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Freedom of Religion- "There Is No Constitutional Right to Choose to Die

Freedom of Religion—"THERE IS NO CONSTITUTIONAL RIGHT TO CHOOSE TO DIE"—*John F. Kennedy Memorial Hospital v. Heston*

The practice of one's religious beliefs has generally been freely allowed in the United States so long as it does not infringe upon the constitutionally protected rights of others.[1] However, in the recent case of *John F. Kennedy Memorial Hospital v. Heston*,[2] the New Jersey Supreme Court seemingly has modified this principle by justifying the restraint of an individual in the practice of his religious beliefs, not to preserve the constitutional rights of others, but to protect that individual from himself.

In the *Heston* case the appellant was an unmarried twenty-two year old female who had suffered a ruptured spleen in an automobile accident. Hospital personnel determined that an operation was required to save her life, necessarily including the transfusion of whole blood, but the patient, a Jehovah's Witness, refused to give her consent to the blood transfusion.[3] Death being imminent, a guardian with authority to consent to a blood transfusion was appointed by a court at the hospital's request, and successful surgery was performed. Upon her recovery, the patient moved to have the court's order vacated. Although the question was conceded to be moot,[4] the Supreme Court of New Jersey affirmed the lower court's order

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1 *See* Sherbert v. Verner, 374 U.S. 398 (1963); Reynolds v. United States, 98 U.S. 145 (1878). *See generally* 16 AM. JUR. 2d *Constitutional Law* § 340 (1964).

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

3 Both of the appellant's parents were also Jehovah's Witnesses. According to the interpretation of the Jehovah's Witness, the Bible makes the injection of blood into the body a violation of the commands of God. For example, *Acts* 15:29 states:

> [A]bstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves ye shall do well.

Leviticus 17:10:

> As for any man of the house of Israel or some alien resident who is residing as an alien in your midst who eats blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people.

Thus the Jehovah's Witneses believe that a blood transfusion is synonymous with eating blood which is directly prohibited by *Genesis* 9:4, which recites: "But flesh with the life thereof, which is the blood thereof, shall ye not eat."

The appellant's mother refused to give her consent to the blood transfusion and her father could not be found. The appellant insisted that she also had expressed her refusal of the blood transfusion, although the evidence indicated that she had been delerious at the time. Nevertheless, the court in reaching its decision treated the appellant as competent at the time she allegedly refused the blood transfusion.

4 Annot., 132 A.L.R. 1185 (1941). By the great weight of authority, an appellate court may render an opinion on a moot subject if it is within the public interest. *See* Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955).

authorizing the appointment of a guardian and held that even though a blood transfusion was contrary to appellant's religious beliefs, "there is no constitutional right to choose to die." [5]

It has generally been held that the state may order medical treatment for children where the parents refuse to give their consent for religious reasons.[6] The state may also require an adult to submit to medical treatment for contagious diseases.[7] A few cases have even required an adult to submit to medical treatment, contrary to his religious beliefs, although there was present no threat of contagious disease.[8] The courts in these cases have

[5] John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670, 672 (1971).

[6] *See, e.g.*, Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Kansas City Ct. App. 1952). *See generally* Annot., 30 A.L.R.2d 1138 (1953). Generally, the courts have employed two lines of reasoning in holding that a child may be compelled to submit to medical treatment over the parents' objections. One view, exemplified by the authority cited above, subscribes that the refusal of parents to give their consent to life-saving medical treatment for their child based on religious grounds, amounts to neglect, and by statute, the state may appoint a guardian who has the power to authorize medical treatment for a neglected dependent child. The other view invokes the doctrine of *parens patriae* and has been defined in Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955) as:

> [A] right of sovereignty [which] imposes a duty on the sovereignty to protect the public interest and to protect such persons with disabilities who have no rightful protector. . . .
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> . . . [It] extends to the personal liberty of persons who are under a disability whether by reasons of infancy, incompetency, habitual drunkenness, imbecility, etc. . . . This jurisdiction and duty is called into play when it is found that such persons could be a danger to themselves or to the public if they were not taken and held under the protective custody of the sovereign. *Id.* at 425, 114 A.2d at 5.

[7] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[8] *Compare* Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), *with* United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964). *But see In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). *See generally* Annot., 9 A.L.R.3d 1391 (1966).

Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) is the leading case in this area. The patient was the mother of a seven-month-old child and therefore, since the patient owed a duty to the community to care for her child, the state had an interest in preserving the life of this mother. In United States v. George, 239 F. Supp. 752 (D. Conn. 1965) the court ordered a blood transfusion for a father of four saying that doctors cannot be required to ignore the mandates of their own consciences under these circumstances. The court in Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965) invoked no theory of law, but emotionally declared that since this mother of six wanted to live, she could not be allowed to die. The problem of whether a competent adult may refuse a blood transfusion was faced by the court in Raleigh Fitkin-Paul Morgan Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964). The court found that

relied primarily on the reasoning that as a parent, the patient owes a duty to society to care for his children, and therefore, society's interest in maintaining the patient's life so that he may care for his children outweighs the patient's interest in his religious convictions.[9] The *Heston* case marks a further erosion of religious freedom in this area by eliminating the family responsibility requirement and holding that even an unmarried adult, having no children, can be ordered to submit to life-saving medical treatment regardless of his contrary religious convictions.

The *Heston* court based its holding that "there is no constitutional right to choose to die" on two lines of reasoning.[10] First, the court considered the unfairness of possible civil and criminal liability confronting the hospital and its staff;[11] second, it considered and weighed the state's interest in an individual's life against the individual's right to freedom of religion. The primary impact of the decision may be found in the latter consideration.

Drawing a direct analogy to decisions involving suicide, the court theorized that since the state had an interest in life in the case of suicide, it necessarily had an interest in the life of one who refuses life-saving medical treatment. Closer analysis exposes marked weaknesses in the court's analogy. Suicide as well as attempted suicide were crimes at common law, but today neither is universally held to be illegal.[12] Furthermore, there has been no

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the life of the pregnant mother and her baby were so intertwined and inseparable that to attempt to distinguish between them would be impracticable.

Two cases have reached an opposite result from that of the above decisions. In *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) the court refused to order a blood transfusion for an adult holding that there was no "clear and present danger" which warranted the interference with the patient's religious rights. Similarly in Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962) the ultimate right of the patient to have the final say in a medical decision was cited as the controlling factor in declining to order a blood transfusion for an adult.

[9] *See* United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964); Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965).

[10] John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

> [W]e find that the interest of the hospital and its staff, as well as the State's interest in life, warranted the transfusion of blood under the circumstances of this case. *Id.* at 580, 279 A.2d at 674.

[11] *See generally* 33 FORDHAM L. REV. 513 (1965) for a discussion of possible civil and criminal liability facing a hospital and its staff when a patient refuses medical treatment after placing himself in their care.

[12] *See* W. Clark & W. Marshall, A TREATISE ON THE LAW OF CRIMES 557 (6th ed. 1958):

case which has tested the validity of a statute punishing suicide or attempted suicide.[13] Suicide has been defined as the "voluntary and intentional destruction of his own life by a person of sound mind." [14] The essence of the offense is the intent, and this presupposes that the requisite mental capacity is also present.[15] Even if suicide is a crime which may be prevented by the state through the use of its police powers, it is highly speculative to assume that a patient who refuses a blood transfusion intends to commit suicide.[16] The *Heston* court adopted the view that to refuse medical treatment knowing that such treatment will save life implies a willingness to die.[17] Rather, it would seem that a patient who relies on faith and prayer for his own cure does not will to die, but only desires to get well through the use of an alternate remedy.[18] Therefore, such a tenuous relationship

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Self-destruction is a form of homicide, and a felony under English Common Law.

The lands and goods of the offender were forfeited to the king, as in the case of other felonies, and his body was ignominiously buried in the highway.

The attitude towards suicide at common law was probably best expressed in 4 W. BLACKSTONE, COMMENTARIES *189-90.

[T]he law of England wisely and religiously considers that no man hath a power to destroy life but by permission from God, the author of it; and as the suicide is guilty of a double offense, one spiritual in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the King, who hath an interest in the preservation of all his subjects, the law has therefore ranked this among the highest crimes, making it a species of felony, a felony committed on oneself.

An attempt to commit suicide was also unlawful and a crime at common law. Commonwealth v. Mink, 123 Mass. 422 (1877). *See, e.g.*, State v. LaFayette, 117 N.J.L. 442, 188 A. 918 (C.P. Camden County 1937); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961) (upholding convictions for attempted suicide). Attempted suicide is an illegal act by statute in at least seven states today. NEV. REV. STAT. § 202. 495 (1957); N.J. REV. STAT. § 2A: 170-25.6 (Supp. 1970); N.Y. PEN. LAW, § 2305 (1960); N.D. CENT. CODE § 12-33-02 (1960); OKLA. STAT. tit. 21, § 812 (1961); S.D. CODE § 13.1903 (1939); WASH. REV. CODE § 9.80.020 (1961). *But see* Wallace v. State 232 Ind. 700, 116 N.E.2d 100 (1953); Pennsylvania v. Wright, 26 Pa. County Ct. 666 (1902) (holding suicide is not a crime). *See also* Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 858-59 (1968).

[13] See Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 862 (1968).

[14] Southern Life & Health Ins. Co. v. Wynn, 194 So. 421, 422, 424 (Ala. 1940).

[15] *See* Shipman v. Protected Home Circle, 174 N.Y. 398, 400, 67 N.E. 83, 85 (1903).

[16] *See* 33 FORDHAM L. REV. 513 (1965).

[17] The court believed that the distinction between actively and passively seeking death was merely verbal. 58 N.J. at 578-79, 279 A.2d at 672-73. The justification for this would seem to lie in the prospect that:

Although the adherents of this religion might not technically "wish to die" in the literal sense, they do refuse medical treatment which they know will prevent death, and implicit in that refusal is a willingness to die.

Comment, *The Right to Die*, 7 HOUSTON L. REV. 654, 664-65 (1970).

[18] *See* Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). Whether

as exists between suicide and the refusal of life-saving medical treatment should not support a conclusion that the state has an interest in the life of one who refuses the treatment.[19]

Even assuming that the state has such an interest in the life of an individual, this interest standing alone should not rise above the individual's first amendment right to freedom of religion.[20] In exploring the question whether one has a right to die, it is noteworthy that the free exercise of religion has been used previously as a basis for the affirmative resolution of that dilemma.[21] Although the freedom of religious belief is absolute, the freedom to exercise that belief is not absolute and therefore does not justify acts which run contrary to the law.[22] Certain guidelines have been established in order to determine when state interference may be justified. The *Heston* court adopted the "compelling state interest" test which provides that a first amendment freedom may be limited only if such restriction is justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." [23]

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or not death will result from the refusal of a blood transfusion is a question of medical judgment. Therefore, the patient is merely exercising his ultimate right to choose among alternate remedies and not suicide.

> [C]ould the ill adult who relied on faith and prayer for his own cure be found to entertain the criminal intent required to make up the crime of attempted suicide? I think not, for his only intent was to get well.

Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 69 (1954).

[19] The *Heston* court's argument, at this point, is founded on the right of the state to intervene to prevent crime under its police powers. If the mere refusing of medical treatment is not a crime, then the state should not be justified in interfering with the patient's religious conduct.

[20] *Cf.* Gitlow v. People, 268 U.S. 652, 666 (1925). The first amendment freedoms are protected from abridgement by the states through the due process clause of the fourteenth amendment.

[21] *See* Comment, *The Right to Die*, 7 HOUSTON L. REV. 654, 662 (1970).

[22] *See* Reynolds v. United States, 98 U.S. 145 (1878). However, the *Reynolds* Court did not establish sufficient guidelines as to which actions would justify state interference and which would not. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943), the Court asseverated that first amendment freedoms can be restricted "only to protect grave and immediate danger to interests which the State may lawfully protect."

[23] NAACP v. Button, 371 U.S. 415, 438 (1963). One such guideline which was rejected by the *Heston* court, directs that a state may interfere with a claimed religious freedom when it is shown that such interference is necessary for or conducive to the protection of society from some "clear and present danger." Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Note, *The Clear and Present Danger Standard: Its Present Viability*, 6 U. RICH. L. REV. 93 (1971).

Although the "clear and present danger" test was rejected by the *Heston* court, the court in *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), a factually similar case, held that there was no "clear and present danger" which warranted inter-

In order for a state to limit an individual in his religious activities, two conditions must be met under the state interest test. First, there must be at least a rational relationship between the religious conduct and the state interest.[24] The dubious relationship of the denial of medical treatment to attempted suicide and its criminal connection does not demonstrate any rational relationship to a state interest where a single adult individual is involved. Second, there must be a grave abuse by this religious activity which endangers paramount interests.[25] In order to have met this second requisite, the *Heston* court would have had to establish that the refusal of life-saving medical treatment was immoral conduct, thereby justifying state regulation to prevent possible detriment to the morals and welfare of society.[26] It is questionable whether this type of activity is immoral, and it also would seem difficult to prove that such conduct would be detrimental to the morals and welfare of society.[27]

In support of its conclusion that the state has an overriding interest in the life of an individual, the *Heston* court relied on cases which have upheld the constitutionality of state statutes requiring motorcyclists to wear helmets.[28] It should be observed however that those cases have been unwilling to hold that the state's interest in protecting individuals is sufficient by itself to establish the constitutionality of the statute. Rather, the decisions have attempted to tie in the general welfare of the public in order to establish

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ference by the State in the patient's conduct. For a criticism of the employment of this test see 44 TEXAS L. REV. 190 (1965).

The snake-handling cases appear to present the same issue as the blood transfusion cases, but were decided prior to the formulation of the "compelling state interest" test. *See, e.g.*, Hill v. State, 38 Ala. App. 623, 88 So. 2d 880, *cert. denied*, 264 Ala. 697, 88 So. 2d 887 (1956); 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); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948). In these cases, the constitutionality of state statutes prohibiting the use of snakes by religious sects in their ceremonies was upheld because the state has a right to protect the lives, health, and safety of its citizens.

[24] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963), *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945).

[25] *Id.*

[26] *See* 44 TEXAS L. REV. 190, 194 (1965).

> While taking one's own life is condemned under Judeo-Christian moral codes, there is some question as to the immorality of committing passive suicide by refusing necessary medical treatment. Even if passive suicide was considered immoral per se, it is doubtful if state interference could be justified on this basis alone. Where the state seeks to regulate "immoral conduct," the justification is usually in terms of the resulting detriment to the morals and welfare of society. That passive suicide has such an effect would be difficult to prove.

[27] *Id.*

[28] *See* State v. Krammes, 105 N.J. Super. 345, 252 A.2d 223 (App. Div.), *cert. denied*, 54 N.J. 257, 254 A.2d 800 (1969); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (Hudson County Ct. 1968).

firmly the statute's constitutionality.[29] The inference is clear that the state does not have a sufficient interest in the individual's safety to limit his personal freedom if its exercise does not affect the welfare of others.

It is submitted that the *Heston* decision threatens to restrict unreasonably religious freedom in this country. One should have the right to die, or at least the right to select his own medicine, as long as his actions do not interfere with the rights of others. A paramount state interest in the individual should exist only where the actions of that individual cease to coexist with the freedom of others. John Stuart Mill, a proponent of social functionalism, asserted what should be the governing principle:

> [T]he sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose which power can be rightfully exercised over any number of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not sufficient warrant.[30]

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29 *Compare* Commonwealth v. Howie, 238 N.E.2d 373 (Mass. 1968) *with* State v. Krammes, 105 N.J. Super. 345, 252 A.2d 223 (App. Div.), *cert. denied*, 54 N.J. 257, 254 A.2d 800 (1969) *and* State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (Hudson County Ct. 1968) *and* People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (Buffalo City Ct. 1967). *But see* American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. Ct. App. 1968).

The court in People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S. 2d 797 (Buffalo City Ct. 1967), summed up what seems to be the consensus of those courts which have upheld the constitutionality of statutes requiring motorcyclists to wear protective helmets:

> It has long been recognized that the power to regulate and control the use of the public roads and highways is primarily the exclusive prerogative of the states. As a corollary of this power the state may control or restrict the type of motor vehicles which use the public roads. . . . Pursuant to this power it would seem only reasonable that the state have the right to reasonably regulate how riders and passengers of vehicles susceptible to special dangers and risks should protect themselves on public property. However, there is another, and perhaps more important reason, for believing the law in question to be constitutional. I believe that there is in fact a real danger to other citizens when a motorcyclist fails to use protective helmets. And if this is so there is no doubt of the state's right to regulate regardless of what definition of "police power" one uses. *Id.* at 469, 262 N.Y.S.2d at 800.

The courts have taken judicial notice that a motorcyclist without a protective helmet can be a hazard to other users of the highway. However, in *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968), the court could see no possible danger to other users of the highway and concluded that the statute was unconstitutional. It is interesting to note that the court, in rejecting the Attorney General's contention that "the State has an interest in the viability of its citizens and can legislate to keep them healthy and self-supporting," said "[t]his logic could lead to unlimited paternalism." Might not the same be said about *Heston?*

30 Mill, *On Liberty*, in THE GREAT LEGAL PHILOSOPHERS 380, 383 (C. Morris ed. 1959).

The individual should be free to act in accordance with his religious beliefs in so far as they may coexist with the freedom of others. It is only when this harmony ceases that the state should derive any interest which will justify interference with the individual's actions.

J. H. M.