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Refused Blood Transfusion: An Ultimate Challenge for Law and Morals, The;Note

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THE REFUSED BLOOD TRANSFUSION: AN ULTIMATE CHALLENGE FOR LAW AND MORALS

On September 17, 1963, Mrs. Jessie Jones, a 25-year-old mother of a son aged seven months, lay in critical condition at Georgetown University Hospital in Washington, D.C., having lost two-thirds of her body's blood supply from a ruptured ulcer. Mrs. Jones and her husband were both Jehovah's Witnesses, and refused to permit blood transfusions because their religious beliefs required them to "abstain from blood," in accordance with their interpretation of passages in the Holy Bible.[1]

On the same day two attorneys, employed by the hospital, appeared at the chambers of Judge Edward A. Tamm, in the District Court for the District of Columbia, requesting that he sign an order directing that the transfusions be administered. When Judge Tamm denied the order, the attorneys then took it to Judge J. Skelly Wright of the U. S. Circuit Court of Appeals. Judge Wright telephoned the hospital, received confirmation of the circumstances, and then went to the hospital and spoke to both the patient and her husband. The husband, notwithstanding pleas from the President of Georgetown University, refused to consent to the transfusion, expressly upon religious grounds. The only audible statement by the patient was "against my will." Both Mrs. Jones and her husband had volunteered to sign a waiver relieving the hospital of any liability for the consequences of the failure to effect the transfusions.

After being advised by physicians the patient would die without transfusions, and there was a better than 50% chance of saving her life with them, Judge Wright signed the order at 5:20 p.m. and the transfusions were then effected.

Mrs. Jones recovered, left the hospital, and filed October 14, 1963, a "Petition for Rehearing En Banc" before the Circuit Court of Appeals for the District of Columbia. In her petition she alleged that several of her constitutional rights had been infringed and asked that the order of September 17 be vacated and quashed. The petition for rehearing was denied, Judges Bastian, Burger, and Miller dissenting.[2]

Although the legal proceedings themselves have been concluded, the possible implications of the order are just beginning to be considered by members of the bar. A lower New York court and the Supreme Court of New Jersey have reached the same conclusion as Judge Wright. The Supreme Court of Illinois has reached the contrary conclusion, at least where the patient is an adult without

[1] "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." (Acts 15:28-29) Reliance is also placed on Leviticus 17:10, Genesis 9:3-4, and Deuteronomy 12:33. It should be noted in this connection that Jehovah's Witnesses make full use of surgery and other conventional medical treatment. They draw the line only at blood transfusions.

[2] Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964).

minor children.[3] A real need exists for examining whether a right in the state should be created for compelling such transfusions. Implicit in such an examination, of course, are the critical and delicate human relationships which have traditionally formed the basis for definition of the extent to which the state might by allowed to oversee the details of private existence.

Initially, it should be observed that an analysis based upon a theory of "the individual versus society" is likely to be misleading. Properly viewed, there is really no "conflict of interest" between society and its members. This becomes clear when we remember the distinction between "society" and "government." The former properly signifies an aggregation of individuals with a variety of interests merely, while the latter signifies a system of institutions through which at given times certain of the interests of some of the individuals are given forcible effect. When looking at the matter in this way, we see that an individual restrained in the assertion of his own will is really not opposed by "society," but by a group of other persons who are using the government against him.

The above analysis is necessary in order to approach the problem of religious freedom in an accurate way. If we forget we are dealing with an encounter between the one person restrained and the many other persons who control the government, and begin to believe we are dealing with a conflict btween one person and practically everyone else in his society, then we are likely to assume our task with a distorted appreciation of the real interests involved.

The absence of this "conflict of interest" is further apparent when we realize the very prerogatives the individual asserts are as much within "society's" interest to protect as to abridge. This is because the assertion of individual prerogatives, although differing from person to person, are necessary to satisfy the wants of every human being alive. The universal feeling of "there but for the grace of God go I" is the fountainhead of all freedom, for it creates in each man a desire to safeguard the personal liberties of his neighbor. This desire is not based upon a belief that his neighbor should be protected from "society," but upon a belief

[3] Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421,201 A.2d 537 (1964), *cert. denied,* 377 U.S. 989 (1964). In this case it was alleged that a blood transfusion was necessary to save the life of the unborn child of the Jehovah's Witness to whom the transfusion was administered. However, the transfusion was, in fact, administered after the birth of the child pursuant to the court order which permitted the transfusion "if necessary to save her life or the life of her child, as the physician in charge at the time may determine." (See discussion in Recent Decisions, 40 NOTRE DAME LAWYER 126 [1964].) In Erickson v. Dilgard 252 N.Y.S. 2d 705 (Special term 1962), the patient was a male adult, who was not said to have minor children or to be incompetent. The court ordered the transfusion despite the religiously based objection of the patient. On the other hand, in In re Estate of Brooks 32 Ill.2d,361,205 N.E.2d 435 (1965), the probate court appointed a conservator of a Jehovah's Witness in order for the conservator to consent to a blood transfusion. The court's action was taken despite the objection of the patient and her husband and despite the fact that they had released the hospital from all civil liability for failure to administer a transfusion. Upon appointment of the conservator, the transfusion was administered. Although the case was moot on appeal, the Supreme Court of Illinois thought the issue of such public importance that it should give its opinion. It distinguished the Georgetown case as one where the patient was the mother of a minor. It held that it was a violation of the First Amendment to compel a competent adult to submit to a blood transfusion against her religious principles.

that "society" should protect his neighbor from the government. The phenomena giving rise to this belief, and hence force to the safeguards, cannot be understood without distinguishing "society" from "government," since it is precisely a mistrust of only those who control the government that the phenomena could be based upon. The founding fathers did not mistrust "society"; they mistrusted what some persons within the society might do with the government. Hence we see that one, and perhaps the most vital, of the "interests of society" is to confine the government to its proper role. Indeed, it is only to "society" that the people, either individually or collectively, have ever been able to appeal when seeking to bring their cause before a higher political forum than the tribunals provided by the state.

In dealing, therefore, with the many questions raised by Judge Wright's order, it must be remembered that it is not "society" on the opposite side of the scale from Mrs. Jones, but merely a group of people (that may or may not be a majority) who disagree with her. Consequently, the true purpose of our inquiry should be to prescribe, if we can, the extent to which we, as members of society, should allow Mrs. Jones' religious freedom to be limited by the opinion of those who agree with Judge Wright.

That her religious freedom *has* been curtailed seems clear. Judge Wright argued that if "the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious beliefs."[4] But the state, through superior force, compelled her to submit to what she believed was an infamous act. So important to her was abstaining from this act that she was willing to give her life rather than commit it. What she willed was to prevent alien blood from entering her body; what happened was exactly the opposite. The result was a direct frustration of her religious belief. Though lack of consent might pardon her in heaven, it cannot erase the feeling of outrage she doubtless carries with her on earth.

Perhaps when considering precedent in this area, it is well to start with the now classic statement of Justice Roberts in another Jehovah's Witness case, *Cantwell v. Connecticut:*[5]

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by the law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.

Justice Roberts' distinction sets forth the principle that belief itself, and the acts of actual worship most closely connected with it, are indeed so sacred to all men as to be beyond the power of government to abridge. His reasoning also suggests, however, that affirmative acts, taking place not only in the world of the

[4] 331 F.2nd at 1009 (1964).
[5] 310 U.S. 296, 303-304 (1939).

spirit but also in the world of man, must be limited by the demands that men see fit to place upon them.

While this distinction does serve to show that freedom of *belief,* more than freedom of *action,* is what the law is seeking to protect, it does not aid in an effort to fix the legal status of those acts that appear essential to give belief an external realization. This is because acts really cannot be severed from the motives that prompt them. It is doubtful that belief in any religion could arise unless the religion sought to command a certain relation between man and the things external to him, and it is equally doubtful that any religion could persist without means for giving its tenets some manifestation in the physical world. So if an *act* done in conformance with a religious commandment is to be prohibited, such should not be construed as other than a denial of the right to pursue effectively the *belief* behind it.

With the limitations of this distinction in mind, it will now be useful to examine those acts which have in the past been considered so outwardly intolerable as to justify prescription, even though firmly based upon religious conviction. From a consideration of decided cases it can be seen that religious acts, and hence the beliefs behind them, have indeed been overridden by the courts under certain conditions. After examining these conditions, some standard by which to evaluate the propriety of Mrs. Jones' refusal should emerge.

Perhaps the best group of cases to consider first are those arising out of the bigamous marriages once practiced by the Mormons in Utah. The first of these was *Reynolds v. United States,*[6] in which the Supreme Court affirmed the conviction of George Reynolds on a charge of being married to both Mary Ann Tuddenham and Amelia Jane Schofield at the same time. The accused proved "the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God."[7] Mr. Chief Justice Waite, however, pointed out that "marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which the government is necessarily required to deal."[8] He then enunciated his widely quoted dictum that religious belief would not excuse murder by ritual sacrifice or suicide by a widow choosing to burn herself on her husband's funeral pyre.[9]

A second case was *Mormon Church v. United States,*[10] in which was tested an act of Congress repealing the incorporation of the Mormon Church, a religious corporation whose prominent object was promotion of polygamous practices. In upholding the enactment, the Court said: "it is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah."[11]

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[6] 98 U.S. 145 (1878). For additional discussion see Lake, *Freedom to Worship Curiously,* 1 UNIVERSITY OF FLORIDA LAW REVIEW 203 (1948).

[7] 98 U.S. 145, at 161 (1878).

[8] *Id.* at 165.

[9] *Id.* at 166.

[10] 136 U.S. 1 (1890).

[11] *Id.* at 49.

Thus the Court in these cases enunciated the broad principle that the majority will indeed be allowed to suppress religiously motivated acts by the minority when they are of such a character as to pose an *overt* threat to the continuance of the majority's well-being. Aggressive proselytizing with a view toward subverting monogamous marriage was the overt threat this Court moved to prevent.

A reverse application of what appeared to be this same principle occurred in *West Virginia State Board of Education v. Barnette,*[12] in which the Supreme Court struck down a state law under which children of Jehovah's Witnesses had been expelled from school for refusal to salute and pledge allegiance to the American flag. The children considered the flag to be one of the "images" their religion prevented them from bowing to or serving,[13] and hence refused to salute it. Mr. Justice Jackson, speaking for the Court, said: "it may be doubted whether the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school."[14] He stated further that "to believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. . . . When they [eccentricities] are so harmless to others or to the State as those we deal with here, the price is not too great."[15] Here the threat posed by the overt act to the majority was indeed small, so the "eccentricity" was allowed to prevail.

Perhaps the nearest judicial expression of the principle of this kind resides in the "clear and present danger" test originally set forth by Mr. Justice Holmes in *Schenck v. U. S.,*[16] a freedom of speech case. It has been since applied without hesitation to other First Amendment rights such as freedom of religion.[17] The test was first stated by Mr. Justice Holmes to be a "question of proximity and degree." Since its adoption, however, it has received a variety of interpretations. One of the most comprehensive is found in *Bridges v. California,* in which the court said: "what finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[18]

While in practice the test has been used primarily as a tool for evaluating specific utterances to determine whether they may be inflammatory in specific circumstances, it does, nevertheless, give silent witness to the broader principle emerging from the religion cases previously discusssed.

Another case in which a principle of this kind has been given expression is *United States v. Hillyard,*[19] in which it was held that Jehovah's Witnesses are

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[12] 319 U.S. 624 (1943).

[13] Their religious beliefs include a literal reading of Exodus 20:4-5: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."

[14] *Supra* note 12, at 636.

[15] *Id.* at 641, 642.

[16] 249 U.S. 47, 52 (1919).

[17] *Supra* note 12, at 633.

[18] 314 U.S. 252, 263 (1941). See also U.S. v. Korner, 56 F.Supp. 242 (S.D.Cal. 1944).

[19] 52 F.Supp. 612 (E.D.Wash. 1943).

justified in refusing to serve as jurors. The court said: "While I cannot understand the defendant's reasoning and cannot accept his conclusions, I must admit that his refusal to serve does not amount to a breaking out into 'overt acts against peace and good order.' "[20]

The court's allusion to "peace and good order" was drawn from the same precedent Mrs. Jones used to support one of the strongest arguments in her petition. She strenuously emphasized the distinction between misfeasance and nonfeasance, as it applied to the character of her refusal. The precedent was the now classic excerpt from Jefferson's "Act for the Establishment of Religious Freedom in Virginia,"[21] which in its preamble proclaimed, "it is time enough for the rightful purposes of civil government, for its officers to interpose when [religious] principles break out in overt acts against peace and good order."

Mrs. Jones contended that since her refusal to accept blood was not an overt act, and therefore did not, directly at least, threaten "peace and good order," she should have been allowed to follow the dictates of her own conscience.

In response to this Judge Wright pointed to *Jacobson v. Massachusetts*[22] as a first example of the state's power to require affirmative acts. This was a case in which the defendant was fined five dollars for refusing to comply with a local compulsory vaccination law during a smallpox epidemic. It did not involve religion and was sustained under the theory that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[23] Judge Wright also relied upon the ability of the state to order compulsory medical treatment for children in cases of serious illness or injury.[24] Although he did not mention the case of *Tyrrell v. United States*,[25] it might well be added in his favor. Here a court held that a ministry student could not escape the draft on the basis of conscientious objection except by consent of Congress.

All three of these "affirmative act" situations can be distinguished from Mrs. Jones'.

In the vaccination matter, no real violation of religious conscience was put in issue because Jacobson based his refusal primarily upon medical grounds. Additionally, it seems that an "overt" danger to the well-being of the community would have in fact resulted, since many persons could have been contaminated by those who declined vaccination.

With regard to the child cases, it must be admitted that an indispensable link in the chain of logical justification for the government's intervention is the presumption that children are not possessed with faculties of judgment sufficient for deciding whether or not they will accept treatment.[26] It does not seem per-

[20] *Id.* at 615.

[21] Sec. 57-1 Code of Virginia (1950 ed.).

[22] 197 U.S. 11 (1905).

[23] *Id.* at 26-28.

[24] People ex rel. Wallace et al. v. Labrenz et al., 41 Ill. 618, 104 N.E. 2d 769, *cert. denied*, 344 U.S. 824 (1952).

[25] 200 F.2d 8, *cert. denied*, 345 U.S. 910 (9th Cir. 1953).

[26] One reading of the facts leads one to believe Mrs. Jones was in possession of her faculties at all times. This, however, was denied by Judge Wright, who concluded that Mrs. Jones "was as little able competently to decide for herself as any child would be." (331 F.2d at 1008) At the very least, it is clear she had expressly ordered that no transfusions be

suasive, therefore, to contend that this forms a precedent for dealing with problems involving adults.

Although the objector case is by analogy perhaps closest to the one Judge Wright was faced with, it is still, however, distinguishable. The "overt" threat to the well-being of the community that would result from allowing persons to exempt themselves constitutionally from military service would, of course, be extinction or subjection of the community's members at the hands of foreign armies. Such dangers cannot really be compared with the small effect of the decreases in population caused by the deaths of persons asserting privileges such as that of Mrs. Jones. To allow Congress to enact legislative privileges for the persons conscientiously objecting is not really the same as permitting exemption by constitutional right. The former can be regulated to insure that public security will not be endangered, but the latter, by its nature, cannot.

A still further group of cases to be considered are those involving the snake worshipper sects found in some of the Southern and border states. In the instance of *Hill v. State*,[27] the defendant brought a large rattlesnake to a religious service in which "believers" were called upon to come to the front of the church and participate in a "test of faith," which consisted of taking the snake in their hands and passing it around among them. The snake had not had its fangs removed, and during the ceremony came as close as fifteen feet from the prosecuting witness. The snake bit no one, but the defendant was convicted under an Alabama statute which expressly made the employment of poisonous reptiles in such a fashion illegal.[28]

The defendant contended in court the ceremony was an integral and necessary manner of observing his faith, and that to prohibit him from participating in the ceremony violated his constitutional right to exercise freely his religion. The court observed that religious beliefs are subject to temporal restraints imposed for the protection of the community, and fined him fifty dollars.

This case is significant for two reasons. The first is that the thing prohibited was apparently a sine qua non for observance of the very theories the religion was based upon. The proscription thus struck at an act which was part of the worship service itself, and therefore demonstrated that when the imminence of danger is high (and perhaps the respect for the religion is low) the majority will override even those practices without which a religion probably could not exist. It is also important because one of the motives for the statutory enactment may well have been to prevent unorthodox religious practices from causing death or serious injury to those participating. One might easily contend that if there existed a paramount policy behind Judge Wright's order, this would be it.

A crucial difference in these situations, however, is that an affirmative right exists in the state to prohibit dangerous activities in general under the police power, whereas no analogous right exists, or apparently ever has existed in the

made at a time immediately prior to the time when any periods of semiconsciousness may have been experienced.

[27] 264 Ala. 697, 88 So.2d 880 (1956). Similar statutes have been upheld in Lawson v. Commonwealth, 291 Ky. 437, 164 S.W. 2d 972, 976 (1942) and Hardin v. State, 188 Tenn. 17, 216 S.W. 2d 708, 710 (1948).

[28] *Code of Ala.* Tit. 14, ch. 75 (a), sec. 419 (2), (3), (1963).

United States under this power, to prohibit persons from failing to seek medical attention for their ills. Persons could be prevented from exposing others to snake-bites just as they could be prevented from practicing bigamy, and religion would simply be deemed an inadequate basis for making exceptions.

Before a general attempt is made to draw these cases together, or to speculate on what they teach in terms of the "social interest" in limiting the government's role in religious matters, it will be helpful to discuss the analogy between Mrs. Jones' case and the laws prohibiting suicide. It will also be interesting to ask whether the fact that Mrs. Jones' refusal was inspired by religion should have made any difference.

Suicide, of course, was a felony at common law, punishable by forfeiture of goods and chattels of the offender, and ignominious burial of his body in a public highway.[29] Today, however, a more lenient attitude prevails. Many jurisdictions refuse to consider suicide a crime as such,[30] and some do not even punish attempts to commit it.[31] While this change no doubt evidences a more realistic appreciation of the small deterrence these laws provide, it also reflects, perhaps, a feeling that little good can be achieved by condemning an individual for committing what is surely the ultimate in private acts.

Also to be considered is the anomalous character of the public's reaction upon learning a suicide has occurred. Completely absent is the immediate desire for retribution that accompanies news of other crimes, and instead are found expressions of sorrow and even pity for the survivors.

When the nature of this public reaction is added to the marked evolution in the law, it can be fairly said that suicide itself is no longer held in the low esteem it once was, and that an affirmative act of suicide undertaken for religious reasons would certainly not be illegal in many of the states today.

When comparing cases of suicide to the case of Mrs. Jones, however, it must be pointed out that Mrs. Jones at no time wished to die. Death was, in the words of Judge Wright, "not a religiously-commanded goal, but an unwanted side effect of a religious scruple."[32] Theories as to whether suicide might be justified for religious reasons or might be a private act not properly proscribable by the state, are not really applicable except by analogy.

A discussion of whether it should have made any difference that Mrs. Jones' refusal was religiously inspired is timely in view of the conscientious objector cases recently decided by the Supreme Court. Certiorari was granted for appeal of conflicting circuit court holdings on the question of whether it constituted an impermissible classification (violating the due process clause of the Fifth Amendment) for Congress to confine military exemption to persons who express belief in a Supreme Being. The Second Circuit held "yes" in *United States v. Seeger*[33] and the Ninth Circuit held "no" in *Peter v. United States*.[34]

The circuit court in each of these cases was forced to explore the significance

[29] Prudential Ins. Co. of America v. Rice, 222 Ind. 231, 52 N.E.2d 624, 625 (1944).
[30] Stiles v. Clifton Springs Sanitarium Co., 74 F.Supp. 907 (W.D.N.Y. 1947).
[31] Prudential Ins. Co. of America v. Rice, *supra* note 29.
[32] *Supra* note 2, at 1009.
[33] 326 F.2d 846 (1964).
[34] 324 F.2d 173 (1963).

of the word "religion" and relate it to the term "Supreme Being," since statement of belief in the latter was expressly required by both draft boards. In *Seeger,* the Second Circuit said: "a requirement of belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called 'religious.' "[35] The Ninth Circuit, however, in *Peter,* quoted with approval a statement in an earlier case[36] holding "no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of the term as it is used in the statute."

While *Seeger* might appear at first to be a departure from traditional theory, a closer examination reveals that it really is not. The circuit court was quick to affirm that "today a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands." The term "religion" was still defined to embrace a "pervading commitment to a moral ideal," and hence is distinguished from a merely political or philosophic opposition to war.

Such an interpretation of *Seeger* seems to explain the final decision in these cases by the United States Supreme Court.[37] The Court reversed the holding in *Peter* and affirmed the holding in *Seeger,* but did not, however, declare the "Supreme Being" requirement of the draft act to be unconstitutional. Instead, the Court concluded that "Congress in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions. . . ."

When relating this decision to Mrs. Jones, therefore, the conclusion must be that it would indeed make a difference whether or not her refusal was religiously inspired, at least insofar as her motives were based upon allegiance to a "moral ideal." The cases show that while "religion" might not be synonymous with "deity," it is by all means tied to "morality." It is fair to suggest that the "pervading commitment to a moral ideal" referred to by the court is really a recognition that "religion," and hence "morality," is based upon some manner of belief that each man's life has an ultimate purpose, against which the rectitude of each of his acts must be measured. The act of going to war was as surely measured against this ultimate purpose by Mr. Seeger as it was by Mr. Peter,[38] and each man found the act wanting. So even though the circuits disagreed on what the "ultimate purpose" should include, both affirmed the necessity of its existence in the mind of the objector.

The conscientious objector appeals conclude the review of decided cases. It remains now to draw from these decisions guidelines by which proper limits for state authority in blood transfusion situations might be established.

[35] *Supra* note 33, at 852.

[36] Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946) *cert. denied,* 329 U.S. 795 (1946).

[37] United States v. Seeger, 380 U.S. 163 (1965).

[38] Mr. Seeger stated that "war, with its indiscriminate crushing of human personality cannot preserve moral values . . . to resort to immoral means is not to preserve or vindicate moral values, but only to become collaborators in destroying all moral life among men." Mr. Peter said "since human life is for me a final value, I consider it a violation of moral law to take a human life. . . . I consider this belief to be superior to my obligation to the state."

The first precept the cases teach is that religious prerogatives will indeed be abridged when to allow them free exercise poses an affirmative danger to other members of society. Bigamy, snake worshipping, ritual sacrifice, and refusing vaccination are each, in their own fashion, overt threats to either the continuance of the community or the maintenance of its vital institutions. Refusing to salute the flag or serve on a jury, however, is not so highly dangerous, and is accordingly granted protection.

The moral justification for this contrast in the decisions appears to reside in the fact that the interests of the respective parties involved in the former set of cases cannot be mutually accommodated. The right of one person to practice polygamy or make ritual sacrifices is hardly compatible with the right of another to be secure in his marriage or safe in his person. One right or the other must give way. To rule in favor of the persons belonging to the larger group may in these instances be justified.

The moral rectitude of such rulings, however, disappears as the threat posed to others by free exercise becomes smaller. Instead of two mutually opposing interests of nearly equal force, there appears instead the same strong demand for religious freedom on the one side, but on the other is perhaps only the majority's desire to avoid irritation or inconvenience. In such instances, where more of an accommodation is possible, a ruling in favor of free exercise seems as morally justified as the ruling against it seemed in the polygamy or ritual sacrifice cases.

Obviously, it would be foolish to maintain that a distinct line can be drawn between the former cases and the latter, or even to assert that a given fact situation might without controversy be assigned to either group. The contrast the cases provide does, however, furnish one criterion by which Mrs. Jones' refusal might be evaluated.

With regard to this criterion, it must be admitted that any "overt threat" to others posed by permitting Mrs. Jones to refuse blood was at best indirect, and appeared to constitute little more than the naked fact of her demise. Arguments that the tiny decrease in population actually assignable to such deaths might endanger the majority seem somewhat tenuous. Hypothetically, of course, a situation could be imagined where every second or third person in a given society elected to adopt Mrs. Jones' biblical interpretations, and hence the death rate from refused transfusions would assume significant proportions. In this event the writer believes built-in compensation factors, later to be discussed, would preserve the right of free expression. But even if these factors did not operate, it still might be asked whether the majority has legitimate basis for complaint. It would be fair to argue that even this society would be aided less by the continued life of some of its members than it would be injured by the denial of religious freedom to all of its members. This would be especially true if the majority, instead of faced with repelling overt threats to its safety, was forced to substitute directly its own religious beliefs for those of a passive dissenter.

When limiting the circumstances to those specific to Mrs. Jones' case, therefore, it appears that Judge Wright's order is distinctly at odds with what might be expected from a traditional application of the "overt danger" test established by court decisions.

Two additional factors should be taken into account when weighing the interests on either side of "free exercise" questions. The first is the importance of religious freedom in the struggle for what has been called the "good life"; and the second is the inability of the majority to deal with religious minorities in an impartial way.

The necessity of risking life itself in order to pursue a higher or more transcendent purpose has been at the root of all great moral decisions. Wars have not been fought, prayers have not been said, and saints have not been canonized merely because men have pursued life for itself, but because they have believed a nobler manner of existence — the "good life" — might be susceptible of achievement. This "good life" has meant different things to different men, but has always involved a conviction that certain conditions at least are necessary for life to have enough meaning to justify its ephemerality. Major among these necessary conditions has been the belief that an enduring and objective purpose to life does in fact exist, and that human experience, and hence human social institutions, have a certain and definable role to play in the process of its achievement.

When fashioning such institutions, therefore, the question of expediency versus ultimate right is continuously at issue. On the side of the latter it will be argued that if society's institutions cannot suffer Mrs. Jones to get to heaven in her own way, then society has failed to meet one of its most basic responsibilities.

The reasons for this argument reside in the transcendent nature of religion itself. To a believer the relation between each man and his God is direct, and of a character far surpassing any temporal matter whatever. It is a relation by which all other relations can be explained and without which no other relation is thought to exist. To deny a religious man the benefit of his belief, therefore, is to deny him the benefit of that which his entire estimate of himself is based upon. Since all men recognize the importance of an ultimate philosophy in their own lives, they should be loath to deny its importance in the lives of others.

Thus belief in the "good life" is a powerful factor on the side of religious freedom, and is perhaps particularly so in the case of Mrs. Jones. Judge Wright was widely quoted for his statement, "I determined to act on the side of life."[39] He remains vulnerable, however, on the question of whether he acted on the side of the "good life." The situation he was faced with may be viewed as presenting exactly that question, because the choice was whether to preserve human life merely, or to have it sacrificed in pursuit of what Mrs. Jones sincerely believed to be a higher ideal. For Judge Wright to have denied this pursuit with no thought of protecting others from its consequences is hard to construe as other than the direct substitution of his beliefs for her own, and surely as a repudiation of the superiority of the "good life" to the immediate one.

The final matter to be considered is the extent to which the inherent nature of the political majority allows it to be trusted with control over religious freedom. Alexis de Tocqueville has said:

> A majority taken collectively is only an individual, whose opinions and frequently whose interests, are opposed to those of another individual, who is

[39] The Washington *Post*, February 7, 1964; *Time*, February 21, 1964.

> styled a minority. If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength. For my own part . . . the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them.[40]

Tocqueville's reluctance is, in some measure at least, vindicated by contemporary treatment of religious minorities. Roman Catholics, who by their numbers demand no small measure of political recognition, have a settled rule of refusing abortions even though it be certain that both the infant and its mother will die if pregnancy is allowed to continue. Christian Scientists, who are not as numerous as Roman Catholics but who nonetheless cannot be ignored, have regularly refused all medical treatment whatever.[41] No case has been found in which a court has ever suggested that these freedoms might be abridged.

It is hard to reconcile these situations with Judge Wright's order forcing Mrs. Jones to undergo the transfusions. If she could refuse a lifesaving abortion as a Catholic, or any medical treatment whatever as a Christian Scientist, it is difficult to see why she could not refuse a blood transfusion as a Jehovah's Witness.[42]

No one would suggest religious freedom should depend upon the political power of the faith adhered to, but such a result appears to be the case if Judge Wright's order is now to be the law. Mrs. Jones indeed would enjoy a greater chance of free exercise in this context if the hypothetical circumstance posed earlier were to occur. If every second or third voter believed his very salvation depended upon "abstaining from blood," there would be little chance that any elected government would oppose it. Such considerations weigh heavily in favor of limiting the majority's role in matters of religion.

In conclusion, it seems fitting to refer to the New York case cited earlier, in which this identical question was presented for what was the first time in a case reported by an American court.[43] During the hearing it was said of the patient, a Jehovah's Witness refusing transfusions, that

> in this particular case he has made a firm and admirable stand that perhaps not everyone could make . . . he feels so strongly in regard to his move that he is willing to take that risk, because he feels that even if his life were extended for even ten years . . . it would be a meager short period of time, in view of the fact that he would be violating to his conscience God's law which is far above any man's law.

The New York court thereupon denied the hospital's petition.

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[40] DEMOCRACY IN AMERICA, vol. 1, p. 259 (1963 ed.).

[41] See How, *Religion, Medicine, and Law,* 3 CANADIAN BAR JOURNAL 365, 371 (Oct., 1960), citing FINNEY, MORAL PROBLEMS IN HOSPITAL PRACTICE 60 (1948).

[42] The limitations of this paper prevent comment upon the question of whether, in this particular case, the hospital might have incurred liability. The waiver would surely have protected it from civil liability, and no case has been found holding a hospital or anyone else criminally responsible for not administering treatment to adults who decline to receive it. The District of Columbia case law is limited to maltreatment of infants. Jones v. United States, 113 U.S.App.D.C. 352, 355, 308 F.2d 307, 310 (1962).

[43] *Supra* note 3.

This case brings into focus what is perhaps the very crux of the entire matter. That is whether one man, or even a group of men acting through a court, are capable of deciding for another whether it is better to die at once and possibly go to heaven or to live a few additional years in what for the latter is surely moral oblivion. To answer this in the affirmative is to say for certain mortal life is such that an individual cannot through moral conscience rise above it.

This writer submits, and Mrs. Jones would agree, that perhaps existence itself must be risked at times in order to render its essence meaningful. In any event, it does not seem improper to leave the question to him who is, in the nature of things, most heavily burdened with finding a satisfactory answer.

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