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Compelled Medical Aid v. Religious Freedom

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right to counsel in special courts-martial with special attention to: (1) the concept of military due process as framed by the United States Court of Military Appeals; (2) the current Constitutional concept of the right to counsel as interpreted by the United States Supreme Court; and (3) the potential problem raised by the *Burns v. Wilson* limitations on federal court review of court-martial cases. It is submitted that such a reexamination will result in (1) the finding that in ordinary circumstances the accused's right to counsel will outweigh military exigency; and (2) the finding that, although the accused's rights are Congressional in origin, those rights are at least rudimentarily governed by Constitutional precepts.

ROBERT E. PAYNE

COMPELLED MEDICAL AID v. RELIGIOUS FREEDOM

The religious beliefs and opinions of the individual may not be interfered with constitutionally;¹ however, this is not necessarily true of religious practices.² A state may exercise its police power³ in order to

¹"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

This amendment is applied to the states through the Fourteenth Amendment. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This federal Constitutional grant is also set forth in numerous state constitutions. E.g., Ala. Const. art. 1, § 3; Cal. Const. art. 1, § 4; Fla. Const. art. 1, § 4; Ill. Const. art. 2, § 3; Ky. Const. art. 1, § 1(3); Mass. Const. part 1, art. 3; N.H. Const. part 1, art. 5; N.Y. Const. art 1, § 3; Pa. Const. art 1, § 3; Texas Const. art. 1, § 6.

²*Mormon Church v. United States*, 136 U.S. 1, 49-50 (1890); "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation." *Davis v. Beason*, 133 U.S. 333, 343 (1890); *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

In *City of Manchester v. Leiby*, 117 F.2d 661 (1st Cir.), cert. denied, 313 U.S. 562 (1941), the Court upheld an ordinance requiring identity badges for people selling religious material on the streets as being within the police power of a municipality. In *Reynolds*, supra, the Court held the laws forbidding bigamy to be constitutional even though the religious tenets of the individual encouraged such practices.

³"The Police power of the State invoked and exercised by the Legislature is a flexible, broad, variable process of government intent upon keeping up to date with all of the public and social needs. What would be a violation thereof in prior years might of necessity in an ever-changing world become legal in our present society. Contrawise, what may have been valid when enacted, as the result of later events might become unlawful." *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 12 App. Div. 2d 223, 210 N.Y.S.2d 193, 196 (1961).

protect the health, safety, and general welfare of the public.⁴ Such exercise of police power, may come into conflict with an assumedly guaranteed religious practice.⁵

This exercise of police power has been upheld in cases involving compulsory vaccination,⁶ prohibition of snake handling in religious ceremonies,⁷ regulation of distribution of religious literature,⁸ and practice of bigamy for religious reasons,⁹ but has been denied, the rights of the individual being considered paramount, in cases involving school prayers,¹⁰ and the pledge of allegiance and flag salute.¹¹

Police power is exercised when an individual regards certain aspects of medical treatment as repugnant to his religious tenets and is compelled to submit to the repugnant treatment.¹² The constitutionality of compelling such medical treatment for an individual for his own good instead of for the good of society was considered in *In re Brooks' Estate*¹³ by the Supreme Court of Illinois. Bernice Brooks, appellant in the instant case, was an adult citizen of the United States and had no

"'Police power' . . . is generally held to mean the power, inherent in the Sovereign, to prohibit or regulate certain acts or functions of the populace as may be deemed to be inimical to the comfort, safety, health and welfare of society." Davis, *Brody, Wisniewski v. Barrett*, 253 Iowa 1178, 115 N.W.2d 839, 841 (1962).

"The police power is that inherent and plenary power in the state over persons and property, when expressed in the legislative will, which enables the people to prohibit all things inimical to comfort, safety, health, and the welfare of society, and is sometimes spoken of as the law of overruling necessity." *Where Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530, 536 (1928), quotes 23 Ill. L. Rev. 185, 186 (1928).

"Exercise of police power must deal with rights which inhere in the public as a whole in order to interfere with those rights granted to the individual. *Neef v. City of Springfield*, 380 Ill. 275, 43 N.E.2d 947 (1942); *Webber v. City of Scottsbluff*, 141 Neb. 363, 3 N.W.2d 635 (1942); *Kane v. Lapre*, 69 R.I. 330, 33 A.2d 218 (1943).

The governing entity must not act arbitrarily to deprive a person of a right to which he is entitled. *Burley v. City of Annapolis*, 182 Md. 307, 34 A.2d 603 (1943).

The "clear and present danger" test originated in *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court points out that the action proscribed must involve more than a possibility of the occurrence of the evil which is intended to be avoided. There must be a balancing of the gravity of the evil against the improbability of its occurrence. *Dennis v. United States*, 341 U.S. 494, 510 (1951). Police power may be exercised when the balance weighs toward the evil's occurrence.

⁴*Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964); Comment, 22 Wash. & Lee L. Rev. 105 (1965).

⁵*Harden v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948).

⁶*City of Manchester v. Leiby*, supra note 3.

⁷*Reynolds v. United States*, supra note 3.

⁸*School Dist. v. Schempp*, supra note 2; *Engle v. Vitale*, 370 U.S. 421 (1962).

⁹*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1934); *Bolling v. Superior Court for Callam County*, 16 Wash. 2d 373, 133 P.2d 803 (1943).

¹⁰It has been held that a student has no constitutional right to refuse to submit to a vaccination as a prerequisite to enrollment in school. *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964).

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

minor children. Appellant had been treated for a peptic ulcer for two years and during this period had repeatedly informed her physician of her unwillingness to submit to blood transfusions to which she was opposed on religious¹⁴ and medical grounds.¹⁵ The ulcer became worse and appellant entered a hospital, attended by the same physician. Appellant and her husband executed documents relieving the hospital and her physician of all civil liability which might be incurred by complications arising from their failure to give her transfusions. The physician felt that her condition was becoming grave and, in company with the attorney for the Public Guardian and the State's Attorney, went before a probate court seeking appointment of a conservator of the person of appellant.

The judge, exercising his discretionary power to waive notice¹⁶ under circumstances which he considered involved an emergency, granted the physician's request upon his testimony that appellant was incompetent, which made no mention of her instructions given while in full possession of her faculties. The conservator gave permission for the transfusions to be given, after which the court, on motion of appellees, issued a second order closing appellant's estate. When appellant became aware of these proceedings, which had occurred without notice to her or her husband,¹⁷ she went before the court and made a motion

¹⁴Appellant was a member of Jehovah's Witnesses whose religious teachings forbid their "eating blood," which they consider analogous to taking a blood transfusion.

¹⁵A blood transfusion today is still not entirely without danger to the party receiving it. See, *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962); *Redding v. United States*, 196 F. Supp. 871 (W.D. Ark. 1961); *Rizzo v. Steiner*, 36 Misc. 2d 701, 233 N.Y.S.2d 647 (Sup. Ct. 1962); *Necolayff v. Genessee Hosp.*, 270 App. Div. 648, 61 N.Y.S.2d 832 (1946), *aff'd* 296 N.Y. 936, 73 N.E.2d 117 (1947).

¹⁶The Illinois statute requires only that "the court may require such notice of the hearing on the petition of incompetency as it deems expedient." Ill. Ann. Stat. ch. 3, § 113(b) (Smith-Hurd 1961).

¹⁷It is interesting to investigate what remedies would have been available to appellant had she received notice of the proceedings when they occurred.

If upon appearance in court and defense upon the merits, appellant had been judged incompetent, her primary course of action would have been to appeal the decree. If, as in this case, the time element was important, this course of action would not be swift enough. By filing supersedeas bond pending appeal, appellant would have stayed execution of the order appointing the conservator.

"(1) In chancery cases and in cases at law tried without a jury, any party may, within 30 days after entry of the decree or judgment, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief. Neither the filing of nor the failure to file a motion under this section limits the scope of review.

"(2) A motion filed in apt time stays execution, and the time for appeal

for the previous orders to be declared void on the ground of lack of jurisdiction *ab initio*. This was denied and appellant appealed.

Appellee's contention was that the question was moot and the appeal should be dismissed. The supreme court held that this case was an exception to the general rule due to the substantial public interest involved,¹⁸ and granted her request that the order appointing be ex-
volved,¹⁸ and granted her request that the order appointing a conserva-

from the decree or judgment does not begin to run until the court rules upon the motion." Ill. Ann. Stat. ch. 110, § 68.3 (Smith-Hurd 1956).

The appellant would not have been able to make use of the writ of mandamus, authorized by Ill. Ann. Stat. ch. 87, § 1 (Smith-Hurd 1956), because the writ will not lie where the duty is general and the exercise of judgment and discretion is involved. *Harris v. Schwartz*, 351 Ill. App. 351, 115 N.E.2d 345 (1953). Mandamus does not lie to set aside or undo what has already been done although it should never have been done in the first place. *Board of Educ. v. Idle Motors*, 339 Ill. App. 359, 90 N.E.2d 121 (1950).

The writ of prohibition would also be unavailable to appellant because this writ is issued by a superior court to an inferior court only when the latter is exercising jurisdiction belonging to another court. The probate court in which the proceedings took place was of the kind designated in Ill. Ann. Stat. ch. 3, § 113(b) (Smith-Hurd 1961).

In Ill. Ann. Stat. ch. 65, § 1 (Smith-Hurd 1957), there are provisions made for obtaining habeas corpus when there are no other remedies available to the petitioner. This would be inapplicable to appellant because the proceeding under supersedeas bond pending appeal is still open to her. If appellant were attempting to attack the constitutionality of the probate statute, habeas corpus would not be the proper method. *United States ex rel. Vraniak v. Randolph*, 161 F. Supp. 553 (E.D. Ill.), *aff'd*, 261 F.2d 234 (7th Cir. 1958).

The federal remedy of habeas corpus, 28 U.S.C.A. § 2254 (1949), would be of possible benefit to appellant if she could show that there had been an exhaustion of state court remedies, or that there was either an unavailability of state corrective process, or there were special circumstances which rendered such process ineffective to protect the rights of petitioner. With the remedies available to appellant it does not appear that this would be considered such a special circumstance to cause the federal court to take jurisdiction.

¹⁸It has been held that in deciding whether to accept an appeal on such a moot question "it must affect the interest of the body politic, as, for example, its revenue laws, or some situation 'affected with a public interest' . . . where the state or government is said to be 'as a substantial trustee for the public.'" *Willis v. Buchman*, 240 Ala. 386, 199 So. 892, 895 (1940).

Board of Examiners of Plumbers v. Marchese, 49 Ariz. 350, 66 P.2d 1035 (1937), at 1037 stated, "if, although the effect of the particular judgment questioned may have ceased, the principle involved therein is a continuing one, courts will sometimes consider the original case in order to avoid a multiplicity of appeals."

New York does not seem to have reached agreement on this point in the Supreme Court, Appellate Division. In *Grossman, Inc. v. Staff*, 252 App. Div. 886, 300 N.Y. Supp. 152 (1937), the Second Dep't held that "appeals will not be heard to settle abstract or *academic* questions, however important they may be to the general public or to the legal profession; but only to cure errors affecting injuriously the rights of some party to the litigation." *Id.* at 154. (Emphasis added.) But in *Commonwealth of Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y. Supp. 713 (1911), the First Dep't held that "appellate courts not infrequently pass upon questions

tor be expunged, thus holding that a woman without dependents, normally competent but presently incompetent by virtue of physical weakness, may not be compelled by the state to receive life-saving medical treatment contrary to her religious convictions expressly and relevantly affirmed while competent. The unanimous court said, "It has been held that governmental actions cannot be proscribed under the . . . [Free Exercise] clause unless they are demonstrated to have a coercive effect upon the individual, but the presence of that effect here is self-evident."¹⁹

When the individual who is compelled to accept medical treatment is not the only person who would be directly affected,²⁰ the courts have generally upheld the compelled treatment. For example, women with minor children have been compelled to submit to blood transfusions,²¹ as have women who were pregnant.²² The state, as *parens patriae*, has long been willing to interfere in the parent-child relationship when the well-being²³ or health²⁴ of the child is en-

affecting important public interests, even where in the particular case the question has become *academic*." *Id.* at 715. (Emphasis added.)

State *ex rel.* *Freeling v. Lyon*, 63 Okla. 285, 165 Pac. 419 (1917), stated that "we understand 'public interest' to mean more than a mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." *Id.* at 420.

¹⁹205 N.E.2d at 438.

²⁰In the principal case, only appellant's well-being was jeopardized by her refusal to accept the medical treatment. The Court points out that there are apparently no reported decisions directly on point. 205 N.E.2d at 438. One New York judge, in dictum, stated what his decision would be if ever confronted by this question: "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." *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243, 247 (1903) (concurring opinion) (failure to provide minor with medical care).

²¹Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964).

²²*Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964).

²³*Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

"[T]he State as *parens patriae* is the supreme guardian of all minors within its jurisdiction, and . . . courts of equity, as part of the State's judicial system, have inherent power, and will when their jurisdiction is duly invoked, intervene to protect the welfare and best interest of minor children whose welfare is jeopardized. . . ." *Arnold v. Arnold*, 246 Ala. 86, 18 So. 2d 730, 734 (1944); "Under the doctrine of *parens patriae* a state has the sovereign power of guardianship over persons of disability, such as minors and incompetent persons." *Warner Bros. Pictures, Inc. v. Brodel*, 179 P.2d 57, 70 (Cal. Dist. Ct. App. 1947).

²⁴*People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952); *State v.*

dangered by parental refusal of medical treatment as contrary to religious beliefs of the parent.²⁵ Where the state has been unable to intervene before the child has died, the parents may find themselves charged with manslaughter.²⁶

In the principal case, the underlying legal and moral problem which had to be determined was whether the state should by means of medical treatment force a person with no one dependent upon him to continue to live. The court emphasized that appellant was the only person directly affected by her refusal to submit to the necessary treatment.²⁷ Apparently, the court assumed that this person's death, if it should ensue, would not cause another person to become a ward of the state,²⁸ nor result in the death of another.²⁹ When it is evident that another's economic well-being or life is dependent upon the person directly affected by the refusal, there is sufficient clear and present danger to justify state intervention to protect the indirectly-affected individual. However, in the principal case, the public health was not endangered, nor was there any threat to the welfare, or morals of the public. Thus, there were no grounds for subjecting religious practices to state regulation.

When a court is considering whether the objection of a person with no dependents is sufficient to prevent compelled medical aid, the primary substantive issue for determination is his competency to refuse.³⁰ This necessitates the hearing of testimony concerning prior

Perricone, 37 N.J. 463, 181 A.2d 751 (1962); *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903); *Application of Brooklyn Hosp.*, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (Sup. Ct. 1965); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Ct. Civ. App. 1947).

²⁵"Parents may be free to become martyrs themselves. But it does not follow they are free... to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (dictum).

²⁶*State v. Chenoweth*, 163 Ind. 94, 71 N.E. 197 (1904); *Owens v. State*, 6 Okla. Crim. 110, 116 Pac. 345 (1911); *Trescher & O'Neill, Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 U. Pa. L. Rev. 203 (1960).

²⁷Her refusal for religious reasons is analogous to refusal for personal reasons. If an objecting person is in full possession of his faculties, barring an emergency making it impossible to consult him, his physician must, to avoid liability, obtain his consent before beginning treatment. *Wall v. Brim*, 138 F.2d 478, 481 (5th Cir. 1943); *Donald v. Swann*, 24 Ala. App. 463, 137 So. 178 (1931); *Nolan v. Kechijian*, 75 R.I. 165, 64 A.2d 866 (1949).

These two reasons are apparently equated, because refusal, in either instance, renders the physician powerless to treat the objector unless he proceeds by means of having the objector declared incompetent.

²⁸*Supra* note 21.

²⁹*Supra* note 22.

³⁰In some instances, another person must give consent for an operation upon an incompetent person. E.g., *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906) (hus-

objections³¹ and the strength of conviction in them.³² The only proper way for this determination to be made is for all pertinent information to be brought before the court. This requires that notice be given to those having such information. Under the probate statute considered in the principal case,³³ there is no means of assuring that all these persons will appear at the hearing since the judge may, at his discretion, waive the notice requirement. In order for such a statute to give adequate protection to an individual, it must make notice mandatory or incorporate a provision for subsequent legal remedies when there is a failure to give notice.³⁴

When no one other than a competent adult citizen is directly or indirectly affected, it seems that a state's police power cannot be invoked to compel medical aid in derogation of one's free practice of religion. Thus a competent adult with no dependents may not be forced to accept medical treatment, but this right is left unprotected unless he is given notice of any proceeding questioning the validity of his refusal.

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band for insane wife). If the patient is competent to consent, his consent is necessary. *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12, 13 (1905).

³¹In the principal case, appellant had repeatedly made it known to her physician that she would not submit to a transfusion. She again voiced her objection to them and signed releases of liability upon entering the hospital. These prior objections were given weight by the Court, who assumed her competency, before dealing with the question of religious freedom. 205 N.E.2d at 438. This information was not presented in the probate court, but if it had been should have received the same degree of consideration. Such an objection which has been voiced over a long period of time should be a strong indication that it is not related to the question of her competency at the present. Under such circumstances the court should be hesitant to discount the objection due to a ruling of subsequent incompetency.

A different situation would exist if the objection had been stated in the past, and there was no evidence that it still existed. The court would then have to hear testimony as to whether this conviction is still held.

If only objected to after incompetent to object, the court is faced only with the problem of determining if the objection is merely a result of incompetency.

³²If the person still maintains the objections in the face of death, the court is required to determine only if competently made in the first place. However, many persons find it easy to adhere to a doctrine, such as appellant's, until faced with the choice of living or adhering and possibly dying. In the Georgetown College case, the patient, who objected on the same grounds as appellant, said that the transfusion would be administered against her will; but if the court ordered it given, the decision would be out of her hands. *Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1005 (D.C. Cir. 1964). If the court feels that there is a possibility that the objector will not adhere to his objection in the face of death, it should hear such evidence as is available requiring that the person attempting to show this lack of strict adherence bear the burden of proof. The court will be dealing with the question of whether she believes in her doctrine, not its reasonableness. 205 N.E.2d at 442.

³³Supra note 16.

³⁴Supra note 17.