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Fare Ye Well: Right to Be Let Alone

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FARE YE WELL: RIGHT TO BE LET ALONE

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.[1]

A recent case[2] in the United States Court of Appeals for the District of Columbia has raised a very important question concerning one of our well established rights—that is, the right to be let alone. Judge Skelly Wright, acting singly, has decided that a young adult member of the Jehovah's Witnesses should be given a blood transfusion over her objection—her refusal being based upon her religious beliefs.[3]

The right of an adult to refuse certain types of medical treatment is a well settled rule. No particular reason is required by the electing person to refuse this treatment. An adult patient, who is conscious and mentally competent, has the right to refuse to permit any medical or surgical procedure.[4] This is true whether the refusal is founded upon fear, religious belief, lack of confidence in the contemplated procedure or mere whim.[5] The patient is the final arbiter as to whether he will take his chances with the treatment recommended by the doctor or risk living without it.[6]

There are areas in which the courts have invaded the right and perhaps justly so, such as in the case of a sick child. Many cases

1. Olmstead v. United States, 277 U.S. 438, 479 (1928).

2. Jones v. Georgetown College, Inc., 331 F.2d 1000 (1963), *cert. denied,* 84 S.Ct. 1883 (1964).

3. 3 Canadian Bar Journal, 365, 368 (1960).

> An official statement from the governing organ of the Jehovah's Witnesses. The view is stated as follows: Jehovah's Witnesses are Christians. They follow the principles set out in God's Word the Bible . . . the fifteenth chapter of the Acts of the Apostles the V. 28, 29 'For it seemed good to the Holy Ghost, and to us, to lay upon you no greater burden than these necessary things; that ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication; from which if ye keep yourselves, ye shall do well, Fare ye well!'
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> There is direct Biblical injunction against consumption of blood: the manner of taking it into the system is immaterial. Jehovah, the Creator, who made blood, has reserved it as sacred to himself. The blood is the life of the creature.

4. Knitzen v. Citron, 101 Cal. App.2d. 33, 224 P.2d 808 (1950); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

5. Martin v. Industrial Accident Commission, 147 Cal. App.2d 137, 304 P.2d 828 (1956).

6. Stetler and Montz, *Doctor and Patient and the Law,* 133 (1962).

can be cited in which the court has disregarded the parent's refusal, regardless of the reason, and has permitted medical treatment of a child.[7] In these cases the court declares the child to be a ward of the state and appoints a guardian. The guardian is then ordered to consent to the prescribed treatment. In some jurisdictions there are statutes granting the court the authority to order medical treatment once it is determined that the child is "neglected."[8]

In *Prince v. Massachusetts*[9] the Court set forth the rule:

> Parents may be free to become martyrs themselves, but it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[10]

The courts have established another exception where contagious diseases are involved.[11] The judiciary, exercising its duty to protect the public health and general welfare, has ordered compulsory medical treatment, and there are no religious exemptions from such orders.[12] In *People v. Pierson*[13] the court stated that the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

The respondent in *Jones v. Georgetown College, Inc.*[14] had lost two-thirds of her blood supply as a result of a ruptured ulcer and because of the great loss of blood, the doctors believed death to be imminent if a transfusion was not given immediately. The respondent and her husband refused to consent, grounding their refusal upon religious beliefs. Judge Wright ordered the transfusion administered and attempted to draw an analogy to the case of a sick child by finding the respondent non compos mentis.[15] Since the case involved

7. People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied,* 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (1952); Mitchell v. Davis, 205 S.W.2d 812 (1947); Prince v. Massachusetts, 321 U.S. 158 (1944).

8. People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied,* 344 U.S. 824 (1952).

9. 321 U.S. 158 (1944).

10. *Id.* at 170.

11. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

12. *Supra* note 8.

13. 176 N.Y. 201, 68 N.E. 243 (1903).

14. *Supra* note 2.

15. Judge Wright attempted to communicate with respondent prior to the signing of the order and tell her what the doctors had said. Respondent's only response was, "Against my will." Judge Wright said ". . . (H)er appearance confirmed the urgency which had been represented to me . . . it was obvious that the woman was not in a mental condition to make a decision." Upon this ex-

an adult and not a child, Judge Wright was, in the first instance, faced with the long recognized right of an adult to be free from invasion of his body against his will and in addition there was the equally settled principle announced by Thomas Jefferson while drafting a Virginia statute defining religious freedom:

> . . . (T)hat to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty, and it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[16]

The Supreme Court of the United States affirmed in *Barnette v. West Virginia State Board of Education,*[17] the principle enunciated by the lower court that:

> Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare.[18]

In addition, the Virginia Bill of Rights has often been quoted by the United States Supreme Court as making explicit the principles outlined in the first amendment:

> All men are equally entitled to the free exercise of religion, according to the dictates of conscience, unpunished and un-

change of words and his sight of respondent, Judge Wright seemed to have based his determination of incompetency. The record is void of other evidence to support a finding of non compos mentis, p. 13 of Judge Wright's opinion, supra note 2.

16. Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, No. A158 September Term 1963, Sup. Ct. N.J. (1963).

17. 319 U.S. 624 (1943).

18. 47 F. Supp. 251, 253 (S.D.W.Va. 1942).

> restrained by the magistrates, unless under color of religion, any man disturb the peace and happiness of society.[19]

In the *Jones* case there was no right of the state in grave danger; there was no interest of the state involved; there was no jurisdiction in the courts to deny this liberty to the individual citizen. To hurdle the barriers erected by the above two principles, which are described by Justice Brandeis as "the right to be let alone,"[20] Judge Wright made a factual determination that the respondent was hardly compos mentis and likened her to a child. Judge Wright's fear that the respondent's life would be snuffed out and his uncertainty as to what the law required caused him to "act on the side of life."[21]

The doctrine that an emergency, in the opinion of the judge, requiring hasty action of some kind as justification for ignoring principles of law is a very dangerous principle. It is corrosive of law and the orderly administration of justice.

There is another right involved where the doctor-hospital-patient relationship exists. It is recognized law that such relationship is purely a contractual one from which either party is entitled to withdraw should he disagree with the modus operandi of the contracting partner.[22] For the first time in history, there is thrust into this private contractual relationship the coercive power of the federal judiciary.

Where a patient wants to withdraw from the contractual relationship and offers to sign a release absolving the hospital and doctors from liability in the event of death, such release would have protected both from civil liability.[23] The signing by the spouse would have been further evidence that the procedure was in accordance with the wishes and desires of the patient, although possibly not medically approved.[24] Once the patient has refused to accept the recommended treatment, there is no legally recognized duty upon the hospital or the doctor.[25]

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19. Virginia Bill of Rights.

20. *Supra* note 1 at 478.

21. *Supra* note 2 at 13.

22. *Supra* note 6.

23. 1 Hospital Law Manual, Consents, §6 (1959).

24. *Ibid.*

25. There are four recognized ways of imposing the duty of care upon another: (1) by statute, Craig v. State of Maryland, 220 Md. 590, 155 A.2d 684 (1959); (2) establishing it in certain relationships such as husband-wife, parent-child, etc., Territory v. Manton, 8 Mont. 95, 19 P. 387 (1888); (3) where one has assumed contractual duty to care for another, People v. Montecino, 66 Cal. App.2d 85, 152 P.2d 5 (1944); and (4) where one voluntarily assumes to

Another exception to the "right to be let alone" rule is the emergency situation where the doctor is unable to obtain the consent of the patient.[26] However, this emergency privilege is limited to those conditions which present an imminent threat to life or grave danger or irreparable injury to health.[27] Before this exception can be invoked, two facts must be established: (1) It must be shown that the emergency was of sufficient magnitude to justify acting without consent; and, (2) It must be shown that there was present such an emergency that under the circumstances there was no time to obtain consent.[28]

The recommended procedure to hospital administrators and doctors has been to obtain the consent of the patient prior to administering any treatment. Where a patient has refused to consent to certain medical treatment the hospital has two alternatives:

> 1. It can refuse to admit the patient on the ground that proper care cannot be rendered because of the patient's refusal to permit procedures and treatments which the hospital believes may be necessary to the preservation of life. No legal liability will result from such refusal to admit.
>
> 2. The hospital can admit the patient and offer such limited services and procedures as the patient will permit. If the patient is already admitted when the refusal to consent becomes known, the hospital must adopt the second alternative since the hospital owes a greater duty to a patient than to a prospective patient.[29]

In his dissenting opinion in the *Jones* case, Judge Burger quoted Justice Cardozo and demonstrated how the court had stepped outside the law and succumbed to the temptation warned against in *The Nature of the Judicial Process*:[30]

> 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 or of goodness.[31]

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care for another and so secludes the helpless person so as to prevent others from rendering aid, State v. Noakes, 70 Vt. 247, 40 Atl. 249 (1897).

26. RESTATEMENT, TORTS § 62 (1934).

27. Bennan v. Parsonnet, 83 N.J.L. 20, 83 Atl. 948 (1912); Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912).

28. *Supra* note 23 at § 5

29. *Supra* note 23 at § 6:1.

30. Cardozo, *The Nature of the Judicial Process* (1921).

31. *Id.* at p. 141.

In a recent case[32] before the Chancery Division of the Superior Court of New Jersey, respondent, a young woman of twenty-nine years of age, in her thirty-third week of pregnancy experienced slight hemorrhaging from the womb, which was diagnosed as *placenta previa.* The hospital believed that further hemorrhaging would occur at the time of birth, and it wished to administer a blood transfusion which the respondent declined to accept. The hospital had relied on the decision of Judge Wright in the *Jones* case. The trial judge stated:

> There was no precedent and no authority for the position taken by the hospital. In a free nation people have a right to make up their own minds what they will do, saving those who are interdicted, insane, or otherwise deprived of their liberty.[33]

The Supreme Court of Illinois reportedly has before it a case involving a thirty-nine year old female member of the Jehovah's Witnesses who was suffering from a peptic ulcer.[34] The lower court, contrary to the desires and religious beliefs of the patient, ordered a conservator appointed and had the conservator consent to transfusions of whole blood. The respondent had become a patient with the understanding that under no circumstances would she accept a blood transfusion. The petition also alleged that the patient and her husband signed a release absolving the hospital and physician from liability for any illness or death that might result from the refusal to accept blood. The release and limitation of treatment implied in the contractual agreement was the only basis upon which the patient would allow the continuation of treatment.

If the decision of Judge Wright is to be followed, how far would the rule extend? Would the court be required to decide which argument is best concerning the Roman Catholic pregnant mother who had been advised that an abortion would be the only treatment to save her life?[35] Should the judge in such case order the mother's

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32. *Supra* note 16.

33. Brief for Appellant, p. 2, Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, *supra* note 16.

34. Estate of Brooks, No. 64P-04410, Probate Court, Cook County, Ill., June 24, 1964.

35. *Ethical and Religious Directives for Catholic Hospitals,* The Catholic Hospital Association of the United States and Canada, § 15, p. 4 (1957).

> Direct abortion is never permitted, even when the ultimate purpose is to save the life of the mother. No condition of pregnancy constitutes an exception to this prohibition. Every procedure whose sole immediate effect is the termination of pregnancy before viability is a direct abortion.

life saved over her objection and the teachings of her church? Consider also the case of a Christian Scientist who refused medical treatment of any sort. Should the court issue a warrant for his arrest and then order the required treatment?

It is true that many would consider refusal of the transfusion, thereby risking death,[36] an unreasonable decision and quickly describe this as "idiotic" and "ridiculous". But it must be remembered that this is a religious belief and as long as the practice of this belief does not infringe upon the rights of others, we have no right to interfere with the practice of it. The "right to be let alone" philosophy should be re-emphasized:

> The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.[37]

It would be advisable to consider again the thoughts of Justice Douglas in *United States v. Ballard*:[38]

> The Fathers of the Constitution were not unaware of the varied and extreme view of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[39]

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36. Address by Dr. Alexander Wiener, Society of Hematology convention, Boston, September 3, 1956:

> "The recent death of a Chicago woman due to transfusion of the wrong type of blood, is repeated about 3,000 times a year in the United States . . . ." There is a great deal of discussion concerning the safety of blood transfusions within the medical profession. This being true, then is there any sensible basis for making blood transfusions obligatory as a matter of law?

37. *Supra* note 1 at 478.

38. 322 U.S. 78 (1944).

39. *Id.* at 87.