THE NEGLECTED PERSON AND THE STATE

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A recent United States Court of Appeal decision dealing with emergency blood transfusions in the face of an adult patient's refusal based on religious grounds is analyzed against the background of prior cases and other relevant policy considerations. Examining the role of the state as parens patriæ, the author postulates principles developed by the cases. He concludes that the appeal court's application of the parens patriæ doctrine to adults possessing full capacity makes the adult voting citizen little more than a ward of the state, permitted to make his own decisions only so long as his decisions accord with the state's view as to the proper state of his health.

I

Mrs. Jones, aged twenty-five and the mother of a seven month old child, was brought to Georgetown Hospital by her husband for emergency care, having lost two-thirds of her body's blood supply from a ruptured ulcer. She had no personal physician and relied solely on the hospital staff. The hospital recommended immediate transfusions of blood, which were refused by the patient and her husband on religious grounds. Thereupon, the hospital, through counsel, applied to the district court in the District of Columbia for an order authorizing the hospital to administer the transfusions. The district judge having denied the application, the counsel at four p.m. on September 17, 1963 applied to Judge Wright of the United States Court of Appeals for an emergency writ to review this action. Judge Wright confirmed the situation by telephone to the hospital and proceeded there with the counsel. He spoke with the husband who repeated his refusal to approve the transfusion. The judge advised the husband to retain counsel but, after discussion with his church, the husband declined to do so. Judge Wright's requested permission to see the wife was granted by the husband, and he attempted to communicate with the wife, advising her of the urgency of the treatment unanimously recommended by the hospital and doctors. The only audible reply from the patient was "against my will." The judge then asked if she would oppose the transfusion if the court allowed it. She indicated "as best I could make out" that "'it would then not be her responsibility." Thereafter, the doctors and the president of the university, whose hospital was involved, pleaded with the patient but to no avail. At

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5:20 p.m. the judge signed the order for the transfusion. [1] The plaintiff recovered and later sought a rehearing en banc of the original application. This was denied. [2]

The case raises some of the most warmly contested issues of this or other times and, while it presented only indirectly a problem in criminal law, strictly viewed, yet it posed the basic question of the liberty of the individual versus his restraint for public reasons. [3]

Judge Wright advanced the following arguments in support of his order :

1. The protection of the doctors and hospital from civil or criminal liability for the neglect of the patient's care, since they had the responsibility to treat her and had unanimously recommended the transfusions. [4] To this argument may be interposed the fact that the patient and her husband were willing to sign a waiver of all claims against the hospital resulting from the "failure" to give the blood transfusion. Further, the penal law of the District of Columbia, in line with criminal laws of the other states, does not impose upon persons generally the obligation to save life, as is done in many European jurisdictions. [5] No case has been found holding a physician or hospital criminally responsible for death or aggravation of injury where their "neglect" was due to denial of permission by the patient or a person responsible for her.

2. The protection of the seven month old child who would be left motherless should the mother die for want of transfusions. Judge Wright said that the state, as *parens patriæ,* would not allow a parent to "abandon" a child by means of "this most ultimate of voluntary abandonments." [6] It should, however, be pointed out that the child, even in the event of the death of the mother, would be in the care of the father not the state, and that apparently both parents were aware of the consequences to the child.

3. The protection of Mrs. Jones, the patient, who was *in extremis* and hardly *compos mentis* and who like a child was not able to decide for herself this serious matter. Hence, he argued, since in the case of

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[1] Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied,* 84 U.S. Sup. Ct. 1883 (1964), noted in 39 N.Y.U.L. REV. 706 (1964); 9 UTAH L. REV. 161 (1964).

[2] Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir. 1964).

[3] See Note, 77 HARV. L. REV. 1539 (1964); Note, 39 TUL. L. REV. 125 (1964). The case of *In re* Brooks Estate, 32 Ill.2d 361, 205 N.E.2d 435 (1965) decided since this essay was written, held that the appointment of a conservator and authorization of blood transfusions against the will of an adult violated basic constitutional rights no minor children being involved and no clear and present danger to society being present.

[4] 331 F.2d at 1009.

[5] *E.g.,* FRENCH PENAL CODE art. 63.

[6] 331 F.2d at 1008. *Cf.* Raleigh Fitkin–Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537 (N.J. 1964), where the welfare of the mother and the unborn child were so interwined and unseparable that it was impracticable to distinguish. In this case the Supreme Court of New Jersey acted on behalf of the unborn child to appoint a special guardian to consent to transfusions.

a child refused medical attention which would save its life, the court had on proper occasion assumed guardianship, it should do so here where a husband "neglected" his wife by denying to her that medical attention which would save her life. [7] However, it might be argued against this position that the wife was an adult, that she had been advised of the seriousness of her condition, by priest, doctors, lawyers and judge, and that she had refused to change her mind.

4. For the protection of life itself. Judge Wright argued that the patient did not want to die, otherwise she would not have sought the hospital's help. Thus Judge Wright "determined to act on the side of life." [8]

5. To protect Mrs. Jones's religious scruples. Judge Wright argued that "if the law undertook the responsibility of authorizing the transfusion without her consent" the effect would be to preserve for the patient "the life she wanted without sacrifice of her religious beliefs." [9]

The contrary arguments raised by certain members of the full court on the petition for a rehearing were as follows :

1. This was not a "case or controversy" such as is required by the United States Constitution and judiciary acts, but was merely an example of a grave dilemma "which confronts those who engage in the healing arts" when they meet the recalcitrant or non-cooperative patient. [10] The problem was difficult and fraught with moral and philosophical dangers, but its mere difficulty and emergency did not of themselves make it a *judicial* question.

2. No legally enforceable right of the hospital was threatened with injury. No economic interest was threatened since the patient and her husband had offered to sign a waiver to relieve the hospital of liability for the consequences of "failure" to effect the transfusions. [11] Does there exist a duty to provide treatment even against the will of an adult patient, such a duty as would support an action in malpractice for non-performance ? Could the hospital be prosecuted criminally had it refrained from action due to the patient's denial of permission ? If the answer to these questions be negative, then it would seem that the hospital had "no standing" to sue under the guides laid down by the United States Supreme Court in such cases as *Joint Anti-Fascist Refugee Committee v. McGrath.* [12]

3. The judicial process is not adapted to cope with such questions. As Judge Burger put it : "Some matters of essentially private concern and others of enormous public concern, are beyond the reach of judges." [13] As

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[7] 331 F.2d at 1008.
[8] *Id.* at 1009.
[9] *Ibid.*
[10] 331 F.2d at 1015.
[11] *Id.* at 1015-16.
[12] 341 U.S. 123 (1950).
[13] 331 F.2d at 1018.

Mr. Justice Cardozo warned: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty and of goodness." [14]

4. Intervention by the judiciary into areas of seemingly irreconcilable scientific demands and religious scruples wherein philosophers and theologians reach different solutions, should not be lightly made but rather should be approached with full awareness of the need for judicial restraint. The blood transfusion case today may lead tomorrow to the crisis in childbirth when decision is required as to whether to save the mother or the child, and religious scruples intervene, and decision delayed may result in the death of both.

II

Much of the thrust of Judge Wright's opinion is toward the notion of the state as *parens patriæ*. [15] It is not, however, clear whether the theory is that the state is the prime parent and guardian of all its citizens, and that it entrusts certain of these functions to natural parents so long as they exercise them in the interests of the state, or that parents are the natural prime guardians with the state being a sort of residual guardian, one who comes into action only when the natural guardians are lacking or forfeit their rights. [16]

Aristotle would seem to place the state in first position when he says that the state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part, [17] and indeed Sparta enacted measures requiring the elimination of unfit infants [18] even against the wills of the natural parents, thus emphasizing the paramount role of the state as *parens patriæ*. On the other hand, Roman law gave to the *paterfamilias* very great powers indeed over his family, and the state intervened only on the rarest of occasions, for example, where a father had sold his son thrice into slavery. [19]

In the common law, the father was early treated as the head of the family and natural guardian, with the mother qualified to act only in limited

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[14] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

[15] 331 F.2d at 1008 where Judge Wright said: "The state, as parens patriæ, will not allow a parent to abandon a child and so it should not allow this most ultimate of voluntary abandonment. The patient has a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."

[16] The Supreme Court of Minnesota wrote in State v. Klosen, 123 Minn. 382, 143 N.W. 984, 986 (1913): "In a state of organized society the rights of the parent are largely subordinate to those of the community, and whereever a breach of the parental trust occurs, no matter from what cause, of such a character that the fundamental welfare of the child is actually endangered, at that moment the state's right to assume its guardianship arises."

[17] ARISTOTLE, POLITICS Bk. K., ch. 2.

[18] JONES, THE LAW AND THEORY OF THE GREEKS 288 (1956).

[19] JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 118 (2d ed. 1961).

instances. The father was permitted wide latitude in discipline, control over property and marriage, and in choice of religion and education. Intrafamilial disputes were to be settled at the hearthside and not in the courts. The father, unlike his continental counterpart, could cut his child off without a shilling. These rights were said by Story to derive from "nature and nurture." [20] Blackstone referred to the relation of parent and child as the most universal in nature. [21]

The first intervention of the state into family governance came via the criminal law. For example, a typical statute provides that any husband or father who deserts and wilfully neglects or refuses to provide for and maintain his wife and minor child or children is guilty of a misdemeanor. [22] Further, any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child shall be guilty of a misdemeanor. [23] Criminal sanctions such as these were effective against the parent who was financially able but unwilling to support the child in that they forced him to fulfil his obligation or be imprisoned, but they were of little use against the impecunious and indigent parents who constituted by far the more numerous offenders.

The second step taken by society was one looking toward the welfare of the child rather than the punishment of the parents, and since Judge Wright drew his analogies from the child to the adult we will concentrate on the cases involving children, turning later to the question of whether these attitudes are apt for application to the adult.

III

A. *The abandoned child*

If the child were abandoned by its parent, Blackstone wrote that the churchwardens and overseers of the parish should seize the parent's rents, goods and chattels and dispose of them toward the child's relief. [24] Again it was a solution for the propertied parent, but suppose that the parent had no goods. The "Poor Laws" and their operation are not a pretty period of English history, and Dickens wrote of the plight of the orphan not from imagination but from a study of life. In modern times, the abandoned child would be turned over to the police and so to a welfare agency. However, abandonment was by no means the worst plight which could befall a child : in fact, it was sometimes a merciful fate where the parents beat their children,

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[20] 3 STORY, EQUITY JURISPRUDENCE § 1157 (14th ed. 1918).

[21] 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-47 (9th ed. 1783).

[22] N.J. STAT. ANN. § 2A: 100.1 (1960).

[23] N.J. STAT. ANN. § 9:6-3 (1960).

[24] 1 BLACKSTONE, *op. cit. supra* note 21, at 448.

degraded them, forced them to work long and inhuman hours, or gave them only enough food to keep body and soul together.

B. *The abused child*

Blackstone spoke of three duties which parents owed by natural law to their children : maintenance, protection and education, since, he said, to bring children into life only to neglect them so that they died was contrary to natural law. [25] In modern times, states such as New Jersey prosecute a parent for a misdemeanor if he abuses, abandons, or treats a child with cruelty and neglect and provide for the removal of the child from the parent's custody. [26] California provides that a "father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary clothing, shelter, or medical attendance or other remedial care for his child is guilty of a misdemeanor." [27] The rationale for removing the child from the parent's custody has been expressed in this way : "While a father so conducts himself as not to violate this right (of the infant to protection), the court will not, ordinarily, interfere with his parental control. If, however, by his neglect or his abuse, he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere, and take the infant under its own charge, and remove it from the control of the parent and place it in the custody of a proper person to act as guardian, who may be a stranger." [28]

The role of interference was traditionally performed by the Chancery Court, [29] but in modern times special courts competent for family matters have been established in many states. [30] The abused or cruelly treated child is usually removed at once from the parental home, but the problem has been how to discover him, since doctors, hospitals and agencies have been reluctant to report these cases of child injury for fear of reprisals or civil litigation. Consequently, many states have recently enacted statutes which make it mandatory for physicians, hospitals and similar agencies to report instances of physical injury inflicted upon children which appear to be non-accidental. Penalties are provided for non-compliance and immunity from civil liability and release from privilege are granted to the one reporting. [31]

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[25] *Id.* at 446-47.

[26] N.J. STAT. ANN. § 9:6-1 (1960).

[27] CAL. PENAL CODE § 270.

[28] Caton, J., in Cowls v. Cowls, 3 Gillman 435, at 437 (Ill. 1846).

[29] 3 STORY, *op. cit. supra* at § 1757.

[30] *E.g.*, New York established its children's court in 1922. As Cartwright, J., expressed it, "the parental care of the state is administered by the juvenile court, and that court performs a purely judicial function in the hearing of causes brought before it." Wittever v. Cook County Commissioners, 256 Ill. 616, 100 N.E. 150 (1912).

[31] *E.g.*, Louisiana on June 24, 1964 passed an act to provide for protection of children who have had physical injury inflicted upon them, to make mandatory the reporting by physicians, hospitals and similar agencies. Failure to report is a misdemeanor. Civil and criminal liability for reporting is denied. The privilege attaching to physician-patient relationship is removed in such cases.

C. *The neglected child*

More difficulty has been experienced in determining the "neglected child" and when it should be removed from parental control. New Jersey defines neglect of a child as "wilfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper house" or "failure to do or permit to be done any act necessary for the child's physical or moral well-being." [32] Interestingly enough, New Jersey goes on to provide that such shall not be construed to deny the right of a parent, guardian or person having the care, custody and control of a child to treat or provide treatment for an ill child in accordance with the religious tenets of any church as authorized by other statutes of New Jersey so long as the laws, rules and regulations relating to communicable diseases and sanitary matters are not violated. [33]

Since Judge Wright based his decision at least in part upon the jurisprudence as it had been developed with regard to neglect of a child's medical or surgical needs, we will limit our discussion to these points. But first let us look at the new law in Minnesota which represents some of the most modern thought on the neglected child. Minnesota defines the neglected child as one who is without necessary subsistence, education or other care necessary for his physical or mental health or morals because his parent, guardian or other custodian neglects or refuses to provide it. Upon proper complaint, investigation and hearing, the juvenile court, if it finds that the child has been neglected, may do one of several things : it may place the child under the protective supervision of the county welfare board or child-placing agency *in his own home* under conditions prescribed by the court and directed to the correction of the neglect of the child; or it may transfer "legal custody" from the parent to an approved child-placement agency or the county welfare board. The philosophy of the Minnesota Act is quite clear :

> to secure for each minor under the custody of the (juvenile court) the care and guidance, *preferably in his own home,* as will serve the spiritual, mental, and physical welfare of the minor, and the best interests of the state : to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for his custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents. [34]

But even when such "legal custody" has been ordered transferred to the child-placing agency or the county welfare board, such is not permanent.

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[32] N.J. STAT. ANN. § 9:6-1 (1960).
[33] *Id.* at § 9:6-11.
[34] MINN. STAT. ANN. § 260:011(2) (1959).

For example, the parent may show that the offending conditions have been remedied and ask for the retransfer of custody. Where, however, conditions have not changed and the parents have shown themselves to be uncooperative, separate proceedings may be instituted for the *termination* of parental rights and in such proceedings the burden of proof is on the petitioner. [35]

The question of "neglect" of medical or surgical care and treatment has not often been before the state supreme courts and the matter may be said to have begun with an English case, *Regina v. Wagstaffe,* [36] wherein the parent was indicted for manslaughter on the ground that he had neglected to provide proper medical attendance to his child. The defense was that according to the parent's religious beliefs (he being a member of a sect called "The Peculiar People") it was wrong to call in a surgeon but rather one must trust to prayer and meditation. The jury refused to find this to be "gross and culpable neglect," Judge Willes remarking that "there was a great difference between neglecting a child in respect to food, with regard to which there could be but one opinion, and neglect of medical treatment, as to which there might be many opinions." [37] In *Heinemann's Appeal,* [38] decided by the Supreme Court of Pennsylvania in 1880, the problem was not one of conviction for manslaughter but the question of transfer of custody of children. The father had no faith in allopathic medicine and doctors, but rather in the method known as the "Bannscheidt system" which he administered himself in cases of illness. The facts indicated that he had had a wife and five children, that first one child died, then his wife, then another child and finally his youngest, all dying of diphtheria and all being treated by his "cure." Thereupon, the maternal grandmother asked for the custody of the two remaining children, which the court granted. Although the father maintained that he was doing what was best for the children, the court found them to be "shamefully neglected as regards medical treatment."

Nineteen years later, [39] an English judge told the jury that if they were convinced that the child's death had been caused or accelerated by want of medical assistance, and if the prisoner had the means to provide such reasonably, and if they considered that medical aid and assistance were such essential things for the child that reasonably careful parents would in general have provided them, they should find the prisoner guilty of manslaughter for not having provided them. "At the present day [1899] when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to supply

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[35] *In re* Barron, 268 Minn. 48, 127 N.W.2d 702. See also: MINN. STAT. ANN. § 260:111 and § 260:191 (1960).

[36] 10 Cox Crim. Cas. 530 (1868).

[37] *Id.* at 533.

[38] 96 Pa. 112 (1880).

[39] [1899] 1 Q.B.D. 283.

medical aid for a dying child does not amount to neglect." [40] But two years later, [41] the Supreme Court of Georgia refused to punish a father who refused to permit medicine to be given to his child, saying that he had committed a "grave and grievous error of judgment" but not the crime of depriving the child of "necessary sustenance." [42]

The type of medical assistance rendered was before the courts of Ontario and New York in 1903. The Ontario father had provided Christian Science practitioners for his child, and it was argued that medical assistance meant assistance by those authorized to practice, *i.e.* registered physicians, but the court was not willing to so limit it. [43] The New York father relied on "Divine Healing" for his child and the court held that "medical attendance" was limited to those authorized to practice medicine. [44]

With regard to the problem in Judge Wright's case, the concurring opinion of Judge Cullen in the New York case is apt: "The state, as *parens patriæ* 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." [45]

Almost forty years later, [46] the Supreme Court of Washington had before it the case of a young girl with a hideously deformed and enlarged arm, which her mother refused to allow to be amputated. Evidence showed that there was a grave possibility that the child would not survive the amputation but everyone except the child's mother was willing to let the child take that risk. The court refused to order the operation, saying that "we have not advanced or retrograded to the stage where in the name of mercy we may lawfully decide that one shall be deprived of life rather than continue to exist crippled or burdened with some abnormality." [47]

To this argument is often opposed the remarks of Mr. Justice Rutledge made in a child labor case to the effect that "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 the choice for themselves." [48]

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[40] *Id.* at 291.
[41] Justice v. State, 116 Ga. 605, 42 S.E. 1013 (1902).
[42] 42 S.E. at 1014.
[43] Rex v. Lewis, 6 Ont. L.R. 132 (1903).
[44] People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).
[45] 68 N.E. at 247.
[46] *In re* Hudson, 13 Wash.2d 673, 126 P.2d 765 (1942).
[47] 126 P. at 771.
[48] Prince v. Massachusetts, 321 U.S. 158, 170 (1943).

Where the child was not of tender years, we may observe three cases which illustrate different attitudes. First, in Texas we have the case of a twelve year old boy who suffered from swollen joints. [49] His father was dead and his mother believed that illness could best be cured by "Divine Healing" although she did take the boy to a chiropractor and an osteopath and on one occasion permitted him to be examined by a physician. The court deprived the mother of custody of the child for the purpose of having treatment of the illness. Similarly, in New York, [50] where a mother had refused psychiatric tests or aid for her child, the court ordered the child to Bellevue Hospital for fifteen days for testing. However, the New York Domestic Relations Court in a case involving a twelve-year-old, who had a congenital hare lip and cleft palate, for the repair of which the father refused to permit surgery, noted that the child was of normal intelligence and that "to arbitrarily force the child to submit to surgery, which he has been conditioned to fear, might do more harm than good" and so decreed that the father be restrained from interfering in any way with discussions between the child and such reasonable number of persons as the court might designate, such discussions directed toward acquainting the child with the benefits accruing to him from prompt submission to the recommended operation. [51] Thus the child would be permitted to make the decision for himself, the state merely intervening to place the facts before him.

Perhaps the first case to involve a blood transfusion and conflicting religious principles was that of *People v. Labrenz* decided by the Supreme Court of Illinois in 1952. [52] There the parents refused to permit the transfusion on religious grounds and the court, treating the child as "neglected," appointed a guardian who ordered the transfusion and the child improved. The child was thereupon released from the hospital to the parents but the guardian was not released until all chance of the child's needing further transfusions was past. The parents attacked the action of the trial court as unconstitutional, but the action was upheld. The Missouri Court of Appeals stated the result of the conflict thus : that the parental right of a parent who, arbitrarily, puts his own theological belief higher than the duty to preserve the life of his child cannot prevail over the considered judgment of an entire people or the deep interest of society in the preservation of the race itself. [53]

The New Jersey Supreme Court in 1962 [54] ordered the appointment of a guardian for a child in desperate need of a blood transfusion which had been refused by the parents on religious grounds. Despite the transfusions

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[49] Mitchell v. Davis, 205 S.W.2d 812 (Texas Civ. App. 1947).

[50] *In re* Carstairs, 115 N.Y. Supp.2d 314 (Dom. Rel. Ct. 1952).

[51] *In re* Seiterth, 127 N.Y. Supp.2d 63. (Dom. Rel. Ct. 1954), *aff'd*, 309 N.Y. 80, 127 N.E.2d 820 (1955).

[52] 411 Ill. 618, 104 N.E.2d 769 (1952).

[53] Morrison v. State, 252 S.W.2d 97 (Kansas City Ct. App. 1952).

[54] State v. Perricone. 37 N.J. 463, 181 A.2d 751 (1962).

the child died. The parents challenged the court's action as being contrary to the first amendment's guaranty of freedom of religion in that it declared the child to be "neglected" solely because of the parent's refusal of the transfusion on religious grounds. In upholding the constitutionality of the action, the court pointed out that "while freedom to believe is absolute, freedom to exercise one's belief is not and must be considered in the light of the general public welfare." [55]

IV

Certain conclusions may be drawn from this review of the cases concerning state intervention where medical attention by parents has been refused to their children.

a. A distinction is drawn between the case of the life or death emergency and that of elective surgery. Only in the former case will intervention be justified.

b. Where a situation exists involving a choice between dangers, medical opinion being divided, the court should not intervene but should leave the matter to be determined by the medical experts and the parents.

c. Where the child is of sufficient age and intelligence to understand the nature of the matter, and the only question is that the parents have presented to the child only one side of the problem, the court's intervention should be limited to seeing to it that all sides of the problem are explored and laid bare for the child's decision. Such a course of action would seem more appropriate for domestic relations and juvenile courts than for ordinary trial courts.

d. The court which is requested to act should consider the effect which its intervention will have upon the continuing relationship of parent and child in the particular case.

e. Each case should be considered on its own facts. [56]

f. The court may be called upon to intervene on behalf of the unborn child, where the mother's life is in jeopardy in childbirth and a decision must be made as to the taking of the child's life to save the mother. [57]

Judge Wright, by applying the jurisprudence on the "neglected child" to the "medically-neglected adult" has raised two important questions. First,

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[55] 181 A.2d at 756.

[56] As was observed in Oakley v. Jackson, [1914] 1 K.B. 216, 220: "The parents are under a legal liability to allow the operation if the refusal to do so was in the circumstances a failure to provide adequate medical aid. Whether it is or is not so must depend upon the facts of each particular case."

[57] See Raleigh Fitkin–Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1963).

apart from the communicable disease situations where public health is involved, what is the basis of the right of state intervention in the case of the adult who is capable of consent but refuses to consent to a course of action which other adults have recommended? Secondly, if there be such a basis for intervention, is a court the proper agent in society to accomplish this? In extending the notion of the state as *parens patriæ* beyond the stage of minority and regardless of the full capacity of the individual, Judge Wright makes the adult voting citizen little more than the ward of the state, permitted to make his own decisions only so long as they accord with the state's view as to the proper state of his physical, mental and moral health. It was Mr. Justice Jackson who wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." [58]

[58] Board of Education v. Barnette, 319 U.S. 624, at 642 (1943).