Compulsory Medical Treatment of Adults

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INTRODUCTION

There is little question that several areas of the law which engender great controversy are those areas which involved the legal determination of death, the "right to die," and compulsory medical treatment of competent adults. A myriad of legal and moral problems are associated with these delicate areas. It is not the object of this Article to exhaustively treat each of these areas, but rather to concentrate upon one central area, the compulsory medical treatment of adults. This study will first consider the

* Ph.L., 1954, M.A. 1960, Louvain University, Belgium; M.S., 1961, Catholic University of America; M.A., 1965, State University of New York at Buffalo; Ph.D., 1973, Graduate Theological Union, Berkeley, California; J.D., 1976, University of San Francisco.

1 The bibliography in the area of the legal determination of death is massive. See, e.g. Berman, The Legal Problems of Organ Transplantation, 13 VILL. L. REV. 751 (1968); Capron & Kass, A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal, 121 U. PA. L. REV. 87 (1972); Dworkin, Death in Context, 48 Ind. L.J. 623 (1973); Halley & Harvey, On an Interdisciplinary Solution to the Legal-Medical Definitional Dilemma in Death, 2 IND. LEGAL F. 219 (1969); Potter, The Paradoxical Preservation of a Principle, 13 VILL. L. REV. 784 (1968); Wasmuth, The Concept of Death, 30 Ohio St. L.J. 32 (1969); Wassmer, Between Life and Death: Ethical and Moral Issues Involved in Recent Medical Advances, 13 VILL. L. REV. 759 (1968); Comment, The Criteria for Determining Death in Vital Organ Transplants—A Medico-Legal Dilemma, 38 Mo. L. REV. 220 (1973). In this area, basic questions tend to become confused, and it is for that reason that the area should be divided into two legal questions: "When is a person dead?" and "When should he be allowed to die?" It is the second question which comes closest to the subject of this Article.

2 It is crucial when considering the right to die to keep in mind the distinction between omission and commission. Some authors have drawn an analogy between cases involving refusals of medical treatment and cases wherein the handling of poisonous snakes in religious ceremonies had been banned by statute. In making such an analogy, the distinction between misfeasance and nonfeasance has been labeled "untenable," Note, Compulsory Medical Treatment and the Free Exercise of Religion, 42 IND. L.J. 386, 399 (1967), or "nonsense," Comment, Unauthorized Rendition of Lifesaving Medical Treatment, 53 Calif. L. REV. 860, 868 (1965) [hereinafter cited as Calif. Comment]. It is submitted for the reasons developed in this Article that the distinction has great merit both in morals and in law. The value of this distinction was recognized by the court in In re Estate of Brooks, 32 Ill. 2d 361, 368, 205 N.E.2d 435, 439 (1965).

3 It is the question of compulsory medical treatment of adults which is the subject of this Article. This topic is also discussed in Note, The Dying Patient: A Qualified Right to Refuse Medical Treatment, 7 J. Fam. L. 644 (1967).

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legal authority relevant to the problem of compulsory medical treatment and then will turn to the arguments, *pro* and *contra*, contained in the relevant legal literature.

**THE LEGAL AUTHORITY**

In the vast and complex area of compulsory medical treatment there are many different kinds of cases to consider. In examining these cases, it is necessary to consider the public interest and individual freedom of conscience or religion. Such an examination, in turn, necessitates discussion of balancing of the interests involved: Have the courts spoken of the freedom of the individual to control his own body? What kind of restraints may the state enforce on this individual freedom and under what circumstances? What of children and those who are not *compos sui*? After treating these issues, the principle cases dealing directly with adult refusal of medical treatment should be examined.

*State Interest and the Balance of Interests*

Most, but by no means all, refusals of lifesaving procedures, such as the refusal of blood and medical treatment, are motivated by religious scruples. Religious freedom in the United States occupies a "preferred position" as a legal right, but is by no means absolute. In the words of Justice Black:

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are ... imperatively necessary to protect society as a whole from grave and pressingly imminent dangers ... .

Freedom of religion is, therefore, a basic constitutional right, although it cannot be an absolute because it is necessarily limited by the interests of the state. The conflict which sometimes arises between the exercise of this individual right and the interests of the state must be resolved by the application of a legal standard which protects the one while safeguarding the other. Such a standard is found in the so-called balance of interests

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test traditionally applied by the courts. This test was best described by Justice Stone:

[W]here there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and . . . it is the function of courts to determine whether such accommodation is reasonably possible.

An examination of the scope of the balance of interests test is crucial in determining whether there exists in a given situation a sufficient state interest to permit the courts to order mandatory lifesaving medical treatment for adults conscientiously opposed to such treatment. Justice Black, in *Cantwell v. Connecticut*, recognized the clear and present danger test as the criterion for sufficient state interest when the constitutionally guaranteed right of free speech is at issue. Justice Black declared:

[In] the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

This clear and present danger test was applied in *Barnette v. West Virginia Board of Education*, wherein a resolution compelling flag salutes was struck down, and in *Taylor v. Mississippi*, wherein the Supreme Court upheld the right to teach the impropriety of a flag salute. The clear and present danger test was not applied, however, in *Prince v. Massachusetts*,

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* Justice Holmes has commented:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897).


2 310 U.S. 296 (1940).

3 Id. at 311. For discussion of the *Cantwell* decision, see Balter, *Freedom of Religion Interpreted in Two Supreme Court Decisions*, 15 Cal. B.J. 161 (1940); 40 Colum. L. Rev. 1087 (1940); 26 Iowa L. Rev. 126 (1940); 15 St. John's L. Rev. 93 (1940); 14 S. Cal. L. Rev. 56 (1940).

4 319 U.S. 624 (1943). In the words of Justice Jackson: "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger . . . ." Id. at 633.

5 319 U.S. 583 (1943).

where the state prevailed without proving that there was imminent danger to the well-being of a child or to the state when the child helped her mother sell copies of a religious newspaper. This test has also been overlooked in a number of other important cases involving freedom of religion, and it would thus appear that the clear and present danger test is uncertain as a legal standard in that area.

In Reynolds v. United States, the Supreme Court adopted the simplistic view that although religious beliefs are protected by the first amendment, religious practices are not when they conflict with the interests of the state. It is doubtful that the framers of the Constitution intended to protect only the freedom of cloistered Benedictine Monks. On the contrary, it seems that the view taken in Reynolds was erroneous since there is abundant proof that religious activity is clearly protected by the first amendment. Protection of belief only, without protection of the outward manifestation of that belief, is a direct denial of freedom of religion in most cases. Liturgy, or external ritual-rite, is historically as much a part of religion as belief. As a matter of fact, most religions would cease to exist absent a liturgy.

In addition to the clear and present danger test, there has also emerged the view that religious practices may be proscribed as soon as they begin to interfere with the rights of others. As Justice Jackson stated in his concurring opinion in Prince: "My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public." Thus, the Prince case indicates that the Supreme Court came full circle from the clear and present danger test applied in Barnette. Had the test of this latter case been applied in Prince, reversal of the conviction would have been inevitable since there was not sufficient showing of a clear and present danger. Justice Murphy, dissenting in Prince, rephrased the clear and present danger test of Barnette when he stated that the state could not interfere with religious

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14 98 U.S. 145 (1878).
16 Difficulties arise when a particular sect is unpopular, as were the Mormons during the 19th century. In 1890 Justice Field said: "To call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind." Davis v. Beason, 133 U.S. 333, 341 (1890). Certainly polygamy offended Justice Field, but it is no less a "religious" tenet. When Chief Justice Hughes dismissed a religious claim, he simply stated, "No interference with religious worship or the practice of religion in any proper sense is shown . . . ." Cox v. New Hampshire, 312 U.S. 589, 578 (1941).
17 321 U.S. at 177 (Jackson, J., concurring).
activities unless the evil to the public is "grave, immediate, and substantial." Perhaps the most comprehensive definition of the test can be stated as follows: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." That is, under this test, the majority will be allowed to prohibit the religiously motivated acts of the minority only when those acts are of such a character that they pose a very serious threat to the continuance of the well-being of the majority or when there is a "breaking out into overt acts against peace and good order." The difficulty lies in determining when the "peace and good order" is breached.

One case wherein such a determination was made is *Tyrrell v. United States,* in which a ministerial student was held ineligible for exemption from the draft. A disturbance of the peace and good order of the community was found in that exemption from military service on religious grounds could ultimately result in subjection of the community to foreign armies. Such a danger is apparently great, so great that even a bona fide religious objection defense was held impermissible absent the explicit consent of Congress.

A determination that peace and good order would not be breached by religious practice was made in *Wisconsin v. Yoder.* There, Amish parents desired to provide vocational training, with a few hours of formal study each week, as an alternative to the conventional high school education which contravened religious beliefs. According to the Supreme Court, the state had the burden of demonstrating that the loss of one or two years of secondary education would impair the physical or mental health of the children or render them unable to support themselves as adults or detract from their ability to discharge the duties and responsibilities of citizenship. This burden was not met. Although the Court recognized the interest of the state in universal education, it declared that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." The demand of the Amish

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18 *Id. at 175* (Murphy, J., dissenting). The "clear and present danger" test was first enunciated in a freedom of speech case, *Schenck v. United States,* 249 U.S. 47, 52 (1919), and was later applied to a freedom of religion case in *Barnette.*


20 *United States v. Hillyard,* 52 F. Supp. 612, 615 (E.D. Wash. 1943), quoting Thomas Jefferson's classic *Act for the Establishment of Religious Freedom in Virginia,* wherein the preamble proclaims, "It is time enough for the rightful purposes of civil government, for its officers to interpose when [religious] principles break out in overt acts against peace and good order." This language is also contained in VA. CODE ANN. § 57-7 (1974).

21 200 F.2d 8 (9th Cir. 1952), cert. denied, 345 U.S. 910 (1953).


23 *Id. at 216.*
parents that they not be coerced into sending their children to schools which they deemed religiously immoral were claims of conscience of the highest order. The Court held that the public interest in compelling one or two years of formal secondary education was of comparatively low priority. Thus, it seems that the Yoder Court applied the clear and present danger test of Barnette as the legal standard to balance meritorious claims of freedom of religion with competing interests of the state. The Court has thus moved away from the views expressed in Prince. Practices dictated by religious conscience, when central to the faith of their advocates, can only be prohibited when a compelling public interest has been demonstrated. Thus, the view of the Barnette Court apparently still maintains vitality: "[F]reedoms of speech . . . and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." The cases discussed above do not of themselves demonstrate that society has an insufficient interest in the preservation of the life of an adult who refuses lifesaving medical care, but they do show that the burden is on the state to demonstrate a sufficient interest. In relevant cases which have been decided since Reynolds, the issue has been whether a religious

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21 The attempt by the Yoder Court to distinguish religious claims from those based on philosophical views, even when the latter occupy a horizontal relationship with "godness" as a totality, does not seem consistent with United States v. Seeger, 380 U.S. 163 (1965). For a comprehensive view of this latter decision, see Rabin, When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise, 51 CORNELL L.Q. 231 (1966).

22 It is still true that, as the Prince Court noted, the State, as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim . . . on religion or conscience.

321 U.S. 158, 166 (1944) (footnotes omitted). Indeed, under the same power of parens patriae, several courts have ordered medical treatment over the religious objections of the child's parents. See People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962). But these cases are clearly distinguishable in that in each case, unlike Prince, the state's burden of proving an important public interest was sustained.

319 U.S. 624, 639 (1943).

23 The Reynolds case, 98 U.S. 145 (1878), poses some serious legal questions. In that case, the Court upheld the conviction of a Mormon for polygamy. The question of what public interest is actually threatened by polygamy is difficult to answer. It has already been pointed out that the distinction between belief and practice, which the Reynolds Court relied on, lacks a constitutional basis. See note 15 and accompanying text supra; cf. Kurland, Of Church and State and the Supreme Court, 21 U. Chi. L. Rev. 1 (1961). While this distinction does serve to show that freedom of belief, more than freedom of action, is what the law seeks to protect, it does not aid in the effort to fix the legal status of those acts that appear essential to give belief an external realization. Today, it is difficult to conceive of an overt threat to the well-being of society posed by those who freely chose to practice polygamy. Perhaps monogamy safeguards the dignity of woman, and promotes psychologically beneficial effects on offspring.
practice is sufficiently detrimental to the public good to justify its curtailment. It has been held that a religious practice must present an immediate threat to a valid public interest or it cannot be proscribed. This is valid law today. Therefore, the question becomes: Is a religiously motivated refusal of lifesaving medical procedure by a competent adult constitutionally protected? If not, what valid public interest is there in the individual's life?

Self-Determination

The juridical argument has been made that each person can do as he wishes with his own body. That this argument has not been fully accepted in law was made evident in Roe v. Wade.28

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.29

There are, however, cases on record which have accepted the principle that as long as there is no danger to others, one may do with oneself as one pleases.30 The most often cited case wherein this right was recognized in dicta is Schloendorff v. Society of New York Hospital,31 in which Justice

But these interests were not shown in Reynolds. In a similar case arising today, such benefits to the state would have to be demonstrated.

The Reynolds Court's examples of religious practices dangerous to society, i.e., the suicide of widows and human sacrifices, are inapposite. The state's interest in preventing suicide and murder dates from the beginning of recorded law, while polygamy has been part of man's history until very recently, and is still practiced in many areas of the globe. This is not to approve or disapprove of the Reynolds decision, but only to point out that it lacks a solid legal standard.

29 Id. at 154, citing Jacobson v. Massachusetts, 197 U.S. 11 (1905), and Buck v. Bell, 274 U.S. 200 (1927).
30 The right of self-determination is primarily recognized in dicta and has not served as the ground of a judicial holding. The statements below are illustrative. "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 (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). "[E]ach 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 1083, 1104 (1960).
31 211 N.Y. 125, 105 N.E. 92 (1914).
Cardozo wrote: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ."32 Such a right, though, is not absolute, and may be restricted even against religious claims on the part of the individual if there exists a serious state interest. The constitutional issue of compulsory medical treatment for competent adults, then, involves the restraints which can be permissibly imposed on the use of one's body by reason of the interests of the state. The questions become: What is the extent of the right, of self-determination and what is the nature of the state's interest in restraining this right?

One of the earliest attempts to answer these questions was made in *Jacobson v. Massachusetts.*33 The defendant in *Jacobson* was fined 5 dollars for refusing to comply with a local compulsory vaccination law during a smallpox epidemic. The Supreme Court sustained the imposition of the fine on the theory that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."34 The *Jacobson* case is a clear example of the state's power to require affirmative acts of its citizens. The holding in that case resulted from a serious community or state interest in protecting its members. The question might be asked whether it is necessary to require vaccination for all citizens since those who desire protection would be inoculated. An argument for compulsory vaccination can be made since an interest of the state is promoted when protection is afforded strangers coming into the community and young children not yet inoculated. In any event, *Jacobson* was followed by a number of cases which emphasized that exceptions will not be made to laws compelling medical care, even when such laws contravene individual religious teachings.35 Nor is it any defense to failure to obey a statute requiring school attendance that the parents entertain religious beliefs against compulsory school vaccination.36 Similarly, neither the exclusion of unvaccinated children from the public schools37 nor a requirement that public school children submit to a physical examination violates religious liberty.38 Nor does freedom of religion exempt one from a statute requiring procurement of a health certificate before marriage, since the state has a

32 Id. at 129-30, 105 N.E. at 93 (dictum).
33 197 U.S. 11 (1905).
34 Id. at 27.
38 Streich v. Board of Educ., 34 S.D. 169, 147 N.W. 779 (1914).
legitimate interest in protecting an innocent party from a possibly infected one.\textsuperscript{39}

In *Kolbeck v. Kramer,*\textsuperscript{40} it was held that there is an interference with religious freedom when the state requires membership in recognized religious group as a precondition to exemption from vaccination laws. The action of Rutgers University in *Kolbeck* was unconstitutional, in view of its preferred treatment of members of the Christian Science Faith. Under the holding of *Kolbeck,* exemptions could be given only if all parties were treated alike.\textsuperscript{41} Thus, under *Jacobson* and *Kolbeck,* it is up to the state to determine whether the danger to the public is so great as to preclude exemptions and, if exemptions are to be made, the state must determine the equal criteria to be applied. A fortiori, the right to do with one's body exactly as one wishes is subject to limitation by the state when there is a serious state interest.\textsuperscript{42}

Clearly, there must truly be a *serious* state interest at stake before the state can interfere with a strong religious conviction.\textsuperscript{43} While polygamy has been held in *Reynolds* to be an activity unprotected under the rubric of religious freedom because of the serious state interest in monogamous marriages, a statute forbidding the drinking of peyote was declared unconstitutional in *People v. Woody,*\textsuperscript{44} when applied to the members of a religious group believing in "Peyotism." Presumably, the reason for this distinction is that the use of peyote is basic to the doctrines of the Native American Church, and "[t]o forbid the use of peyote is to remove theological heart of peyotism."\textsuperscript{45} The *Woody* court emphasized that peyote is not a harmful narcotic, its use does not lead to use of harmful narcotics, and its use is strictly limited to religious liturgy. The *Woody* court distinguished *Reynolds* on the ground that the practice of polygamy is not central to the Mormon faith, whereas the use of peyote is at the heart of the Native American Church. In addition, the court declared that, unlike polygamy, use of peyote was not injurious to the morals and health of the practitioners.\textsuperscript{46} The court correctly implied that if the state had shown injury to

\textsuperscript{39} Peterson v. Widule, 157 Wis. 641, 147 N.W. 966 (1914).
\textsuperscript{40} 84 N.J. Super. 569, 202 A.2d 889 (Super. Ct. Law Div. 1964).
\textsuperscript{41} Id. at 575, 202 A.2d at 892.
\textsuperscript{42} A cautionary note was struck by Justice Frankfurter when he declared:

"... 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 is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle."


\textsuperscript{43} See *Davis v. Beason,* 133 U.S. 333 (1890).
\textsuperscript{44} 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
\textsuperscript{45} Id. at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.
\textsuperscript{46} It is submitted that the *Woody* Court attempted to distinguish what cannot be distin-
health or morals there would have been a state interest sufficiently compelling to justify prohibition of this religious practice.

In Sherbert v. Verner,\(^a\) the Supreme 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 . . . .'"\(^a\) What is this compelling state interest? "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 limitation.'"\(^a\) Thus, the exercise of religion is a fundamental right, and only the highest public interest can displace its exercise.

The decision of the Supreme Court in Griswold v. Connecticut\(^b\) supports the argument that a compelling state interest is necessary to limit the individual's right to privacy. In Griswold, the Court struck down a state statute forbidding the use of contraceptives. If the individual for religious or other conscientious reasons wishes to refuse various lifesaving medical procedures, he could support his action by relying on the right to privacy doctrine enunciated in Griswold. It will be recalled that the Court in Griswold, stated that such a right exists, not in any one part of the Bill of Rights, but in the "penumbra" of several of them.\(^a\) While the scope of Griswold is unclear, it would seem logical to conclude that the "zones of privacy" recognized in that case protect the individual's right to refuse compulsory medical treatment, whether for religious or any other reason. Both the right to free exercise of religion and to individual privacy are rooted in the American traditions of individual freedom and an abhorrence of unreasonable government intrusion into private relations.\(^a\) It must be understood, however, that an interest of the state sufficiently compelling to permit the state to limit the individual's right of privacy does not necessarily qualify as such in the area of religion, since different rights are at stake. In any case, it is juridically sound under Sherbert, that an invasion

\(^a\) 374 U.S. 398 (1963).
\(^b\) Id. at 403, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).
\(^c\) 374 U.S. at 406, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945). Thus, it would appear that the Barnette rule of "clear and present danger" was reaffirmed in Sherbert since "compelling interest" seems comparable with "grave and endangering."
\(^d\) 381 U.S. 479 (1965).
\(^e\) Id. at 484-85. The right to be left alone was recognized by Justice Brandeis in his famous dissent in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\(^f\) See generally Comments on the Griswold Case, 64 MICH. L. REV. 197 (1965).
of privacy requires more than a rational relationship to a colorable state interest. Thus, if an act of a private citizen in no way injures society or any third person, it is a right:

Anglo-American law starts with the premise of thorough-going self determination. It follows that 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 . . . .

The only legitimate reason for limiting the right of privacy in this context is that the patient's refusal of treatment injures society or some third party whom the patient owes a duty. For example, a parent owes a duty to his child, as does a pregnant mother to her unborn. The inquiry thus turns specifically to finding such an injury. Injury to a colorable public interest will not do. In fact, performance of medical procedures without the consent of one authorized to give it constitutes an assault and battery. Administration of medical treatment despite such a refusal, even with good intentions, can be costly even if the treatment is successful since it is no defense that the unauthorized treatment was skillfully performed.

In *State v. Congdon*, a group of pacifists refused to seek shelter during a state mandated practice air raid alert. It was held that the state may interfere with the individual's right of self-determination to protect a citizen from his own folly even though it is precisely this folly which could have detrimental effects on other citizens.

That is, because of his refusal to seek shelter, a person could be injured, and others could not simply abandon him. Injury to others would result since time and efforts of physicians and attendants may be required that could have been given to others.

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54 See *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92, (1914), wherein Judge Cardozo stated:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages . . . . This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.

*Id.* at 129-30, 105 N.E. at 93.
57 The reasoning of the *Congdon* court is tenuous at best:

> 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 bomb radiation.

*Id.* at 511-12, 185 A.2d at 31.
Similarly, persons should be forced to participate in lifeboat exercises and fire drills because it is possible that during an actual emergency the non-participators may obstruct others and disrupt the necessary orderly procedures by simply being in the way in every sense. Unfortunately, such analysis was not developed by the court in the Congdon case.

As was noted above, the Supreme Court in Jacobson measured the duty of the state to intervene and sustained imposition of a fine for refusal to receive vaccination. Similar reasoning has been used in other cases. Compulsory school vaccinations have been upheld time and time again. In Sadlock v. Board of Education it was argued that compulsory vaccination violated religious freedom and personal liberty. The court upheld a resolution of the school board making vaccination a mandatory prerequisite for admission since it is within the police power of the state to prescribe reasonable methods to combat disease. Similarly, a court may even appoint a guardian for unvaccinated minors, and vaccinate them. Moreover, the state may require the purification of sewage and the public water supplies to prevent pollution. Finally, a state university can deny admission to a student who refuses to submit to an X-ray examination for the detection of tuberculosis. Under cases such as Congdon, where but a small state interest can be demonstrated, it can nevertheless be argued that the state has a sufficient interest in each individual to protect him from himself. Thus, there are decisions sustaining legislative fluoridation of water, though it was not always viewed as a medical procedure. It should be noted, however, that fluoridation of a municipal water supply does not require an individual to ingest fluorine, since he has several alternatives, such as bottled water.

There exist a number of cases wherein a competent adult’s desire to forego an important medical procedure has been upheld by courts. In Petition of Nemser the court dismissed the petition by two children of an 80-year-old diabetic for appointment of a temporary representative to authorize a foot amputation. Noting that the woman was not an adjudicated incompetent, the court refused to invoke the doctrine of parens patriae, though it did appoint a guardian ad litem and designated a psychiatrist

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54 137 N.J.L. 85, 58 A.2d 218 (Sup. Ct. 1948).
56 E.g., State Bd. of Health v. City of Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912).
58 The interest of the state is based upon the belief that each citizen makes a valuable and unique contribution to society. Is this interest truly sufficient, however, to outweigh the individual’s right to refuse treatment when he harms no one but himself?
to examine the woman. The same result obtained in *Palm Springs General Hospital, Inc. v. Martinez.* There the appellee, a 72-year-old woman, was critically ill from an anemia condition. Minor surgery was necessary to keep her alive so that periodic blood transfusions could be made. She refused and expressed a desire to die. The hospital petitioned for permission to perform the surgery, and the court denied relief, stating:

> Based upon the debilitated physical condition of the defendant and the fact that performances of surgery upon her and administration of further blood transfusions would only result in the painful extention of her life for a short period of time, it is not in the interest of justice for the Court of Equity to order that she be kept alive against her will. A conscious adult patient has the right to refuse medical treatment, even when the best medical opinion deems it essential to save her life.

There exists other authority which seems to confirm this general right to be left alone and to refuse to accept lifesaving medical procedures even when necessary to save the patient’s life. Petitions are not to be granted just because a person happens to be old when there is no evidence of mental incompetence. On the contrary, it is necessary to establish mental incompetence by evidence which is clear, convincing, and satisfactory at the time of the hearing. As will be discussed later in this study, religious and nonreligious convictions of adults who are not incompetent and have no legal duties to others must be respected.

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67 Id.
68 Guardianship of Raasch, No. 455-996 (County Ct. Milwaukee County, Wis. Jan. 21, 1972). In the *Raasch* case, the court refused to order a lifesaving medical procedure after determining that the patient was not incompetent. There was absolutely no evidence of incompetence—the patient knew what she was doing and refused the operation. The patient died on March 6, 1972. In Guardianship of Phelps, No. 459-207 (County Ct. Milwaukee County, Wis. July 11, 1972). Michael Bratcher sought to file a petition for himself as temporary guardian of Mrs. Phelps, a Jehovah’s Witness who had refused all blood transfusions before becoming comatose. Mrs. Phelps had no history of mental disease or incompetence, and had signed a release in which she refused to permit treatment. The court found: (1) there was no mental disease; (2) the patient had refused blood while conscious; (3) she was sincere in her religious beliefs; and (4) a court “cannot use a guardian devise in order to foist its own personal opinions upon an adult competent citizen.” The petition was denied and Mrs. Phelps died the following day.
69 See Westerberg v. Olson, 236 Wis. 301, 295 N.W. 24 (1940); Warner v. Welton, 232 Wis. 467, 287 N.W. 803 (1939); *In re Streiff,* 119 Wis. 566, 97 N.W. 189 (1903); *In re Welch,* 108 Wis. 387, 84 N.W. 550 (1900).
70 In Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971), the court held that convictions expressed by a 59-year-old man before he had been shown to be incompetent must be observed by the hospital. Since the patient had been involuntarily admitted to the hospital and compelled against his protestations to take medication, the court held that his complaint stated a cause of action under the federal civil rights statutes. Rejecting the applicability of the doctrine of *parens patriae,* the court noted that his alleged incompetence
Interests of Third Parties

What are the interests of third parties which will enable the police power of the state to proscribe a competent adult's practice of his religious beliefs?

One such interest is the protection of children. In People ex rel. Wallace v. Labrenz and State v. Perricone, Jehovah's Witnesses refused blood transfusions for their children. It is a well established principle of law that a parent may incur criminal liability for failing to provide adequate medical care for his child. It has been held that an unreasonable refusal to consent to a surgical operation on one's child violates a legal obligation. The justification for such holdings is the power of parens patriae. The parent commits a crime when, due to his religious belief, he denies his child medical aid required by statute, and if the child consequently dies, the parent will be liable for manslaughter. Though courts have refused to order medical treatment for adults who decline such treatment in no way altered his previously held religious views. The court stated: "[T]here is no justification for defendants-appellees substituting their own judgment for that of their patient." Applying the "compelling state interest" test, the court noted that the first amendment rights do not rest upon the same "slender grounds" as the fourteenth amendment rights. State action which might otherwise be objectionable under the latter amendment will be upheld if supported by "any rational basis." The Winters court said no "clear interest" of society or of a third party would be substantially affected by the patient's exercise of his rights.


In People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903), the court rejected the defense that failure to give medical treatment to a child was justified since it was due to religious conviction. The court stated that society has an interest in the welfare of the child. It is clear that the status quo simply cannot be maintained in such situations since the right to practice religion freely does not include the right to expose the community or a child to communicable disease, or the latter to ill health or death. Moreover, courts will interfere when a parent abandons his child. Cf. State v. Sandford, 99 Me. 441, 59 A. 597 (1905); Palmer v. State, 223 Md. 341, 164 A.2d 467 (1960).

See, e.g., Oakley v. Jackson, [1941] 1 K.B. 216; Rex v. Wagstaffe, 10 Cox Crim. Cas. 530 (1869); Rex v. Lewis, 6 Ont. L.R. 132, 1 B.R.C. 732 (1903).

ment on religious grounds,\textsuperscript{77} the state's interest in protecting children outweighs the first amendment right to free exercise, and necessary medical treatment of children may be compelled.\textsuperscript{78} For example, in \textit{The Queen v. Senior}, an English case, the defendant was a member of a faith healing sect. When his 9-month-old infant contracted diarrhea and pneumonia, the defendant called in the elders to pray and anoint the child with oil. Though seven of his previous children had all died under similar circumstances, the defendant refused to call for medical assistance. The child died and the defendant was indicted for manslaughter under the Prevention of Cruelty to Children Act.\textsuperscript{80} The trial judge directed the jury that it must be satisfied that the death of the child had been caused by the want of medical assistance, that medical aid was so essential that reasonable care would require it, that the defendant reasonably possessed the means to provide medical care, and that the defendant had violated the statute and in so doing accelerated the child's death. The jury was told that such conduct constituted manslaughter, no matter what the defendant's motivation or state of mind.

There is no doubt that the courts have the power to order compulsory treatment of children for any serious injury or sickness. In \textit{Welker v. Welker},\textsuperscript{81} it was stated in dictum that custody may be denied to a parent whose religious beliefs would prevent a child from receiving vaccinations or blood transfusions. As a matter of fact, it is generally held that a parent's refusal on religious grounds to permit a child to receive a necessary blood transfusion amounts to statutory neglect and permits the court to order a transfusion.\textsuperscript{82}

There are cases where the value of a particular procedure was not clear. In \textit{In re Vasco}\textsuperscript{83} a two-year-old child who suffered from a malignant eye disease was provided with an operation by order of the court when the parents refused to consent. Although the court declared that the refusal of the parents was arbitrary, in reality it was not since the operation carried only about a 50 per cent chance of cure.\textsuperscript{84} Similarly, at least one court has ordered surgical care for a child suffering from limb deformity.\textsuperscript{85} Medical


\textsuperscript{78} \textit{Prevention of Cruelty to Children Act of 1894, 57 & 58 Vict. c. 1, § 1.}


\textsuperscript{80} Id. at 131, 263 N.Y.S. at 555.

\textsuperscript{81} \textit{In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. Kings County 1941).}
treatment will not be ordered for a child, however, when the treatment endangers life, and generally will not be ordered when there is difference of medical opinion as to the efficacy of the treatment. In such cases, the parents’ decision normally is determinative.

There are, of course, borderline cases. In In re Green a 16-year-old child who suffered from polio and paralytic sclerosis was unable to stand due to the collapse of his spine. Physicians recommended a spinal fusion. The child’s mother, a Jehovah’s Witness, refused to consent to a blood transfusion and the court appointed a guardian to protect both the child and the state. The court refused, however, to invoke the doctrine of parens patriae and find the child “neglected” under state law since his life was not immediately imperiled by his mother’s refusal to permit blood transfusions incident to surgery. In In re Hudson, a mother objected to an operation to correct a congenitally deformed arm which was ten times its normal size. Medical opinion revealed that there was a fair risk of grave danger. The majority of the court reasoned that although the mother objected to the operation she was a fit parent, and a court of equity has no power to take custody of a child under such circumstances and subject the child to an operation that might result in death.

Perhaps the most puzzling cases having to do with the free exercise of religion are the cases involving the handling of poisonous snakes by members of various churches as proof of faith. In these so-called “snake cases” a poisonous snake was brought to a religious service and “true” believers were called upon to come to the front of the church and practice the “act of faith” by handling the snakes. In Hill v. State, in which the snake bit no one, the defendant contended that the ceremony was an integral part of his religious faith and to deny him his right to hold such ceremonies was to deny him his constitutional right to freely exercise his religious faith. The court reasoned, however, that religious beliefs are subject to restraints imposed for the benefit of the community.

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86 Amputation of a 12-year-old child’s severely deformed arm was not ordered when the parent’s objections were based on a fear of possible failure of the operation in In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942). The Hudson court was impressed with the high risk of death involved in the operation. In In re Frank, 41 Wash. 2d 294, 248 P.2d 553 (1952), the parents refused to have the child’s speech impediment corrected. This was not deemed sufficient reason to award custody of the child to someone who would have the impediment corrected.
88 Id.
89 13 Wash. 2d 674, 126 P.2d 765 (1942).
The *Hill* case is significant because, no matter how revolting, the religious practice of snake handling was an integral part of the worship service of the particular church. Thus, *Hill* demonstrates that when risk of danger to the public is grave the first amendment right to free exercise must be curtailed. The *Hill* case is also interesting because one motive for the statutory enactment prohibiting snake handling may have been to prevent unorthodox religious practices from causing death or serious injury to those who handled snakes as well as to protect those who simply witnessed the ceremony. Seemingly, the snake cases demonstrate the state's interest in protecting the individual from himself. On the other hand, argument can be made that the interest of the state is in preventing harm to spectators and the general public should the snakes escape. The answer would be to require an escape-proof glass cage to protect the spectators. It seems clear that the cases can be read either way. That is, it is not clear whether an essential part of the church's liturgy is forbidden for the protection of the handlers of the snakes or the general public or both. In *Lawson v. Commonwealth*, however, the Kentucky Court of Appeals sustained a "law prohibiting the practice of a religious rite which endangers the lives, health, or safety of the participants, or other persons." The breadth of the language of the Kentucky statute seems to protect both handlers and onlookers. Similarly, it would seem that a Tennessee statute prohibiting the handling of poisonous snakes in religious ceremonies so as to endanger the life of any person is directed in part toward insuring the safety of the handler. In fact, in *Harden v. State* the court dismissed the argument that proper precautions were employed for observers and stated that "such precautions do not at all protect those who are actually handling these

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There is a crucial difference between active and passive events. An affirmative right exists in the state to prohibit dangerous affirmative activities under the police power, whereas no analogous right exists, or apparently ever has existed in the United States under the police power, to prohibit persons from failing to seek medical attention for their ills. Individuals can be prevented from exposing themselves or others to snake bites just as they can be restrained from practicing bigamy and murder. But these are active religious practices requiring the individual's volition. To say that a distinction between "misfeasance" and "nonfeasance" (commission and omission) is "nonsense," is to overlook the reality of human activity and free will. *But see* Calif. Comment, *supra* note 2, at 868.

*See* Harden *v. State*, 188 Tenn. 17, 24, 216 S.W.2d 708, 710 (1948), wherein the court stated that the legislative purpose in outlawing such activities was to protect people "participating in or attending religious services."

291 Ky. 437, 164 S.W.2d 972 (1942).

*Id. at* 441-42, 164 S.W.2d at 974 (emphasis added).

TENN. CODE ANN. § 39-2208 (1975) provides that "[i]t 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." (emphasis added).

188 Tenn. 17, 216 S.W.2d 708 (1948).
poisonous snakes." The court continued, "the purpose of this statute . . . is to . . . better 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 may be inferred that the legislature intended to except any one from its provisions." 100

The snake cases state the constitutional issue rather clearly: Can the state directly intervene to protect the individual himself against his own folly or foolishness even when the individual acts in the name of the free exercise of religion? But because it is not clear whether the state’s interest in prohibiting snake handling stems from protection of the handler or the public, the snake cases do not solve the issue. A clearer perspective can be gained from examination of cases on forced medical procedure administered to adults.

The Classical Cases

The case of Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson101 is interesting because the patient was pregnant and refused blood transfusions due to her religious beliefs. The Supreme Court of New Jersey, in a unanimous decision, found 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." 102 The foundation for this determination of the court is found in the state’s power to intervene for the welfare of the child. 103 The broader constitutional issue of mandatory aid to a nonpregnant adult was not reached. However, the court ordered that transfusions could be administered to the mother "if necessary to save her life or the life of her child, as the physician in charge at the time may determine." 104 Perhaps the interest of the state directly involved the well-being of the unborn child and this interest justified ordering unwanted transfusions which were the only way to save the child’s life. If this is so, this case does not differ from those discussed above concerning the state’s police power and children. On the other hand, if the court meant to authorize transfusions for the mother even if they were not necessary to save the child, then the case may be authority for the proposition that adults cannot refuse lifesaving medical treatment. Anderson, however, is far from clear in this respect since the interest of the state includes preventing

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100 Id. at 24, 216 S.W.2d at 710.
101 Id. at 21-22, 216 S.W.2d at 710.
103 42 N.J. at 423, 201 A.2d at 538.
104 "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." Id.
104 Id.
abandonment of the child. The case does demonstrate the "conduit" theory, i.e., that the mother is the vehicle or means by which the unborn child can be reached. Moreover, even though counsel for the hospital argued that the state cannot permit the suicide of its citizens and in fact may punish them for the attempt, the court explicitly refused to resolve the constitutional question of compulsory treatment of adults. Whether the court should have addressed the constitutional question is a matter open to debate.

Application of President and Directors of Georgetown College is most notorious because the thrust of that case was to mandate lifesaving medical treatment of a sick patient who refused to consent on religious grounds. In the Georgetown case, a single member of the court of appeals, Judge Skelly Wright, issued an order for a needed blood transfusion, after the order had been refused by the district court. In so ordering, Judge Wright did not reach the constitutional question of the right of a competent adult to refuse lifesaving medical treatment on religious ground, but rather based his decision on common law grounds. These included:

(1) The description of the patient as in extremis and therefore not compos mentis, thus giving the court the power and duty of guardianship.
(2) The state's parens patriae power to prevent an adult from abandoning a minor child. The judge called the patient's conduct the "most ultimate of voluntary abandonments.
(3) The dilemma of the hospital administrators and doctors who must decide whether to treat an objecting patient or let him die, thus risking civil and/or criminal liability in either case.

106 It has been stated that "[t]he Anderson decision is the first instance of a judicial mandate compelling a person of sound mind and reasonable judgment to submit to a blood transfusion, even though such transfusion violates his fundamental religious tenents." 40 Notre Dame Law. 126 (1964). However, the state's interest in the welfare of the adult mother is still only indirect insofar as it seeks to protect the child from abandonment caused by a willful act of the mother. Refusing lifesaving treatment has been termed the "most ultimate of voluntary abandonments." Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964).


109 331 F.2d at 1008; cf. Collins v. Davis, 44 Misc. 2d 622, 254 N.Y.S.2d 666 (Sup. Ct. Nassau County 1964). In Collins, the wife of a comatose patient refused to consent to surgery upon her husband who had voluntarily submitted himself to the care of the hospital. The court ordered the necessary treatment on the ground that the patient and his wife could not put the hospital in an impossible position.

110 331 F.2d at 1008.

111 Id. at 1009; see Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962). Judge Wright in Georgetown noted that "[w]hether or not a waiver signed by a patient in extremis would
The key question in *Georgetown* involved the basic right of the patient, Mrs. Jones, to freely practice her religion versus the interest of society in limiting or, in this case, nullifying that right. It was clear that this religious belief was so important to her that she was willing to give her life rather than submit to medical treatment. The court, however, ordered her to submit. It is not very helpful to say that the state’s interest was in preventing suicide under the common law. Mrs. Jones at no time wanted to die and took no steps to affirmatively bring about her own death. Even Judge Wright admitted that death was, in this case, “not a religiously-commanded goal, but an unwanted side effect of a religious scruple.”

Characterization of her conduct as suicide is extremely tenuous. Judge Wright’s argument concerning the *in extremis* and *non compos sui* state of the patient is weak at best. The fact of the matter was that Mrs. Jones refused medical treatment, and made known her refusal, long before she reached a critical state. It would be a different situation if she had not previously refused treatment, or was unconscious *ab initio*; that, however, was not the case. Her right to refuse should be protected even after she could no longer assert it. A court should not use juridical language as a subterfuge for imposing its own definition of “life,” for there is grave danger that any decision by the patient which is inconsistent with the general mores of society could in fact be viewed by a court as evidence of incompetency. Such would be a totally irresponsible use by the court of its *parens patriae* power. It is, however, an exaggeration to argue that “[t]he purpose of *parens patriae*, is to provide a vehicle for the court to physically protect the child and not to protect a parent so he can in turn provide for his child.” Enough is known of modern child psychology to justify extension of the court’s duty to protect the well-being of the child to include psychological well-being. In this respect, it is difficult to argue against the role assumed by Judge Wright in *Georgetown*. But there is a contrary argument of some moment, namely, that the parent refusing medical treatment is providing the child with a most important lesson: that there are some moral and religious principles more important than physical life itself.

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1 See 9 UTAH L. REV. 161, 169 (1964).  
2 See 113 U. PA. L. REV. 290, 294 (1964), where the author convincingly argues that there was little evidence in *Georgetown* to indicate incompetency.  
331 F.2d at 1009 n.18. But the court further noted: “[T]his case does not involve a person who, for religious or other 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.  
The most convincing argument is that the state had an important interest in *Georgetown* since the patient was the mother of a minor child who would have suffered had the patient died. The criterion was not the "social worth" of the individual as a mother, but the state's interest in making sure that the child not be abandoned, even if abandonment be religiously motivated. The rights of third parties seem a solid ground for intervention by the state. Any other rationale would create a clear precedent for compelling any reluctant patient to receive treatment that medical authorities feel is necessary to save his life. If the desire of the patient can be disregarded, it is impossible to avoid the difficult task of weighing the rationality of the doctors against the rationality of the individual patient, of weighing the doctors' concept of "life" against that of the patient.

The dissent of then Circuit Judge Burger to an en banc denial of a rehearing is of particular importance since it recognized the right of the individual to follow his own conscience:

> [W]e have an obligation to deal with the basic question whether any judicially cognizable issue is presented when a legally competent adult refuses, on grounds of conscience, to consent to a medical treatment essential to preserve life . . . . The end, desirable as it obviously developed, cannot establish the existence of a case or controversy if such did not exist independent of the sequel to the enforced medical treatment.

Here lies the crux of the constitutional issue with which both Judge Wright and the court of appeals sitting en banc refused to grapple. Judge Burger described that issue:

The threshold issue, therefore, is whether the hospital had a right which it was entitled to require the court to enforce . . . . No affirmative act of the patient is suggested as invading or threatening any right of the hospital. So we must decide whether an "invasion" of legal right can be spelled out of a relationship between the patient's refusal to accept a standard medical treatment thought necessary to preserve life and the possible consequences to the hospital if, relying on her refusal of consent, it fails to give a transfusion and death or injury follows . . . . The choice between violating the patient's convictions of conscience and accepting her decision was hardly an easy one. However, since it is not disputed that the patient and her husband volunteered to sign a waiver to relieve the hospital of any liability for the consequences of failure to effect the transfusion, any claim to a protected right in the economic damage sphere would appear unsupported.
The rationale for the fundamental right to be left alone was developed in Justice Brandeis’ dissent in *Olmstead v. United States*, which recognized that right as founded not on the free exercise clause of the first amendment but as belonging to everyone. Judge Burger in *Georgetown* said of Justice Brandeis’ dissent:

> Nothing in this . . . suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.

There is a definite choice of values, especially at the boundary between public interest and private conscience:

> It is at the periphery of the boundaries of power where the guidelines are less clear that an appealing claim presents difficult choices, but this is precisely the area in which restraint is called for in light of the absolute nature of our powers and the finality which often, as here, attends our acts. But we should heed Cardozo’s counsel of restraint and reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters of essentially private concern and others of enormous public concern, are beyond the reach of judges.

Judge Burger more than intimates that there exists a right to self-determination even in the area of accepting or refusing lifesaving medical treatment.

Relying heavily on the rationale employed in the *Georgetown* case, the court in *United States v. George* ordered necessary transfusions although the patient was not *in extremis* and was found to be “rational and coherent.” The court expressed deep concern about the ethical questions 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 meaning of this last statement must remain a mystery. Perhaps it means that the patient can request nontreatment but cannot demand it from the doctors. In any case, it explains nothing and does no more than describe a conflict of consciences which is there resolved in favor of the medical profession. The constitutional issue was not reached or discussed. The situation in *George* was

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122 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).
121 331 F.2d at 1017 (emphasis in original).
122 Id. at 1017-18. See also Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. New York County 1965).
124 Id. at 754.
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quite similar to that in Georgetown since the patient was the father of four minor children and was voluntarily admitted to the hospital for treatment of a bleeding ulcer, but objected to blood transfusions because he was a Jehovah's Witness. The ultimate action of the court was very strange. The court advised the patient that it was powerless to compel a transfusion and that he was free to resist by simply placing his hand over the injection area. The patient said that he would "in no way" resist the doctors' action once the court order was signed.125

_Erickson v. Dilgard_126 upheld a limited right of a competent adult to refuse lifesaving medical treatment. The court in _Erickson_ rejected the contention that the medical community should be the final arbiter in this area. Asserting that "it is always a question of judgment whether the medical decision is correct,"127 the court concluded that it is the individual who must make the final determination. The patient was a male adult who was not said to have minor children or to be incompetent. The court denied the doctor's application to administer needed blood:

[I]t is the individual who is the subject of a medical decision who has the final say and that 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.128

It would seem that this case is authority for the proposition that any competent adult at least has a limited right never to be forced to submit to unwanted treatment. As discussed above, the state's interest in the welfare of minor children may limit that right.129

Another case which recognized the right to refuse treatment, _In re Estate of Brooks_,130 dealt directly with the constitutional issue. In that case, the state contended that society has an overriding interest in protect-

125 Some commentators suggest that the patient in _George_ really wanted blood but would not ask for it. Note, _The Dying Patient: A Qualified Right to Refuse Medical Treatment_, 7 J. Fam. L. 644, 657 n.49 (1967). This is an amazing conclusion since there is nothing in the case to suggest anything of the kind, and such a conclusion is an insult to the integrity of the individual's religious beliefs.


127 Id. at 28, 252 N.Y.S.2d at 706.

128 Id.

129 A case similar to _Erickson_ is _In re Appointment of Yetter_, No. 1973-533 (Pa. Ct. C.P. Northampton County Orphans' Ct. 1973). Citing the United States Supreme Court decision in _Roe v. Wade_, 410 U.S. 113 (1973), the _Yetter_ court determined that the right of privacy also includes the right to die. It was determined that the state should not interfere where there are no minor or unborn children and no clear and present danger to public health, welfare, or morals. The patient in _Yetter_ had been competent when she first refused treatment, and the court said it would not interfere even though her decision might be considered unwise, foolish, or ridiculous.

130 32 Ill. 2d 361, 205 N.E.2d 435 (1965).
ing the lives of its citizens even when treatment is resisted on religious
grounds. The *Brooks* case was distinguished from *Georgetown* because the
patient in *Brooks* was neither *in extremis* nor the parent of a minor child.\(^{131}\)
The court reasoned that although religiously motivated actions are not
totally immune from regulation, the patient's refusal to consent to transfu-
sions was not an "overt or affirmative act . . . [constituting] any clear
and present danger to society. . . ."\(^{132}\) Thus, the *Brooks* case returned to
the "clear and present danger" doctrine. The court determined that the
state may interfere with religious activities only "when religious 'principles
break out into overt acts against peace and good order.'"\(^{133}\) Thus it may
be a violation of first amendment rights to compel a competent adult to
submit to a blood transfusion against his religious principles. Because of
the overriding public policy of preventing danger to the public and the
creation of public wards, courts still cast a wary eye to the exercise of the
right to refuse treatment even though the first amendment provides a solid
foundation.\(^{134}\) One author claims that this clear and present danger test,
valid for free speech, should not apply to religious exercises. In the view of
that author the test for state interference should be based upon the balanc-
ing of various public interests. Thus, he concludes that the court in *Brooks*
came to the correct conclusion by using the wrong test.\(^{135}\)

In *Brooks*, the appellant had informed her doctor over a 2-year period
that her religious beliefs precluded her from receiving medical transfu-
sions. The court steadfastly refused to order violation of beliefs absent an
overriding danger to society.\(^{136}\)

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\(^{131}\) *Id.* at 367-68, 205 N.E.2d at 440.

\(^{132}\) *Id.* at 369, 205 N.E.2d at 440.

\(^{133}\) *Id.* at 373, 205 N.E.2d at 442.

\(^{134}\) It is not suggested here that the courts will bow in every case where religious convictions
are raised. If there is the slightest hint of incompetence, the courts usually appoint a guard-
refused blood transfusions on religious grounds. A victim of an accident which had ruptured
her spleen, she was conscious but in shock and in need of a lifesaving operation. The court
appointed a guardian who consented to blood transfusions. The court stated: "Religious
beliefs are absolute, but conduct in pursuance of religious beliefs is not wholly immune from
governmental restraint." *Id.* at 578, 279 A.2d at 672. The court referred to the interest of the
state in cases involving the use of snakes in religious worship, fluoridation of drinking water,
and proscription of polygamy.

\(^{135}\) Sullivan, *The Dying Person—His Plight and His Right*, 8 NEW ENG. L. REV. 197, 209
(1973).

\(^{136}\) The danger of a court imposing a decree of "incompetence" on a helpless patient is
illustrated by *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972) wherein a 20-
year-old unmarried male who was injured but conscious and competent refused blood for
religious reasons. All of his relatives refused to give their consent on similar religious grounds.
After the patient lost consciousness, a probate court named a conservator for him as an
incompetent minor and transfusions were administered. A civil rights action was commenced.
In both *Brooks* and *Erickson*, what in fact took place was a balancing of interests. Among the public interests to be considered, the predominant is that of the adult, competent patient. His wishes, short of suicide, must be observed and enforced. The interests of the medical profession and the hospitals in maintaining standards, particularly in the context of emergency situations, must be considered, but the predominant interest must be that of the competent adult patient. The interest of the state in keeping its citizens off of public relief and out of state supported institutions must be considered. These and other interests must be weighed and balanced in determining whether the state may interfere with the exercise of religious freedom.

**The Arguments on Compulsory Medical Treatment**

The issue of compulsory medical treatment of competent adults, whether refusals of treatment are religiously motivated or not, includes various problems of a legal and moral nature: the right to die, suicide, sanctity of life, consent, *parens patriae*, the public interest and individual rights, and the right to privacy and to be left alone. These are delicate problems, not all of which have been resolved either by statute or by judicial decision.

Some preliminary distinctions are in order. The first is between those who have voluntarily sought out medical care in hospitals and clinics and those who have not. This is an important distinction insofar as the legal and moral liabilities of institutions and doctors are concerned. Judge Wright in *Georgetown* relied explicitly upon the patient's voluntary hospital admission as one reason for ordering blood transfusions for a nonconsenting adult. In other words, there is a social interest *per se* involved whenever a patient has voluntarily sought out the aid and services of medical facilities and doctors. This may be sufficient to deny such a patient legal protection in his refusal to consent to lifesaving treatment. Such an interest, of course, would not legitimate compulsory treatment by a doctor who entered a home uninvited to treat a sick person. To hold otherwise would be to significantly curtail the rights of an individual to determine what is to be done with his own body. For there does exist the right of the person to be left alone. It seems that the patient waives this right against the hospital and the conservator. The district court denied the hospital's motion to dismiss, but granted a similar motion of the conservator, on determining that the latter possessed judicial immunity.

331 F.2d at 1007.

See the dissenting opinion of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), cited in *Application of President & Directors of Georgetown College*, 331 F.2d at 1016-17 (Burger, J., dissenting).
to be left alone when he voluntarily enters the hospital, and consents to some medical treatment. Such a patient has placed both the hospital and the doctor in a vulnerable legal and moral position. In other words, this distinction will not necessarily be determinative in any one particular case, but the judiciary should make the distinction between the patient who has sought aid and the one who has not. The latter should have greater freedom in determining what factors will prolong his life than the former.

It is important to note that both courts and commentators have expressed incredulity for the religious beliefs of others, particularly when such religious beliefs differ radically from the accepted mores. This attitude is simply a subterfuge for escaping the difficult constitutional issue. One can see this in the Georgetown and George cases. In each of these cases, the court suggested that although the individuals involved were unwilling to abandon their religious beliefs, they nevertheless wanted to live, and instead of resenting society's interference, they actually welcomed it. This is a gratuitous assumption with no foundation in the facts before the court. Such an assumption imputes insincerity where only some weakness, common to all men and women facing such a terrible and final decision, was evident. The courts should seek to ascertain the true wishes and desires of these patients, and should not prey upon their weaknesses and use them as a pretext for intervention and substitution of the court's values for those of the patient. It would be more honest to simply accept the decision of the patient as sincere, if the patient is competent to make a decision, and to squarely face the constitutional issue presented.

**Parens Patriae**

This Article has discussed the power of *parens patriae* as used on behalf of such people as children and mental incompetents. *Parens patriae* is the state's power to protect persons with "disabilities who have no rightful protector," even over the religious objections of parents and

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139 It is highly doubtful that a hospital or its staff would be either civilly or criminally liable if a waiver had been freely and knowingly signed by the patient and/or the next of kin. Cf. Pratt v. Davis, 224 Ill. 300, 309-10, 79 N.E. 562, 565 (1906); Jackovach v. Yocom, 212 Iowa 914, 237 N.W. 444 (1931); Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912). If the patient is delirious and refuses treatment, and the family refuses to consent, the doctor and hospital are normally absolved from civil liability. See Littlejohn v. Arbogast, 95 Ill. App. 605 (1901).

140 The courts should consider the true desires of patients, particularly if they have expressed opposition to a particular medical procedure prior to their entrance into the hospital or prior to becoming non compos sui.

141 But see Note, Compulsory Medical Treatment and the Free Exercise of Religion, 42 Ind. L.J. 386, 403 (1967); Calif. Comment, supra note 2, at 864-65.

142 See text accompanying notes 71-76 & note 76 supra.

143 *Parens patriae* has been described as follows:
next of kin. It has long been held that this power extends to incompetent adults as well. This concern of the state has nothing to do with socialistic principles, but rather with a concern for benefit to the individual. It must be noted that the power of parens patriae has never been exercised for the benefit of competent adults. An Illinois court refused to extend the doctrine to adults for conduct which does not endanger "clearly and presently, the public health, welfare or morals." Certainly society's concern for individual life is deep, for a number of reasons. Is this interest so great, however, that it should outweigh the right of a competent adult to refuse some lifesaving medical procedure? This is the basic constitutional question and one that can be solved only by a balancing process, not by an extension of the doctrine of parens patriae.

In cases where the courts have ordered medical treatment of adults by extension of the parens patriae doctrine, there were either unborn or minor children involved. The Georlport can be criticized for extending the parens patriae beyond its intended limits. Moreover, to allow a court to order treatment whenever a previously objecting patient becomes non compos mentis because of his illness may prove extremely dangerous for human rights. As was previously noted, if a patient had objected before losing consciousness, the court could simply wait until he is sufficiently incapacitated and then base its determination to authorize treatment on incompetency—a complete abuse of parens patriae and a circumvention of the patient's right to refuse treatment. Clearly, "[t]he purpose of parens patriae is to provide a vehicle for the court to physically protect the child and not to protect a parent so that he can in turn provide for his child." This seemed to be the view of the Supreme Court in the Prince decision. In any event, parens patriae should be limited to subsidiary

This parens patriae jurisdiction is a right of sovereignty and imposes a duty on the sovereignty to protect the public interest and to protect such persons with disabilities who have no rightful protector. . . .

[It] extends to the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkeness, imbecility, etc.


In re Brooks Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The use of parens patriae was also rejected in Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), wherein the court noted that the alleged incompetence of a woman in no way altered previously held religious views.


Note, Compulsory Medical Treatment: The State's Interest Re-evaluated, 51 Minn. L. Rev. 293, 301 (1966).

"Parents may be free to become martyrs themselves. But it does not follow that they are
intervention on behalf of incompetents and not extended to competent adults.\textsuperscript{50}

\textit{Public Interest}

Since the issue of mandatory lifesaving procedures for adults should not be determined by extension of the doctrine of \textit{parens patriae}, it must be resolved by the balancing of individual rights and the public interest. The public interest argument proposes that the state has an interest in the life of each member which is sufficient to outweigh the right of an individual to refuse treatment. The basic constitutional question which must be addressed and answered involves the balancing of these interests. There are no rights which exist \textit{in se et per se}, but only those which society recognizes in the individual in the face of the coercive force of government:

Consent to surgery is required to protect the patient's right of personality against unwanted touching, inviolability of the person being a cardinal right vouchsafed to the individual by our social and legal philosophy. Under this individualistic philosophy, the right of the individual to die of disease or injury, at his election, is paramount to the social interest in preserving him by compulsory surgery.\textsuperscript{51}

What social benefit would be more valuable than the individual's freedom of choice or right to determine what will happen to his body? The right to self-determination in cases of nonconsent to treatment is even clearer than that right as it was recognized in \textit{Roe v. Wade},\textsuperscript{152} where the interest of the state in potential human life gave it the power to prohibit abortion in the second and third fetal trimesters, and thereby restricted the right of the woman over her own body. In many cases where medical treatment is refused, the interests of minor or unborn children are not involved. At most, the social interest approach can be used to limit the right to refuse treatment, but not to deny it entirely. Thus, among the public interests to be considered, the most important is that of the competent adult patient himself. The interests of the medical community, hospitals, minor and unborn children, all must be balanced against the interests of competent adults to arrive at an equitable resolution of this difficult legal question.

\textsuperscript{50} See cases discussed in Cawley, \textit{Criminal Liability in Faith Healing}, 39 Minn. L. Rev. 48, 57-64 (1954).
\textsuperscript{51} Smith, \textit{Antecedent Grounds of Liability in the Practice of Surgery}, 14 Rocky Mt. L. Rev. 233, 236 (1942).
\textsuperscript{152} 410 U.S. 113 (1973).
The Omission—Commission Distinction

One of the most troubling distinctions maintained by some commentators is that between passivity and active intervention. Some consider this distinction to be "nonsense," but such a description is surely an exaggeration. The moral situation of one who fails to take affirmative action to keep himself alive is quite different from that of one who actively seeks death, especially when the measures refused are artificial surgical procedures. It is one thing for the state to impose an affirmative duty to take certain minimum measures to stay alive. Such requirements are reasonable and, in fact, are imposed by most safety laws. But it is another theory of jurisprudence which would empower the state to impose on citizens an affirmative legal duty to make use of highly developed medical techniques in order to prolong life. What would be the limitations of such a principle? Could such a duty be imposed by state officials, and, if it could, what procedures could be mandated and which not? To kill oneself is one thing. Not to avail oneself of surgery is quite another. In the latter case there certainly is no active intent to die, as there is in cases of suicide. The mere presence in medical facilities of those persons who refuse certain treatment attests to their strong desire to live, though they may not wish to live if they must sacrifice deeply held moral and religious principles. The tradition of sacrificing one's life for strongly held beliefs dates back to Socrates, to St. Thomas More. To call this "suicide" is certainly to lack moral sensitivity.

The distinction between active and passive acts must be maintained, else there would be no way of distinguishing the public policy against suicide from that of preventing interference by hospitals with the wishes of their patients. The fact remains that suicide produces death by an affirmative act of the individual, while the death of a patient who refuses treatment is not directly willed, desired, or actively brought about in any way. It is simply allowed to transpire. Perhaps this distinction is too subtle for a pragmatic judiciary, but it does have some foundation in reality and should not be ignored.

The Sanctity of Life

The term sanctity of life is used to express the traditional interest of the state in protecting the life of its citizens in the face of suicide or other foolish or irrational acts. The term is hopelessly vague and stems from the Judeo-Christian influence on our legal system. Legal definitions of the

133 Calif. Comment, supra note 2, at 868.
134 "In suicide there is a conscious purpose to bring about death . . . ." 9 Utah L. Rev. 161, 166 (1964); accord, 26 Mont. L. Rev. 95, 100 (1964); 44 Texas L. Rev. 190, 194 (1965); 18 Vand. L. Rev. 772, 775 (1965).
term are rather nebulous and are primarily contained in cases involving suicide. It has been argued that protection of the individual's life is itself a strong societal interest, and that religious convictions cannot be permitted to limit this interest. This concept has always been difficult to express, and perhaps after Roe v. Wade it is no longer a viable legal concept. At the very least, this whole concept is in a great state of flux. The utilitarian view of life would simply emphasize the effect of the individual's death upon others in society in terms of grief, shock, or despair, while the moral point of view would stress the sacredness of human life and its unique value to society. Authors as diverse as Aristotle and Aquinas argued against all forms of self-destruction. The present trend away from criminal sanctions for suicide and attempted suicide does not stem from a diminished respect for life, but from the realization that such sanctions are unjust and do not serve as deterrents. But the positive duty of the state to prevent suicide is difficult to express precisely because it is so fundamental to any rational legal system. In Reynolds, the court stated in dictum that it is within the power of government to prevent a religious suicide. Such a conclusion simply restates the problem of the omission-commission distinction. The final argument against permitting suicide is philosophical: once the principle of the sanctity of life is abandoned, there can be no definition of the right to life save that which is dependent on personal taste. The Roe v. Wade decision could be seen as simply one more step down this road.

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159 Many commentators use an a minori ad majorem form of argument:

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.

Note, Compulsory Medical Treatment and the Free Exercise of Religion, 42 Ind. L.J. 386, 401 (1967). The fact is that where death is simply and purely intended, the state will intervene. Many decisions have upheld such state action. In cases involving compulsory medical treatment, however, there is another fundamental issue involved, the patient's basic religious convictions.

156 98 U.S. at 166. Yet, an affirmative act of suicide undertaken for religious reasons would not be illegal in many states today.
157 Physicians have been held privileged to render emergency aid to a patient unable to give consent regardless of the subjective wishes of the patient. See Jackovach v. Yocom, 212 Iowa 914, 237 N.W. 444 (1931).
When compared with the problem of preventing death by compulsory medical treatment of competent adults, the problem of suicide is exacerbating. Although there are statutes prohibiting suicide, there have never been any statutes prohibiting refusals of necessary medical techniques. The problem becomes ever more acute for the law as medical science and technology prolong the life span of individuals. Many commentators argue that both pure suicide and refusals of treatment are species of suicide and therefore the state has a serious interest in preventing both since every citizen makes a valuable contribution to society. It is also argued that most people who attempt suicide are temporarily incompetent and irrational, and there is good reason not to allow such an individual freedom of choice. Adults refusing lifesaving medical procedures, however, are generally not incompetent or irrational. Suicide requires a specific, intentional act rather than a passive refusal of treatment. Yet, if it is clear that the patient will die without treatment, then the problem of finding a state interest has been reached; only then does the balancing process begin.

In any case, the analogy of a refusal of medical treatment to suicide has not proven convincing. As one commentator noted, where there is no statute making attempted suicide illegal, "the refusal of necessary medical aid . . . must be conceded to be lawful." Rather than seeking a solution to the presence or absence of an anti-suicide statute, it is better to look to such decisions as *Prince*, where the Court reiterated its position on the balance between religious freedom and public welfare. As Justice Murphy stated, the state should not interfere with religious activities unless the threat to the public is "grave, immediate, and substantial." Thus, in the case of a patient refusing medical aid, there is no way to avoid the balancing process and the ultimate conclusion that the patient's beliefs should be respected.

Another way of stating the issue is to inquire whether the individual has a constitutional right to die. Like all individual rights, the right to die would have to be limited if the patient's refusal of aid was injurious to society or to a third person owed a duty by the patient, of if the patient

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103 See generally L. Dublin, Suicide 144 (1963); Perkins, Criminal Law 67-68 (1957).
104 In some cases where medical treatment is refused, the specific intent required for suicide is negated by the fact that the patient voluntarily came to the hospital seeking aid. See 26 Mont. L. Rev. 95, 99-100 (1965).
105 When it is not certain that the patient will die, or where the necessary treatment involves a high degree of risk or is of questionable medical value, the decision should always be left to the patient. In every such case, of course, it should be clear that the patient is competent. Cawley, Criminal Liability in Faith Healing, 39 Minn. L. Rev. 48, 68-69 (1954), concludes that a religiously motivated refusal of medical aid would not constitute attempted suicide.
106 Id. at 68.
107 321 U.S. at 158.
108 Id. at 175 (Murphy, J., dissenting).
was incompetent. The issue must be approached by attempting to establish an injury to others that would outweigh an accepted common law right. Moreover, additional arguments for a qualified right to die or be left alone can be based on the ninth amendment and the famous comment of Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*: 168

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments. 170

The right to a natural death with dignity may fall within the domain of this amendment. There must be evidence that the patient is competent to make such a decision, that no emergency exists, and that the patient has no legal duties to third parties. Then, under circumstances which ensure that an impetuous judgment has not been made, the wishes of the patient should be respected. Such would not amount to legal approval of euthanasia or mercy killing—it would only establish the right to refuse medical assistance in a present crisis or for a future one. Viewed thusly, the right to die is included in the right to privacy. 171 In the words of one commentator:

[I]t will be submitted that the burden of proof is upon the state to establish that the individual does not have the right involved under the Ninth Amendment, and that the burden of proof is not upon the individual to establish his right under the Amendment. In other words, the individual does have the right involved under the Ninth Amendment unless the state can prove that he does not. 172

**Conclusion**

It is difficult in this area of evolving medical procedures and the law to come to any firm answer to the original question posed by this Article: Can the state, through its police power, force an objecting, competent adult, to accept lifesaving medical aid? The answer must be found through a balancing process in order to safeguard both the important interests of the state and the fundamental right of religion, the right of self-determination, and the conscience of the individual. Thus, it is evident that, at most, the individual has only a qualified right to refuse treatment in the light of his obligations to third parties, to the medical profession (if

168 381 U.S. 479 (1965).
170 *Id.* at 488 (Goldberg, J., concurring).
he voluntarily sought out their aid) and to himself. Opponents of this right rely upon the rather vague notion of the "importance of the individual's life to the welfare of society." The reality of the matter is that, at least to date, there seems to be no clearly accepted social interest which will justify complete denial of a competent adult's right to refuse lifesaving medical help. It is, of course, reasonable to impose basic limits on the exercise of this right. Until an overriding social interest is clearly shown, a judge must either skillfully find injury to third persons or simply respect the wishes of the competent adult.

In other words free exercise is not only a "fundamental" constitutional right, but the state has the burden of pleading and proving a compelling state interest when this right is sincerely and objectively invoked. It is submitted that the state must and should fail in this endeavor in a case involving refusal of medical services by a competent adult, unless children or other dependents are directly involved. Enough is known of child psychology to allow the state to establish the trauma of "this most ultimate of voluntary abandonments" and to thereby meet its burden. Other than this unique case, no interest of society seems so great as to overcome the right to religiously motivated refusal of medical aid by competent adults. The constitutional issues must be squarely faced by the Supreme Court, which, freed from the emotional atmosphere of an emergency room, can assess the crucial questions raised in this ever growing area of law.

113 Calif. Comment, supra note 2, at 862.