UNAUTHORIZED RENDITION OF LIFESAVING MEDICAL TREATMENT

> Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery . . . .[1]
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> Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and, if he remains and relieves him by physical touch, hold him guilty of assault?[2]

An adult hospital patient refuses to consent to lifesaving medical treatment, such as a blood transfusion: The individual's right to determine what shall be done with his own body and the sanctity of life come into direct conflict. Should a court order that the treatment be given, or should it respect the individual's commands and let him die? The few courts which have faced this problem are divided as to the proper course.

In September 1963 the mother of a seven-month-old baby entered the Georgetown College Hospital.[3] Massive internal bleeding, caused by a ruptured ulcer, necessitated an immediate transfusion.[4] Due to religious conviction,[5] both the patient and her husband refused to authorize the transfusion. Hospital officials sought a court order authorizing the transfusion. After a district judge had refused the order, Circuit Judge Wright was contacted and after conferring with the patient, her husband, and attending physicians, signed an order authorizing the administration of "such transfusions as are in the opinion of the physicians in attendance

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[1] Natanson v. Kline, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1960) (dictum), cited with approval in Woods v. Brumlop, 71 N.M. 221, 227, 377 P.2d 520, 524 (1962) (dictum).

[2] Meyer v. Knights of Pythias, 178 N.Y. 63, 67, 70 N.E. 111, 112 (1904) (dictum).

[3] Application of President of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). Several law reviews have noted this case. *E.g.*, 10 CATHOLIC LAW. 260 (1964); 13 CATHOLIC U.L. REV. 188 (1964); 33 GEO. WASH. L. REV. 580 (1964); 77 HARV. L. REV. 1539 (1964); Comment, 39 N.Y.U.L. REV. 706 (1964); 40 NOTRE DAME LAW. 126 (1964); 113 U. PA. L. REV. 290 (1964); Comment, 9 UTAH L. REV. 161 (1964). These materials deal mainly with the interesting procedural problems involved in the case, while voicing a general condemnation of the case.

[4] Four attending physicians presented sworn statements to the effect that the patient would die without the immediate administration of blood transfusions. Brief for the Petitioner, app., Exhibit C., Jones v. President of Georgetown College, Inc., 337 U.S. 979 (1964) (certiorari denied).

[5] Mrs. Jones and her husband are members of the religious sect known as the Jehovah's Witnesses. Objection to blood transfusions, which are equated with the drinking of blood, is based on the Biblical text. See Acts 15:28-29. See generally WATCHTOWER BIBLE AND TRACT SOC'Y OF NEW YORK, INC., BLOOD, MEDICINE AND THE LAW OF GOD (1961); How, *Religion, Medicine and Law*, 3 CAN. BAR J. 365 (1960). The reasonableness of religious belief is not justiciable but the courts can ask if the belief is held in good faith. United States v. Ballard, 322 U.S. 78, 86 (1944). It is apparent that the parties were acting in good faith.

necessary to save . . . [her] life."[6] Transfusions were given and the patient recovered.[7]

Application of the President of Georgetown College, Inc.[8] is one of several cases in which a court has authorized lifesaving treatment on the adult patient who has refused to consent.[9] The Illinois Supreme Court, however, has recently held that where the refusal of treatment was due to religious conviction, such action constituted an unconstitutional infringement of religious liberty.[10]

The thesis of this Comment is that the rendition of emergency lifesaving medical treatment on the person of the objecting adult patient is proper. It will be seen that neither the common law nor the "free exercise"

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[6] 331 F.2d at 1002 n.4.

[7] Her petition for rehearing en banc was denied (apparently on the grounds of mootness). 331 F.2d at 1010.

[8] 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

[9] These cases are not reported. See Watchtower Bible and Tract Soc'y of New York, Inc., *Do Hospital Patients Have Rights?*, Awake! Sept. 8, 1964, p. 21 [hereinafter cited as Awake!]; notes 61, 74 *infra*. A recent case of interest is Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964). In that case, physicians determined that the patient, a Jehovah's Witness in her thirty-second week of pregnancy, suffered from a condition that would probably necessitate blood transfusions during the delivery of her child. When physicians learned of her objection to the proposed treatment, they sought judicial authorization and, on appeal, the New Jersey Supreme Court held: "The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine." *Id.* at 423, 201 A.2d at 538. If the court meant only that the mother's life should be saved if such was required to save the life of her child, then the case is only a logical extension of those which authorize medical treatment on children over their parents' objection. See note 69 *infra*. On the other hand, if the court meant to authorize transfusions on the mother even though such were not necessary to save the child, that is, after the child was delivered, then the case is clearer than the *Georgetown* case in holding that an adult patient cannot reject lifesaving treatment. In the *Georgetown* case, there was some doubt as to whether the patient was compos mentis at the time she refused treatment. See note 24 *infra*. In the *Anderson* case, the patient was in good health when she refused to consent to the transfusions and hence there is no question that the refusal was the product of deliberation rather than physical weakness and confusion. See text accompanying note 23 *infra*. Physicians read the ambiguous decision as authorizing treatment designed purely to save the mother's life and apparently gave the transfusions after the child was delivered. 40 NOTRE DAME LAW. 126 n.3 (1964).

[10] *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *accord*, Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). In the *Erickson* case, the court felt that the Jehovah's Witness patient, in refusing an emergency blood transfusion, was simply making a medical decision which the courts could not reverse. However, this is contrary to numerous decisions which do not treat the objection to treatment as a medical one in cases involving children. See cases cited in note 69 *infra*. While it is true that the Jehovah's Witnesses contest the medical propriety of the use of blood, they state that whether "the procedure is considered safe or dangerous from a medical standpoint in no way influences their position . . . ." WATCHTOWER BIBLE AND TRACT SOC'Y OF NEW YORK, INC., BLOOD, MEDICINE AND THE LAW OF GOD 16 (1961).

clause of the first amendment of the United States Constitution give the individual a right to reject lifesaving treatment. The law's traditional view of the sanctity of human life and the importance of the individual's life to the welfare of society, deny the individual a right to, in effect, consent to his own death. It will be shown that denial of the right to reject lifesaving treatment will not result in wholesale substitution of medical opinion for that of the individual. It will also be argued that a prior court order is not necessary in such a situation and the physician should be allowed to save the patient's life without one.

I

RIGHT TO REFUSE MEDICAL TREATMENT

In most circumstances the individual is afforded the right to reject medical treatment. Both the common law and the first amendment afford protection of the individual's right to determine what shall be done with his own body. However, an examination of these two sources of protection indicates that they do not give the individual the right to reject lifesaving treatment in the emergency situation.

A. Common Law Protection: Unauthorized Medical Treatment as Battery

Common law recognizes the right to refuse medical treatment at least in the non-emergency situation. Tort liability is imposed on the physician who renders treatment without his patient's authorization,[11] or, having once obtained it, goes beyond it by rendering treatment different from,[12] or more extensive than that authorized.[13] The plaintiff suing for an intentional, as opposed to a negligent, tort need only show that the treatment was given without authorization;[14] he need not rely on the expert witnesses generally required in a malpractice action.[15] Since the heart of

[11] Gill v. Selling, 125 Ore. 587, 267 Pac. 812 (1928) (operation on wrong patient).

[12] Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) (operation on left ear instead of right as agreed to by the patient).

[13] Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1952) (during operation for appendicitis, diseased fallopian tubes removed). However, a physician can extend an operation beyond that which the patient authorized in some circumstances. See note 22 *infra*.

[14] Generally, the risk of non-persuasion on the issue of consent falls on the defendant in an intentional tort action. However, when such an action is predicated on an invasion of one's person, the plaintiff has the risk of non-persuasion and the burden of going forward with the evidence. The plaintiff may, however, establish a prima facie case based on his own testimony, thereby transferring the burden of going forward to the defendant. RESTATEMENT, TORTS § 10, comment *c* (1938). However, the plaintiff can establish a prima facie case on the basis of his own testimony, thus shifting the burden to the defendant-physician. SHARTEL, MEDICAL PRACTICE § 4-02 (1959).

[15] See, *e.g.*, Beane v. Perley, 99 N.H. 309, 109 A.2d 848 (1954).

the battery action is the absence of legal consent,[16] it is no defense that the unauthorized treatment was given with a high degree of skill[17] or that it actually benefitted the patient.[18]

The common law does not, however, afford an absolute right to reject medical treatment, at least under certain circumstances. An exception to the requirement of prior consent is recognized in the emergency situation where the patient is in a condition, such as unconsciousness, which renders him incapable of either giving or withholding his consent.[19] The physician is then privileged to give the emergency aid.[20] The privilege is supported on two grounds. First, it is assumed that the patient, if capable, would consent to the treatment and hence its rendition does not conflict with his right to determine what shall be done with his own body.[21] Second, although the particular patient might reject the treatment were he able to do so, the lives of other patients in like circumstances would be lost if the physician were held to act at his peril, *i.e.*, if the physician were held liable for battery if it developed that the patient would have refused consent.[22] Thus, without yet reaching the

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[16] PROSSER, TORTS, § 9 at 33 (1955). Although "battery" popularly connotes evil intent, the only intent required is that the actor believe that the result, *i.e.*, the touching, is substantially certain to follow from his act. *Id.* § 8. See Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956).

[17] *E.g.*, Perry v. Hodgsen, 168 Ga. 678, 148 S.E. 659 (1929); Franklyn v. Peabody, 249 Mich. 363, 228 N.W. 681 (1930); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

[18] See, *e.g.*, Church v. Adler, 350 Ill. App. 471, 113 N.E.2d 327 (1953).

[19] The classic case is Jackovach v. Yocum, 212 Iowa 914, 237 N.W. 444 (1931), where a boy of seventeen jumped from a freight train, sustaining severe head and arm injuries. Attending physicians, while the boy was anesthetized, amputated the arm due to their fear of gangrene. The efforts to reach the boy's parents had failed. The court held the physicians were privileged because of the emergency situation.

[20] According to the *Restatement of Torts*, the physician must maintain an affirmative burden as to the following elements: (1) that an emergency existed involving a serious threat to the life or health of the patient; (2) that the patient could not give his consent (physical incapacity such as unconsciousness or delirium, or legal incapacity such as minority or insanity), and that pressures of time prevented conference with his legal representatives; (3) that a reasonable man would have consented to the treatment; and (4) that there was no reason to know that the patient would, in fact, object. RESTATEMENT, TORTS § 62 (1938).

[21] Courts tend to speak in terms of implied consent in this situation, but this is an obvious fiction. Implied consent, in its true meaning, is consent implied from conduct. For example, the act of holding one's arm out to be vaccinated implies consent to the vaccination. O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891). This is akin to estoppel; the plaintiff, having caused the reasonable man to believe that he has consented, will not be heard to deny that consent.

[22] RESTATEMENT, TORTS § 62 comment *a* (1938). This appears to be the basis of those cases which have allowed a physician to exceed his patient's consent during surgery when an unexpected condition is found. To require consent would often require a new operation, entailing additional expense and danger, because the patient is anesthetized and his legal guardians are far removed from the scene of the operation. A detailed examination of these

question of whether there is ever a right to reject lifesaving treatment, it appears proper in many emergencies to ignore the patient's refusal. Certainly the physician may ignore the refusal to consent of an insane or delirious patient.[23]

Where the patient is neither insane nor delirious, it would be proper in many cases to render the treatment over the patient's commands when failure to do so would mean the patient's death. Assuming that the individual has, in effect, a right to choose death, the law should require a high degree of certainty that he really desires to exercise this prerogative before giving it operative significance. In many emergency situations, such certainty is not possible.

Assume that an individual's leg has been crushed in an automobile accident. Without immediate amputation he will die of blood poisoning. Stating that he would rather die than live with one leg, the patient refuses to consent. Just as it is assumed that an unconscious patient, if capable, would consent to emergency treatment, it seems justified to assume that this refusal of lifesaving aid is due to weakness, confusion, and pain rather than deliberation.

Such an assumption could, of course, be overcome if the refusal had been confirmed by a course of conduct antedating the emergency. For example, refusal by a Jehovah's Witness to consent to a blood transfusion is probably an expression of true preference. Yet, in a case like *Georgetown*, where the patient is suddenly seized by a condition requiring a transfusion, his refusal may be due to his physically weakened condition.[24] Even here there may be insufficient certainty to allow the patient to die.

In many cases involving the refusal of lifesaving aid, the physician should, therefore, be allowed to proceed, either by prior judicial order or by holding him privileged in a subsequent battery action, because of the inherent difficulties in distinguishing the rash refusal from that represent-

cases is beyond the scope of this Comment, but the emerging rule appears to be that the physician is free to do that which good surgery demands provided it neither greatly increases the dangers involved nor involves a serious question of a non-medical nature, *e.g.*, removal of a part of the reproductive system. See Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1952). *Contra*, Marshall v. Curry, 60 Can. Crim. Cas. Ann. 136, 152 (1933) (testicle removed during hernia operation and physician held privileged because unreasonable to postpone removal). The situation confronting the physician need not be an emergency. Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956). See generally Kelley, *Physician, Patient and Consent*, 8 KAN. L. REV. 405 (1960); McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381 (1957); Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MT. L. REV. 233 (1942).

[23] See, *e.g.*, Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906) (dictum); Littlejohn v. Arbogast, 95 Ill. App. 605 (1900) (dictum); RESTATEMENT, TORTS § 62 (1938), note 20 *supra*.

[24] In the *Georgetown* case, Judge Wright found the patient *in extremis* and "hardly compos mentis" when he arrived at the hospital. 331 F.2d at 1008.

ing true choice. Whether the refusal was in fact rash should not be determinative, for to require the physician to act at his peril would tend to deter all action, thus costing the lives of those whose refusal was due to confusion and weakened physical condition.

This rationale, however, cannot be applied where it is clear that the patient's true desire is to refuse consent. For example, physicians inform a pregnant woman that blood transfusions will be necessary to save her life after the delivery of her child. While in perfect health, before any loss of blood, she refuses to consent. Here the issue is clearly raised: Does the individual have a legally protected right to reject lifesaving treatment? The few cases which have faced the issue in the battery context have given no clear answer.[25] Does the Constitution afford such a right?

B. Constitutional Protection: Freedom of Religion

If the refusal of required treatment is due to religious belief, to ignore it might violate the free exercise of religion clause of the first amendment to the United States Constitution. Yet reliance on the first amendment raises rather than answers the question because that amendment has not been held to give absolute freedom to religious practice.[26]

In the early case of *Reynolds v. United States*,[27] the private secretary of Brigham Young appealed his conviction for bigamy, arguing that the statute was unconstitutional as applied to him because his religion required its violation. The United States Supreme Court, affirming, held that whereas freedom of conscience was absolute, the right to free exercise of religion could not justify acts against the public well being.[28]

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[25] *Compare* Mulloy v. Hop, 1 West. Weekly R. (n.s.) 714 (1935), *with* Ollet v. Pittsburg & St. L. Ry., 201 Pa. 316, 50 Atl. 1011 (1902).

[26] It is apparent that a refusal of medical treatment for religious purposes is a "religious practice." It is well recognized that the state can regulate only religiously motivated behavior, not religious belief. See text accompanying note 27 *infra*. However, such behavior can consist of omissions as well as commissions, as in the refusal to be vaccinated against contagious disease, see note 30 *infra*, or in the failure to provide adequate medical care for one's child, see text accompanying note 67 *infra*.

[27] 98 U.S. 145 (1878). For the historical setting of this case, see Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 49-53 (1954).

[28] 98 U.S. at 166. This does not mean that dictates of religion can never be a defense to criminal prosecution. In People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), a state statute prohibiting the use of peyote was held to be unconstitutional as applied to good faith believers in a small religious sect which used the drug in its ceremonies. The court distinguished *Reynolds*, first, on the ground that the practice of polygamy was not central to Mormon faith, whereas the use of peyote was the heart of the religion before it. This is likewise true in the case of the Jehovah's Witnesses for the primary goal of that sect is not the abstention from blood transfusions. The second ground of distinction was that, unlike polygamy, use of peyote was found to be not injurious to the morals and health of the practitioners. The court implied that if the state had made the latter showing, then there would have been a compelling state interest to justify curtailment of religious practice.

In the cases since *Reynolds*, the question has been whether a religious practice is sufficently detrimental to the public good to justify its curtailment: Courts have held that the practice must present an immediate threat to a valid public interest.[29] Whether a religiously motivated refusal of lifesaving medical treatment is constitutionally protected turns on whether there is a valid public interest in the individual's life. In many analogous areas of the law, courts have recognized this interest.

II

PUBLIC INTEREST IN THE LIFE OF THE INDIVIDUAL

Refusal of lifesaving treatment does not constitute an immediate and direct threat to the well being of others; however, several areas of the law recognize the propriety of curtailing activities which do not directly endanger others.[30] Certain activities, because they adversely affect the participants and thus indirectly affect the welfare of society, have fallen under legal proscription.[31] Polygamy, for example, does not present an immediate and direct threat to the welfare of other individuals but this practice may be made criminal even for those whose religion dictates it.[32] It is likewise argnable that much of modern narcotics legislation is designed primarily to protect users.[33] The use of narcotics presents pri-

[29] For example, in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Supreme Court struck down a board of education requirement that school children salute the flag daily. Jehovah's Witness parents argued that their children were being forced to pay homage to a "graven image." See Exodus 20:4-5. The Court held that first amendment freedoms can be restricted "only to prevent grave and immediate danger to interests which the state may lawfully protect." 319 U.S. at 639.

[30] Where the individual presents a direct threat to the well-being of others, his activities will be restricted. In the area of battery, compulsory vaccination against contagious disease has been upheld as a valid exercise of police power. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[31] The threat a particular practice poses to the general welfare appears to vary with the number of people engaged in the practice and with the amount of harm each suffers. Against this must be weighed the burden which must be placed on the individual if the social harm is to be prevented. Several factors should be considered in assessing the burden which remedial action places on the individual: the particular right which is being curtailed, such as, the right of contract or the right of free exercise of religion; the extent that the right is being restricted, for example, a complete prohibition of the activity or a prohibition only in particular circumstances; and the method of curtailment, for example, the imposition of criminal sanctions or a less severe approach. It should also be considered whether another means exists by which to prevent the harm.

[32] Reynolds v. United States, 98 U.S. 145 (1878).

[33] Narcotics generally have a depressant effect on the user. In its final report, a joint committee of the American Bar Association and the American Medical Association on narcotic drugs concluded that the evidence is "heavily in favor" of the view that the crimes associated with the use of narcotics are due primarily, not to the effects of the drugs, but rather to narcotic laws which drive the price of drugs up. To support his habit, the addict must turn to crime. In regard to the user, the committee concludes that in "most

marily an indirect threat to society by harming the individual user.[34]

Similarly, this Comment argues that refusal of lifesaving treatment constitutes an activity which should be curtailed despite the fact that it does not endanger others. Such a refusal is tantamount to consenting to death. In the analogous areas of euthanasia, the "snake cases" and suicide, the law has uniformly denied operative significance to the individual's consent to his own death and consequently it should be expected that the same result will follow in the case of the refusal of lifesaving treatment.

A. Euthanasia

It is no defense to homicide prosecution that the decedent desired to die.[35] In effect, the individual cannot consent to his own death at the hands of a second party. The primary concern of the law in condemning "mercy killing" is apparently not with the difficult proof problems in the prosecution of homicide that the defense of consent would generate; hence, the case of taking life cannot be distinguished from that of saving it by unauthorized treatment. First, there is society's interest in the life of the individual.[36] If this is the reason why the individual has no right to consent to his own death in the euthanasia situation, then he would have no right to prohibit lifesaving medical treatment. Second, there is the fear that any exception to the sanctity of life cannot but cheapen it.[37] The same fear would lead to hesitation before condemning any act which saves life, *e.g.*, the rendition of lifesaving aid. If the individual has the right to command his own death, the form of the command should not be determinative: that is, whether it commands another individual to do something, as in the case of euthanasia, or whether it commands him not to do something, as in the case of the refusal of required medical treatment.

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instances the addicts' sins are those of omission rather commission; they are ineffective people, individuals whose great desire is to withdraw from the world and its troubles into a land of dreams." JOINT COMM. OF THE AMERICAN BAR ASS'N AND THE AMERICAN MEDICAL ASS'N, DRUG ADDICTION: CRIME OR DISEASE? 165 (1961).

[34] Numerous other examples could be cited. In State v. Congdon, 76 N.J. Super. 493, 185 A.2d 21 (Super. Ct. App. Div. 1963) the court held that the state, without violating the first amendment, could impose criminal sanctions on individuals refusing to take cover during an air raid drill. It stated that "the basis of the State's police power is the protection of its citizens. This protection must be granted irrespective of the fact that certain individuals may not wish to be saved or protected." *Id.* at 511-12, 185 A.2d at 31. Another example would be that of dueling, which is illegal though both parties consent. *E.g.*, CAL. PENAL CODE §§ 225-31.

[35] Regarding the legal status of mercy killing in this country and elsewhere, see Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350 (1954).

[36] SHARTEL, MEDICAL PRACTICE § 1-17 n.5 (1959).

[37] See note 57 *infra*.

B. Poisonous Snake Rituals

The "snake cases"[38] provide additional precedent for the proposition that the state may act to prevent the individual from consenting to his own death. A small religious sect, known as the Holiness Church, believes that the true test of faith is the handling of poisonous snakes: The true believer will not be harmed. Several state legislatures made this practice criminal. Several state courts, upholding the constitutionality of the statutes, iterated the traditional language about the safety of onlookers, but a close reading of the cases indicates that the concern was with the individuals who handled the snakes.[39]

It is difficult to find a meaningful distinction between an individual who handles a poisonous snake and one who refuses required medical treatment. A distinction between misfeasance and nonfeasance[40] is nonsense; each individual is making basically the same decision. Walking into a burning house is tantamount to refusing to walk out.[41] In terms of the danger to others presented by the two acts, there is little distinction. The ceremonies of the Holiness Church create a slight public danger in that the poisonous snake might escape.[42] If minor considerations are determinative, then it could be argued that the hospital patient, in refusing lifesaving treatment, creates a danger to others by bringing otherwise unneeded physicians to his bedside and by generally interrupting the smooth operation of the hospital.[43]

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[38] Hill v. State, 38 Ala. App. 623, 88 So. 2d 880 (Ct. App. 1956), *cert. denied*, 38 Ala. 697, 88 So. 2d 887 (1956); Lawson v. Commonwealth, 291 Ky. 473, 164 S.W.2d 972 (Ct. App. 1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949), *appeal dismissed sub nom.* Dunn v. North Carolina, 336 U.S. 942 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948).

[39] For example, in one case, the court stated that the legislative purpose in outlawing such activities was to protect people "participating in or attending religious services," and later, after finding that the precautions taken to protect the audience were inadequate, stated that "of course, such precautions do not at all protect those who are actually handling these poisonous snakes." Harden v. State, 188 Tenn. 17, 24, 216 S.W.2d 708, 710 (1948). Relying on *Reynolds*, see text accompanying note 27 *supra*, another court stated that it was constitutional to enact a "law prohibiting the practice of a religious rite which endangers the lives, health or safety of the participants, or other persons." Lawson v. Commonwealth, 291 Ky. 437, 441-42, 164 S.W.2d 972, 974 (1942).

[40] The Illinois Supreme Court, in holding unconstitutional a court order allowing blood transfusions on the objecting Jehovah's Witness patient, distinguished the snake cases on this basis. *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

[41] To impose criminal liability there must be a criminal act or a failure to act in violation of an affirmative duty. See, *e.g.*, Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948). However, the question of the criminal liability of the patient is not at issue.

[42] In Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), the court gave only one instance of a death actually occurring. It did not indicate whether a snake handler or an outsider died. The danger to onlookers is discussed in Comment, 9 UTAH L. REV. 161, 165 (1964).

[43] In the *Georgetown* case, numerous doctors, along with counsel for the hospital and various hospital officials, congregated to discuss the dilemma. 331 F.2d at 1007.

A stronger argument for curtailing religious practice can be made in the case of the hospital patient than in the case of the snake handler. First, the extent of social harm presented by the practice is greater because death from the refusal of lifesaving treatment is as certain as medical knowledge can be, whereas death from the handling of snakes is a mere possibility.[44] Second, the extent that religious practice must be curtailed is less in the case of the hospital patient. Handling snakes is essential to the ritual of the Holiness Church; the proscription of a given form of medical treatment is generally just one of many proscriptions found in religious doctrines.[45] In addition, while the members of the Holiness Church are forever barred from practicing the dictates of their religion, the members of a sect which prohibits a given form of treatment are free to follow their religious dictates in all but the most limited of situations: the life and death situation. As to the manner of curtailment, criminal sanctions are imposed on the individual who handles snakes due to his religion, while in the case of the individual who refuses a form of medical treatment due to his religion, no such sanctions are imposed. When a patient refuses lifesaving treatment, the propriety of his decision is not at issue: The only question is whether a physician's act in violation of that decision is proper.

C. Analogy to Prevention of Suicide

It is obviously proper for a physician to save his patient's life by unauthorized treatment if the physician in doing so is in the same position as the individual who has prevented a suicide. It is not a legal wrong to prevent suicide.[46] To hold the physician liable and the rescuer from suicide privileged, a distinction must be found either in their respective actions or in the actions of the person saved.

There are two possible ways to distinguish the acts of the suicide from that of the patient who refuses lifesaving treatment: first, by the misfeasance-nonfeasance analysis, and second, in terms of the motivation of the person saved. Neither, however, appear to justify intervention in one case but not in the other.

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[44] See note 42 *supra.*

[45] See People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), discussed in note 28 *supra.*

[46] See Commonwealth v. Mink, 123 Mass. 422, 429 (1877). It might be argued that the patient, in refusiug lifesaving aid, is "attempting suicide" and hence, in those states where suicide is unlawful, the physician could avail himself of the privilege to prevent the commission of a crime. However, such an argument is not in point as it is the behavior of the physician, not that of the patient, which is to be condemned or approved. For an interesting analysis of the problem which concludes that a religiously motivated refusal of medicial aid would not constitute attempted suicide, see Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 68-70 (1954).

The misfeasance-nonfeasance analysis would be misapplied in this context because the concern is not with whether the individual is "guilty" of his own death but rather with the preservation of his life. The misfeasance-nonfeasance analysis is employed to determine an individual's culpability in relation to a given result which society has condemned, and not to reassess the social disutility of that result. For example, a defendant drowns another by pushing him in a lake. He is guilty of homicide. A second defendant refuses to take affirmative action which would effectuate an easy rescue. He is guilty of nothing.[47] In both cases, however, the man is dead, and the loss to society is equally great. Similarly, the result of the suicide's "misfeasance" and the patient's "nonfeasance" is the same.[48]

The second ground for a possible distinction between the suicide and the hospital patient lies in their respective motivations. The suicide wishes to die, whereas the patient who declines treatment for religious reasons, wishes to live, but prefers death to a breach of religious commandment. The act of the patient does not "seem" like suicide. It may well be that society's condemnation of suicide is directed at the motivation behind the act and not at the act itself because, as one author explains:

> Suicide shows contempt for society. It is rude. . . . This most individualistic of all actions disturbs society profoundly. Seeing a man who appears not to care for the things which it prizes, society is compelled to question all it has thought desirable. The things which make its own life worth living, the suicide boldly jettisons. Society is troubled, and its natural and nervous reaction is to condemn the suicide. Thus it bolsters up again its own values.[49]

This may be good psychology but to use motivation as a basis of legal

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[47] Osterline v. Hill, 263 Mass. 73, 160 N.E. 301 (1928).

[48] One is reminded of the gravedigger scene in Hamlet where preparations are being made for Ophelia's burial. When informed that it was to be a Christian burial, which was denied the suicide at common law, the clown asks: "How can this be, unless she drowned herself in her own defence?" Employing the misfeasance-nonfeasance analysis, he explains: "Here lies the water; good: here stands the man; good: if the man go to this water, and drown himself, it is, will he, nill he, he goes,—mark you that; but if the water come to him and drown him, he drowns not himself: argal [therefore], he that is not guilty of his own death shortens not his own life." Act V, scene I, lines 9-13.
If the misfeasance-nonfeasance distinction is adopted by the courts in this area, it could be argued that refusing required treatment is an act and thus constitutes "misfeasance." In the case of the religious suicide, such as a Buddhist monk burning himself, there is undoubtedly an "act." It would seem that the Buddhist monk and the patient refusing life-saving treatment should be treated in the same manner: either they both have a right to their religious practice or neither do. The use of the nonfeasance-misfeasance analysis, however, would lead to different results.

[49] FEEDEN, SUICIDE 42 (1938) as quoted in WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 267 (1957).

distinction in this context would be absurd. Take, for example, two hospital patients both in dire need of blood transfusions. One rejects them because of a desire to die, the other because of religious conviction. Should the law allow the patient wishing to live but preferring death to breach of religious faith, to die, while forcing the one wishing to die, to live? To ask the question is to answer it.

In *Reynolds v. United States*,[50] the Court stated in a dictum that it is within the power of government to prevent a religious suicide.[51] The dictum makes sense. If the non-religious suicide may be prevented, so may the religious suicide. If judicial response were to vary in the two situations, it would be the sheerest of hypocrisies: Life may be saved, not because it is valuable, but rather because suicide is "rude."

Failure to find a meaningful distinction between the refusal of lifesaving treatment and suicide, either in their respective motivations or in the misfeasance-nonfeasance analysis, leads to the conclusion that, based on the quality of their respective conduct, neither the patient nor the suicide can demand legal protection from lifesaving touching. Consequently, if the physician who renders unauthorized treatment is to be held liable while the individual who prevents suicide is held privileged, a distinction must be found in the respective acts of the rescuers. It may be that the latter would be held privileged because he was justified in assuming that the would-be suicide was acting rashly.[52] However, it is apparent that not all suicide attempts are rash. If the rescuer knew that the would-be suicide was not acting rashly, would he commit a legal wrong if he prevented the suicide?[53] If he would not be, then neither would the physician.

D. Is There A Right to Choose Death

To hold that a court order which allows the physician to proceed with lifesaving treatment over the religious objections of the patient is an unconstitutional infringement of religious liberty, or to hold that the

[50] 98 U.S. 145 (1878).

[51] *Id.* at 166.

[52] Studies indicate that most suicide attempts are, in fact, rash, or perhaps insincere. For example, of the 138 patients admitted to the suicide ward of a London hospital during a one-year period, only one had committed suicide five years later. ST. JOHN-STEVAS, THE RIGHT TO LIFE 74 (1963).

[53] Even if the privilege to prevent suicide is predicated on the assumption that the suicide is acting rashly, the individual preventing a suicide would probably be held privileged even though the would-be suicide was not acting rashly, at least where the rescuer was unaware of this fact. In the privilege to render emergency aid on the patient unable to give consent, the law has held the physician privileged despite the subjective wishes of the patient. See text accompanying note 19 *supra*. It is probable that such a rule would be applied here because in many attempted suicides the individual is seeking help rather than death. DUBLIN, SUICIDE 164 (1963).

physician who has rendered the treatment is liable for battery, is to hold that the individual has a legally enforceable right to choose death. Because of society's interest in the life of the individual, because of the law's traditional view of the sanctity of human life, and because life can be saved without too great a curtailment of the religious liberty of those patients who refuse treatment on religious grounds, the law should not give its protection to the individual's decision to choose death.

Society has an interest in the life of the individual. In the *Georgetown* case, the patient was the mother of a seven-month-old child and it is apparent that others than herself would have suffered had she died.[54] Once it is admitted that there is sufficient interest in the life of a particular patient to deny him a legal right to refuse lifesaving treatment,[55] then the decision must be the same for all patients. That is, the criterion of the "social worth" of the patient would lead the courts into insolvable problems. Any distinction based on "social worth" in this area is repugnant to the basic ideal of equality: If the mother of several children is to be saved, then so must the childless individual.[56]

It would be out of line with the law's traditional affirmation of life were it to label the saving of life as either unconstitutional or as a civil wrong.[57] To bring the issue into focus, take the case of a Buddhist monk's attempt to burn himself. Does the individual commit battery if he prevents the attempted suicide? Does a court unconstitutionally deny the free exercise of religion if it acts to prevent the suicide? There seems but one answer.

To deny the individual a legally enforceable right to reject lifesaving treatment for religious reasons does not greatly curtail his religious freedom, where objection to treatment is on this ground. First, no criminal sanctions are imposed on him. Second, he is allowed to practice the dic-

[54] Judge Wright argued that the "state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother." 331 F.2d at 1008.

[55] *Cf.* Martin v. Industrial Acc. Comm'n, 147 Cal. App. 2d 137, 304 P.2d 828 (1956) (withholding death benefits under workman's compensation because of an "unreasonable" refusal by the decedent, a Jehovah's Witness, to consent to a blood transfusion).

[56] The Supreme Court of Illinois, however, would apparently make this distinction. In holding that the unauthorized treatment could not be given, the court distinguished *Georgetown* on the basis that the patient involved in the case before it was not the mother of a small child. *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The general tenor of the opinion, however, indicates that even in the *Georgetown* situation, the court would deny the order.

[57] See ST. JOHN-STEVAS, THE RIGHT TO LIFE (1963). Dealing with such topics as suicide and the recent thalidomide tragedies, the thesis of the book is that once the principle of the sanctity of life is abandoned, there can be no criterion of the right to life save that of personal taste.

tates of his religion in all but the most limited of circumstances: the life and death situation. Third, neither he nor his religion, at least in the case of the Jehovah's Witnesses, will deem him to have sinned. He did not voluntarily breach religious dictates.[58]

III

LIMITATIONS

If it is decided that the physician can properly ignore his patient's objections to lifesaving treatment, can application of this rule be limited to cases where medical treatment is immediately required to save life? Or will the result be a wholesale substitution of medical discretion for that of the individual?

Basically, two problems are found.[59] The first concerns the type of medical treatment which would be justified, and the second concerns whether lifesaving treatment could be justified upon the individual who had not sought any medical treatment.[60] As to the type of treatment, it would seem that only emergency medical treatment, with a high degree of probable success, would be justified.[61] This limitation is inherent in a

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[58] The conscientious Jehovah's Witness is to do "everything possible within reason and right and without injury to another" to resist the court-ordered transfusion. However, he is not required to resist by physical violence. Letter From the Watchtower Bible and Tract Society of New York, Inc., to the Villanova Law Review, Oct. 6, 1964, as quoted in 10 VILL. L. REV. 140 n.3 (1964). In the *Georgetown* case, Judge Wright pointed out that if "the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve . . . the life she wanted without sacrifice of her religious beliefs." 331 F.2d at 1009.

The individual having objection to a certain form of medical treatment could reach an agreement with his physician that it not be given should the need arise. The magazine of the Jehovah's Witnesses makes this recommendation. Awake!, *supra* note 9, at 21, 27.

[59] Two other problems should be mentioned. First, could the decision recognizing sufficient public interest in the individual's life be read as authorizing compulsory health checkups? The argument would be that society has an interest in the individual's health as well as his life. However, the underlying factors involved in the two cases—the social good advanced, the numbers of people involved, and the rights which must be curtailed—are quite different. See note 31 *supra*. Courts should have little difficulty in limiting the decision to life and death situations. Second, could the philosophy expressed in *Georgetown* justify therapeutic abortion over the Roman Catholic mother's refusal, were it required to save the mother's life? Clearly not, for the question of taking of life, by choosing between lives, is different than the one of saving life.

[60] Judge Wright, in the *Georgetown* case, was careful to point out that that case did not "involve a person who . . . refused to seek medical attention . . . [nor] a disputed medical judgment or a dangerous . . . operation." 331 F.2d at 1007.

[61] It might be argued that the privilege should be restricted only to treatments which do not adversely affect the individual, *i.e.*, to exclude such things as amputations. Such a distinction, however, appears to be without merit. First, when a patient states that he would rather die than to have a limb amputated, because this decision cannot be confirmed by prior belief, as can a religious objection to treatment, it is possible that the

privilege to ignore a patient's refusal of consent in order to save his life. To justify his trespass, the physician would probably be required to sustain the burden[62] of showing that the situation was clearly one of life and death. This clear choice is not present when the proposed treatment does not have a high degree of probable success.

If it is decided that the social interest in the patient's life is sufficient to deny him legal protection in his refusal to consent to lifesaving treatment, the question arises whether or not this decision would justify similar treatment on the individual who has refused to seek medical aid altogether. For example, would a physician be held privileged to enter the home of a Christian Scientist, uninvited, to render lifesaving treatment? There appear to be three possible grounds to distinguish this case from the case where the patient has voluntarily consented to some medical treatment. First, to recognize a privilege in the case of an individual who has not sought medical treatment would be an additional curtailment of the rights of the individual. Like the case of the hospital patient, the individual's right to determine what shall be done with his own body is invaded, but here also the right of the individual to be "let alone" is curtailed.[63] In the judicial balance, this additional burden on the individual could tip the scales in his favor. Second, the hospital patient, unlike the person who has not sought medical attention, has placed the physician in an extremely vulnerable position both legally[64] and

refusal is not an expression of true will. In the emergency situation, there is not enough certainty that the patient truly desires to die to allow him to die. See text accompanying note 24 *supra*. Second, even were it determined that the individual was expressing true will in his refusal, the same considerations which would allow the physician to save the patient's life without crippling treatment would apply to crippling treatment. The only distinction is that, for the majority of people, it seems much worse to undergo an amputation than a blood transfusion, *i.e.*, it "makes more sense" to refuse an amputation. However, to those who have religious objections to transfusions, such treatment is as repugnant to them as is probably the crippling operation to the majority. It would be somewhat hypocritical to force only that treatment to which the majority would gladly submit. In July 1964 a Florida judge issued an order authorizing physicians to amputate the gangrenous leg of a patient over the latter's objections. Awake!, *supra* note 9, at 21.

[62] Where the defendant in a trespass action is claiming that his behavior was privileged because greater social good could be advanced by approving his actions rather than in redressing the plaintiff's harm, he has the burden of showing this. RESTATEMENT, TORTS § 10 comment *c* (1938).

[63] Mr. Justice Brandeis said in Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion): "The makers of our Constitution . . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." Circuit Judge Burger relied on this statement in his dissent in *Georgetown*. 331 F.2d at 1016-17. However, it seems that the patient waives his "right to be let alone" when he enters the hospital, and voluntarily consents to some medical treatment. The case for finding waiver is stronger when the conditions which the patient seeks to impose on his treatment lead to his death.

[64] It is doubtful that the hospital would have incurred either civil or criminal liability

morally.[65] Finally, the hospital patient, in entering the hospital, recognizes the propriety of medicine in general. Although it is arguable that the reasons supporting the denial of a legal right to reject lifesaving aid outweigh the above considerations, the judiciary may make the distinction between the patient who has sought aid and the one who has not.

IV

IS A COURT ORDER NECESSARY?

Assuming that judicial authorization of lifesaving treatment on the adult patient is proper,[66] the question arises whether it is essential or even advantageous. In other words, is the physician privileged to render the same treatment without prior judicial blessing? If the role of the courts is critical, the physician may be held liable if he acts without

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if it had assented to the wishes of its patient. Were the refusal by a mentally incompetent individual, it has been suggested that the hospital would be under a duty to give the lifesaving treatment, 39 N.Y.U.L. REV. 706, 708 (1964). While it is true that several cases, in recognizing the privilege to render treatment when it is impossible to receive authorization because of the emergency situation, see text accompaning note 19 *supra*, do speak of the physician's duty to do so, no case has indicated that such a duty arises when the patient objects and, in fact, many cases have implied the contrary. See, *e.g.*, Pratt v. Davis, 224 Ill. 300, 309-10, 79 N.E. 562, 565 (1906) (dictum); Jackovach v. Yocum, 212 Iowa 914, 237 N.W. 444 (1931); Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912). It has been held that where the patient is delirious and refuses treatment, and where his family refuses to consent to the treatment, the physician is absolved from civil liability. Littlejohn v. Arbogast, 95 Ill. App. 605 (1901). It would appear harsh to hold the physician liable in battery for operating against the wishes of the rational patient while also holding him liable for negligence for not doing so in the case of the delirious patient. For one thing, it would often be difficult to determine whether or not the refusal was rational or rash. For the above reasons, it is doubtful whether the hospital would be under a duty to act.

[65] See Froham, *Vexing Problems in Forensic Medicine*, 31 N.Y.U.L. REV. 1215, 1221 (1956).

[66] It is essential to define exactly what is involved in judicial authorization of the treatment. Although there may be some question as to the hospital's civil or criminal liability incurred by its acquiescence to the patient's commands, it is doubtful that either would arise. See note 64 *supra*. If this were the motivation of the moving parties in *Georgetown*, all such possible liability should vanish as the initial court refused to authorize treatment. Further, the order obtained in both cases was permissive. See text accompanying note 6 *supra* and note 9 *supra*. If the order were justified because of a duty to act on the part of the physicians, it would be mandatory. It would be a radical reading of the cases to find that they recognize an affirmative duty on the part of the physicians and it is not surprising that none of the several comments on the cases view them in this light. Consequently, the orders are in effect a judicial determination that no tort liability would arise if the physicians gave the treatment. A vigorous dissent in the *Georgetown* case argued that the issue was nonjusticiable, lying beyond judicial power in an area reserved for the individual. Yet this misconceives the basic issue which is not the propriety of the patient's decision, but rather that of the physicians' actions in violation of that decision. The issue is the same as if the physicians had given the treatment without judicial order and the patient sued for battery. Thus the *Georgetown* case represents a prior adjudication that, under the facts of the case, there would not be liability. The only question which remains is whether a court order is required.

prior court order. An examination of the court's role, however, indicates that it is at best mere ritual and at worst grounds for abuse.

This can be illustrated by those cases which involve children. It is established that a parent may incur criminal liability for failing to provide adequate medical care for his child[67] and it has been specifically held that an unreasonable refusal to consent to a surgical operation on one's child violates a legal obligation.[68] Many courts have authorized medical treatment, including blood transfusions, on children over the objections of their parents.[69]

With this in mind, consider an actual case in which physicians had determined that a newborn infant's life would be lost without a blood transfusion. His parents refused consent and the physicians sought judicial intervention. Before a legal guardian could be appointed for the infant, however, the local statute required that the parents be given notice of one day. The parents refused to waive notice. Realizing that the infant would not survive the twenty-four hour delay, would the physicians have been liable if they had proceeded without awaiting the order? Although some works on the subject imply that they would,[70] it is difficult to comprehend that a court would take this position. The law would be working at cross-purposes if the physicians were civilly liable for giving the transfusion while the parents, in refusing to authorize it, may have breached a legal duty. The decision to hold the life of the child paramount to his parents' desires has been made and it is doubtful that the courts would allow this decision to fall due to mere formalism. In the example above, when the court reconvened the following day, the infant was dead.[71]

The requirement of prior judicial order in the case of the adult patient can be defended on two grounds: first as a deterrent to unwarranted action on the part of physicians; and second, as a valid use of ritual, that is, it is one thing for a judge to override the patient's decision, but quite another for a physician to do so. As to the former, however, it may well be

[67] See, *e.g.*, People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903) (denying the defense that the failure was due to religious dictates).

[68] Oakey v. Jackson, [1941] 1 K.B. 216.

[69] "The state, as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because of the [parent's religion] . . . ." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Under the power of *parens patriae*, several courts have ordered medical treatment over the objections of the child's parents. See, *e.g.*, State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); People *ex rel.* Wallace v. Labrenz 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (1952).

[70] See, *e.g.*, Kelley, *Physician, Patient, and Consent*, 8 KAN. L. REV. 405, 433 (1960). *Contra*, Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATHOLIC LAW. 212, 220 (1964).

[71] Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 62 (1954).

that a better deterrent in this situation would be to deny the physicians prior judicial authorization, a bulwark against civil liability,[72] and to require them to justify their actions before a jury, if and when the patient sues for battery.[73] In this manner there can be a sober adjudication of the efficacy of the treatment and of the existence of the emergency, an adjudication which is often impossible during the emergency itself.[74]

As to the need of ritual, it is doubtful that the courts would insist upon it in light of the countervailing factor: Life may hang in the balance. Just as actual consent is not required in the emergency situation where the patient is unconscious,[75] it is probable that the courts would not insist upon prior judicial authorization, once the basic decision that the individual cannot insist on legal protection from unauthorized life-saving touching has been made.

CONCLUSION

The *Georgetown* case, in ordering that lifesaving treatment may be given to the objecting adult patient, seems to be in accord with the traditional legal view of the sanctity of human life and the interest society has in the life of the individual. To hold otherwise is to hold that the individual has a legally enforceable right, in effect, to choose death, and that the saving of human life, under these circumstances, is a legal wrong.

As medical science becomes more sophisticated, one can expect more such cases to arise and hence it is essential that the courts clarify the respective rights of the patient and his physician. Today, a life may depend on the individual judge's opinion as to the propriety of judicial intervention into this area.

Kenney F. Hegland

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[72] Whether the court order bars all civil liability on the part of the physician is beyond the scope of this Comment. That is, the physician may be liable in tort for being mistaken as to the existence of the emergency or as to the propriety of the treatment authorized.

[73] In Raleigh Fitkin-Paul Morgan Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), discussed *supra* note 9, physicians obtained judicial authorization of the administration of required blood transfusions. Apparently, only one pint was actually administered and it has been effectively argued that, if only one pint was given, the transfusion was not necessary. Awake!, *supra* note 9, at 21, 26-27. If this is in fact correct, the religious freedom of the patient might have been better guaranteed by refusing the physicians a judicial order, thus forcing them to be absolutely certain that the treatment was required.

[74] On May 16, 1964, Mrs. Rotarius suffered blood loss after giving birth. When she refused to consent to a transfusion, doctors in Anaheim, California, obtained authorization from a judge over the telephone. There was no written court order. Awake!, *supra* note 9, at 21, 26.

[75] See text accompanying note 19 *supra*.