a blood transfusion would be considered an ordinary means in the theological sense. At least in cities, where hospital care and transfusions are easily available and not unduly expensive, I believe most theologians would call it an ordinary means of preserving life and health. The moral consequence is that given these circumstances a patient would be obliged to take this means when it is judged necessary to preserve life.

But is a blood transfusion an ordinary means for a person who is firmly convinced on religious grounds that such a transfusion is an offense against the law of God? This raises the question as to how far one may take into account subjective feelings, subjective errors, mistaken attitudes, etc., in estimating what is ordinary and what is extraordinary, and in deciding the consequent objective obligation to take given affirmative measures to preserve life, or in deciding the objective liceity of foregoing such measures.

At first sight it may seem strange that subjective errors and attitudes can be the determinants of objective morality. A little reflection, however, will show that it has been customary with moralists to allow subjective elements to be taken into account in making the moral judgment as to what is ordinary or extraordinary in a given case. In the last analysis this may rest on the concept of stewardship. It is because we are stewards, acting in the name of God, that we are obliged to take ordinary care of our health. There is nothing contradictory in supposing that God does not demand of a steward efforts which for him are extraordinary, even if it is an erroneous idea of the steward that makes them so.

For instance, all are agreed that the individual circumstances must be taken into account, and one of the circumstances is the amount of pain involved in a given procedure. But pain is a highly subjective phenomenon. Some people can stand a good deal. Others cannot. They have an exaggerated horror or an exaggerated reaction even to a small amount of pain. This is one subjective, variable element which all moralists, I believe, would recognize as having to be taken into account to decide the objective obligation.[6]

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[4] Witnesses would presumably object to blood plasma just as they do to whole blood. I do not know if they would object to a synthetic plasma substitute like "Gentran." Many serums and antitoxins are made from blood. Logically, it would seem they should refuse all of these, also.

[5] Cf. J.C. Ford, S.J., and J.E. Drew, M.D., "Advising Radical Surgery: A Problem in Medical Morality," *Journal of the American Medical Association,* 151 (Feb. 28, 1953) pp. 711-716. For a general discussion of ordinary and extraordinary means see G. Kelly, S.J., "The Duty of Using Artificial Means to Preserve Life," *Theological Studies,* 11 (June 1950) n.2, pp. 203-220; and "The Duty to Preserve Life," *ibid.,* 12 (Dec. 1951) n.4, pp. 550-556.

[6] Noldin, *De Praeceptis,* n.325, 3, a.

Some moralists also give the example of a groundless or exaggerated fear of surgical operations of any kind. They admit that in such cases an ordinary surgical procedure can be considered extraordinary for the individual in question.[7]

Authors also recognize that a woman who has an extreme (and therefore irrational) horror of being examined by a physician cannot be accused of sin if she refuses to take this otherwise ordinary means to preserve life and health. For her it is extraordinary, because of her subjective misconception as to what the virtue of chastity demands, or her subjective emotional horror which is in fact altogether unreasonable.[8]

Finally there is the well-known, if somewhat fanciful, example of the dying Carthusian who will eat no meat even if the doctors consider it necessary to preserve his life and health. The Carthusian does this, in the supposition, out of love of his Rule. But he has a mistaken idea as to what the Rule requires. Yet authors admit that his mistaken or exaggerated ideas of devotion to the Rule make the use of this ordinary means extraordinary for him.[9]

From all this, I would conclude that subjective elements and mistaken subjective attitudes may sometimes be taken into account when deciding the objective obligation to make use of a given procedure.

With a sincere Jehovah's Witness who is firmly convinced that a transfusion offends God, we are dealing with a case where his conscience absolutely forbids him to allow the procedure. In this mistaken frame of mind he would actually commit sin if he went against his conscience and took the transfusion. I see no inconsistency in admitting that this frame of mind is a circumstance which makes the transfusion for him an *extraordinary* means of preserving life. And it does not seem contradictory to me to admit that while his reason for refusing is objectively mistaken and groundless, nevertheless his frame of mind can become at the same time an objective excuse from the moral obligation which would otherwise be present. The obligation to take positive measures to preserve life is an affirmative one, and it is not unreasonable to suppose that God, who is the master of life and death, does not objectively require of his steward a means of self-preservation which appears to the steward to be certainly sinful. In coming to this tentative conclusion, I am influenced also by the thought that we can allow an individual considerable leeway in exposing his own life to danger, especially in the negative way of not taking surgical means to preserve it, and also by the thought that it is always easier to consider a procedure objectively extraordinary when it is artificial, comparatively recent, and technically rather complicated.

The consequence of this opinion for the physician is obvious. Where the patient is not morally obliged, objectively, to make use of a procedure, and actually refuses it, the physician is not morally obliged to give it to him; nor do the hospital administrators have a moral obligation to see that he gets it.

In fact, even if one holds that the Witness has an objective obligation to take the transfusion, it will not in practice make much difference in estimating the personal moral obligation of the physician or hospital administrator. If a person had the erroneous religious belief that he should commit sui-

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[7] Genicot, *Theologia Moralis,* I, n.364; Noldin, *op. cit.,* n.325, 3, b, citing Capellmann-Bergmann.
[8] St. Alphonsus, *Theologia Moralis,* lib. III, n.372, cited by many others.
[9] Vermeersch, Theologia Moralis, II, n.300, 5.

cide by taking positive means to kill himself, we would all agree that it would be justifiable and usually obligatory to prevent him by force from doing so. But when the erroneous belief has to do with the omission of a positive, artificial means of self-preservation, it is an entirely different matter to assert that the physician has any right, and much less any duty, to force a patient to conform to the objective moral law. Naturally, all concerned (no matter what theory they hold as to the objective or subjective morality of the case) will try to persuade the patient to be sensible. But failing to do so, I do not see that there is any further moral obligation, in either theory, to take action. The question of legal liability will be discussed below.

Another consequence of the view that the sincere Witness is not objectively obliged to have a transfusion is this: From the moral point of view, as far as his individual relationship with the patient is concerned, the physician would be more readily justified in making an agreement not to give him a transfusion. But it is a different matter to decide whether a physician would be morally justified in making such an agreement in view of the legal consequences which the observance of the agreement might entail for himself and for the hospital where he practices. It seems to me that it is both unwise and unjustifiable for a physician or a hospital to make an agreement involving serious risks of this kind. A word will be said about legal liability below.

When a physician makes an agreement not to give a transfusion he is obliged *per se* to honor it. Sometimes, however, contractual agreements cease to bind when unforeseen events make a substantial change in the subject matter or the circumstances of the agreement. For instance, a physician might agree to give no transfusion, and later discover, with the patient at death's door, *e.g.*, from hemorrhage during Cesarean section, that observance of it would entail serious legal consequences for himself and for the hospital where he is working. Such unforeseen circumstances would, in my opinion, be sufficient grounds for releasing him from his moral obligation to go through with the agreement. Furthermore, if the law were to void an agreement of this kind as being contrary to public policy, this might well constitute grounds for a release from one's personal obligation to observe it, even if it were not clear whether the law invalidated the contract itself for the forum of conscience from the beginning.

The foregoing opinions have to do with the case of an adult Witness. The practical problems are more difficult and delicate when the patient is a child or a baby, and the parents' religious convictions lead them to refuse to allow a necessary transfusion to be given. Acute cases have arisen involving children and infants who are in desperate need of transfusion.[10] The rights and duties of all concerned are very different in these cases from the case of the adult Witness.

It is clear that a child has an objective right to ordinary care, no matter what its parents' mistaken beliefs may be. Consequently, when a blood transfusion is a necessary part of this ordinary care, the parents have an objective moral obligation to supply it, and if they fail to do so others who have undertaken the care of the child, such as physicians and hospital authorities, have *per se* a moral obligation to see that the child gets it. In the case of a young child,

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[10] Cf. C.C. Cawley, "Parens Patriae: The Sovereign Power of Guardianship," *New England Journal of Medicine*, 251 (Nov. 25, 1954) n.22, pp. 894-897.

therefore, it would be morally wrong to make an agreement not to administer a transfusion in case of serious need; and if such an agreement were made, one would have no obligation to honor it.

The obligation of physicians and others who have actually undertaken to care for the child would ordinarily be an obligation of justice as well as of charity. Others who have not actually undertaken the care of the child might have an obligation of charity to intervene in order to see to it that a neglected child is properly cared for.

When serious bodily harm to the child, or even its life is at stake, no one will concede that the parents' erroneous religious beliefs must be respected; they have no right to inflict them on their children.

When there is question of taking means to preserve life, we can allow a person a degree of control where his own life is concerned, but can without inconsistency refuse him such power where another's life is at stake. For instance, a theologian who would permit a Carthusian to refuse meat and continue his abstinence even though it endangered his life, would never conceivably permit a Carthusian superior, out of love of the Rule and in order to strengthen religious discipline, to impose abstinence on such a subject, or refuse to give him meat when the doctor ordered it. A parent, whose false ideas of chastity or horror of physical examination might be considered a valid reason or sufficient excuse for refusing medical care herself, would never be allowed by any moralist to inflict these ideas on her young child. If she refused to allow the doctor to make a necessary examination of her child for such a reason she would simply be accused of sinful neglect by the moralists. Likewise, a religious superior, extraordinarily sensitive to pain, though he might himself be excused from undergoing a painful operation of an ordinary kind, could not possibly be permitted to inflict his ideas on a religious subject. Furthermore, one might legitimately risk one's own life and be a martyr of bravery, but one could not oblige another to do the same in the same circumstances. And so it is possible, without inconsistency, to admit that a blood transfusion may be an extraordinary means for one who is erroneously convinced in his personal conscience that such a transfusion offends God; but to deny that anyone, even a parent, has a right to inflict such erroneous ideas on a child.

There are limits to the power of disposal which parents have over the bodies of their children. They cannot do them bodily injury and they cannot refuse them ordinary medical care. The Catholic position, based on natural law, would be in accord with those legal decisions which oblige parents to conform to an objective standard of ordinary care.

It is difficult to define with any accuracy what is meant by a young child. Certainly one who has reached his legal majority is able to speak for himself if he is normally *sui compos*. Certainly one who has not reached the age of reason cannot speak for himself. But what about those who are, for example, between the ages of seven and twenty-one? Hardly anyone would say that a nine-year-old child could decide for himself to refuse the transfusion even at the risk of life. But there might be many a nineteen-year-old that could. No one can draw the age line exactly, and it would always be subject to individual differences, because some children attain maturity earlier than others. But the younger the child, the more one would hesitate to allow it to make such a decision. And of course, the physician

should take special legal precautions to protect himself in the case of any minor.

It was stated above that physicians and others who have undertaken the care of a child have *per se* a moral obligation to administer a transfusion when this is an ordinary and necessary means of preserving life; and that the mistaken religious beliefs of the parents do not of themselves excuse from this obligation. The phrase *per se* was used because in practice the physician may not be able, morally speaking, to do what he believes is necessary. If he insists on a transfusion, the parents will probably take him off the case. Or if they persist in their refusal, he could be morally justified in withdrawing from the case. After all, his legal position is far from clear; and it is no small matter to undertake a surgical procedure on a young child contrary to the express refusal of the parents to allow it. Serious surgical accidents happen even with a relatively safe procedure like a blood transfusion. Where would the physician stand if such an accident happened when he was operating contrary to the parents' will? The moral consequence of these considerations is that although there is *per se* an obligation to administer such a transfusion, there may often be an excuse from it in practice—at least in those cases where physicians and hospital administrators are not protected by a court order.

III. Legal Liability

When physicians or hospital authorities have undertaken the care of a Jehovah's Witness, or the child of a Witness, embarrassing legal dilemmas may arise. Particularly trying are those cases in which the Witness refuses for self or child a transfusion which is judged to be imperatively needed to prevent imminent death.

A series of hypotheses can be imagined. One can inquire about criminal or civil liability or both; about the case of the adult or the case of the child; about the case where the transfusion is given or where it is omitted; about the case where there has been an explicit agreement not to give a transfusion, or the case where no such agreement exists; about the case where the patient survives and resents the transfusion, or the case where he dies because the transfusion was omitted, or even where he dies as a result of a surgical accident connected with the transfusion itself. By combining these suppositions in various ways, and including cases where the surviving relatives take civil action or attempt criminal complaints, one can imagine a large number of hypothetical legal problems. A further twist could be introduced by supposing that the doctor himself is a Jehovah's Witness, who by his advice abets the patient in his refusal of a transfusion, or, especially, abets the parent who refuses it for a young child.

It is not my intention or my province to try to solve all the labyrinthine ins-and-outs of these problems. The attempt would be unduly speculative anyway, seeing that precedents in the form of actually decided cases are hard to find. I mention the possibilities in order to illustrate the multiplicity of the legal problems that could conceivably arise. My present purpose is merely to recall some generally admitted legal principles which are apropos, and to make some general suggestions, leaving it to the individual physician or hospital to get professional advice when faced with an actual dilemma.

A recent article has reviewed the state of the law on "Criminal Liability in Faith Healing."[11] This interesting essay deals not

[11] C.C. Cawley in 39 *Minnesota Law Review*, 48-74 (Dec. 1954).

only with faith-healing cases strictly so-called, but also with cases involving Christian Scientists and Jehovah's Witnesses. Although it does not touch on the specific problems of physicians' liability, some of its conclusions are instructive for our purposes, especially where children are made to suffer for their parents' beliefs.

One of the principles now established is that a *parent* who fails to provide necessary medical care for his child can be held criminally liable. "Since the turn of the century, then, it has been well established that a parent commits a misdemeanor when, due to religious belief, he denies his sick child the medical aid required by statute, and that, if the child consequently dies, the parent is liable for manslaughter."[12] Faith-healing defendants appeal in vain to the religious freedom clauses of the first amendment. The Supreme Court of the United States in the famous Mormon polygamy case stated: "Laws are made for the government of actions, and while they cannot interefere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[13]

It is anomalous that in the United States the pastor or religious leader who abets a parent in the criminal neglect of the child is apparently not held liable. "It is clear," says Cawley, "that in Canada, criminal liability attaches to the pastor or other adult who actively counsels a parent against furnishing his child with necessary medical care.... I submit that here is the glaring anomaly in our law: that the parent who denies a child medical aid is punished, while the pastor who counsels that denial goes free."[14]

It would not be legitimate to infer, however, that a physician would be equally free from criminal liability. Once he has undertaken the care of the child he has affirmative duties in its regard, and for him to advise and abet parents in their neglect of necessary care would put him in a position very different legally, it seems to me, from that of the pastor.

It must be confessed, however, that as far as giving or omitting a blood transfusion is concerned, the physician seems to be caught in a conflict of legal obligations. He is obliged not to undertake a surgical procedure, even if he judges it necessary, without the parent's consent. This rule is so clearly established that it needs no elaboration. On the other hand, is he not obliged to give a blood transfusion which is desperately needed, when the parents who refuse to provide it are guilty of criminal neglect? But then, in doing so, he is really taking it upon himself to decide two questions which in a given case, or in a given jurisdiction, might be open to dispute: the question of fact: "Is this transfusion absolutely necessary?," and the question of law: "Is this transfusion part of the reasonable medical care which the law requires parents (and others) to provide?" And finally, as mentioned above, he would be violating the well-established rule that to operate without consent is to be guilty of assault and battery.

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[12] *Loc. cit.*, p. 57, citing three leading cases: For England, Reg. v. Senior, 1 Q.B. Div. 283, 19 Cox C.C. 219 (1899). For Canada, Reg. v. Lewis, 6 Ont. L. Rep. 132, 1 B.R.C. 732 (1903). For the United States, People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).

[13] Reynolds v. United States, 98 U.S. 145 (1878).

[14] *Loc. cit.*, p. 72 and p. 74.

In this dilemma it would seem that the physician's only complete legal security is in a court order empowering him to go ahead with the transfusion even against the parents' wishes. But in the absence of such an order, in a clear-cut desperate case, I should imagine that a physician would have little to fear legally from giving the transfusion. It does not seem likely that he would be made to suffer legally if he could show that the life of the child was really at stake, and that the parents' refusal of a transfusion constituted criminal neglect on their part. But conceivably it might involve him in troublesome and expensive litigation.

It is all very well to hold the parents for manslaughter if the child dies, but is there not available some legal means of preventing the tragedy? In Chicago, in 1951, in the case of the child Cheryl Linn Labrenz, the courts found a method of circumventing the persistent refusal of the parents. A petition was filed in Family Court to the effect that the child was dependent because of lack of parental care and guardianship. The Chief Probation Officer was appointed guardian with the right to consent to necessary blood transfusions. These were given and the child's life was saved. Cawley describes the appeal to the doctrine of *parens patriae* in this Illinois case, and in similar cases[15] in Texas, Missouri, and New York. Sometimes, however, the legal machinery creaks and cannot be put into effect with sufficient dispatch to save the child.[16]

If I may be allowed to make some suggestions regarding cases involving children, I would stress the following points.

It is legally inadvisable to make any agreement or contract with a parent not to give a necessary blood transfusion to a child. As was stated above in Part II, this would also be open to moral objections.

The only complete legal security for physicians and hospital authorities who would give a transfusion contrary to the parents' wishes would be in a court order. Consequently those concerned should familiarize themselves with the available legal procedures in their own jurisdiction, and get legal advice ahead of time on the method of obtaining such an order as quickly as possible should the need arise.

When the case is desperate, and no order has been obtained, it would appear that there is not much to fear by way of legal liability in giving the transfusion. And considerations of charity for the neglected child may well weigh the balance in favor of transfusion. But one should get competent legal advice on each case as it occurs.

The case of the adult Witness who refuses consent for an imperatively necessary transfusion does not cause such troublesome complications. The law seems to allow an adult to run risks with his own life which he may not take with the life of his minor child. In a Supreme Court decision we read: "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.... Parents may

[15] *Loc. cit.*, p. 57 ff., citing: People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Mitchell v. Davis, *et al.*, 205 S.W.2d 812 (Tex. Civ. App. 1947); Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952); *In re* Seiferth, 127 N.Y.S.2d 63 (Children's Court, Erie County, 1954). For a discussion of this last case, and further references to the decided cases, see "Recent Cases" in 39 Minnesota Law Review, 118-122 (Dec. 1954). See also "Comment: Custody and Control of Children," 5 Fordham Law Review, 460 (1936). In a Washington case, where the surgery itself involved serious danger to the child, the court refused to intervene: *In re* Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942).

[16] Cawley, *loc. cit.*, p. 62, gives the details of the *Grzyb* case in Chicago, Jan. 1954.

be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children. . . ."[17] And Cawley remarks: "Society and the courts seem to say: '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 parent's religious or other eccentricities. But having taken the trouble so 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.' "[18]

In some jurisdictions attempted suicide is a crime, and one who aids and abets a suicide or an attempt at suicide is criminally liable. But there are no cases, apparently, to show that an adult who refuses a particular surgical procedure, considered by physicians to be necessary to prevent death, is guilty of the crime of attempted suicide. Indeed, the difference between taking affirmative action on purpose to destroy one's own life, and merely refusing to make use of a highly technical surgical means of preserving it, is a very obvious one. And it would be far-fetched, indeed, to imagine that a physician who failed to transfuse could be held criminally liable on any theory of aiding and abetting attempted suicide, whether his failure stemmed from sympathy with the patient's beliefs, or from the patient's refusal to permit the transfusion.

The patient's consent is required before a physician may legally perform any surgical operation. "Operation without consent is a trespass. It constitutes a technical assault and renders the operating surgeon liable."[19] And when the adult patient who is in his right mind resolutely refuses to consent and positively forbids the operation, the physician is absolutely obliged, legally, to respect his wishes. The patient's persistence may result in his death, but I have not been able to find any authority for the statement that the physician would incur either criminal or civil liability by his failure to force a transfusion or other surgical procedure on an unwilling patient even in these extreme circumstances.[20]

If surgeons do not dare to transfuse a child in the face of the parents' refusal, and have to resort to the cumbersome device of a court order for legal protection, even with the child at the point of death, it seems very unlikely that they will expose themselves to legal liability by not transfusing a recalcitrant adult, who, being of right mind, positively forbids the operation. Given a case of acute appendicitis with extreme danger of death, and a patient who in his right mind resolutely refuses surgery, there is only one thing for the doctor to do: omit the surgery and take what measures he can to save the patient's life. The same thing is true of adult transfusion cases.

There does not seem to be any legal machinery by which a court order can be obtained to empower a physician to operate on an unwilling adult or by which surgical treatment can be forced on him. In my opinion this is as it should be. The bodily integrity of an individual should enjoy a

[17] Rutledge, J., in Prince v. Mass., 321 U.S. 158, 167 (1944). Quotation of this passage does not indicate agreement with the decision in the case.
[18] *Loc. cit.*, p. 69.
[19] Louis J. Regan, *Doctor and Patient and the Law*, 2d ed., St. Louis 1949, p. 58.
[20] There is a Massachusetts case in which the court held that where a patient refused to have an x-ray taken, the physician was not responsible for the consequences of the patient's own want of care. Carey v. Mercer, 239 Mass. 599, 132 N.E. 353 (1921).

very high degree of immunity from invasion by public authority, as will be asserted below. This is especially true when conscientious convictions are at stake.

Although the physician incurs no liability by omitting the transfusion, yet he may not be in a position to prove that the consent was actually refused. If the patient dies and his survivors want to make trouble, they may be able to do so unless the physician can produce something in writing to show that consent was refused. If a physician decides to undertake the care of a patient who makes a stipulation or is likely to make a stipulation against blood transfusions, it would be wise for him to protect himself by a written witnessed order from the patient to that effect, together with a written release from all liability in case the lack of transfusion results in harm or death to the patient. One should have professional legal advice in formulating such an agreement and release.

Should physicians and hospitals, then, simply refuse to undertake the care of a patient who rejects or is likely to reject a blood transfusion on religious grounds? Obstetrical cases offer a special difficulty since even though one acceded to the request not to transfuse the mother, it seems legally inadvisable and morally improper to make such an agreement regarding her baby. I doubt if a universal answer can be given to the question either for the obstetrical or for other cases. In some cases the future need of transfusion is so likely that it would be foolish to undertake the case and at the same time deprive oneself of an essential element for successful treatment. I doubt, however, whether a physician's reputation (or the hospital's) would suffer to any extent if a patient is lost through his own refusal of a transfusion. But it is not an easy thing to have to stand by with hands tied while one's own patient makes a martyr of himself on such flimsy grounds. On the other hand, where will the thousands of Witnesses get medical care if everyone refuses to have anything to do with them? It seems to me that *acute* dilemmas are going to be sufficiently unusual and infrequent so that it would be too drastic to refuse all Witnesses because of the relatively few desperate cases likely to eventuate. Witnesses may often start by refusing. But under the pressure of imminent death many will doubtless find their native common sense triumphing over their peculiar religious indoctrination.

IV. Public Policy

It is obvious from the foregoing that general questions of State power arise whenever there is a conflict or an apparent conflict between what the individual's conscience may demand of him, and what the public good or the rights of other individuals may require. These are the questions of "public policy" referred to here. The general question of Church and State and religious freedom is too large for our discussion. I intend to speak of public policy only in relation to blood transfusions and closely related matters.

My reason for discussing this aspect of the matter at all is that I consider it important to defend and support the view that it is good public policy to concede to the State the power to give a necessary blood transfusion to a child against the sincere but erroneous religious convictions of the parent; and that it is bad public policy to concede to the State the right to force an adult to take this means of staying alive against his own sincere religious convictions.

It would be considerably easier to determine these questions of public policy if we

lived in a society in which the great mass of the citizens were all in agreement as to the requirements of the natural moral law and of the positive laws of God. For in such a case there would at least be no conflict between the laws of the State and the objective law of God. But even in such a society one would still have to contend with the individual erroneous conscience. One would still have to uphold the right of the individual to follow such a conscience when he sincerely believed that not to do so would be a sin offending God. And in practical cases one would still have the task of determining when a religious practice based on an erroneous idea of the will of God was so harmful to the common good or so contrary to the rights of other individuals that it had to be restrained.

In the society we live in there is no such general agreement as to the requirements of the objective moral law. Catholics believe that from reason and revelation they are in possession of those moral truths by which we are expected to conform ourselves to the will of God. And this belief is based partially on the more fundamental one that the Catholic Church was founded by Christ, who is the Son of God, and that this Church has power to teach authoritatively in matters of faith and morals. Obviously these beliefs are not shared by the majority of our citizens. It might seem at first sight, therefore, a rather hopeless task to try to formulate a statement of public policy which would be consistent with Catholic teaching, acceptable to the mass of citizens and capable of being put into practical effect.

But the situation is not as bad as it seems. We have a common heritage of Judeo-Christian thought which still pervades many of our political institutions and much of our national thinking. There would be quite general agreement, in the Anglo-Saxon tradition, that the State should be allowed to interfere with the individual liberty as little as possible. And very few would object to the doctrine that the State must be empowered to protect the lives of its citizens, especially young children, against fantastic religious aberrations. It is not impossible, when people agree on general principles such as these, to achieve a considerable measure of agreement on practical problems of public concern as to the life and health of the people. On the great majority of such problems we can hope to arrive at practical norms agreeable to the mass of the citizens and not at variance with the objective moral law. Exceptions should be of infrequent occurrence.

It is the task of moralists and lawmakers, then, to try to draw a practical line which will delimit the powers of the State and the rights of the individual—a line which will protect against religious fanaticism and at the same time do justice to natural law principles and to sincere religious convictions whether erroneous or not.

At the outset, in drawing this line, two mistakes at opposite extremes are to be avoided. The first exaggerates State power. The second exaggerates individual liberty.

State power is exaggerated when one subscribes to the proposition that any interference by the State can be justified as long as the majority opinion approves. To make public policy a mere function of the will of the majority reduces it in the last analysis to some form of the doctrine that might makes right. Such thinking was utterly foreign to the founding fathers of the American republic. But it has found some modern adherents both on the philosophical and practical level. They reduce law to the organized

force of the majority that stands behind it. They use the words "undemocratic" and "divisive" to describe those who dissent from majority views.

Democracy does not mean that the majority is *right*. Majority rule is a practical way of making a republic work. If it were true that mere force of numbers made the difference between right and wrong, good and bad, then mere force would be controlling. Might would make right. But if anything is clear in the fundamental political thought of our country, it is the idea that minorities have a right to exist and to propagate their ideas. It was a minority that thought slavery wrong and finally abolished it. Right and wrong are not determined by a show of hands. They are determined by a show of minds.

Now one may take the viewpoint of the practical statesman, that in our system the holders of minority views must be protected (within limits) whether they are right or wrong, and that it is hard to say which is which. Or one may take the viewpoint of the Catholic moralist who claims to know what is right and demands protection for the minority view when it is right, and for the erroneous conscience (again within limits) when it is wrong. But in both cases the principle of individual liberty is safeguarded against invasion by mere majority might. In both cases it is possible to arrive at practical formulations largely agreeable to both viewpoints.

The mistake at the opposite extreme is to imagine that any practice, no matter how immoral, or ridiculous, or dangerous must be tolerated in the interests of individual liberty if it is based on sincere religious belief. The example of human sacrifices mentioned above in *Reynolds v. United States* speaks for itself.

One may assert further, with varying degrees of assurance, that the State can and ought to prevent the Hindu widow from casting herself on her husband's funeral pyre; or the Japanese officer from committing hara-kiri; or anyone at all from committing suicide; or the Mormon from practicing polygamy; or the evangelical fanatic from exposing others to snakebite; or the Christian Scientist from neglecting ordinary medical care for a dangerously sick child; or a Hindu from going about unvaccinated in an epidemic because he has religious scruples about using cows to produce vaccine; or a Church congregation from conducting services when a quarantine has been imposed to safeguard the public health.

But it is to be noted of all these examples that the justification of State interference is based on urgent considerations of the public good, or the imperative need to protect some individual person's right to life and health. The principle that the State should interfere as little as possible with individual liberty, especially where bodily integrity is involved, and most of all where conscience is affronted, is acceptable to most legislators and, I am sure, to all Catholic philosophers. Only strong, clear reasons of the common good, or the clear necessity of protecting the rights of others, especially defenseless children, can justify State intervention in such cases. Catholics, being themselves a minority group, are especially jealous of their rights in this regard and especially loath to concede to the State a power of intervention which might be turned against them.

What then of public policy where the conscientious refusal of blood transfusions is concerned? Having put the problem in its philosophical setting, where should that practical line be drawn to delimit State

power and protect individual liberty in this field? My opinion and the reasons for it can now be briefly recapitulated.

The State should not be empowered to force a transfusion on an adult Witness who is in his right mind and who, because of his religious convictions, refuses it. First, because this would be an unwarranted invasion of his rights of conscience. The State cannot show that interference with individual liberty in such a case is justified. There is involved here no urgent need of protecting the common good, no pressing necessity of protecting the rights of others.

Secondly, for the Witness, given his frame of mind, the use of a blood transfusion is an extraordinary means of preserving life to which he is not objectively obliged by the moral law. This was the tentative opinion defended in Part II, above. The State should certainly not be empowered to force an individual to make use of a surgical procedure to save his own life, when the moral law itself does not oblige him, in the circumstances, to do so. If the moral law leaves him free to risk his life to that extent, the State should leave him free also.

Thirdly, if one takes the other view and considers that a transfusion is an ordinary means even for a conscientious objector, one should still deny the right of the State to intervene. The State is not competent to enforce every aspect of the moral law. The line between ordinary and extraordinary means of self-preservation is finely drawn and hard to determine. Can we allow the State, in the absence of urgent considerations of public good or the rights of others, to become the moral arbiter, with power to encroach upon the bodily integrity of the citizen? Has anyone ever thought that the State could force a man to undergo surgery for appendicitis, because he was in danger of death without it? Furthermore, in the transfusion case, there is also at stake the right of conscience.

Someone may object: If the State has the power to make attempted suicide a crime and to prevent a person from committing suicide, then, *a pari,* it should have the power of forcing a transfusion on an unwilling, conscientious objector. For to refuse the transfusion is the equivalent of committing suicide. In our opinion there is no adequate parity between the two cases. The person who commits suicide violates a negative precept of the law of God: "Thou shalt not kill." The moral situation of one who fails to take affirmative measures to keep himself alive is quite different, especially when the measures concerned are artificial surgical procedures. It is not inconceivable that there should exist a legal tradition of obligatory self-preservation, a tradition which would impose the affirmative legal duty of taking certain minimum measures to stay alive – for instance, to take food and drink. But I find it hard to conceive a theory of jurisprudence in which the State would be empowered to impose on me an affirmative legal duty to make use of highly developed surgical techniques in order to prolong my earthly existence. To kill oneself is one thing. Not to avail oneself of surgery is quite another.

Finally, in the case of the child, I believe the State is justified in intervening and giving a necessary transfusion, even if the parents object on religious grounds. First, because the child has a certain objective right to life and to ordinary medical care to preserve life, no matter what its parents' mistaken beliefs may be. Secondly, where there is a clear-cut case of necessity, to save an innocent person from impending death,

the State can intervene even at the expense of the erroneous conscience. Thirdly, no one objects to the power of the State to supply for the neglect of the parents in other, lesser matters. If the parents are cruel or sufficiently negligent of health, education or morals, the State, for the good of the child, can remove it from the custody of the parents for extended or indefinite periods. *A fortiori,* it should be empowered to save the child's life by seeing that it receives a necessary transfusion.

This rather long inquiry into the scriptural, moral, legal and public policy aspects of the transfusion case is justified, I hope, by the importance of the problems it raises. Not the least among them is the very human one of dealing with the stubborn sincerity of the Witness. I suggest patience, when their intransigence becomes irritating, and still more patience when their mistaken zeal attacks the Church of Christ. Our hospitals and physicians can show them by example that the charity of Christ is all-embracing.

CHARITABLE BEQUESTS
(Continued)

tionary power to invade the principal of the trust for a noncharitable beneficiary, unless the power of invasion is limited by a definite standard and as of the date of decedent's death the likelihood of any invasion is so remote as to be negligible.[28] A deduction for the charitable remainder is also jeopardized where a trustee is authorized to distribute to a noncharitable life tenant capital gains dividends received on stock of regulated investment companies.[29]

Conclusion

These observations on some important federal estate tax considerations in drafting charitable bequests have been offered only as a brief review for those who are already familiar with the subject and as an introduction for others. For those interested in reading further, there is a substantial body of literature available.[30]

If one were to single out a recommendation for estate planning in this area, it would be that the lawyer approach the drafting of all but the most routine bequests as one challenged to conform the product of his draftsmanship to the provisions of highly technical statutory and regulatory provisions. Working with the Code and the estate tax regulations at one's elbow gives reasonable assurance of solving all but the most abtruse problems.

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[28] Rev. Rul. 54-285, 1954-2 CUM. BULL. 302. See also the appendix to the opinion in Kline v. United States, 202 F. Supp. 849 (N.D.W. Va. 1962), where the cases on invasion of charitable remainders are collected and analyzed in tabular form.

[29] Rev. Rul. 60-385, 1960-2 CUM. BULL. 77.

[30] *E.g.,* Fraser, *Charitable Giving as an Element in Planning Lifetime and Testamentary Giving,* N.Y.U. 19TH INST. ON FED. TAX 751 (1961); Golden, *Use of Charitable Gifts in Estate and Tax Planning,* 100 TRUSTS & ESTATES 898 (1961); Quiggle & Myers, *Tax Aspects of Charitable Contributions and Bequests by Individuals,* 28 FORDHAM L. REV. 579 (1960); and Richardson, *Gifts of Property to a Charity,* 1957 SO. CAL. TAX INST. 705.