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James F. Hoover

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NOTES

AN ADULT'S RIGHT TO RESIST BLOOD TRANSFUSIONS: A VIEW THROUGH JOHN F. KENNEDY MEMORIAL HOSPITAL V. HESTON

I. Background

May an adult Jehovah's Witness be compelled against his religious beliefs to submit to a blood transfusion considered medically necessary to save his life? The case decisions involving administration of blood to Jehovah's Witnesses have struggled to resolve complex questions involving legal, medical and religious issues into a simple answer.

Jehovah's Witnesses do not object to receiving medical aid or undergoing surgery. They take full advantage of the technology offered by the medical sciences with the single exception of blood transfusions which they decline for religious reasons.¹ A fundamental principle adhered to by the Jehovah's Witnesses is that the receiving of a blood transfusion is a serious violation of the law of God for which transgressors will be called upon by God to account for and be punished for their sins.²

A conflict of interests ultimately resulting in litigation arises when members of the medical profession deem it necessary to transfuse blood to a Jehovah's Witness for the purpose of saving his life, and the Jehovah's Witness refuses to consent. At this point, doctors, hospitals, and even spouses have sought court orders authorizing the administration of a blood transfusion.

Parents of children needing blood transfusions have refused to give the necessary consent. The courts have consistently authorized the transfusions³ based on the grounds that the parents, despite their religious objections, have the duty, evolving from the "law of nature, as well as common law"⁴ to provide adequate medical treatment for the well-being of their child. The Supreme Court observed in *Prince v. Massachusetts*⁵ that:

[t]he right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death. . . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.⁶

1 The Jehovah's Witnesses believe that a blood transfusion is "eating blood" which is prohibited by the Bible in Leviticus 17:10, Acts 15:28-29 and other biblical quotations. In re Estate of Brooks 32 Ill.2d 361, 362-63, 205 N.E.2d 435, 437 (1965). For an expanded discussion of their religious beliefs concerning blood transfusions see Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212, 213-14 (1964); How, *Religion, Medicine and Law* 3 CAN. B. J. 365, 367-70 (1960).

2 In re Estate of Brooks, 2 Ill.2d 361, 362; 205 N.E.2d 435, 436-37 (1965).

3 *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952), cert. denied, 344 U.S. 824 (1952); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964). Additional cases are listed in Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386, 391 n.31 (1967).

4 *People v. Pierson*, 176 N.Y. 201, 211, 68 N.E. 243, 246 (1903).

5 321 U.S. 158 (1944).

6 *Id.* 166-170.

If medical science requires a blood transfusion to preserve the life of a child, the child may not be deprived of his right to live because of his parents' religious objections.⁷ The state has the duty to ensure that the helpless child's right to survive is protected until the child is able to care for himself.⁸

The court decisions concerning orders sought to administer blood to adult Jehovah's Witnesses have reached varied conclusions. The outcome of a decision has depended upon the particular factual circumstances of the case, each court giving different weight to different considerations.⁹ These cases fall into two general categories: those involving parents of minor children, and those which do not.

Every court which has faced a parent of a minor refusing to accept a life-saving transfusion has ordered the transfusion despite the parents' objections.

Judge Skelly Wright in *Application of President and Directors of Georgetown Co.*¹⁰ granted an emergency writ authorizing the administration of blood to a Jehovah's Witness to preserve her *status quo* pending a hearing on the issues of the controversy. In granting the emergency writ Judge Wright considered, *inter alia*, the question of the hospital's potential liability¹¹ and the welfare of a seven-month-old child who would be abandoned by his mother if she died—the "most ultimate of voluntary abandonment."¹²

The legal reasoning in *Georgetown* convinced a New York judge, approached by a husband seeking a court order authorizing a blood transfusion for his wife, a mother of six, to sign the order in *Powell v. Columbian Presbyterian Medical Center*.¹³ In *United States v. George*,¹⁴ a federal district court also relied upon the rationale of *Georgetown* in ordering blood to be administered to a father of four children. Emphasis was given by the federal court to the doctor's interest in transfusing the blood.¹⁵

The Supreme Court of New Jersey sustained an order compelling a blood transfusion in *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*,¹⁶ where a woman, 32 weeks pregnant, had refused to consent. The court ordered the transfusion "because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them. . . ."¹⁷

On the other hand, in the decisions not involving parents of minors, the courts have been reluctant to order a transfusion. A New York court in *Matter of Erickson v. Dilgard*¹⁸ declined "to make any order directing that blood be

7 *Battaglia v. Battaglia*, 9 Misc. 2d 1067, 172 N.Y.S.2d 361 (1958).

8 *Id.*; *State v. Perricone*, 37 N.J. 463, 473-74, 181 A.2d 751, 757-58, *cert. denied*, 371 U.S. 890 (1962).

9 For example, *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965) gave great consideration to the interest of the doctor in giving the transfusion, an interest not considered at all in *In re Estate of Brooks* 32 Ill.2d 361, 205 N.E.2d 435 (1965).

10 441 F.2d 1000 (D.C. Cir. 1964), *rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964).

11 *Id.* at 1009.

12 *Id.* at 1008.

13 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965).

14 239 F. Supp. 752, 753-54 (D. Conn. 1965).

15 *Id.* at 754.

16 42 N.J. 421, 201 A.2d 537 (1964) *cert. denied*, 377 U.S. 985 (1964).

17 *Id.* at 423, 201 A.2d at 538.

18 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962).

administered¹⁹ to an adult. The Illinois Supreme Court, in *In re Estate of Brooks*,²⁰ held that to force an adult Jehovah's Witness to accept a blood transfusion against his religious objections was an interference with his basic constitutional rights.²¹

The most recent court to be approached with an application for an order to force an adult Jehovah's Witness without children to receive blood was the Supreme Court of New Jersey. The New Jersey court in *John F. Kennedy Memorial Hospital v. Heston*²² held, contrary to *Erickson* and *Brooks*, that an adult may be compelled to submit to a blood transfusion necessary to save his life notwithstanding his religious tenets which forbid such transfusions.

Heston passed over *Erickson* as an exception to case law²³ and specifically rejected the result reached in *Brooks* because the Illinois court had failed to expressly consider the state's interest in sustaining life and the interests of the medical profession in caring for its patients.²⁴ The opinion of the Supreme Court of New Jersey must be critically analyzed to determine whether or not it properly resolved the problems facing the judiciary in deciding whether or not to compel an adult Jehovah's Witness, without dependent children, to receive a blood transfusion.

II. The Facts of *Heston*

Defendant, Delores Heston, age 22 and unmarried, was admitted to plaintiff hospital having been seriously injured in an automobile accident. The doctors' prognosis was that Miss Heston would expire unless an operation was performed, necessitating the administration of whole blood. Miss Heston and her mother, defendant Jane Heston, were both alerted to the situation, but neither would consent to the blood transfusion because of their religious beliefs as Jehovah's Witnesses. Jane Heston on her daughter's behalf executed a release for the hospital and medical staff from any liability arising from the defendants' desire not to have any blood transfused.

Subsequently, plaintiff applied to the superior court law division for an order appointing a temporary guardian to Miss Heston with authority to consent to the blood transfusion needed to preserve her life. The order was granted and blood was administered during surgery saving Miss Heston's life.

Thereafter, defendants moved to vacate the order contending, *inter alia*, that Miss Heston's religious freedom as guaranteed by the first amendment had been violated. The trial court declined to vacate and on appeal the Supreme Court of New Jersey affirmed²⁵ and held that an adult may be compelled to submit to

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

20 32 Ill.2d 361, 205 N.E.2d 435 (1965).

21 *Id.* at 374, 205 N.E.2d at 443.

22 58 N.J. 576, 279 A.2d 670 (1971).

23 *Id.* at 583, 279 A.2d at 673.

24 *Id.* at 584, 279 A.2d at 674.

25 The controversy became moot at the giving of the transfusion. The Supreme Court of New Jersey heard the appeal because the public importance of the issue warranted a decision. *Id.* at 579, 279 A.2d at 671; *State v. Perricone*, 37 N.J. 463, 469, 181 A.2d 751, 755, *cert. denied*, 371 U.S. 890 (1962); *In re Estate of Brooks*, 32 Ill.2d 361, 364, 205 N.E.2d 435, 437-38 (1965).

a blood transfusion necessary to save his life notwithstanding his religious tenets which forbid such a transfusion.²⁶

III. The Suicide Analogy to Resisting Blood Transfusions

Chief Justice Weintraub, speaking for the New Jersey court, stated that there was no constitutional right to choose to die as evidenced by the fact that attempted suicide was a crime at common law²⁷ and had remained so under New Jersey law.²⁸ However, contrary to the law of New Jersey, attempted suicide in most jurisdictions is no longer a crime. Only four states²⁹ presently prohibit it and England, where the crime originated, has abolished it.³⁰ Further, the use of the crime of attempted suicide as a basis for compelling blood transfusions to Jehovah's Witnesses has been challenged on two grounds, first that an act of misfeasance should be distinguished from the nonfeasance of inaction³¹ and, second, that the requisite intent to attempt suicide is lacking.³²

The concepts of misfeasance and nonfeasance are primarily used in the areas of tort³³ and criminal³⁴ law. No liability is imposed for nonfeasance unless there was a duty to take affirmative action. The ensuing argument is that refusal of a blood transfusion is not attempted suicide since the moral law does not impose an affirmative duty to use technical medical surgery to prolong one's existence.³⁵

Additional resistance to the suicide analogy has been made through the proposition that a Jehovah's Witness, in passively allowing death by refusing the transfusion, lacks the intent to commit suicide.³⁶ Death is not the objective of the refusal but an unwanted consequence.³⁷ Any intention to seek death would be negated by the fact that the patient voluntarily came to the hospital seeking aid.

A reference by the defendants in *Heston* to the difference between actively seeking death and passively submitting to it³⁸ was disregarded by the court as

26 58 N.J. 576, 279 A.2d 670 (1971).

27 *State v. Carney*, 69 N.J.L. 478, 480, 55 A. 44, 45 (Sup. Ct. 1903).

28 "Any person who attempts to commit suicide is a disorderly person." N.J. STAT. ANN. § 2A: 170-25.6 (1937). The validity of this statute was attacked in *Penney v. Municipal Court of Cherry Hill*, 312 F. Supp. 938 (D. N.J. 1970) (action was dismissed for lack of jurisdiction).

29 N.J. STAT. ANN. § 29:170-25.6 (1937); 21 OKLA. STAT. ANN. tit. 21 § 812 (1958); S.D. CODE 22-16-38 (1967); WASH. REV. CODE § 9.80.020 (1961).

30 English Suicide Act. 9 and 10 Eliz. 2, c. 60 (1961).

31 Ford, *Refusal of Blood Transfusion by Jehovah's Witnesses*, 10 CATH. LAW. 212, 225 (1964); see 9 UTAH L. REV. 161, 166-67 (1964); *contra*, Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860, 869-71 (1965).

32 Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293, 303-04 (1966).

33 W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 28, 34 (3d ed. 1964).

34 See *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907).

35 Ford, *supra* note 31, at 225; Cunningham, *Indicated Blood Transfusions and the Adult Jehovah's Witness: Trial Judge's Dilemma*, 2 VALPARAISO UNIV. L. REV. 55, 80, saying:

It would be no consolation to know that science and medicine were advanced at the cost of deprivation of so precious a thing as one's religious liberty. And it would be sad in the extreme if a trial judge failed to protect a person's religious liberty because he mistakenly believed that the threatened refusal was absolutely immoral.

36 *Supra* note 32.

37 Application of President and Directors of Georgetown Col., 331 F.2d 1000, 1009 (D.C. Cir. 1964), *rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964).

38 Brief for Defendant at 8-9, *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) [hereinafter cited as brief for Defendant].

being "merely verbal," saying "[I]f the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other."³⁹

The conclusion drawn by the court in *Heston* is in line with *Georgetown* in which Judge Wright's opinion suggested that a person may not be allowed to refuse a lifesaving transfusion in a jurisdiction where attempted suicide was illegal.⁴⁰ He felt that "[o]nly quibbles about the distinction between misfeasance and non-feasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this . . . conclusion."⁴¹

A position contrary to that taken in *Heston* and *Georgetown* was expressed in *Erickson*. Here the New York court did not accept the argument "that as a practical matter the patient's decision not to accept blood is just about the taking of his own life."⁴² The New York court also disagreed with the argument "that it is in violation of the Penal Law to take one's own life."⁴³ If attempted suicide is not unlawful, *Georgetown* maintained that "the refusal of necessary medical aid . . . whether equal to or less than attempted suicide, must be conceded to be lawful."⁴⁴

Even assuming that refusal of a blood transfusion is tantamount to attempted suicide, the right of a Jehovah's Witness to choose death over a transfusion may nevertheless be maintained through proper consideration of the three classifications of suicide:⁴⁵ justifiable, excusable, and culpable, the first two classes being clearly defensible. A father losing his life by dashing in front of a train to save his child commits justifiable suicide. Yet, this act of self-killing would not be prosecuted under a law against suicide for it doesn't fall into the traditional category of culpable suicide. This is true even though the father took affirmative action when he knew death was certain to follow. Quite possibly society not only would justify his death but also praise him for his heroic deed. The question is whether or not a Jehovah's Witness may justifiably save his spiritual being.

An eloquent summary of the difficulty in applying the suicide analogy was given by Judge Wright in *Georgetown* when he stated:

The Gordian knot of this suicide question may be cut by the single fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously commanded goal, but an unwanted side effect of a religious scruple . . . Mrs. Jones wanted to live.⁴⁶

IV. The Limitations on Religious Freedom

The New Jersey court went on to enunciate that the first amendment's free

³⁹ 58 N.J. at 581-82, 279 A.2d at 673.

⁴⁰ 331 F.2d at 1008.

⁴¹ *Id.* at 1009; but see *In re Estate of Brooks*, 32 Ill.2d 361, 205 N.E.2d 435 (1965), in which affirmative action is distinguished from passive "action." *Id.* at 368, 373, 205 N.E.2d at 439, 442.

⁴² 44 Misc. 2d at 28, 252 N.Y.S.2d at 706.

⁴³ *Id.*

⁴⁴ 331 F.2d at 1008.

⁴⁵ R. PERKINS, *CRIMINAL LAW* 82 (2d ed. 1969). Justifiable suicide is a heroic act of self-sacrifice. Excusable suicide is an accidental self-killing.

⁴⁶ 331 F.2d at 1009.

exercise of religion clause did not establish a constitutional right to refuse a blood transfusion.⁴⁷ In *Cantwell v. Connecticut*⁴⁸ the Supreme Court held, per Justice Roberts, that the first amendment right of the free exercise of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things the second cannot be. Conduct remains subject to regulation for protection of society."⁴⁹ Thus, while the state "cannot interfere with mere religious belief and opinions [it] may with practices."⁵⁰ To hold otherwise would place religious beliefs in a position superior to the state's sovereign authority, making each citizen an independent lawmaker.⁵¹ It would permit under the sanction of individual liberty any religious practice, however immoral or dangerous to others, if based on sincere religious beliefs.⁵² Though it is readily seen that religion may not be used as a legal instrumentality for justifying unreasonable infringements on public interests, it is not clearly delineated as to when the government may intervene.

The Supreme Court in *Reynolds v. United States*⁵³ relied on Thomas Jefferson's Act for the Establishment of Religious Freedom in Virginia⁵⁴ in developing a standard defining the extent of religious freedom. The Court ruled that the government should only interfere "when [religious] principles break out into overt acts against peace and good order."⁵⁵ The Court clarified this guideline in declaring that the state could only "reach actions which were in violation of *social duties* or subversive of good order." (Emphasis added.)⁵⁶

This "peace and good order" test still prevails under various forms as the legal justification for limiting external manifestation of religious beliefs. Variant examples have been: "paramount necessity" to protect the community in self-defense;⁵⁷ "paramount societal interest";⁵⁸ "[o]nly the gravest abuses, endangering paramount interests";⁵⁹ "clear and present danger,"⁶⁰ and, "compelling state interest."⁶¹ These phrases reiterate the value that *Reynolds* placed on the free exercise of religion.

47 58 N.J. at 580, 279 A.2d at 672.

48 310 U.S. 296 (1940).

49 *Id.* at 303.

50 *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

51 *Id.* at 167.

52 Ford, *supra* note 31, at 224.

53 98 U.S. 145 (1878).

54 The court quoted at length from Thomas Jefferson's preamble to the Act for the Establishment of Religious Freedom in Virginia:

[T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles or supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, "it is declared," that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. In these two sentences is found the true distinction between what properly belong to the church and what to the State. *Id.* at 163.

55 *Id.*

56 *Id.* at 164.

57 *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

58 *McBride v. McCorkle*, 44 N.J. Super. 468, 479, 130 A.2d 881, 886 (1957).

59 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

60 *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *In re Estate of Brooks*, 32 Ill.2d 361, 373, 205 N.E.2d 435, 442 (1965).

61 *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Winters v. Miller*, 306 F. Supp. 1158, 1169 (E.D.N.Y. 1969); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 584, 279 A.2d 670, 674 (1971).

The Supreme Court of New Jersey in its decision thought "compelling state interest" to be the appropriate test while specifically rejecting the "clear and present danger" test utilized in *Brooks*.⁶² This latter standard has been criticized as being a substitute for the analysis and balancing of interests required to reach a rational and intelligent decision.⁶³ The New Jersey court, however, conceded that it couldn't be said with confidence that *Brooks*, which allowed an adult Jehovah's Witness to refuse a lifesaving blood transfusion, would have had a different outcome using the "compelling state interest" criterion, as the Illinois court had not expressly considered what the New Jersey court felt to be "compelling state interests," namely, the state's interest in sustaining life and the interests of the hospital and medical personnel under the circumstances.⁶⁴ "Compelling state interest," could be more properly called "compelling public interest," as it was in a New York federal court decision,⁶⁵ correctly putting the emphasis on the adjective "public" to hopefully eliminate the possibility of the state being arbitrary and capricious in determining the essential nature of a "compelling state interest."

Whatever "test" is applied the premise is that "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."⁶⁶ The justification for state interference with religious practice is predicated on the urgent consideration of public welfare—the protection and promotion of the health, safety and morals of its citizens.⁶⁷ The Supreme Court has asserted that "liberty itself, the greatest of all rights . . . is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others."⁶⁸ A Jehovah's Witness then is free to practice his religious tenets as long as he does not interfere with or deny equally important rights of others.

In balancing the rights of society, as enforced by the state, against the individual's freedom to exercise religious beliefs, the courts have upheld statutes against polygamy,⁶⁹ snake handling,⁷⁰ and enforced compulsory vaccinations,⁷¹ fluoridation of water,⁷² and the wearing of motorcycle helmets.⁷³ The rationale of

62 58 N.J. 576, 584, 279 A.2d 670, 674 (1971).

63 44 Tex. L. Rev. 190 (1965).

64 58 N.J. at 584, 279 A.2d at 674.

65 *Winters v. Miller*, 306 F. Supp. 1158 (E.D.N.Y. 1969).

[A] limitation on religious practices is proper when there is a compelling public interest which conflicts with the individual's private religious interest. In such circumstances the government may protect and promote the general health, safety and welfare of its citizens. . . . *Id.* at 1169.

66 *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

67 *Id.*; *In re Estate of Brooks*, 32 Ill.2d 361, 372; 205 N.E.2d 435, 441-42 (1965); *State v. Betts*, 21 Ohio Misc. 175, 180-81; 252 N.E.2d 866, 870 (1969).

68 *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905).

69 *Reynolds v. United States*, 98 U.S. 145 (1878).

70 *Hill v. State*, 38 Ala. App. 623, 88 So. 2d 880 (Ct. App. 1956); *Hardin v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948); *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942); *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949), *appeal dismissed sub nom.*, *Bunn v. North Carolina*, 336 U.S. 942 (1949). The snake handling cases concerned religious rituals involving the handling of poisonous snakes "in such manner as to endanger the public health, safety and welfare." *Id.* at 734, 51 S.E.2d 179.

71 *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Mountain Lakes Bd. of Education v. Maas*, 56 N.J. Super. 245, 152 A.2d 394 (App. Div. 1959), *aff'd*, 31 N.J. 537, 158 A.2d 330 (1960), *cert. denied*, 363 U.S. 843 (1960).

72 *Baer v. City of Bend*, 206 Ore. 221, 292 P.2d 134 (1956).

73 *Bogue v. Faircloth*, 316 F. Supp. 486 (S.D. Fla. 1970); *State v. Anderson*, 275 N.C.

these decisions has been that the police power of the state was properly imposed in light of public health, welfare or morals. The Supreme Court of Illinois made the analysis in *Brooks* that "[t]hose cases which have sustained governmental action as against the challenge that it violated the religious guarantees of the First Amendment have found the proscribed practice to be immediately deleterious to some phase of public welfare, health or morality."⁷⁴

The refusal of a blood transfusion, though necessary to save an individual's life, generally does not constitute an immediate and direct threat to the safety, well-being or health of others.⁷⁵ Nevertheless, the Supreme Court of New Jersey, seemingly going beyond the public defense concept in finding that the state had a "compelling interest" in sustaining life itself, authorized force directed at protection of an individual from his own inaction.

The prevailing theory prior to *Heston* was that intervention of religious practice was warranted only to protect society. Illustrative are the vaccination cases⁷⁶ which have compelled medical treatment against communicable disease. If the health of society becomes endangered through the indifference of an individual to his own health, the state may intervene. The objective is protection of society not the individual. Congress has specifically decided that an individual properly quarantined from the public may not be compelled to be treated for communicable disease.⁷⁷ Whether a religiously motivated refusal of a necessary blood transfusion is a constitutionally protected right will turn on whether there is a valid public interest in saving the individual's life.

The state's "compelling interest" in an individual's life has been the subject matter of court decisions involving statutes requiring motorcycle riders to wear helmets. The statutes have been held constitutional on the grounds that they bear a reasonable and substantial relationship to public safety, health and welfare.⁷⁸ Two New Jersey cases have dealt with such a statute. A defendant's argument that the purpose of the legislation was to protect the individual motorcyclist and not the general public was rejected in *State v. Krammes*⁷⁹ where it was held that the statute bore a "real and substantial relationship to highway safety"⁸⁰ in general. This decision reaffirmed *State v. Mele*⁸¹ in which the New Jersey court reasoned that the statute was clearly distinguishable from a hypothetical statute requiring automobile drivers to wear seat belts, a statute which would be "clearly . . . directed only at the individual and not at the general public."⁸²

168, 166 S.E.2d 49 (1969); *State v. Odegaard*, 165 N.W.2d 677 (N.D. 1969); *State v. Krammes*, 105 N.J. Super. 345, 252 A.2d 223 (App. Div. 1969), *cert. denied*, 54 N.J. 257, 253 A.2d 800 (1969); *State v. Mele*, 103 N.J. Super. 353, 247 A.2d 176 (Hudson County Ct. 1968).

74 32 Ill.2d at 372, 205 N.E.2d at 441-42.

75 The state under the doctrine of *parens patriae* may order blood to be administered to a child over the objections of the parent, *supra* note 3, or to the parents of a child. Application of President and Directors of Georgetown Co., 331 F.2d 1000, 1008 (D.C. Cir. 1964); *see Winters v. Miller*, 306 F. Supp. 1158, 1167 (E.D.N.Y. 1969).

76 Cases cited note 71 *supra*.

77 D.C. CODE ANN § 6-119i (1939).

78 Cases cited note 73 *supra*.

79 105 N.J. Super. 345, 252 A.2d 223, (App. Div. 1969), *cert. denied*, 54 N.J. 257, 254 A.2d 800 (1969).

80 *Id.*

81 103 N.J. Super. 353, 247 A.2d 176 (Hudson County Ct. 1968).

82 *Id.* at 355-56, 247 A.2d at 178.

Krammes and *Mele* would appear to adhere to the proposition that there must be an interference with the general public welfare to justify state intervention with an individual's rights.

A North Dakota Supreme Court decision, *State v. Odegaard*⁸³ upheld a helmet statute because the helmet protected not only the rider but also the welfare of the public.⁸⁴ In its dictum the court stated that the statute might be constitutional even if the helmet protected only the rider, but a legitimate state interest was in fact shown by the court—the preventing of persons from becoming public charges after the result of brain damage.⁸⁵

Brooks mentioned that the state confronted with a dying parent, a situation such as existed in *Georgetown*, might have an overriding interest in the welfare of a parent in preventing children from becoming wards of the state.⁸⁶ The focus is on the children, a valid state interest, not the adult.

On the other hand, the rationale of the public charges argument has been refuted on the basis that it would allow the state to regulate every aspect of an individual's life for his protection, causing all limitations on police power of the state to disappear.⁸⁷

The state's interest in preventing public charges did not exist under the facts of *Heston* as Miss Heston had no children to abandon upon her death.

The preservation of human life has been called one of society's most important interests, deserving protection of the law against those who would refuse medical treatment for religious reasons.⁸⁸ The Supreme Court of New Jersey would accept this proposition, but an analysis of other decisions shows an uneasiness in the legislatures and courts in dealing with self-preservation.⁸⁹

The cases which purportedly deny an individual the right to expose himself to danger of death actually put the emphasis on the protection of the public from either economic or physical harm. The prevailing view is that an individual is at liberty to do as he pleases as long as he does not unduly infringe on the rights of others.

Two state court decisions have found helmet statutes unconstitutional for having no reasonable relationship to public health, safety and welfare.⁹⁰ The state was said to have no legitimate interest in protecting the motorcyclist from himself.⁹¹ In contrast, *Heston* permitted the state to protect a hospital patient from her refusal of a blood transfusion. The refusal of a blood transfusion does not generally endanger the state's interest in the community's well-being. *Heston*

83 165 N.W.2d 677 (N.D. 1969).

84 *Id.* at 680.

85 *Id.* at 679.

86 32 Ill.2d at 369, 205 N.E.2d at 440.

87 Note, *Constitutional Law — Police Powers — Michigan Statute Requiring Motorcyclists to Wear Protective Helmets Held Unconstitutional*, 67 MICH. L. REV. 361, 364-65 (1968).

88 Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386, 396 (1967).

89 *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969).

90 *Motorcycle Assn. v. State Police*, 11 Mich. App. 351, 158 N.W.2d 72 (1968); *State v. Betts*, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969).

91 *Motorcycle Assn. v. State Police*, 11 Mich. App. 351, 158 N.W.2d 72 (1968); *State v. Betts*, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969).

apparently found a "compelling state interest" in sustaining life for its own sake as a cog in the state machine.⁹²

In balancing the scales to determine whether or not the state interest is truly compelling, consideration must also be given to the rights and interests of the Jehovah's Witnesses. Though freedom of religious belief has absolute protection while freedom of religious practice may be curtailed, a major difficulty lies in the fact that actions are but manifestations of belief. The act cannot be severed from the motives that prompt it. Religion, therefore, much more than mere state of mind, is a life style which commands a certain relationship between man and the things external to him.⁹³ A Jehovah's Witness forced to receive a blood transfusion prohibited by his religious tenets is effectively denied the right to pursue his religious beliefs—his ultimate pursuit. The religious practice of a Jehovah's Witness necessarily demands the utmost in governmental protection against interference.

A Jehovah's Witness has the freedom to subscribe to religious beliefs, practices and values which are unique to his religious faith. The view of the Supreme Court as expressed in *Board of Education v. Barnette*⁹⁴ is that the freedom to differ with society is not limited to things that do not matter much. "That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."⁹⁵ A court may consider the religious principles of Jehovah's Witnesses to be erroneous and foolish, especially those regarding blood transfusions, but in the absence of a "grave and immediate danger to interests which the State may lawfully protect" it is powerless to intervene.⁹⁶ As the Illinois Court observed in *Brooks*:

Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable . . . would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare.⁹⁷

The court went on to say that an individual may refuse to act for religious reasons as long as the "refusal to act is not directly harmful to society."⁹⁸

A fundamental concept of our American heritage is that minority groups

92 See Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 721-22 (1969).

93 Milhollin, *The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals*, 10 NATURAL L.F. 202, 205 (1965).

94 319 U.S. 624 (1943).

95 *Id.* at 642.

96 *Id.* at 639.

97 32 Ill.2d at 373-74, 205 N.E.2d at 442.

98 *Id.*

have a right to promulgate their ideas; the state may not interfere on the basis that the majority rules. To make public policy a mere function of the majority's will is to ascribe to the notion that "might makes right."⁹⁹ No court decision has mentioned the role of politics as an influence in its determination of the bounds of religious freedom, but, it must be noted that the beliefs of both the Roman Catholics and the Christian Scientists are such as to cause their adherence to forsake lifesaving medical treatment,¹⁰⁰ yet, without opposition. Have these two religious groups gained rights through favorable public opinion that the politically hapless Jehovah's Witnesses have not?¹⁰¹ One author feels that "[i]f every second or third voter believed his very salvation depended upon 'abstaining from blood,' there would be little chance that any elected government would oppose it."¹⁰²

The court may not, though motivated by good intentions, pass independent moral judgment on the Jehovah's Witness' decision. Thomas Jefferson's preamble to the Act for Establishment of Religion in Virginia had been relied upon in part by the Supreme Court in *Reynolds* and the Illinois decision of *Brooks*. In it Jefferson warned that religious freedom was destroyed when the judge "will make his opinion the rules of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."¹⁰³ Justice Brandeis in the same light warned that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding."¹⁰⁴ Judicial restraint is necessary to prevent the judge from becoming a moral arbiter "roaming at will in pursuit of his own idea of beauty or of goodness,"¹⁰⁵ which could only result in an unwarranted invasion of a Jehovah's Witness' rights.

Judge Berger (now Chief Justice Berger) in reference to forced blood transfusions to Jehovah's Witnesses, adhered to the opinion that some areas of enormous public concern are beyond the control of the judiciary.¹⁰⁶ His opinion was founded on an additional consideration favorable to the Jehovah's Witnesses' freedom to refuse transfusions—the "right to be let alone," first enunciated by Justice Brandeis' dissent in *Omstead v. United States*.¹⁰⁷ The "right to be let alone" is not specifically enumerated in the Constitution. However, Justice Goldberg in *Griswold v. Connecticut*¹⁰⁸ stated that there is a penumbra of fundamental rights protected from governmental infringement that exists alongside those rights

99 Ford, *supra* note 31, at 223.

100 How, *Religion, Medicine and Law*, 3 CAN. B.J. 365, 370-74; Milhollin, *supra* note 93, at 213.

101 See 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 325 (1950).

102 Milhollin, *supra* note 93, at 213.

103 VA. CODE ANN. § 57-1 (1950).

104 Justice Brandeis' frequently cited dissent in *Omstead v. United States*, 277 U.S. 438, 479 (1928).

105 Application of President and Directors of Georgetown Col., 331 F.2d 1010, 1017 (D.C. Cir. 1964) (Berger, J., dissenting).

106 *Id.* at 1018.

107 277 U.S. 438, 478 (1928).

108 381 U.S. 479 (1965).

specifically mentioned.¹⁰⁹ *Griswold*, by establishing a right of marital privacy, demonstrated a willingness to include the "right to be let alone."¹¹⁰

Further, it is well said that the right to choose to die for one's religion is included in the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹¹¹ Judge Berger believed that the "right to be let alone" justified refusal of medical treatment at great risk.¹¹² The right to choose to die for one's religious beliefs is not a novel concept. For centuries of religious persecutions Christians had not only been allowed to die for their faith, but had been forced to die. Existence itself must at times be risked in the pursuance of a higher or more transcendental purpose to render its essence meaningful.¹¹³ A court of justice is neither empowered nor competent to say that earthly life is such that "an individual cannot through moral conscience rise above it."¹¹⁴ Every man must be free to decide for himself what values are worth dying for. To hold otherwise is to ignor the words of Justice Harlan, speaking for the Court in *Prince v. Massachusetts*,¹¹⁵ that adults "may be free to become martyrs."¹¹⁶

V. The Interest of the Medical Profession

The Supreme Court of New Jersey striving to find a "compelling state interest" for transfusing blood to Delores Heston weighed the interest of the hospital and its staff.¹¹⁷

One aspect of the medical profession's interest in administering blood to Miss Heston was respect for its creed and conscience.¹¹⁸ One case prior to *Heston* had expressly dealt with the doctor's conscience in regard to giving blood transfusions to Jehovah's Witnesses. This was *United States v. George*,¹¹⁹ the Connecticut federal district court decision which had relied upon the rationale of *Georgetown* in ordering a blood transfusion for a Jehovah's Witness.¹²⁰ *George* gave additional consideration to the physician's conscience and professional oath. The federal court maintained that a patient who voluntarily submitted to and insisted upon medical care was not justified "even in the name of free religious exercise"¹²¹ to require the physicians to ignore the mandates of their conscience and "dictate . . . a course of treatment amounting to medical malpractice."¹²² In the words of the court: "[t]he patient may knowingly decline treatment, but he may not demand mistreatment."¹²³ Similarly, in *Heston* it was said that a

109 *Id.* at 487 (concurring opinion).

110 *Id.* at 494.

111 *Omstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

112 Application of President and Directors of Georgetown Col., 331 F.2d 1010, 1017 (D.C. Cir. 1964) (dissenting opinion).

113 Milhollin, *supra* note 93, at 212-14.

114 *Id.* at 214.

115 321 U.S. 158 (1944).

116 *Id.* at 170.

117 58 N.J. at 582-83, 279 A.2d at 673.

118 *Id.*

119 239 F. Supp. 752 (D. Conn. 1965).

120 *Id.* at 753-54.

121 *Id.* at 754.

122 *Id.*

123 *Id.*

doctor should not be asked to operate under the "strain of knowing" that a medically required transfusion would not be given.¹²⁴ At first glance both *Heston* and *George* appear to be authority for the proposition that the doctor's conscience under the circumstances deserves protection at the expense of the patient's moral conscience. But keeping the doctor's conscience clear is not the foremost concern of the court. The main objective is to avoid liability for medical malpractice.

The hospital and its staff upon the admission of a patient become legally responsible for his proper care. Both *George* and *Georgetown* maintained that the hospital and doctors' rights had been subjected to the possibility of an impermissible infringement through exposure to risk of criminal and civil liability.¹²⁵ Although patients in both cases had executed releases of liability, neither court could say with any certainty that the releases would in fact absolve the parties from all civil and criminal liability.¹²⁶

Heston implied another serious, but possible, consequence facing the hospitals and doctors. The court said that "the failure to use a simple established [medical] procedure" under the circumstances would be malpractice in the eyes of the medical profession "however the law may characterize that failure because of the patient's private convictions."¹²⁷ This suggests that a doctor, though not legally liable for malpractice, risks losing his license to practice medicine. Under New Jersey law, the doctor's license could be revoked or suspended if the State Board of Medical Examiners found that he was "guilty of gross malpractice or gross neglect in the practice of medicine which has endangered the health or life of any person."¹²⁸ This places the doctor in the dilemma that he may possibly be held liable not only for neglecting to administer the blood but also for administering the blood without the patient's consent.

The common law principle of inviolability of the body gives the patient the final say in medical decisions.¹²⁹ Treating a patient without consent is a battery whether or not the treatment was medically beneficial. In the situations concerning the Jehovah's Witnesses, this right to protection of bodily integrity is enhanced by the patient's religious convictions.

The question is whether under this individualistic philosophy the right of a competent adult, without minor children, to withhold his consent to lifesaving treatment is paramount to the societal interests in preserving him.¹³⁰ *Erickson* and

124 58 N.J. at 582, 279 A.2d at 673.

125 239 F. Supp. at 754; 331 F.2d at 1009.

126 *Georgetown* stated that a release executed by a patient *in extremis* could not be relied upon by doctors to avoid criminal prosecution as death resulting from the lack of medical care was manslaughter in the District of Columbia. 331 F.2d at 1009 n.18. *George* would not go so far as to say that a release signed by both a coherent rational patient and his wife would absolve attending doctors of all civil and criminal liability. 239 F. Supp. at 754. *Contra*, Application of President and Directors of Georgetown Col. 331 F.2d 1010 (1964). Judge Berger (now Chief Justice) dissenting said the risk of economic liability in *Georgetown* was unsupported. He added that possible moral duty of the hospital towards the patient was not justifiable. *Id.* at 1015-16.

127 58 N.J. at 582, 279 A.2d at 673.

128 N.J. STAT. ANN. § 45:9-16 (1937).

129 *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906); *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96 (1913). For a discussion of the consent required from patient see Powell, *Consent to Operative Procedures*, 2 MD. L. REV. 189 (1961); Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MT. L. REV. 233 (1942).

130 See note 31 *supra*.

Brooks have answered in the affirmative, which answer has been reinforced by the dicta of other cases.¹³¹ The conclusion in *Erickson* was that:

it is the individual, who is the subject of a medical decision, who has the final say and . . . this must be necessarily so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.¹³²

The right to withhold consent has an exception. Under the doctrine of *parens patriae*¹³³ the state has been allowed to make medical decisions for infants and incompetents acting as their guardian. Blood transfusions have been given both to children over the objections of the parents¹³⁴ and also to the parents themselves under the rationale of protecting the children from abandonment.¹³⁵ Since Delores Heston was 22 years old, unmarried and not pregnant,¹³⁶ *parens patriae* could only be applied to her under the state's power of guardianship over incompetents.

The mental condition of Delores Heston was a question of substantial import at both the trial and appellate court levels. The lower court had been "called upon to resolve the key issue of whether the defendant Delores Heston was physically and/or mentally competent to formulate an informed opinion in order to give a refused consent to a blood transfusion."¹³⁷ The holding of the trial court

131 Powell, *supra* note 130; Smith, *supra* note 130. *But see* *Winters v. Miller*, 306 F. Supp. 1158 (E.D.N.Y. 1969):

Where the ability of the patient to choose his type of treatment is unquestioned, because his mental capacities have been unimpaired, *he is allowed to choose the scope of the treatment, even to the extent of refusing medically necessary blood transfusions.* (Emphasis added.)

Id. at 1167. The court distinguished *Erickson* and *Brooks* from *Raleigh* and *Georgetown* on the basis of the public interest in the dependent children cases. *Id.* at 1167; *Natson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960).

Anglo-American law starts with the premise of thoroughgoing 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 lifesaving surgery or other medical treatment.* (Emphasis added.)

350 P.2d at 1104; *Wood v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

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 lifesaving surgery or other medical treatment.* (Emphasis added.)

377 P.2d 520 at 524; *Ford, supra* note 31, at 221.

132 44 Misc.2d at 28, 252 N.Y.S.2d at 706.

133 *Parens Patriae* refers to the right and duty of the sovereign to protect any person who is under a disability, e.g., a child or incompetent adult.

134 *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962); *Hoener v. Bertinato*, 67 N.J. 571, 171 A.2d 140 (Juv. Ct. 1961); *In re Santos*, 16 App. Div. 2d 755; 227 N.Y.S.2d 450 (1962); 552 (1933); *In re Clark*, 90 Ohio L. Abs. 21, 185 N.E.2d 128 (C.P. 1962).

135 Application of President and Directors of Georgetown Col., 331 F.2d 1000 (D.C. Cir. 1964); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964); *see* *United States v. George*, 239 F. Supp. 752 (1965); *Powell v. Columbian Presbyterian Medical Center*, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965).

136 Brief for Defendant at 2; brief for Plaintiff at 2, *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) [hereinafter cited as brief for Plaintiff].

137 Brief for Plaintiff at 10.

in response was "that she was not physically able to give or refuse consent to a blood transfusion."¹³⁸

On appeal directly to the Supreme Court of New Jersey the plaintiff-respondent hospital reaffirmed its basic contention that Miss Heston had been medically incompetent, thereby giving the state the authority to protect her right to live.¹³⁹ The plaintiff in its brief distinguished *Erickson* and *Brooks* from the instant case in that Delores Heston had been declared incompetent whereas *Erickson* and *Brooks* dealt with adults who had competently withheld consent.¹⁴⁰ The defendant in return argued that Delores Heston not only was competent but, also, that a procedural error existed in the determination of her competency.¹⁴¹

The competency issue was the basis of both the trial court's decision and the plaintiff's argument for affirmance. However, the New Jersey court avoided the issue competency and referred to Delores Heston's mental condition only through implication. In stating the facts of the case the court mentioned that on Miss Heston's admission to the hospital she was "then or soon became disoriented or incoherent,"¹⁴² the very words the trial court relied upon in finding Miss Heston incompetent.¹⁴³ The court added that she "presumably could not" have executed a release of liability, another suggestion of incompetency.¹⁴⁴

Rather than affirming or reversing on the incompetency issue, the New Jersey court made its analysis of the right to die for religious beliefs. Considering prior case decisions, especially *Brooks* and *Erickson*, only *George* and *Georgetown's* consideration of the doctor's interest provided any reasonable argument, aside from incompetency, for finding a "compelling state interest" in transfusing blood to an adult Jehovah's Witness without child over his objections. But, this argument loses its persuasiveness as authority since no action for malpractice in omitting to administer blood to a Jehovah's Witness has, to date, been brought against a hospital or its staff.

Furthermore, it must be remembered that the doctor's interest was only one of the factors determinative of the outcome in *Georgetown* and *George* (relying

138 Brief for Defendant at 96a.

139 Plaintiff's first argument was that:

the physical and mental condition of . . . Delores Heston, was such, that she was unable to formulate an informed opinion, and the passing of many hours in such a critical state had so reduced her to a state of shock, that she was not physically or mentally able to rationally give or refuse consent to a blood transfusion. (Emphasis added.)

Brief for Plaintiff at 9.

Plaintiff's second argument was that since Delores Heston was incompetent to make a rational decision whether or not to consent to the transfusion, that the court authorization of the transfusion was in protection of her right to live. Brief for Plaintiff at 13-21.

Plaintiff's final argument was "that defendant's right to a jury trial as to the issue of mental incompetency under N.J.S.A. 3A:6-35 . . . is not applicable to a life and death emergency situation." Brief for Plaintiff at 22.

140 Brief for Plaintiff at 18-19, 20.

141 Brief for Defendant at 9, 10, 15. Delores Heston herself gave a statement that she was "not incoherent" and knew what she was doing. *Id.* at 7a.

142 58 N.J. at 578, 279 A.2d at 671.

143 The trial court relied on the physician's statements in finding that Miss Heston was "not physically able to give or refuse consent." Brief for Defendant at 88a-91a, 96a-97a. Four physicians and six registered nurses gave affidavits repeatedly using the words "disoriented" and "incoherent," to explain that Delores Heston was not competent at the time it was determined that she needed a transfusion. Brief for Defendant at 21a-30a.

144 58 N.J. at 578-79, 279 A.2d at 671.

upon *Georgetown*). These two decisions were also deeply concerned with the preservation of a parent's life for the well-being of a child, proper use of *parens patriae*—an important factual distinction from *Heston*, the same distinction which was made in *Brooks*.¹⁴⁵

The only possible *compelling* public interest in giving Delores Heston a blood transfusion was protection of an incompetent adult.

VI. Conclusion

Judicial guidelines must be established for objectively resolving the true legal issues which confront courts in blood transfusion cases.¹⁴⁶ The court must be able to reach its decision quickly; time is of the essence. The emotional influences as seen in *Georgetown* and *Powell* are to be avoided.¹⁴⁷

If an adult Jehovah's Witness has competently withheld his consent to all blood transfusions, there appears to be no legal justification for complete denial of his right to refuse a transfusion. At best this right is subject only to limited infringement under the circumstances of a paramount societal interest. The right of a child to survive and be cared for by his parents until capable of making his own value judgment in regard to transfusions is such an interest.¹⁴⁸ The doctor's interest in avoiding liability for malpractice is not such an interest since it is more of a theoretical than persuasive argument.

Generally, protection of an incompetent adult is a compelling public interest since he is as helpless as a child in caring for himself. But there is a danger of abusing this use of *parens patriae*.

Often the adult's physical condition has already deteriorated to the state of medical incompetency before a transfusion is determined to be necessary.¹⁴⁹ Also, it is possible for medical personnel to wait until the patient is incompetent in order to apply for a court order on that basis.¹⁵⁰ Either situation will effectively negate the adult's right to competently refuse the transfusion.

The proper approach in solving this problem was taken in *Brooks* by

145 32 Ill.2d at 369, 372-73, 205 N.E.2d at 440, 442.

146 An attempt to establish definite guidelines was made by the Jehovah's Witnesses of the state of Washington. They brought a class action including minors and adults for the purpose of declaring their rights and permanently enjoining all doctors and hospitals in the state of Washington from administering blood transfusions to the plaintiffs in the future. The action was dismissed as to all defendants. *Jehovah's Witnesses in State of Wash. v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968), *rehearing denied*, 391 U.S. 961 (1968).

147 Both courts were unwilling to let any desiring to live but refusing blood on a religious basis die. In the words of Judge Markowitz in *Powell* this is expressed in saying:

How legalistic minded our society has become, and what an ultra-legalistic maze we have created to the extent that society and the individual have become enmeshed and paralyzed by its unrealistic entanglements!

I was reminded of "The Fall" by Camus, and I knew that no release—no legalistic absolution — would absolve me or the Court from responsibility if I, speaking for the Court, answered "No" to the question, "Am I my brother's keeper?" This woman wanted to live. I could not let her die!

49 Misc. 2d at 216, 267 N.Y.S.2d at 452.

148 *Supra* note 3.

149 For example, in the event of a serious injury resulting from an accident, the patient will often be in severe shock before arrival at the hospital.

150 64 MICH. L. REV. 554, 559 (1966). This was contended to be the factual situation in *Heston*. Brief for Defendant at 9-10.

determining the competency of the patient at the time the consent was initially withheld, not at the time the transfusion was deemed medically necessary.¹⁵¹

How would this procedure have affected Delores Heston? For six years she had carried a card in her wallet which expressed and explained her desire not to receive blood.¹⁵² This fact taken together with the affidavits of her mother, her minister, and herself¹⁵³ left no doubt that she had competently withheld her consent to all blood transfusion prior to her accident. If Delores Heston was competent to withhold her consent, there was no compelling state interest in giving her a transfusion.

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151 32 Ill.2d at 365-72, 205 N.E.2d at 438-42.

152 Affidavit of Delores Heston. Brief for Defendant at 20a.

153 Affidavits said that Delores Heston had been a baptized Jehovah's Witness for six years and as a result of her religious studies and training had made the decision not to accept blood transfusions long before her admittance to the hospital. Brief for Defendant at 9a, 16a, 19a-20a.