Jehovah's Witnesses and the Refusal of Blood Transfusions: A Balance of Interests

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NOTE

JEHOVAH'S WITNESSES
AND THE REFUSAL OF
BLOOD
TRANSFUSIONS: A
BALANCE OF
INTERESTS

The United States Constitution protects every citizen's religious freedom\(^1\) and personal privacy.\(^2\) Generally, one or both of these rights have

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\(^1\) U. S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." \(\text{Id.}\) This part of the first amendment has two clauses: the establishment clause and the free exercise clause. \(\text{See J. Nowak, R. Rotunda & J. Young, Constitutional Law § 17.1, at 1031 (3d ed. 1986).}\) The first amendment has been extended to the states. \(\text{E verson v. Board of Educ., 330 U.S. 1, 8-18 (1947) (establishment clause held applicable to states); Cantwell v. Connecticut, 310 U.S. 296, 301-03 (1940) (free exercise clause held applicable to states).}\)

The free exercise clause prohibits government from proscribing religious beliefs. \(\text{See Pierce v. Society Sisters, 268 U.S. 510, 534 (1925) (statute requiring children to attend only public schools considered undue restriction on freedom of both parents and children); see also J. Nowak, R. Rotunda & J. Young, supra § 17.6, at 1067.}\)

An individual may seek exemption from a government requirement under the free exercise clause. \(\text{See L. Tribe, American Constitutional Law § 14-12, at 1242 (2d ed. 1988).}\) The claimant must show that he has a sincerely held religious belief and that this belief is burdened by state requirements. \(\text{Id.; see also Bowen v. Roy, 476 U.S. 693, 696 (1986) (court accepted sincerity of claimants' assertion that use of social security number in daughter's name would injure her "spirit"). But see Thomas v. Review Board, 450 U.S. 707, 715 (1981) (some beliefs may be "so bizarre, so clearly non-religious in motivation as not to be entitled to protection under Free Exercise Clause").}\)

The freedom of religion guaranteed by the federal and state constitutions is not unlimited. \(\text{See McNinch, A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court, 55 U. Cin. L. Rev. 997, 998 (1987).}\) Although the freedom to believe is absolute, the freedom to act on those beliefs may be regulated for the protection
been involved when justifying an individual's refusal of life-saving medical treatment. The right to refuse this treatment, otherwise known as

of society. See, e.g., Feiner v. New York, 340 U.S. 315, 321 (1951) (religious liberty does not allow privilege to incite others to bodily attack); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (state may enact compulsory vaccination law); Reynolds v. United States, 98 U.S. 145, 167 (1879) (religious belief in polygamy will not justify actions of bigamist); Lawson v. Commonwealth, 291 Ky. 437, 440, 164 S.W.2d 972, 974 (1942) (state may prohibit religious rite which requires snake-handling).

8 See Roe v. Wade, 410 U.S. 113 (1973) (court balanced compelling governmental interests against woman's right to terminate her pregnancy and acknowledged constitutional protection for fundamental right of privacy). Although the Constitution does not expressly provide for a right of privacy, the Supreme Court has recognized that there is a constitutional protection for certain "zones of privacy." Id. at 122.

The Court has stated that this right of privacy arose from the first amendment, the penumbra of the Bill of Rights, and the fourteenth amendment. See Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972) (upheld right to distribute contraceptives to unmarried persons); Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) (person could not be punished for private possession of obscene material); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (upholding married couple's right to use contraceptives). The right of privacy is a fundamental right which includes various forms of choice in matters relating to the individual's personal life. See J. Nowak, R. Rotunda & J. Young, supra note 1, § 11.7, at 371. Fundamental rights are to be given strict forms of constitutional protection. Id. at 367.

For the development of the right of privacy at common law, see Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1890). The most carefully guarded and sacred right at common law is "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id.

The right of privacy is not absolute—at some point the state's interests in protecting health, medical standards, and prenatal life predominate. See Wade, 410 U.S. at 146-67; Buck v. Bell, 274 U.S. 200, 207-08 (1927); Jacobson, 197 U.S. at 29-36.

8 See In re Osborne, 294 A.2d 372, 374 (D.C. 1972) (patient refused lifesaving blood transfusions based on religious belief); In re Estate of Brooks, 32 Ill. 2d 361, 363, 205 N.E.2d 435, 436-37 (1965) (patient repeatedly informed doctor of religious convictions precluding her from receiving blood transfusions to save her life); Hamilton v. McAuliffe, 277 Md. 336, 337, 353 A.2d 634, 635 (1976) (refusal of blood transfusions on religious grounds). The right to refuse medical treatment always involves an individual's right of privacy, therefore when a right to refuse is based on religious grounds both rights are asserted. See id.

There are many cases based strictly on the right to privacy. See, e.g., Foody v. Manchester Memorial Hosp., 40 Conn. Supp. 127, 134, 482 A.2d 713, 717-18, 720 (Conn. Super. Ct. 1984) (semi-comatose patient asserting right of privacy permitted to forego life-sustaining treatment); John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So.2d 921, 926 (Fla. 1984) (terminally ill incompetent person, in permanent vegetative state with no reasonable prospect of regaining cognitive brain function, sustained only through use of extraordinary life-sustaining treatment, can have treatment terminated, under "doctrine of substituted judgment" by close family member based on terminally ill individual's right of privacy); Leach v. Akron Gen. Medical Center, 68 Ohio Misc. 1, 8-9, 426 N.E.2d 809, 814-15 (Ct. C.P. 1980) (constitutional right to privacy guarantees right of terminally ill and permanently semi-comatose person to decide his or her own treatment).

Most individuals asserting only their right of privacy are incurably ill patients undergoing extraordinary life-sustaining medical treatment. See, e.g., Leach, 68 Ohio Misc. at 812,
"the right to die," has engendered continuous litigation and has raised profound legal and moral questions. A person asserting a right to die is in direct conflict with competing state interests—specifically, the preservation of life, protecting third parties, preventing suicide, and maintaining the medical profession's ethical integrity. Presently, a balancing test has engendered continuous litigation and has raised profound legal and moral questions.

When a person is refusing lifesaving medical treatment he is generally asserting his right of religious freedom because the type of treatment is against a tenet of his religion. See, e.g., Hamilton, 277 Md. at 337, 353 A.2d at 635.

Courts sometimes distinguish between lifesaving and life-sustaining treatment when deciding whether a person has a right to die. See A. A. M. E. S., right to Die § 4.11, at 92-93 (1988). Courts are more willing to uphold a person's right to die as the patient's prognosis dims. See id. at 93-94. If treatment can save a person's life, courts are more willing to deny the patient's right to die. Id.; see, e.g., John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 579-80, 279 A.2d 670, 674 (1971) (court appointed guardian to consent to blood transfusion for twenty-two-year-old female, where hospital and medical personnel believed patient would die without it). But see St. Mary's Hosp. v. Ramsey, 465 So.2d 666, 669 (Fla. Dist. Ct. App. 1985) (non-terminal patient allowed to refuse blood transfusion because of religious beliefs).

* See 1 New Topic Serv. Am. J. U. § 7 (1979). "Even though it is misleading to characterize as a 'right to die' the right to acquiesce in an imminent and inevitable death... has often been referred to in those terms." Id.

* See supra note 3 and accompanying text.

* See Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 216, 267 N.Y.S.2d 450, 451 (Sup. Ct. N.Y. Cty. 1965) (court ordered blood transfusion for mother of six children who refused to give consent, but was not opposed to receiving transfusion). Justice Markowitz stated, "Never before had my judicial robe weighed so heavily on my shoulders." Id.; P. Riga, right to Die or right to live vii (1981) (decision of whether or not to allow individual right to die further complicated "by the almost limitless circumstances surrounding each case"); see also Note, The Dying Patient: A Qualified Right to Refuse Medical Treatment, 7 J. Fam. L. 644, 644 (1967) ("bizarre issue" of whether competent adults have right to refuse lifesaving medical treatment is arising with increasing frequency); Comment, Mercy Hospital, Inc. v. Jackson: A Recurring Dilemma for Health Care Providers in the Treatment of Jehovah's Witnesses, 46 Mo. L. Rev. 514, 514 (1987) [hereinafter Mercy Hospital] (legal problems which arise when Jehovah's Witness refuses lifesaving blood transfusion are among most difficult to resolve ethically).

* See Heston, 58 N.J. at 580, 279 A.2d at 674 (when individual invokes right to refuse lifesaving treatment there is clash with state interest in preserving life and efforts to maintain medical and ethical integrity); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 425, 201 A.2d 537 (N.J. Super. Ct.) (pregnant individual asserting right to refuse lifesaving treatment conflicted with state's interest in preserving life and protecting innocent third parties), cert. denied, 377 U.S. 985 (1964).

* See Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 732-36, 370 N.E.2d 417, 425-27 (1977). The court surveyed the previous cases involving an individual's right to refuse medical treatment and developed the list of four countervailing state interests. Id.

Other courts have adopted the approach of looking at the four state interests in conflict with one's right to refuse treatment. See, e.g., St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985); Satz v. Perlmutter, 379 So. 2d 359, 359 (Fla. 1980); Brophy v.
is employed to resolve this conflict.9 Courts have not yet developed a uniform approach in applying this test, especially when an individual refuses treatment because the medical procedure in question would violate a basic religious tenet.10

This Note will discuss how the judiciary has applied the balancing test in determining whether a Jehovah's Witness may refuse a blood transfusion. Furthermore, this Note will examine the inherent conflict in balancing state interests against an individual's right of self-determination. Specifically, the weight and degree of sensitivity to be given the state's interest in preserving life and protecting third parties will be analyzed. Finally, this Note will suggest how to equitably apply the balancing analysis in future cases.

**LANDMARK CASE LAW ON REFUSAL OF BLOOD TRANSFUSIONS BY JEHOVAH’S WITNESSES**

In determining whether an individual may refuse medical treatment, courts have arrived at varying and occasionally inconsistent results. This is due to the absence of clearly formulated legislation and the virtually unlimited factual situations that have arisen.12 Ordinarily, however,
when the patient is competent, childless, and not pregnant, the right of self-determination outweighs the countervailing state interests and the individual is generally permitted to reject medical treatment even at the risk of certain death. A number of cases in which a right has been asserted to refuse lifesaving medical treatment have involved refusal of blood transfusions by Jehovah's Witnesses.

A recent case illustrates the scope of the problem. In Munn v. Southern Health Plan, Inc., 719 F. Supp. 525 (1989), the defendant attempted to assert the defenses of avoidable consequences and assumption of the risk where he negligently caused a car accident by attempting to overtake plaintiff's car in the fog. Id. at 525. Plaintiff and his wife were Jehovah's Witnesses and the wife, who was seriously injured, refused to undergo a blood transfusion. Id. She subsequently died and defendant claimed it was not his negligence that caused her death but her own negligence in refusing the blood transfusion. Id. at 525-26; see also Moore, supra note 10, at 281. Jehovah's Witnesses believe accepting blood into the body is a grave sin against the Lord. See Deuteronomy 12:23-25 (King James).

Only be sure that thou eat not the blood for the blood is life; and thou mayest not eat
Recently, in *Public Health Trust of Dade County v. Wons*, the Supreme Court of Florida held that there was no compelling state interest which would require a Jehovah's Witness to submit to a blood transfusion which may be necessary to sustain her life. In *Wons*, Mrs. Norma Wons checked herself into Jackson Memorial Hospital with a condition known as dysfunctional uterine bleeding. Doctors immediately advised Mrs. Wons that without a blood transfusion she would probably die. Mrs. Wons, a practicing Jehovah's Witness and mother of two, declined the treatment based on her religious beliefs. Immediately thereafter, the Health Trust petitioned the circuit court, attempting to force Mrs. Wons to submit to the blood transfusion. At the hearing, Norma Wons' husband testified that he fully supported her decision to refuse treatment. Furthermore, he stated that if Mrs. Wons were to die, the two children would be cared for by him and Mrs. Wons' supportive family. Notwithstanding, the court ordered the transfusion, which was performed while Mrs. Wons was unconscious.

Upon awakening, Mrs. Wons immediately appealed the order. The order was reversed by the district court which held that the state's in-...
interests could not override Mrs. Wons' constitutional rights to religious freedom and privacy. Believing the issue to be one of great public importance, the court certified it to the Supreme Court of Florida. The supreme court affirmed the district court, holding that Mrs. Wons could refuse the lifesaving blood transfusion.

Writing for the court, Justice Kogan indicated that the individual's right to refuse treatment must be determined by delicately balancing the rights of the state against those of the individual using the four criteria set forth in Satz v. Perlmutter. The court reasoned that the state's interest in preserving a two-parent home for the minor children was not sufficiently compelling to outweigh Mrs. Wons' right to privacy and religious freedom. Therefore, the court concluded that Mrs. Wons could refuse the blood transfusion.

Id. at 683. The court stated:

"Viewed in the abstract and without the benefit of our constitutional heritage, the rights of the individual in this area of law may seem to some rather paltry when weighed against the interests of society as a whole . . . On the contrary, the courts have given great deference to the privacy and religious freedom rights involved in the subject balance—and have required only the most compelling of societal interests to override such rights."

Id. at 687. The court stated that three of the four societal interests which could override the patient's rights were absent—the state's interest in preserving life, maintaining the ethical integrity of the medical profession, and preventing suicide. In the court's view, the protection of third parties, namely the minor children, was the only issue to be resolved. Id. at 688. Since the children had a surviving father and a supportive family to provide financial support, they would not become wards of the state, therefore, there is no abandonment. Id.

362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980). The Perlmutter court adopted the balancing test set forth in Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 735, 370 N.E.2d 417, 426 (1977). In Perlmutter, the issue was whether a competent adult patient, with no minor children, suffering from a terminal illness, has the constitutional right to refuse extraordinary medical treatment. Perlmutter, 362 So. 2d at 162. The court immediately recognized the state's strong interest in the preservation of life; however, it made a distinction between the patient who can be cured and the patient who is terminal. Id. The Perlmutter court found the patient's situation wretched and continuation of his life temporary and totally artificial. Id. Therefore, there was no compelling state interest which could override the patient's wishes. Id. Mr. Perlmutter had no minor children, so the state's interest in protecting third parties was not a factor in the decision. Id. It was clear that Mr. Perlmutter wished to live, but not artificially. Id. Consequently, the court found that the state's interest in prevention of suicide is not an issue. Id. at 163. Finally, the court reasoned that allowing a suffering, terminal patient to refuse continued treatment is consistent with modern medical mores. Id.
fuse consent to any future blood transfusion.\textsuperscript{31}

Chief Justice Ehrlich concurred with the majority opinion, asserting that the primary interest in the case was the protection of the minor children, which has its basis in the doctrine of \textit{parens patriae}.\textsuperscript{32} The chief justice indicated that, should Mrs. Wons die, the children would be cared for by the surviving family members, and, therefore, would not be abandoned.\textsuperscript{33} The concurring opinion continued by stating that although the state's interest in the preservation of life is strong, it cannot override Mrs. Wons' personal interest in directing the course of her life.\textsuperscript{34} Chief Justice Ehrlich reasoned that the costs of preserving Mrs. Wons' life were too high, as she would be forced to commit a great sin against her religion which would make returning to a normal life impossible.\textsuperscript{35} The concurrence concluded that a truly compelling state interest was absent, hence, the court must protect Mrs. Wons' right to make her own choice.\textsuperscript{36}

Justice Overton, in a vigorous dissent, argued that reliance on \textit{Satz v. Wons}, 541 So. 2d at 98.

\textsuperscript{31} Id. 541 So. 2d at 98.

\textsuperscript{32} Id. "\textit{Parens patriae}, literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th Ed. 1979). \textit{See}, e.g., \textit{Stanley v. Illinois}, 405 U.S. 645, 652 (1972) (parental control over child subject to state and may be regulated by legislation or judicial action); \textit{Prince v. Massachusetts}, 321 U.S. 158, 166 (1944) (state, as parens patriae, has power to limit parental freedom and authority in areas that affect child's welfare); \textit{Turner v. Turner}, 167 Cal. App. 2d 636, 640, 334 P.2d 1011, 1015 (1959) (parents responsible to state for their child's well-being).

The \textit{parens patriae} doctrine can be traced to Roman law. \textit{See} Keiter, \textit{Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach}, 66 MIA. L. REV. 459, 498-01 (1982) (predicate for parens patriae state intervention is presumption that certain classes of citizens are particularly vulnerable to exploitation and lack ability to care for themselves); Developments in the Law, \textit{The Constitution and the Family}, 93 HARV. L. REV. 1156, 1199 (1980) (acting under its parens patriae power, state may pursue ends that would be impermissible under police power).

\textsuperscript{33} Id. 541 So. 2d 96, 98 (Ehrlich, C.J., concurring). The chief justice analogized the situation in \textit{Wons} as nearly identical to that in \textit{In re Osborne}, 294 A.2d 372 (D.C. 1972). The \textit{Osborne} court allowed a mentally competent male Jehovah's Witness to refuse a blood transfusion. \textit{Id.} at 376. The court acknowledged the presence of two minor children, however, the close family relationship that existed was taken as evidence the children would be cared for sufficiently. \textit{Id.} at 375.

\textsuperscript{34} Id. at 101 (Ehrlich, C.J., concurring). Chief Justice Ehrlich reasoned that Mrs. Wons would be unable to live with her sin or the knowledge she may have to submit to another blood transfusion in the future. \textit{Id.} at 100 (Ehrlich, C.J., concurring). He recognized that "[t]he] cost must be looked at from the patient's point of view," and questioned the dissent's simplified statement that Mrs. Wons could return to a normal life. \textit{Id.} (Ehrlich, C.J., concurring).

\textsuperscript{35} Id. at 102 (Ehrlich, C.J., concurring).
Perlmutter was misguided. Furthermore, the state's interests in preserving life and preventing abandonment of the minor children were clearly compelling enough to warrant the necessary blood transfusion. The dissent concluded, therefore, that the state should prevent the totally unnecessary death of Mrs. Wons and protect the innocent children from abandonment.

In an earlier case, Application of the President and Directors of Georgetown College, Inc., the United States Court of Appeals for the District Court of Columbia decided that the state's interests in the preservation of life and protection of third parties overcame both a patient's right to privacy and her freedom to exercise her religious beliefs. The patient, Mrs. Jones, was a Jehovah's Witness and mother of a seven-month-old infant. She had lost two-thirds of her blood supply due to a ruptured ulcer. As a consequence of her faith, she refused to consent to a crucial blood transfusion. The hospital immediately sought an injunction in a district court, which was denied. The hospital then initiated an appeal to Judge J. Skelly Wright. Judge Wright, recognizing the immediacy of the situation, visited the patient at the hospital. Subsequently, Judge Wright granted the hospital a court order authorizing the transfusion.

In reaching his decision, Judge Wright examined the state's interest in protecting minor children and reasoned that the mother had a duty to society to care for her child, therefore, the state will not permit the

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87 Id. at 102 (Overton, J., dissenting). The dissent distinguished Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980), on the facts. Wons, 542 So. 2d at 102 (Overton, J., dissenting). Mr. Perlmutter, Justice Overton noted, was seventy-three years old and terminally ill, with a life expectancy of two years. Id. at 104 (Overton, J., dissenting). Justice Overton contended that the decision unreasonably extends the analysis contrary to the Perlmutter court's original intention. Id. at 103 (Overton, J., dissenting). Moreover, the Perlmutter court specifically limited the holding to the facts. Id. (Overton, J., dissenting).

88 Justice Overton took judicial notice of the fact that the two children would be denied an intangible right they had to be raised by two loving parents. Wons, 541 So.2d at 102 (Overton, J., dissenting).

89 Id.


91 Id. at 1008.

92 Id. at 1006.

93 Id.

94 Id. at 1002.

95 Id. at 1001.

96 Id.

97 Id. at 1006. While at the hospital, Judge Wright spoke to the patient's husband who reaffirmed his refusal to approve the blood transfusion. Id. He also attempted to communicate with Mrs. Jones. Id. at 1007. Her only statement was a barely audible, "[a]gainst my will." Id.

98 Id. at 1007.
mother to abandon the child. Judge Wright also addressed the state's interest in the prevention of suicide. He stated that Mrs. Jones had no desire to commit suicide, as was evidenced by the fact that she voluntarily admitted herself into the hospital. The opinion concluded by asserting the most "compelling reason" which mandated the unwanted transfusion. Judge Wright stressed that "a life hung in the balance ... [t]here was no time for research and reflection." Action was necessary to "preserve the status quo," so he chose "to act on the side of life."

In another important case, In re Estate of Brooks, the Illinois Supreme Court chose to uphold a patient's right to refuse an essential blood transfusion to treat a peptic ulcer. The patient was a wife and the mother of adult children. Mrs. Brooks and her husband signed a document releasing the hospital from all civil liability that might result from not administering the blood transfusion. Nevertheless, Mrs. Brooks' doctor and several attorneys for the state petitioned the probate court to appoint a guardian for Mrs. Brooks and to authorize the guardian to consent to the blood transfusion. Thereafter, the guardian was appointed and consented to the procedure. After the transfusion, Mrs. Brooks appealed the probate court decision.

In upholding Mrs. Brooks' right to refuse, the court reasoned that the patient's choice to refuse the blood transfusion posed no "overriding danger to society," and, therefore, precluded judicial intervention. To

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49 Id. at 1008. Judge Wright reasoned that since the state acting as parens patriae could prohibit a mother from abandoning her child, "so it should not allow this most ultimate of voluntary abandonments." Id. at 1008. Therefore, the state's interest in preserving the mother's life is indisputable. Id.
50 Id. at 1009.
51 Id. "The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die." Id. Simply stated, "Mrs. Jones wanted to live." Id. Potential death was incident to her religious beliefs, it was not sought nor desired. Id.
52 Id.
53 Id.
54 Id. at 1010.
55 32 Ill. 2d 361, 205 N.E.2d 435 (1965).
56 Id. at 363, 205 N.E.2d at 436.
57 Id. The court suggested that if minor children had been involved its decision may have been different since the state has an interest in seeing that the children do not become wards of the state. Id. at 366-70, 205 N.E.2d at 440-442.
58 Id. at 364, 205 N.E.2d at 437.
59 Id.
60 Id.
61 Id. at 363, 205 N.E.2d at 436.
62 Id. at 369-70, 205 N.E.2d at 442. The court reasoned:

[The] First Amendment ... protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where
decide otherwise, the court concluded, would violate the patient’s right to religious freedom.\textsuperscript{64}

The courts of New York have also wrestled with the complex issues that arise when an individual refuses a crucial blood transfusion on religious grounds.\textsuperscript{66} New York courts have recognized that a competent patient’s right to refuse medical treatment is not absolute and may be superseded by a compelling state interest.\textsuperscript{66} Recently, in \textit{Fosmire v. Nicoleau},\textsuperscript{67} the leading New York case in this area, the appellate division held that the supreme court had erroneously authorized a blood transfusion on a patient who had just given birth by cesarean section.\textsuperscript{68} The court stated that the patient’s constitutional right to due process was violated by the court’s failure to fully ascertain “the patient’s state of mind and wishes” before authorizing the transfusion which was clearly against the patient’s religious beliefs and personal convictions.\textsuperscript{69}

In anticipation of similar cases occurring in the future, the court stated that an individual’s right to refuse treatment was not unqualified.\textsuperscript{70}

\begin{itemize}
\item such exercise endangers, clearly and presently, the public health, welfare or morals. \textit{Id.} at 368, 205 N.E.2d at 441.
\item \textsuperscript{64} \textit{Id.} at 369-70, 205 N.E.2d at 442. The court stated that it may consider the individual’s beliefs “unwise, foolish or ridiculous,” but could not “decide what course of action is best for a particular individual . . . .” \textit{Id.}
\item \textsuperscript{66} \textit{Id.} In a later case, a federal court interpreting Illinois law stated that the true test to determine whether a state may impose restrictions on religious freedom is “an \textit{ad hoc} balancing test which examines the facts of each particular case, focusing upon the interests of the state and its citizens.” \textit{See} Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 130 (N.D. Ill. 1972). This seems to indicate that the “overriding present danger” test is no longer applicable in favor of the balancing analysis employed by a majority of the courts.
\item \textsuperscript{68} \textit{See} In \textit{re} Melideo, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (Sup. Ct. Suffolk Cty. 1976) (upholding non-pregnant, childless, competent adult’s decision to refuse blood transfusion based on religious principles); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 215, 267 N.Y.S.2d 450, 451 (Sup. Ct. N.Y. Cty. 1965) (court ordered a blood transfusion to mother of six against religious convictions); Erikson v. Dilgard, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (Sup. Ct. N.Y. Cty. 1962) (upholding adult male’s decision to refuse blood transfusion).
\item \textsuperscript{69} \textit{See supra} note 65 and accompanying text.
\item \textsuperscript{70} 144 A.D.2d 8, 536 N.Y.S.2d 492 (2d Dep’t 1989).
\item \textsuperscript{67} \textit{Id.} at 10-11, 536 N.Y.S.2d at 493.
\item \textsuperscript{68} \textit{See id.} at 12, 536 N.Y.S.2d at 494-95. Brookhaven Memorial Hospital applied for a court order authorizing the administration of a blood transfusion to Mrs. Nicoleau after she had refused such treatment. \textit{Id.} at 11, 536 N.Y.S.2d at 494. Without conducting a hearing or contacting the Nicoleau family or their representatives, the supreme court issued an ex parte order authorizing the hospital to administer the blood transfusion. \textit{Id.} The court reasoned that since the rights involved were so important, the court should not have taken any action until the patient or her legal representatives had an opportunity to be heard. \textit{Id.} at 12, 536 N.Y.S.2d at 494.
\item \textsuperscript{70} \textit{See id.} at 14, 536 N.Y.S.2d at 495-96. The court stated that even if the individual based her right to refuse the treatment upon her religious beliefs, state interests could still prevail.
\end{itemize}
The court identified the four basic state interests which, if compelling enough, could override an individual's right to self-determination. The opinion emphasized that in this particular situation non-blood treatment could have been utilized successfully to preserve the patient's right and that these avenues of treatment must be explored before considering blood transfusions. Even if non-blood treatment was not a viable option, however, the state's interest in preserving life would not be controlling by itself. The Fosmire court stressed that if the patient had not yet given birth and her unborn child was at risk by her choice to forego treatment, the state, as parens patriae, could mandate the treatment. The most difficult issue in the balancing process was the state's interest in protecting minor children. The court stressed that the most crucial factor to be considered was whether the surviving family members would be financially able to care for the child.

However, the court conceded that the best interests of the child could not be reduced to a "rigid rule to be followed blindly in every case in which there exists a surviving parent and extended family." Instead, courts must exercise wide discretion in recognition of the innumerable fact situations and act on behalf of the child. In any event, the court has the responsibility to make "the most extensive inquiry possible under the circumstances" in order to accurately balance a patient's wishes against the competing state interests.

**THE STATE'S INTEREST IN THE PRESERVATION OF LIFE**

The majority of commentators agree that the most significant state interest is the preservation of life. This interest can be separated into

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Id.

71 Id.

73 Id.

74 Id. The court pointed out that this case did not involve a pregnant woman whose refusal would jeopardize the life of her unborn baby, or a patient who refused to affirmatively consent to treatment but would allow treatment if court ordered. See id. at 15, 536 N.Y.S.2d at 496. Thus, the court seems to suggest that the state's interest in preserving life would prevail if any of these factors were present. See id.

76 Id.

77 Id. at 15-16, 536 N.Y.S.2d at 496-97.

78 Id. The court also stated that the surviving family must be willing to provide familial and emotional support for the child. Id. at 15, 536 N.Y.S.2d at 496.

79 Id. at 16, 536 N.Y.S.2d at 497.

80 Id. The court recognized the sensitivity involved in making determinations in this area; however, the court stated that it would appear the state interest in protecting minor children would be satisfied because there was a concerned and interested surviving parent who was financially capable of supporting the child. See id.

81 Id.

two distinct concepts—preserving the respect for sanctity of all life and preserving as inherently valuable the life of the individual person.\textsuperscript{81} Recently, the focus of the state’s interest has been on the quality of the patient’s life and the potential for complete recovery.\textsuperscript{82} It is widely recognized that the state’s interest in preserving life erodes and the privacy rights of the individual are enhanced when an increasing risk of bodily invasion exists with a minimal likelihood of recovery.\textsuperscript{83} Indeed, most of the refusal-of-treatment cases have involved highly invasive treatments, such as artificial respiration, dialysis or amputation.\textsuperscript{84} Therefore, there is


Law and society have formulated nearly uniform views on the high value of human life. See, e.g., In re Long Island Jewish-Hillside Medical Center v. Levitt, 73 Misc. 2d 395, 397, 342 N.Y.S.2d 356, 358 (Sup. Ct. Nassau Cty. 1973) (court appointed patient’s niece as guardian for purpose of giving consent to lifesaving operation); see also Note, Unauthorized Rendition of Lifesaving Medical Treatment, 53 CALIF. L. REV. 860, 862 (1965) [hereinafter Note, Unauthorized Rendition] (“the law’s traditional view of the sanctity of human life and the importance of the individual’s life to the welfare of society, deny the individual a right to, in effect, consent to his own death”); Note, Compulsory Medical Treatment and the Free Exercise of Religion, 42 IND. L. REV. 386, 400 (1967) [hereinafter Note, Compulsory Medical Treatment]. Society’s interest in the preservation of a single life can be characterized in either utilitarian or moral terms. Id. The utilitarian point of view emphasized “the effect of the individual’s death on others in society in terms of grief, shock and despair.” Id. The moral point of view would stress the “sacredness of human life and its spiritual value.” Id.

\textsuperscript{81} See Matthews, Suicidal Competence and the Patient’s Right to Refuse Lifesaving Treatment, 75 CALIF. L. REV. 707, 731 (1987) (discussing conflict between state’s interest in preserving patient’s life versus individual’s right to self-determination).


\textsuperscript{84} See Satz, 362 So. 2d at 161 (terminal patient requesting removal of artificial respirator); Comm’r of Correction v. Myers, 379 Mass. 255, 256, 399 N.E.2d 452, 453 (1979) (patient refusing to consent to hemodialysis treatments); In re Quackenbush, 156 N.J. Super. 282, 283, 383 A.2d 785, 786 (1978) (patient refusing to allow amputation of gangrenous legs). But see Bouvia, 179 Cal. App. 3d at 1137, 225 Cal. Rptr. at 300 (stating that right to refuse extends to all treatment); Barber v. Superior Court, 147 Cal. App. 3d 1006, 1016, 195 Cal.
an important distinction between prolonging life and preserving life.\textsuperscript{88} It is generally accepted that a blood transfusion is a non-invasive medical treatment.\textsuperscript{86} Additionally, in most instances, if the patient submits to the lifesaving transfusion, the medical prognosis is extremely favorable and the individual may return to a qualitatively rich life.\textsuperscript{87} This Note suggests that courts often fail to recognize and adequately consider the patient’s youth, intelligence, and potential for long life. It is therefore suggested that the state’s interest in preserving life is severely mitigated by allowing such patients to refuse crucial blood transfusions.

In the same context as the aforementioned argument, it can be asserted that the interest of the state lessens and the individual’s interest in religious freedom intensifies as intrusion on religious beliefs increases.\textsuperscript{88} Since a blood transfusion is considered a minimal bodily invasion, the burden placed on the patient cannot be considered a physical one.\textsuperscript{90} The treatment sought creates a spiritual burden by infringing on the individual’s religious beliefs.\textsuperscript{91} Clearly, it is not the court’s responsibility to determine the reasonableness of an individual’s beliefs, but a duty exists to carefully evaluate the gravamen of the religious objection, when balancing it against the state’s desire to preserve life.\textsuperscript{91} Accordingly, it has been suggested that before deciding the merits of such cases, the courts should hear testimony from an authority in the particular religion involved in

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Rptr. 484, 490 (1983) (no distinction between feeding tubes and other treatments, or between ordinary and extraordinary treatments).  
\textsuperscript{86} Quinlan, 70 N.J. at 41, 355 A.2d at 644 (blood transfusions considered minimal bodily invasions).  
\textsuperscript{87} See, e.g., Wons, 541 So. 2d at 104 (Overton, J., dissenting). “Here it was unrefuted that, following medical treatment, Wons could return to a normal life. . . .” Id. (Overton, J., dissenting).  
\textsuperscript{90} See Bratton, The Right to Die: A Constitutional One?, 41 JURIST 155, 170 (1981). The test is based on the same logic as right-to-die cases founded primarily on the constitutional right to privacy, however, it becomes necessary to modify the test when confronted with issues of religious freedom. Id.  
\textsuperscript{89} See supra note 86 and accompanying text.  
\textsuperscript{91} See, e.g., Wons, 541 So. 2d at 100 (Ehrlich, C.J., concurring). The cost in this case was described in spiritual terms. Id. (Ehrlich, C.J., concurring).  
\textsuperscript{88} See Note, Unauthorized Rendition, supra note 80, at 866 n.31; cf. Wons, 541 So. 2d at 100 (Ehrlich, C.J., concurring) (“[a] workable solution may be devised by a consideration of the religious interests affected by a judicial mandate”):
the litigation in order to determine the degree of the infringement.\textsuperscript{92}

The exact depth and nature of the infringement is an important consideration since most religions believe that sin only manifests itself in voluntary acts, and involuntary acts do not imperil the soul or preclude eternal salvation.\textsuperscript{88} Apparently, there are some Jehovah's Witnesses who believe that receiving a blood transfusion under any circumstances will deny them everlasting life, and others who believe they are absolved from fault if they are forced to submit.\textsuperscript{94} Clearly, the state has an affirmative obligation to investigate the patient's interpretation of his own faith, because in the event the patient's conscience could be clear by being forced to undergo the transfusion, the state's interest in preserving life becomes undeniably compelling.\textsuperscript{86}

\textsuperscript{92} See Comment, Recent Decisions, 40 Notre Dame Law. 126, 131 (1964) (advocating courts to seek advise of spiritual counselors of the afflicted at issue).
\textsuperscript{88} See id. The dutiful Jehovah's Witness is to do "everything possible within reason and right and without injury to another" to resist the court-ordered transfusion; however, he is not required to resist by physical violence. Letter from the Watchtower Bible and Tract Society of New York, Inc. to the Villanova Law Review (Oct. 6, 1964) (quoted in Recent Developments, 10 Vill. L. Rev. 140, 141 n.3 (1964)); see also Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (1964), cert. denied, 377 U.S. 978 (1965). Justice Wright pointed out that if "the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve ... the life she wanted without sacrifice of her religious beliefs." Id.

\textsuperscript{94} See Bratton, supra note 88, at 170 n.83; see also Georgetown College, 331 F.2d at 1007 (patient intimated that court could force transfusion without her resistance); United States v. George, 239 F. Supp. 752, 753 (D. Conn. 1965) (patient refused to accept blood transfusion but stated if court forced him his conscience would be clear); In re Osborne, 294 A.2d 372, 374 (D.C. 1972) (Jehovah's Witness refused blood transfusion based on belief that he would be deprived of everlasting life even if he involuntarily received transfusion); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985) (patient believed ingestion of whole blood would deny him both resurrection and eternal salvation, regardless of involuntary circumstances); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 216, 287 N.Y.S.2d 450, 451 (Sup. Ct. N.Y. Cty. 1965) (critically ill patient did not object to receiving transfusion, but also refused to consent).

\textsuperscript{86} See Comment, supra note 92, at 131.

[It is suggested that before deciding the merits of such cases, the court hear testimony from an authority on the particular religion involved in the litigation, and issue the writ only if the court is reasonably convinced that involuntary submission to medical treatment will not 'violate a cardinal religious tenet which endangers the soul's salvation."

Id. (footnote omitted); see also Fosmire v. Nicoleau, 144 A.D.2d 8, 12, 536 N.Y.S.2d 492, 495 (1989) (court should fully comprehend patient's wishes and beliefs before taking action). Indeed, courts do recognize the importance of ascertaining the breadth of the patient's belief. Id. at 15, 536 N.Y.S.2d at 496. The court must distinguish 'the situation in which a patient refuses to affirmatively consent to a certain medical treatment based on religious beliefs, but would accept such treatment if directed by court order.' Id. When this occurs the interest in the preservation of life "may well sustain the issuance of such an order." Id.
The State's Interest in the Protection of Innocent Third Parties

The state's interest in protecting third parties is based on the common law doctrine of parens patriae. It is the duty of the state to protect those persons who, because of infancy or incompetence, are legally incapable of caring for themselves. Some courts have held that the state's interest in preserving the life of the mother outweighs the constitutional rights of privacy and freedom of religion, regardless of whether there is a family to continue to care for the children. Moreover, the possible impact on these children subsequent to the death of a parent could be determinative of the outcome of the balancing process. This occurred in

** See supra note 32 and accompanying text.


The *parens patriae* doctrine also enables the government to protect the interests of mentally incompetent patients. *See* P. Riga, *supra* note 6, at 167. When a patient has been judged incompetent, the state may override the individual's constitutional rights and permit the courts to authorize lifesaving medical treatment. *See* Nathan & Miriam Barnett Memorial Hosp. Ass'n v. Young, 63 N.J. 578, 579, 311 A.2d 1, 2 (1972) (court appointed guardian to incompetent patient to authorize amputation); *In re* Schiller, 148 N.J. Super. 168, 177, 372 A.2d 360, 370 (1977) (court appointed guardian to an elderly disoriented patient to authorize amputation). *But see* Lane v. Candura, 6 Mass. App. Ct. 377, 382, 376 N.E.2d 1232, 1236 (1978) (refusal to submit to necessary operation is not presumption of incompetence); *In re* Nemser, 51 Misc. 2d 616, 625, 273 N.Y.S.2d 624, 632 (Sup. Ct. N.Y. Cty. 1966) (refusal to authorize amputation for elderly patient unable to comprehend the gravity of situation). *See generally* Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients*, 30 Rutgers L. Rev. 243, 246 (1977) (discussing legal complexities of allowing incompetent to die).

*See*, *e.g.*, *George*, 239 F. Supp. at 754 (father not permitted to refuse treatment because of four minor children); Application of Winthrop Univ. Hosp., 128 Misc. 2d 804, 805, 490 N.Y.S.2d 996, 997 (Sup. Ct. Nassau Cty. 1985) (patient has societal duty to care for infants); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 216, 267 N.Y.S.2d 450, 451 (N.Y. Sup. Ct. 1965) (blood transfusion authorized on mother with six children). Indeed, in some states, the most determinative factor in the balancing analysis is the existence of minor children or other innocent third parties. *See* *Mercy Hospital*, supra note 6, at 522.

*See* *Mercy Hospital*, supra note 6, at 523. The court is not only concerned about the child's physical welfare, "but also for the quality of the child's life and the upbringing that the child would have if the parent were to die." *Id.* In fact, several cases allowing refusal of treatment qualify the decision by stressing, in dicta, that the outcome would be different if minor children were involved. *See*, *e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977) (existence of minor children would be important factor which would have critical effect on balancing process); *In re* Me-
Application of President and Directors of Georgetown College, Inc., where the court held that a parent's "right to die" by refusing to consent to lifesaving medical treatment would not be recognized when minor children are dependent on the adult. Clarifying the Georgetown decision, United States v. George held that the parent's right would not be recognized even though he or she was fully competent to refuse to consent to the medical treatment deemed necessary. The Georgetown court reasoned that the state, as parens patriae, should not allow a parent to abandon a child. By refusing lifesaving treatment the court stated that a mother would be engaging in the "most ultimate [act] of voluntary abandonment." Since the state can generally act to safeguard a child's welfare, it should be able to prevent this "ultimate abandonment" of a

Although the Wons court repeatedly stated the children would not suffer financial harm, it acknowledged the emotional harm which would result from the loss of their mother. See Wons, 500 So. 2d at 688. Clearly, the state has an interest in "protecting third parties, particularly minor children, from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse lifesaving or life-prolonging treatment." Saikewicz, 373 Mass. at 742, 370 N.E.2d at 426.

See generally Black's Law Dictionary 1003 (5th ed. 1979) ("[p]arens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people. . . .") (citation omitted).
child.\textsuperscript{107} While the use of the \textit{parens patriae} doctrine to justify this intervention has been questioned,\textsuperscript{108} the state still clearly maintains an interest in protecting minor children according to the balancing test.\textsuperscript{109} It is submitted that the weight given this important state interest should be, largely or in part, based upon the degree of harm to be inflicted on the minor child. For example, it is submitted that the \textit{Wons} court failed to distinguish this degree and oversimplified the matter by stating that in all situations the nurturing and support of a child by two parents is not sufficient to override fundamental constitutional rights. Alternatively, \textit{Fosmire} gave much more discretion to courts by allowing a case-by-case analysis.\textsuperscript{110}

The harm to be inflicted on a child when the child’s parent refuses lifesaving treatment is two-fold. First, there is an economic harm and second, there is an emotional harm.\textsuperscript{111} The \textit{Wons} and \textit{Fosmire} courts found that there would be no economic harm since the fathers were still living and would provide for the children.\textsuperscript{112} Going one step further, the \textit{Wons} court decided that the state's interest in the emotional well-being of a minor child would \textit{never} override a competent patient’s right to refuse treatment.\textsuperscript{113} Contrary to this reasoning, it has been asserted that the physically leaving the child with an intent to sever the parental relation entirely, so far as it is possible to do so. \textit{Id.}

\textsuperscript{107} See Georgetown, 331 F.2d at 1008. The court likened the refusing of lifesaving treatment to the foregoing of parental duties. \textit{Id.}

\textsuperscript{108} See Note, \textit{Compulsory Medical Treatment: The State's Interest Reevaluated}, 51 MINN. L. Rv. 293, 298-01 (1966). While the state's interest of having the parent care for his or her child is sufficient to order lifesaving medical treatment, the application of the \textit{parens patriae} doctrine was incorrect. \textit{Id.} at 301. “The purpose of \textit{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.” \textit{Id.} The \textit{parens patriae} doctrine is generally used in situations where the child is in physical danger. \textit{See} State v. Perricone, 37 N.J. 463, 469, 181 A.2d 751, 759 (court appointed guardian to accept blood transfusion for child whose parents refused based on religious grounds), \textit{cert. denied}, 371 U.S. 890 (1962); Mitchell v. Davis, 205 S.W.2d 812, 815 (Tex. Civ. App. 1947) (state's interest in welfare of its citizens allows it to take custody of children where parents abandon them or parents prove otherwise unsuitable).

\textsuperscript{109} See \textit{Satz} v. \textit{Perlmutter}, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), \textit{aff'd}, 379 So. 2d 359 (1980). The test only mentions the state's interest in protection of third parties. \textit{Id.} It seems to suggest that since the test never mentions the state's power as \textit{parens patriae}, there is no need for courts to discuss the doctrine.

\textsuperscript{110} See supra notes 75-78 and accompanying text.

\textsuperscript{111} See \textit{Wons}, 541 So. 2d at 97; Superintendent of Belchertown State School v. \textit{Saikewicz}, 373 Mass. 728, 732, 370 N.E.2d 417, 426 (1977). \textit{See generally} Cantor, supra note 97, at 251 (child benefits emotionally by continued love and reassurance from parent and economically by continued financial support).


\textsuperscript{113} See \textit{Wons}, 541 So. 2d at 97. “While we agree that the nurturing and support by two parents is important in the development of any child, it is not sufficient to override funda-
state does have a legitimate interest in a child's emotional well-being which can be sustained on two grounds. Firstly, there is an unselfish concern to provide each child with a healthful environment. Secondly, there is a concern in preserving this environment so that children will develop into rational adults and thus promote the political and social welfare of society. In reasoning contrary to the majority of courts, it is submitted that this interest, when combined with the other state interests, might override an individual's right to refuse lifesaving treatment depending upon the degree of harm, emotional as well as economic, to be sustained by the child.

**DISCRIMINATORY EFFECT OF THE BALANCING ANALYSIS**

Courts have stressed that minor children would not be abandoned if the surviving family was able to support them. It has been suggested by some commentators that adherence to such reasoning would result in discrimination between men and women. Although the percentage has decreased, the primary provider for most families remains the male head of household. It is submitted that decisions such as the one reached in *Wons* set a precedent which would cause a father to be restricted from refusing medical treatment because his surviving spouse would be unable to support the children. On the other hand, a mother who renders no financial support would be permitted to refuse treatment because the children would have the benefit of the father's financial support in the event of the mother's demise. Similarly, this Note suggests that compli-
ance with such reasoning would discriminate between the wealthy and the impoverished.\(^{121}\) It is submitted that an individual's right to refuse treatment will increase proportionally with his wealth, since his child will less likely become a ward of the state. Obviously, this results in unequal protection of the law, which clearly violates public policy.\(^{122}\)

**THE BALANCING PROCESS**

When faced with the question of when an individual can refuse lifesaving treatment, courts must determine which constitutional rights are implicated, and which individual rights specifically warrant protection.\(^{123}\) Strangely, the state concerns cited on the other side of the equation are sometimes analogized to the interests either of suppression\(^{124}\) or censorship.\(^{125}\) Often, it seems, courts make this analogy, and subsequently the interests of society receive less weight.\(^{126}\) When such a conflict arises there should be reasonable accommodations, whenever possible, to pre-

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\(^{121}\) See supra note 119 and accompanying text.

\(^{122}\) See Note, Unauthorized Rendition, supra note 80, at 861. It has been asserted that if treatment can be ordered for some persons because of their particular circumstances, for example, responsibility to their children, it must be ordered for all. Id.

\(^{123}\) See supra notes 1-10 and accompanying text.

\(^{124}\) See supra notes 1-3 and accompanying text; see also Note, The Right to Die: A Comment on the Application of the President and Directors of Georgetown College, 9 Utah L. Rev. 161, 163-68 (1964). The right to transfer belief into action is subject to reasonable regulation to insures public health, safety, and morals. Id. Thus, it has been held that despite individual religious beliefs to the contrary, the state can mandate certain requirements. See, e.g., Bunn v. North Carolina, 336 U.S. 942, 946 (1949) (prohibiting handling of poisonous snakes); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (requiring medical treatment of children); Zucht v. King, 260 U.S. 174, 176 (1922) (requiring all persons to be vaccinated); Kaul v. City of Chehalis, 45 Wash. 2d 616, 621, 277 P.2d 352, 355 (1954) (adding fluoride to public drinking water).

\(^{125}\) The "clear and present danger" test evolved in cases involving freedom of speech under the first amendment. See, e.g., Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). It is submitted that the test used to censor a person's speech should be more strict than any test employed in a religious context. See Note, Court Authorization of Blood Transfusion to Patient Whose Religious Beliefs Prohibits the Acceptance of Blood Violates His Freedom of Religion—In re Estate of Brooks, 44 Tex. L. Rev. 190, 194-95 (1965); see also Note, Compulsory Medical Treatment, supra note 80, at 403-04. When balancing individual religious interests, "[t]he problem is seen as a battle between the existence of religious freedom and the intermeddling of society." Id.

\(^{126}\) See Note, Compulsory Medical Treatment, supra note 80, at 404. "There is a general failure to balance the conflicting interests involved, and as a result the interests of society are, as a matter of course, accorded a lesser weight." Id.
serve the essentials of both sides. Accordingly, courts have a duty of giving proper weight to “considerations of social advantage.” When they fail to accomplish this, judgments consequently lack expression and guidance. It is submitted that most decisions in this area fail to satisfy this duty of allocating proper importance to social interests but rather dogmatically uphold a person’s right to refuse lifesaving treatment.

CONCLUSION

Obviously, the question of whether an individual may refuse a blood transfusion is legally and morally complex. This is especially true where the individual asserting the right is young, and death would be viewed as particularly tragic and wasteful. This is precisely why it is essential for courts to inquire extensively into the particular situation and not oversimplify the balancing process. It is suggested that the majority of courts have ignored factors that could be determinative in the outcome of whether an individual should live or die. Therefore, many courts have failed to afford protection to minor children and, most importantly, have seriously denigrated the sanctity of human life.

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197 See Antieu, The Limitation of Religious Liberty, 18 Fordham L. Rev. 221, 224 (1949). Courts should determine when there can be a reasonable accommodation between governmental interests and constitutional rights. Id.
198 See Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897). “I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.” Id.
199 Id. When judges fail to take into consideration society’s interests the result is “simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.” Id.