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Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964)

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RECENT DECISIONS

COURT AUTHORIZED BLOOD TRANSFUSION OVER ADULT PATIENT'S RELIGIOUS OBJECTION—A VIOLATION OF THE FIRST AMENDMENT?—Petitioner entered Georgetown University hospital in Washington, D. C., for emergency care of a ruptured ulcer. The hospital staff concluded that death would be imminent without blood transfusions, but permission to administer them was refused by both the patient and her husband. Counsel for the hospital applied to a federal district judge for permission to administer blood but the judge denied the application. Counsel then applied to a judge of the District of Columbia Court of Appeals for an appropriate writ. Petitioner's husband explained to the appellate judge that his own and his wife's religious beliefs made it impossible to approve of the blood transfusion,[1] but said if the court so ordered, it would not be his responsibility. The judge next attempted to speak with petitioner, but in her weakened condition, her only remark was "Against my will." He then signed an order allowing the hospital to administer sufficient blood to save her life. The transfusions were administered, and the patient recovered. *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964).

Petitioner later filed a petition for a rehearing en banc by the District of Columbia Court of Appeals, and for an order vacating and quashing the order issued by the appellate judge which authorized the transfusions, contending that she was still subject to that order. *Held*: Petition denied *per curiam* with one concurrence and four dissents.[2] *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1010 (D.C. Cir. 1964).

[1]Both the patient and her husband were Jehovah's Witnesses. Among other tenets, this sect finds a Biblical prohibition against the taking of blood. This belief is said to be based upon passages in their Bible such as: "For the soul of every sort of flesh is its blood by the soul in it. Consequently I say to the sons of Israel: 'You must not eat the blood of any sort of flesh, because the soul of every sort of flesh is its blood. Anyone eating it will be cut off.' " *Leviticus* 17:14. Their refusal of transfusions is also based upon such other passages as *Leviticus* 17:10, 3:17; *Genesis* 9:3, 4; *Acts* 15:28, 29. All these refer in some way to the "eating" of blood. *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (1962); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962). For a more detailed study on the history and beliefs of this sect, see Mulder, *Jehovah's Witnesses Mold Constitutional Law*, 2 BILL OF RIGHTS REV. 262 (1942).

[2]The appellate judge granting the temporary order wrote the opinion reported in 331 F.2d 1000. The opinion of the full court denying the petition for rehearing appears at 331 F.2d 1010. Both these opinions will be considered in this note. In each of them, it is made clear that this controversy was not decided upon its merits. The appellate judge granted the order under an "All Writs" statute; 28 U.S.C. § 1651 (1958). In denying the petition, the full court questioned the judge's ability to grant the temporary order under this statute, and other procedural aspects, and hence, never touched upon the merits. The petition was denied on the basis that the jurisdiction of the Court of Appeals was not properly invoked and the controversy was obviously moot by the time the petition was filed, since the order was temporary. For a complete analysis of this aspect, see 77 HARV. L. REV. 1539 (1964). However, a discussion of the underlying constitutional issue presented by the facts of this case will be the subject of this note.

Although the filing of the petition for rehearing is puzzling, it may be that the

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The extent to which the state has power to control the exercise of religious beliefs and practices has historically presented a difficult question. The inviolability of the first amendment to the Constitution requires a delicate touch in handling religious questions. Courts have been hesitant to decide religious exercise questions except when forced by the circumstances of the case. However, a basic method of analysis has emerged and is generally used in deciding religious questions arising under the first amendment. It is a two-fold approach which calls for a determination of, first, whether the application of a statute imposes any burden upon the exercise of religion, and second, if it does, whether some compelling state interest justifies the infringement.[3] Almost all cases deciding the religious issue involve the constitutionality of a statute that limits the freedom of religious exercise. In the instant case there was, of course, no statute requiring the patient to submit to blood transfusions. In this respect the case is less analogous to previous authority. Even so, the state's compelling interest is not limited to that in enacted statutes, and the important consideration becomes one of whether the state had a compelling interest on *any* grounds.

A problem arises in defining the "compelling state interest," which is to be balanced against the awesome weight of the individual's constitutional guarantees.[4] While no concrete definition of compelling state interest has been propounded, it is recognized that the state may have a compelling interest in religious *practice* but not in religious *belief*. The United States Supreme Court and lower courts have generally agreed that although religious beliefs may not be prohibited, religious practices may.[5] The Kentucky Court of Appeals would apparently uphold this approach even though the only person endangered by the practice would be the practitioner. Judge Tilford of that court in an opinion on this matter said, "it is apparent that the Federal Constitution does not preclude a state from enacting a law prohibiting the practice of a religious rite which endangers the lives, health or safety of the participants, or other persons."[6] However, the California Supreme Court in *People v.*

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patient brought the petition for its publicity value or to make the point that she was not subject to the jurisdiction of this court. This at least may be a possible reason, as competent counsel would surely realize that petitioner was no longer subject to a temporary order issued to authorize such blood transfusions "as necessary to save her life" after she had fully recovered.

[3]Sherbert v. Verner, 374 U.S. 398 (1963).

[4]See, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); NAACP v. Button, 371 U.S. 415 (1963); American Civil Liberties Union of Southern California v. Board of Education, 10 Cal. Rptr. 647, 359 P.2d 45 (1961); Wollam v. City of Palm Springs, 29 Cal. Rptr. 1, 379 P.2d 481 (1963).

[5]See, *e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); *In re* Jenison, 375 U.S. 14 (1963); Prince v. Massachusetts, 321 U.S. 158 (1944); Craig v. State, 220 Md. 590, 155 A.2d 684 (1959).

[6]Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942). This case concerned a defendant who used poisonous snakes to demonstrate that because of his religious belief, they would not bite him, or if they did, he would not be harmed. These demonstrations usually took place in "revival" meetings, among a group of other persons. Therefore, in such a situation, there is always the chance that even though the participant is handling the snake, there will be considerable danger to

Woody,[7] specifically exempted from this approach the use of a drug prohibited by narcotics statute because the court felt such use was not a harmful practice. Since the use was not harmful, and the drug, peyote, was used in a bona fide religious practice, the narcotics statute could not prevent its use. The court utilized the analysis suggested above, and concluded there was no compelling state interest because use of the drug had no permanent deleterious effect upon the user, and the morals of those persons using peyote religiously were not impaired thereby.[8]

The facts of the instant case are even further removed from the scope of compelling state interest than those in the *Woody* case. They present the additional question of whether petitioner's refusal was a religious *practice* or a religious *belief*. Here, there was no rite, ritual or overt action which would endanger the patient or others. It was, arguably, only a refusal to accept help from others, which would hardly fall into the category of a dangerous religious *practice*.

Within the limits of the compelling state interest, three distinct tests have emerged which the courts utilize in finding such an interest. These approaches are grounded in the (1) *Public Health, Safety and Morals*, (2) the *Criminal Law*, and (3) the *Parens Patriae doctrine*.

Public Health, Safety and Morals

It is accepted as fundamental that the state may pass laws for the protection of the public at large,[9] and by this reasoning, it has been held that general public health laws are constitutional.[10] The courts also have the power to order compulsory medical treatment or confinement for persons with communicable diseases, and to require vaccination.[11] Thus,

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other persons close to him. Even though the court speaks of the law applying to a person participating, the rule should not be extended to any practice less exotic than this.

[7]People v. Woody, 40 Cal. Rptr. 69 (1964).

[8]*Id.* at 74.

From this decision, it seems that the use of peyote in religious practices is lawful, but its use outside religion is still illegal. In the one case in Montana that has arisen on this point, the Montana Supreme Court held that the constitution section guaranteeing free exercise of religion could not be invoked as a protection against a Montana statute prohibiting the possession of peyote under the claim that it was possessed and used in a church for sacramental purposes. State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926). See Laws of Montana 1923, ch. 22, § 1 at 40. However, in 1957, this statute was amended, and a proviso clause added that specifically allows the use or possession of peyote for bona fide religious sacremental purposes. See REVISED CODES OF MONTANA, 1947, § 94-35-123. Hereafter REVISED CODES OF MONTANA will be cited R.C.M.

[9]City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942); Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930); State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940).

[10]Pacific Coast Dairy v. Department of Agriculture, 19 Cal. 2d 818, 123 P.2d 442 (1942); Coelho v. Truckell, 9 Cal. App. 2d 697 (1935); *Patrick v. Riley, supra* note 9; Moore v. Draper, 57 So. 2d 648 (Fla. 1952).

[11]*Moore v. Draper, supra* note 11; Mosier v. Board of Health, 308 Ky. 829, 215 S.W.2d 967 (1948); Board of Education v. Maas, 56 N.J. Super. 245, 152 A.2d 394 (1959); *In re* Whitmore, 47 N.Y.S.2d 143 (Dom. Rel. Ct. N.Y. City 1944). R.C.M. 1947, § 69-709 provides:

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so far as the lives of the mass of its citizens are concerned, the state has a compelling interest. The interest is, as a general rule, limited to the mass and does not extend to the individual citizen.[12] This is pointed out by the Wisconsin court in *Benz v. Kremer*.[13] In that case, the criterion used to determine whether a public health statute was a legitimate exercise of power, was whether the public health in general would be promoted, and not whether it would be promoted in isolated cases. For example, the spreading of a deadly communicable disease could economically cripple an entire area. The panics usually accompanying such epidemics hardly tend to promote good order and general public safety.

The patient here was clearly outside the scope of these reasons for the compelling state interest. Her death would neither be a great economic loss to the public as a whole nor would it cause any measurable panic. It would be no basis for fears concerning public health or safety that would justify judicial interference.

Courts have also seen fit to regulate religious practice when it was obviously contrary to public morals. The case *Reynolds v. United States* is probably the most often quoted example.[14] The United States Supreme Court found that both legally and morally the practice of polygamy was repugnant and unacceptable.[15] In the instant case, it could be argued that the patient's refusal of medical assistance in the face of almost sure death was "immoral." However, it would seem that the more liberal courts of today would not find this sufficiently immoral for a decision analogous to *Reynolds*. The present case is even less analogous to *Reynolds* when it is remembered that here there is no applicable statute to serve as a guidepost to the public mores.

Whenever smallpox exists or is threatened in any part of the state, the state board of health shall have authority to require all persons frequenting any schoolhouse within the infected or threatened district to be vaccinated, or to present evidence of a successful vaccination with cowpox, and no person shall be permitted to enter any schoolhouse within the district included in the order of the state board of health unless such requirements are complied with.

[12]There are exceptions to this view. *Cf., Lawson v. Commonwealth, supra* note 6.

[13]142 Wis. 1, 125 N.W. 99 (1910). The case arose when Kremer, the state bakery inspector refused to grant Benz a bakery license because the floor of his bakery was more than five feet below street level, which was against a state health law. Benz contended that since the purpose of the statute was sanitation, and his facilities were as sanitary as any other, the statute was inapplicable and unconstitutional. The court held that the individual case cannot determine the necessity for a general law on the subject, and stated this to be the rule. Notice here, however, that the law is one which was made not for the protection of Benz, but for the health of the public in general. Thus, an individual should not be held under a public health statute unless it will promote *public* health, not merely the health of the individual concerned. It would seem then, that the state should not have the power to control health measures when only the health of the individual is concerned.

[14]98 U.S. 145 (1879).

[15]The Court first found in the *Reynolds* case, that under the first amendment it could reach actions in violation of social duties or subversive of good order. The Court then faced the question of whether polygamy was licentious. It found that the practice was historically limited to Asiatic and African people, while odious in northern and western Europe. England had always treated it as offense against society, and Virginia, in 1788, had made it punishable by death. From this, the conclusion was that polygamy was licentious and that the Court could act against it, even though it had been practiced under the guise of religious liberty.

Criminal Sanctions and Statutes.

Like public health statutes, criminal laws are enacted for the protection of the public. It has been held that there is no religious exception to criminal laws.[16] The Court in the *Reynolds* case illustrated this idea, using the example of a religion advocating human sacrifice or suicide. The Court stated that it would not be outside the scope of civil government to prevent the practice of such a religion. This "no exception" rule is probably based on the reasoning that the Constitution does not grant special privileges to persons of any particular religious belief, merely because they hold that belief.[17] In other words, the courts look through the religious belief to see if one outside religion would be allowed to perform the particular act.[18] If not, then justification of the act based upon religious belief will not overcome the prohibitory statute. Utilizing this approach, the courts find no problem in controlling a religious practice that requires the commission of a crime, and religious practices have thereby been limited under murder and manslaughter statutes.[19]

The question of attempted suicide in refusing medical aid would vary with the particular state statutes involved. In those states which have no laws replacing the common law on this point, the person refusing may be guilty of a felony. Montana's statute,[20] unlike the District of Columbia Code, requires only the killing of a human being, so it could possibly be extended to a "suicide" committed on religious grounds. The applicable District of Columbia Code[21] section requires the killing of "another," and would therefore make it more difficult to include the instant case within its scope. However, even if the common law or a statute expressly makes attempted suicide illegal, the additional problem of criminal intent presents itself. A person relying upon a hospital to heal him has the intent to get

[16]*Reynolds v. United States, supra* note 14, at 167.

[17]Although courts seldom specifically state this rule, it seems to permeate the thinking in the majority of cases. Mr. Justice Jackson, in a case also concerning a Jehovah's Witness, stated the basic rationale:

> In my view, the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communication must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non- religious communications were more narrow or in any way inferior to those of avowed religious groups.
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> It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer . . . . It was to assure religious teaching *as much* freedom as secular discussion, rather than to assure it *greater license*, that led to its separate statement. Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943). (Emphasis added.)

[18]Note that the *Woody* case, *supra* note 7, does not follow this reasoning. Another example would be the exception granted to religions for the use of wine for sacramental purposes when the eighteenth amendment was in effect.

[19]*Craig v. State, supra* note 5.

[20]R.C.M. 1947, § 94-2501 provides in part:

> "Murder is the unlawful killing of a human being with malice aforethought."

[21]D.C. CODE ANN. § 22-2401 (1961) provides in part:

> "Whoever . . . kills another . . . is guilty of murder . . . ."

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well, not to commit suicide. For example, if he refuses to submit to surgery out of fear, it cannot be said that he has the intention of comitting suicide. This is further complicated by the absence of an overt act in cases where there is only a refusal to accept aid of a particular kind.

In the instant case, the patient is outside the scope of the criminal laws. Both intent and overt act are lacking. Petitioner did not wish to die; she wanted to live.[22] By her refusal, she would not have caused her death, but merely would have allowed a contingency to occur. Therefore, her refusal was beyond any statutory or common law prohibition against suicide.

The question of the liability of petitioner's husband is not so readily answered. Under present law in Montana, he might have been held liable for manslaughter. In *State v. Mally*,[23] the Montana Supreme Court held a husband liable under the manslaughter statute[24] for failure to provide medical care for his wife after she had broken her arm. The court based its holding on the husband's duty to care for his wife, and stated, "the conclusion is inescapable that the failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence as to constitute involuntary manslaughter provided death results from the failure to act."[25]

It is questionable whether a result such as this could be upheld in the District of Columbia concerning petitioner's husband. The District of Columbia Codes do not expressly define involuntary manslaughter, and convictions for this offense have generally been obtained under the negligent homicide statutes.[26] However, the negligent homicide statutes are concerned with automobiles used as instrumentalities of death.[27] The best analogy to the instant case would be the child support cases under the

[22]The facts of the case itself present a strong inference that petitioner had no suicidal intent. In his opinion, the appellate judge pointed out the fact that she came to the hospital for help, and that death was not a religiously-commanded goal but an unwanted side-effect of a religious scruple. Both she and her husband indicated that although they could not authorize the transfusion, if the court authorized it, it would not be their responsibility. These facts weighed together, while far from conclusive, point less to a suicidal intent than to a will to live.

[23]139 Mont. 599, 366 P.2d 868 (1961).

[24]R.C.M. 1947, § 94-2507 provides in part:

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> . . . .
>
> 2. Involuntary, in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.

[25]*State v. Mally, supra* note 23, at 606, 366 P.2d at 872.

[26]D.C. CODE ANN. §§ 22-2401 to 2405 (1961). Under this statute, manslaughter has been defined only as "the unlawful killing of a human being without malice aforethought." United States v. Edmonds, 63 F. Supp. 968 (1946); Fryer v. United States, 93 U.S. App. D.C. 34, 207 F.2d 134 (1953); and an involuntary manslaughter conviction was upheld for driving an automobile in a criminally careless manner. Story v. United States, 57 U.S. App. D.C. 3, 16 F.2d 342 (1926). However, in that case, there was no mere omission, but a recklessly negligent commission. These cases define manslaughter as existing where the killing is unlawful, but no suggestion is made that manslaughter may be a lawful act that produces death in an unlawful manner. *But cf.* R.C.M. 1947, § 94-2507.

[27]D.C. CODE ANN. §§ 40-606, 607 (1961).

statutes raising that duty.[28] If the same result could be reached, it would involve interpretation of dissimilar statutes and a considerable extension of their applicability.

Parens Patriae

The doctrine of *parens patriae* is perhaps the broadest base upon which courts have found a compelling state interest. At common law, the king was the guardian of all those persons who for some reason were unfit to manage their own affairs. The United States adopted this doctrine with the state, rather than the king, as the sovereign guardian.[29] The application of this doctrine has historically been confined to minors and persons adjudged to be incompetent, such as insane persons, habitual drunkards and others *non sui juris*.[30]

An early case held that the doctrine was also limited by the common law principle of reasonable necessity.[31] This limitation dovetails with the requirement of compelling state interest, since the state usually has no compelling interest unless the action to be taken is both reasonable and necessary.

The modern application of this doctrine to freedom of religion can best be seen in the cases involving children. As children began to acquire more legally enforceable rights in the nineteenth and twentieth centuries, courts began to uphold certain of these rights under the *parens patriae* doctrine, even though they conflicted with freedom of religious practice.[32] The Ohio Domestic Relations Court, in a case concerning a blood transfusion of a three year old child, held that when a child's right to live and his parents' religious belief collide, the right to life is paramount, and the religious doctrine must give way.[33] Other courts have ordered blood transfusions for an unborn child certain to have an RH blood factor problem,[34] and for a "blue baby" voluntarily admitted to the hospital by its parents.[35] The objections to the transfusions in the above cases were made by Jehovah's Witnesses, on religious grounds. The courts had little trouble finding a compelling interest based upon *parens patriae* to override this religious objection. Although it is well settled that the doctrine takes precedence when applied to children, the instant case raises the question of whether it may be extended to include adults.

[28]D.C. CODE ANN. §§ 22-902 to 904 (1961).

[29]See, *e.g.*, Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950); *In re* Turner, 94 Kan. 115, 145 Pac. 871 (1915).

[30]See, *e.g.*, McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917 (1922); Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955).

[31]State v. Ray, 63 N.H. 406 (1884).

[32]See, *e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Morrison v. State, 252 S.W.2d 97 (Kansas City Ct. of App., Mo., 1952).

[33]*In re Clark, supra* note 1.

[34]Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961).

[35]Application of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964).

Until recently, this question has not given the courts a great deal of trouble. The United States Supreme Court in *Prince v. Massachusetts* stated: "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."[36] In the 1903 New York case of *People v. Pierson,* one of the leading cases in the child-health area, Judge Cullen wrote in his concurring opinion:

> The state, as parens patriae, is authorized to legislate for the protection of children. As to an adult (except possibly in the case of a contagious disease which would affect the health of others), I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other consideration.[37]

Such broad statements as this are not commonly found in the more recent cases, and the trend has been to expand the scope of the doctrine to include adults in certain situations. This trend is shown by the decision of the New Jersey Supreme Court in *Johnson v. State.*[38] Although the facts concerned a minor who had committed a murder, the court speaks of a broad doctrine. It discusses the early law, where the scope of the rule was limited to civil matters relating to contract and property rights of infants and their supervision where necessary, but says the rule is now much broader.

> [It] extends to the personal liberty of persons who are under a disability whether by reason 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 are not taken and held under the protective custody of the sovereign. . . . The principle that an infant on reaching the age of 21 becames a *sui generis* person and therefore no longer a child does not automatically apply to persons who are under a natural disability such as an incompetent, imbecile or habitual drunkard, and therefore subject to the *parens patriae* jurisdiction. . . .[39]

In the instant case, the patient's refusal to authorize the blood transfusion made her a danger to herself. The theory of the *Johnson* case could possibly be applied to this situation, although the court implies a lack of choice when it speaks of a "natural" disability. It could be argued that a disability raised by a religious doctrine which would force one to

[36]321 U.S. 158, 170 (1944).

[37]176 N.Y. 201, 68 N.E. 243, 247 (1903).

[38]*Johnson v. State, supra* note 30.

[39]*Id.* at 6.

choose between the religious doctrine and almost certain death is no more of a "conscious choice" than that which a habitual drunkard might make.

In a recent case, the New Jersey Supreme Court was again faced with the problem of an adult refusing a blood transfusion on religious grounds. The case was decided on the authority of child cases, as the adult was pregnant. However, the court recognized the existence of the question and stated:

> The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it is unnecessary to decide that question in broad terms because the welfare of the child and mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop. The blood transfusions *(including transfusions made necessary by the delivery)* may be administered if necessary *to save her life* or the life of the child, as the physician in charge at the time may determine.[40] (Emphasis added.)

Although the court here does not expressly hold on the question, the opinion clearly does not limit the transfusions to effectuate the saving of the child's life only. For example, by the holding of this case, a post delivery transfusion could conceivably be administered to the mother even if the child was clearly no longer in danger.

It may be that the extension of the common law *parens patriae* doctrine to the adult is the best theory upon which religious-medical questions may be determined. In the instant case, certainly, it is not so objectionable as other grounds discussed. Here, the patient wanted to live, and the inference from the text of the opinion is that she was quite willing to submit to the transfusion so long as she was not forced to compromise her religious beliefs.[41] Certainly, from a moral standpoint, the appellate judge took the proper course of action. The saving of another human being's life, especially when that person wants to live, cannot be condemned on moral grounds.

However, from a legal standpoint, his action cannot be upheld. As much as the expansion of this doctrine would help under the present facts, it is submitted that it is too dangerous to be allowed as precedent. To condone this expansion in any general way it would have to be argued that in certain situations a particular religious belief makes a person "incompetent" and powerless to help himself, and that the state, as *parens patriae*, may assume temporary jurisdiction for the person's own benefit. This would open the door to further expansion of the state's power to regulate individuals, and worse, to regulate religious belief. If the state

[40]Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 33 U.S.L. WEEK 2013 (N.J. Sup. Ct. June 17, 1964).

[41]Supra note 22.

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could hold a religious belief as making a person incompetent, could not the state then actually circumvent the constitutional ban on interfering with the belief itself? The concept of the state stepping into a person's religious life "for his own good" is repugnant to the spirit of the first amendment.

As the law stands today, there is no legal justification for this kind of interference, and the expansion of any of the doctrines discussed, in any general way, would be an excessive infringement upon the personal liberties of the individual guaranteed under the first amendment.

RICHARD L. BEATTY.

ADDITUR, AS A MEANS OF MODIFYING A JURY DAMAGE AWARD, NOT RECOGNIZED IN MONTANA.—The State of Montana, acting through its State Highway Commission, plaintiff, condemned land belonging to the defendant. The commission appointed by the parties to appraise the land awarded defendant $50,000, and plaintiff appealed. A jury awarded defendant $30,000 in district court, whereupon defendant appealed, deeming the award inadequate. Finding a new trial justified on the grounds of inadequacy,[1] the trial court judge gave plaintiff the option of either consenting to entry of judgment in the sum of $37,897.45, in which event defendant's motion for a new trial would be denied, or granting the motion for retrial. Plaintiff appealed, contending the court had no authority to compel such an election. *Held,* the trial court abused its discretion in attempting to exercise the power of additure. *State Highway Comm'n v. Schmidt,* 391 P.2d 692 (Mont. 1964).

Additur is the procedure by which the trial court, with the consent of the defendant, increases the amount of an inadequate jury award, as a condition to denying plaintiff's motion for a new trial.[2] Remittitur is the analogous practice used to decrease the amount of a jury verdict. The two procedures are employed *only* when the court is in a position to

[1]REVISED CODES OF MONTANA, 1947 § 93-5603 enumerates the grounds for a new trial: ". . . (5) Excessive damages, appearing to have been given under the influence of passion or prejudice; (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law. . . ." While excessive damages is a ground (subdivision 5), the party who wishes to appeal an inadequate award must move on the ground of "insufficiency of the evidence to justify the verdict," under subdivision 6. Flaherty v. Butte Electric Ry. Co., 42 Mont. 89, 111 Pac. 348 (1910). This anomaly is a product of the common law and is discussed in a California decision, Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930). REVISED CODES OF MONTANA are hereinafter cited R.C.M.

[2]For purposes of this discussion, it will be assumed that sufficient grounds exist for a new trial. Also, the terms "additur" and "remittitur" will be defined in the conditional sense, *i.e.,* one party is given the option to consent to a modification of the award, or submitting to a new trial. The option is given to defendant if plaintiff moves for a new trial, and to plaintiff if defendant so moves. Attempts to go beyond conditional use and arbitrarily modify damage awards without either party's consent have been declared unconstitutional. *E.g.,* Kennon v. Gilmer, 131 U.S. 22 (1889); Bourne v. Moore, 77 Utah 184, 292 Pac. 1102 (1930); Borowicz v. Hamann, 193 Wis. 334, 214 N.W. 431 (1927).