Mississippi College Law Review

Volume 7
Issue 1 *Vol. 7 Iss. 1*

Article 4

1987

Constitutional Law - Mississippi's Recognition of a Privacy Right to Refuse Medical Treatment - In re Brown

Marc S. Roy

CONSTITUTIONAL LAW – MISSISSIPPI'S RECOGNITION OF A PRIVACY RIGHT TO REFUSE MEDICAL TREATMENT

In re *Brown*,

478 So. 2d 1033 (Miss. 1985)

FACTS

On August 8, 1985, Mattie Brown, aged 47, was transported to Hinds General Hospital. She had been shot and seriously wounded during a family disturbance. The attending physician recommended surgery supported by blood transfusions to keep Brown alive. Brown evinced a desire to live and to have the requisite operation. She refused, however, to have the transfusion. Brown, a Jehovah's Witness, maintained that receiving the blood of others is proscribed by the Bible.[1]

Brown's daughter was charged with aggravated assault in the shooting incident and was additionally charged with the rat poison murder of her father. Mattie Brown was to be a key witness in the cases against her daughter. To minimize the risk that Mattie Brown would die before testifying, the Hinds County District Attorney applied for an order from the Chancery Court of Hinds County mandating that Brown receive the blood transfusion. On August 26, 1985, the order was entered. On August 29, 1985, a motion by Brown's counsel to vacate the order as an infringement of the rights to the free exercise of religion and to privacy was overruled by the Chancery Court.[2]

The surgery and attendant transfusions were performed. Brown pursued an emergency appeal to the Mississippi Supreme Court and insisted that the issues of the right to privacy and to the free exercise of religion were not yet moot.[3] On September 11, 1985, the court learned that further surgery was needed by Brown and that supportive blood transfusions were again recommended to accompany the operation. Following oral argument on Septem-

1. *In re* Brown, 478 So. 2d 1033 (Miss. 1985).
2. *Id.* at 1035.
3. *Id.* at 1036.

ber 12, 1985, the court ruled that the lower court orders requiring Brown to submit to blood transfusions be vacated.[4]

INTRODUCTION

At the outset of its opinion, the Mississippi Supreme Court recognized the privacy of the rights of an individual when those rights are confronted by a competing interest of the state. Mattie Brown's rights to bodily privacy and to the free exercise of her religion were held to be paramount to the interest of the state in preserving her testimony.[5] This note examines an individual's right under *Brown*, predicated upon the exercise of the right to privacy, to refuse to allow a bodily intrusion conducted under the aegis of governmental authority.

Treatments of the general right to privacy have been ably formulated elsewhere.[6] From the initial consideration of the right "to be let alone" as a variant form of property,[7] the right to privacy has proven a fecund ground for commentators as new dimensions of the right have been explored.[8] Not expressly stated in the constitution, the right to privacy exists as a "penumbra" of the individual freedoms guaranteed by the Bill of Rights and "formed by emanations from those guarantees that help give them life and substance."[9]

In the landmark case of *Roe v. Wade*,[10] the United States Supreme Court upheld the right of a pregnant woman to have an abortion, subject only to the interest of the state in preserving the woman's health and in protecting the well-being of a viable fetus. Taking judicial notice that women having an abortion during the

4. *Id.* (The additional surgery was performed on Mattie Brown without blood transfusions. She has now recovered from her bullet wound and the operations which saved her life.).

5. *Id.* at 1041.

6. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) (extensive listing of privacy cases and development of the constitutional doctrine of privacy; interesting presentation that "the protections of personhood span the spectrum-from the most hardy to the most tender"); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974) (broad definition of privacy urged as "control over when and by whom the various parts of us can be sensed by others").

7. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

8. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 117 at 804-14 (4th ed. 1971); Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Cantor, *Privacy and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243 (1977); Shattuck, *National Identification Systems, Computer-Matching, and Privacy in the United States*, 35 HAST. L. J. 991 (1984).

9. Griswold v. Connecticut, 381 U.S.479, 484-85 (1965) (held unconstitutional a statute which prohibited the furnishing of contraceptive information).

10. Roe v. Wade, 410 U.S. 113 (1973).

first trimester of pregnancy may be subject to a lower mortality rate than if they proceeded to normal childbirth, the Court held the state's interest became "compelling" at the end of the first trimester.[11] Prior to that time, the woman has the right to determine her own bodily freedom with respect to abortion decisions.[12] The right of an individual to assert a privacy zone encompassing the ability to regulate intrusive bodily incursions, absent a compelling state interest to the contrary, was the early legacy of *Roe v. Wade.*

A comprehensive list of the federally protected interests that qualify as privacy rights has not yet been, nor is it likely to be, forthcoming. It is clear, however, that familial duties and relationships qualify,[13] as well as the broader "interest in independence in making certain kinds of important decisions."[14] Much of the interstitial development of the individual's right to refuse intrusive acts against his person has accordingly been left to the respective states.[15] The court in *Brown* found the right of a witness to a crime to refuse state-requested medical treatment to be independently grounded in Mississippi law[16] and to be "well within the federally recognized right to privacy."[17] Due to a lack of local precedent, the court considered similar issues raised in other jurisdictions in reaching its decision. The result of the *Brown* decision is an activist extension of the right to bodily self-determination. Correspondingly, it raises anew questions of the limits of the right, the persons able to exercise the right, and the point of legitimate interference with the right by the state.

BACKGROUND

Limits to the unfettered discretion of an individual to determine

11. *Id.* at 163.

12. *Id.*

13. Paul v. Davis, 424 U.S. 693, 713 (1976) (privacy rights include at least the areas of "marriage, procreation, contraception, family relationships, and child rearing and education").

14. Whalen v. Roe, 429 U.S. 589, 599 (1977).

15. Katz v. United States, 389 U.S. 347, 351 (1967); Read v. State, 430 So. 2d 832, 841 (Miss. 1983).

16. MISS. CONST. art. III, § 32 (1890) provides simply: "The enumeration of rights in this Constitution shall not be construed to deny and impair others retained by, and inherent in, the people."; Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 473 (Miss. 1976) (unwarranted invasion of minors' privacy by newspaper article protected by state common law).

17. *In re* Brown, 478 So. 2d 1333, 1040 n. 7 (Miss. 1985); *see also* Carey v. Population Services Int'l, 431 U.S. 678 (1977); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Whalen v. Roe, 429 U.S. 589 (1977).

the control of his body have been recognized by the court.[18] No decision rendered in Mississippi or elsewhere prior to *Brown* has evaluated the specific issue of whether a witness to a crime may, by invoking the right to privacy, refuse to accept medical treatment dictated by the state. Related situations involving invasive procedures have served, however, to delimit the ability of agents of the state to override the right of bodily privacy.[19] Comparison of the traditional rights to refuse medical treatment and the relatively recent assertions of bodily privacy rights by those in the custody of the state with the interests sought to be protected by the state offers a guide to the balancing criteria required by the courts.

A general right to refuse medical treatment may be claimed by competent adults and has found support in the courts.[20] In Mississippi, this right is further protected by statutory mandate.[21] The doctrine of informed consent acts as an historical buttress for the exercise of the right to bodily privacy. Irrespective of the finer intentions of the party providing medical treatment, the failure to obtain the consent of the patient to a specific protocol may constitute a battery.[22] The capacity to exercise independent judgment in evaluating whether or not to undergo specific medical treatment has been found in minors when they possess the ability of the average person to understand and weigh the benefits and dangers of the treatment.[23]

When given, the consent of an individual is limited to the type

---

18. Roe v. Wade, 410 U.S. 113, 153-54 (1973) ("The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate"); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upheld state's authority to require smallpox inoculations for the public welfare); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (although "no right is held more sacred, or is more carefully guarded," the right to bodily control may be impeded by "clear and unquestionable authority of law").

19. Tune v. Walter Reed Army Medical Hosp. 602 F. Supp. 1452 (D.C. 1985) (patient has ultimate decision regarding acceptable medical treatment); Zant v. Prevatte, 248 Ga. 832, 286 S.E. 2d 715 (1982) (forced feeding of prisoner violates right of privacy); *In re* Quinlan, 70 N.J. 10, 353 A.2d 647 (1976) (guardian has right to discontinue exceptional medical treatment of unconscious ward). *But cf.* Schmerber v. California, 384 U.S. 757, 770 (1966) (state requested blood test was reasonable to determine whether automobile driver was intoxicated).

20. *See generally* Doe v. Bolton, 410 U.S. 179, 192 (1973) (privacy is of constitutional dimensions); Reikes v. Martin, 471 So. 2d 385, 392 (Miss. 1985); Bratling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984); Satz v. Perlmutter, 362 So. 2d 160 (Fla. 1978).

21. MISS. CODE ANN. § 41-41-101, *et. seq.* (Supp. 1986). Section 41-41-101 reads, "[t]he purpose of sections 41-41-101 *et. seq.* is to allow a person to authorize the withdrawal of life-sustaining mechanisms from his body under the conditions provided by sections 41-41-103 *et. seq.*" *Id.*

22. *See* Pizzalotto v. Wilson, 437 So. 2d 859 (La. 1983)(court found battery resulted from unauthorized hysterectomy performed by surgeon on young woman who had wanted children); Beck v. Lovell, 361 So. 2d 245 (La. Ct. App. 1978) (where patient had crossed out relevant portion of surgery authorization form, tubal ligation was battery irrespective of skill used by surgeon), *writ denied*, 362 So. 2d 802 (1978).

23. Gulf & Ship Island R.R. v. Sullivan, 155 Miss. 1, 119 So. 501 (1928); Lacey v. Laird, 166 Ohio St. 12, 139 N.E. 2d 25 (1956) (subjected minor was eighteen years of age). Apparently, the minor's right to independent consent has not been extended to major operations.

and extent of the risk reasonably perceived by the grantor.[24] A patient is accordingly free to accept or reject forms of invasive treatment as he may direct.[25] Problems arise in the application of this right when the absence or refusal of consent to recommended medical treatment will lead to the probable death or permanent disablement of the patient. In these instances, it is incumbent upon the courts to decide whether other persons, including the patient's children and the attending medical staff, will be adversely affected by the patient's decision.[26] Furthermore, the state's interest in the welfare of its citizenry is inextricably intertwined with the interest of these private third-parties.

The inceptive case considering the subrogation of a patient's interest to those responsibilities adherent to third-parties is *Application of the President and Directors of Georgetown College.*[27] In *Georgetown*, counsel for the hospital applied to a federal Circuit Judge for a writ to compel a blood transfusion against the wishes of a female patient, a Jehovah's Witness. The patient was the mother of an infant child. The judge ordered transfusions be performed as needed to save the life of the patient. Although the patient was not *compos mentis*[28] and was *in extremis*[29] the judge reasoned that the state as *parens patriae* had a valid interest in stopping the mother's abandonment of the child which could result from the mother's refusal of a blood transfusion.[30]

The interest of the hospital staff in avoiding civil and criminal liability for failure to render standard medical care was also a factor considered by the court.[31] Cognizant of the exigency of the circumstances and lack of time for reflection, the judge granted the writ to preserve the patient's life.

The interest of the state in supporting the professional ethics of the medical profession was further recognized in *United States v. George* when a blood transfusion was authorized by court order to be administered by Veterans Administration Hospital staff to

---

24. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.) (the court emphasized that it is fundamental under American law for each adult of sound mind to determine what medical procedures he will allow), *cert. denied*, 409 U.S. 1064 (1972); Gill v. Selling, 125 Or. 587, 267 P. 817 (1928).

25. Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) (physician must disclose any material information to patient so that patient may determine what shall or shall not be done with his body).

26. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH *Deciding to Forego Life-Sustaining Treatment* at 1-11 (Library of Congress No. 83-600503, March 1983).

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

28. *Id.* at 1008.

29. *Id.*

30. *Id.*

31. *Georgetown College*, 331 F.2d at 1009.

save the life of a father of four children.[32] The mental capacity of the patient, a Jehovah's Witness, was not in question since he appeared alert and rational when interviewed by the judge who issued the order. The court concluded that a patient may refuse treatment, but may not command his physicians to pursue a treatment violative of the ethics and practice standards of the medical profession.[33] Other courts have recently taken a dimmer view of the roles of physician and the state in determining the ultimate treatment of a patient.[34]

That the state has an interest in the preservation of life is undeniable.[35] Yet the courts have with regularity dismissed the assertion that a general state interest in preserving life is compelling when that assertion stands counter balanced by an individual's constitutional right to refuse medical treatment.[36] The Jehovah's Witnesses, in pursuit of religious freedom,[37] have forcefully argued that the preservation of life on earth is not of the highest value.[38] Elevated to constitutional stature,[39] the right to bodily privacy is not likely to yield to an amorphous, generalized right of the state. It has been philosophically stated that freedom, not life, is the more ultimate value in our society, and that wars to keep the world safe for democracy witness to our willingness to sacrifice life for some higher value.[40]

An interest in preventing suicide has been advanced as a more cogent argument for the state's interference with personal freedom than a blanket social regulatory claim by the state. Suicide has been defined by one state supreme court as an act of " 'designedly destroying one's own life by a person of years of discretion and of sound mind.' "[41] A distinction, however, exists

32. United States v. George, 239 F. Supp. 752 (Conn. 1965).

33. *Id.*

34. Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452 (D.D.C. 1985) (it is the patient "who ultimately decides if treatment-any treatment-is to be given at all."); Matter of Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (patient's right to determine treatment is paramount to doctor's obligation to render care), *cert. denied*, 454 U.S. 858 (1981).

35. Roe v. Wade, 410 U.S. 113 (1973); In Snyder v. Holy Cross Hosp., 30 Md. App. 317, 352 A.2d 334 (1976), the state's interest in preserving the lives and well-being of its citizenry was manifested by compelling an autopsy against the assertion of religious and privacy rights by the parents of the deceased.

36. Doe v. Bolton, 410 U.S. 179 (1973); Reikes v. Martin, 471 So. 2d 385 (Miss. 1985).

37. *Genesis* 9:3-4, *Leviticus* 3:17, 17:10-14, *Deuteronomy* 12:23, *Acts* 15:28-29 (Jehovah's Witnesses take the position that the Biblical prohibition against "eating blood" is a mandate against acceptance of blood in any form, including blood transfusions.).

38. *In re* Osborne, 294 A.2d 372 ,373 (D.C. 1972) (Jehovah's Witness, arguing against a blood transfusion, stated that his grandson, a hospital patient, "wants to live very much. . . . He wants to live in the Bible's promised new world where life will never end. A few hours here would nowhere compare to everlasting life."). The contention appears to be that a form of spiritual suicide may result from certain forms of medical treatment.

39. Roe v. Wade, 410 U.S. 113 (1973).

40. Friedmann, *Interference with Human Life: Some Jurisprudential Reflections*, 70 COLUM. L. REV. 1058 (1970).

41. Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 97 (1878) (Justice Woodward citing Webster with approval and adopting the term "self-murder" as synonymous with suicide).

between the intent to commit oneself to an act designed to end life and the refusal of medical treatment. Refusal of treatment merely allows the patient's injury or disease to progress to its penultimate effect, which may not cause the death of the patient. Where an individual had not voluntarily induced his life-threatening situation and had not evinced a desire to die, the court in *Satz v. Perlmutter*[42] decided that a patient's refusal of medical treatment was not tantamount to suicide. In *Perlmutter*, the court approved the request of the patient, a seventy-three year old man with Lou Gehrig's disease, that medical personnel disconnect a life sustaining device. The man was mentally alert and his family supported his decision to terminate this form of treatment. His right to the cessation of mechanical life-support systems was found by the court to be within the constitutional privacy rights of free choice and bodily self-determination.[43]

Evolving authority favors the *Perlmutter* approach and supports the proposition that a patient will be allowed to forego bodily intrusive treatment.[44] In *Superintendent of Belchertown v. Saikewicz*,[45] the *parens patriae* function of the state was held to protect the "best interests"[46] of a person in the state's care. The court reasoned that the best interests of a patient include the unique individual viewpoint of the patient,[47] in reaching its conclusion that the "patient's right to privacy and self-determination is entitled to enforcement."[48] The interest of the state in compelling bodily intrusions must be based, in the absence of a clearly exhibited intent by an individual to commit suicide, upon more than the stated goal of preserving that individual's life.[49]

Persons in the legal custody of the state are more subject to bodily intrusions where the state seeks to enforce its criminal laws. In *Schmerber v. California*,[50] the Supreme Court held that a blood-alcohol test was a permissible bodily intrusion of a drunk driving suspect where the arresting officer reasonably believed destruction of evidence was imminent. The officer had taken the suspect to a hospital following an automobile accident and had taken ad-

42. Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978).

43. *Id.* at 164.

44. Wons v. Public Health Trust, 500 So. 2d 679 (Fla. Dist. Ct. App. 1987) (Jehovah's Witness' refusal of blood transfusion); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 427 (1977) (both competent and incompetent persons may refuse treatment "in appropriate circumstances," a determination of which includes a consideration of countervailing state interests).

45. Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

46. *Id.* at 428.

47. *Id.*

48. *Id.* at 435.

49. *E.g.*, Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452 (D.D.C. 1985); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

50. Schmerber v. California, 384 U.S. 757 (1966) (5 to 4 decision).

ditional time to investigate the accident scene. Under these circumstances, the court concluded that natural bodily functions would have eliminated any alcohol from the suspect's bloodstream if a blood sample had not been taken to preserve that evidence.[51] The fact that the performance of the test was conducted in a reasonable manner by the hospital physician and not by lay personnel was recognized as significant by the Court.[52] Had the blood test or other invasive procedures been administered by law enforcement personnel, a different decision could have resulted. *Schmerber* sanctioned only minor bodily intrusions "under stringently limited conditions" by the state agents in exercising their criminal enforcement duties.[53] Judicial notice of the widespread usage of blood tests for marriage licenses, college admissions and blood donations was taken by the court in formulating its "reasonableness" demand for any bodily privacy invasions by government.[54] The balancing of the minor nature of the intrusive procedure and the interest of the community in determining guilt or innocence was found in *Schmerber* to favor the taking of compulsory blood samples from drunk driving suspects.[55]

The mandate of *Schmerber* that strict standards be applied for invasions of bodily privacy was continued in the recent case of *Winston v. Lee*.[56] The state of Virginia sought in *Lee* to compel a robbery suspect to undergo surgery for removal from his left chest of a bullet fired by the robbery victim. The *Schmerber* balancing test of "reasonableness" was applied by the court in weighing the risk to the suspect, the extent of intrusion upon the suspect's bodily integrity, and the state's interest in locating evidence of a crime.[57] Holding that a request for compelled surgical bodily intrusion is to be evaluated on a case-by-case basis and may be "unreasonable" even if likely to divulge probative evidence of crime, the court refused to order the removal of the bullet.[58] Additional substantial evidence was available to the state in its efforts to resolve the robbery case, and testimony by physicians indicated that general, not local, anesthesia would be desirable if the requested operation was conducted.[59] The opinion of the

51. *Id.* at 770.
52. *Id.* at 771-72.
53. *Id.* at 772.
54. *Id.* at 771.
55. *Id.* at 772.
56. Winston v. Lee, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 466 U.S. 934 (1984), *aff'd*, 470 U.S. 753 (1985).
57. *Winston*, 470 U.S. at 763.
58. *Id.* at 766.
59. *Id.* at 764.

Court, by Justice Brennan, gave consideration to these facts,[60] although it is not at all certain that their absence would have caused the Court to reach an opposite result.

The reticence of the courts to compel invasive surgical procedures is attributable to the inherent risks involved in operations and to the lack of any conscious control by a patient. In situations involving medical treatment of infants or mental incompetents, a court appointed guardian may be required to exercise his best judgment to protect the patient's interests.[61] The state would be remiss in its duty to its charges if it did not assume a custodial, *parens patriae* role in these matters.

Persons in the custody of the state may under special circumstances be subject to less drastic forms of bodily intrusions in the furtherance of state interests. Prisoners, in the interest of prison security and orderly administration, may be subject to routine visual bodily cavity examinations at the request of the governing authority of the prison facility.[62] It has been held that a state can also order vaccinations reasonably designed to halt the spread of disease.[63] Challenges to the authority of federal agencies to require their employees to submit to "intrusive" drug-testing procedures have succeeded only to clarify the standards of reasonableness and have not invalidated the procedures.[64]

---

60. *Id.*

61. *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977) (court ordered appointment of guardian to consent to life-saving treatment for patient suffering from gangrene, diabetes mellitus, infection, anemia); Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D.Wash. 1967) (necessary blood transfusions for dependent children are not unconstitutional and may be ordered over parents' objections), *aff'd*, 390 U.S. 598, *reh'g denied*, 391 U.S. 961 (1968).

62. Bell v. Wolfish, 441 U.S. 520 (1979).

63. *E.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (smallpox vaccination); Morris v. Columbus, 102 Ga. 792, 30 S.E. 850 (1898) (smallpox vaccination).

64. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987). The Fifth Circuit, in staying the district court's injunction against a drug-testing urinalysis program by the Customs Service, found that the program did invade an employee's expectation of privacy. However, the court concluded that the totality of circumstances test balanced in favor of the government. Factors weighed by the court included the time, place, manner, purpose, and extent of the intrusions. Only those persons with advance notice of the tests and who were in positions classified as "sensitive" were subject to these tests. "Sensitive" positions cover a variety of positions involved with law enforcement, national security or a high degree of public trust pursuant to President Reagan's Executive Order 12564, 3 C.F.R. 224 (1986); *see also* Allen v. City of Marietta, 601 F. Supp. 482 (N.D.Ga. 1985) (municipal employees terminated after compulsory urinalysis revealed traces of marijuana); McDonnell v. Hunter, 612 F. Supp. 1122, (S.D. Iowa 1985) (State Department of Corrections employees held subject to blood, urine, breath analyses at the time of apparent influence of drugs or alcohol), *modified*, 809 F.2d 1302 (8th Cir. 1987).

DISCUSSION

The majority opinion, written by Mississippi Supreme Court Justice Robertson, examined the broad constitutional and common law bases of Mattie Brown's assertion of her right to bodily privacy. The Mississippi Supreme Court held that Brown's claim to individual privacy surpassed any interest of the state in forcing her to undergo a blood transfusion.[65]

The state of Mississippi argued that the prosecutions for the murder of Mattie Brown's husband and the attempted murder of Brown constituted a compelling interest sufficient to overcome any objection by Brown to measures designed to save her life. To allow a murderer to escape punishment for the lack of proper witnesses at trial, submitted the state, would be to inflict the risk of serial killings upon the public at large since the murderer would be free to kill again.[66] The court rejected this argument by stating that the probability of continued murderous acts was difficult to predict and "the danger to society of one murderer escaping prosecution are qualitatively different-and lesser-than that of a small pox epidemic."[67] Agreeing that the interest of the state in criminal prosecution was important, the court nonetheless held that the privacy rights of Brown were not subservient to the state's interest.[68] One's right of bodily self-determination, according to the court, is "peculiar to the individual."[69] This right may not be assumed by someone else and does not succeed the death of the individual.[70] The Mississippi Supreme Court thus found authority cited by the state involving a deceased person to be inapplicable to Brown, a living and mentally competent person.[71]

The court found that no waiver of her right to accept or reject specific medical treatment occurred as a result of Brown's voluntary admission to a hospital facility. The state's argument to the contrary was rejected as specious.[72] The right to refuse blood transfusions, said the court, is to be curtailed "only in cases of great and eminent public danger."[73] The current association made by

65. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985).
66. *Id.*
67. *Id.* at 1041.
68. *Id.*
69. *Id.* at 1041.
70. *Id.*
71. *Id.* at 1041. Synder v. Holly Cross Hosp., 30 Md. App. 317, 352 A.2d 334 (1976), cited by the state, involved an autopsy conducted over the objections of members of the deceased's family.
72. *In re* Brown, 478 So. 2d 1033, 1041 (Miss. 1985).
73. *Id.* at 1040.

many persons, between blood transfusions and various diseases, though likely ill-founded,[74] was nonetheless presented by the court as an example of a reason for the discretionary power of the individual to refuse medical treatment for any reason.[75]

Questions of Brown's competence to decide what forms of medical treatment she would accept were rejected by the court. The state argued that Brown, in the throes of injuries wrought by three .38 caliber bullets, was not mentally fit to deny treatment on her own behalf.[76] The state pointed out that Brown had been previously warned of the probability that her daughter was a murderer and that Brown continued thereafter to live with the daughter in obvious disregard of the possible tragic consequences.[77] Brown's counsel argued that Brown had no desire to die and was conscious, lucid, and alert when the transfusions were refused.[78] Accepting this position, the court emphasized that its holding applied only to cases involving competent adults.[79] Consequently, no application of a state interest in preventing suicide was found to be appropriate by the court in *Brown*. The court further noted that just as Mattie Brown was free to dictate her course of treatment based on the doctrine of informed consent and the right to bodily privacy, the attending medical personnel could have declined to continue treatment based upon unreasonable conditions.[80] The hospital and surgeon in the instant case were agreeable to continuing the recommended surgery without transfusing blood into Brown.[81]

In a dissenting opinion, Justice Hawkins maintained that Brown's individual rights to refuse medical treatment should yield to the interest of the state in preserving her ability to testify.[82] Since Brown could not refuse to testify as a witness, the dissent argued that the compelling of proper medical treatment is a necessary adjunct of the state's power to compel testimony.[83] The dissent concluded that a case-by-case determination is the correct approach

74. *Id.* According to Dr. Joseph Candelora, Ph.D., M.D., Staff Pathologist at St. Dominic's Hospital, Jackson, Miss., this assumption by the court is correct. Dr. Candelora states that testing/detection procedures for AIDS (Acquired Immune Deficiency Syndrome), Hepatitis A and B, and for Non-A, Non-B Hepatitis in use by blood resource centers since 1985 are providing an effective screen against unsafe blood supplies. For a discussion of the public response to the AIDS epidemic and the concept that "AIDS is the modern day equivalent of leprosy," *see* Rasmussen v. South Fla. Blood Service, Inc., 500 So. 2d 533, 536-37 (Fla. 1987).

75. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985).

76. State's Brief at 4-5, *In re* Brown, 478 So. 2d 1033 (Miss. 1985) (Misc. No. 1954).

77. *Id.*

78. Petitioner's Brief at 2, *In re* Brown, 478 So. 2d 1033 (Miss. 1985) (Misc. No. 1954).

79. *In re* Brown, 478 So. 2d 1033, 1042 (Miss. 1985).

80. *Id.* at 1041.

81. *Id.*

82. *Id.* at 1042.

83. *Id.*

to take in balancing the individual's rights with those of the state. In Justice Hawkins' view, had the blood transfusion been a questionable medical procedure, Brown's arguments might have been more tangible.[84]

ANALYSIS AND CONCLUSION

Decisions supporting the right of an individual to refuse a blood transfusion have traditionally been predicated upon the assertion of the constitutional right of freedom of religion.[85] *Brown* upholds a person's choice to reject a blood transfusion based upon the right to bodily privacy.[86]

The United States Supreme Court in *Winston v. Lee*[87] again applied the *Schmerber*[88] balancing test to hold that the state was not permitted to compel a robbery suspect to submit to a surgical operation to obtain evidence. The opinion in *Lee* stated that when the state seeks to intrude upon an area in which society recognizes a significantly heightened privacy interest, "a more substantial" justification is required to make the search reasonable.[89]

Bodily integrity is unquestionably an area of constitutional privacy entitled to protection.[90] *Brown* extends that protection of the individual right to bodily privacy to encompass the decision of an individual to refuse even the most mundane invasive procedures. The individual may refuse to comply with the asserted state interest for "motives noble or base."[91]

The long-standing doctrine of informed consent supports this extension of privacy rights. From the theory that a person has the right to determine whether or not to seek medical treatment, it is with small effort that the right to reject a particular form of treatment is inferred. As an analogy, the court pointed out that mentally competent adults have the statutory right in Mississippi to demand the cessation of mechanical life support systems.[92]

---

84. *Id.*

85. *See, e.g.*, Mercy Hosp., Inc. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (1985); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (Ill. 1972); *In re* Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

86. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985).

87. Winston v. Lee, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 466 U.S. 934 (1984), *aff'd*, 470 U.S. 753 (1985).

88. Schmerber v. Calif., 384 U.S. 757 (1966).

89. *Winston*, 717 F. 2d at 889.

90. Roe v. Wade, 410 U.S. 113 (1973).

91. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985).

92. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985); MISS. CODE ANN. §§ 41-41-101, *et seq.* (Supp. 1984) provide that competent persons, or those persons empowered to consent for incompetents or minors, have the right to refuse the continuance of life-sustaining medical support mechanisms.

Justice Robertson, by separate note in the opinion, explained that the state admitted at oral argument that had Mattie Brown given a confession of a crime at the time of her refusal of the blood transfusion, that confession would have been "sufficiently, knowingly, and intelligently given so as to be admissible in a court of law."[93] This admission, when paired with the fact that Brown had expressed no desire to die or to exclude all medical treatment, would not have allowed the court to logically find Mattie Brown to be incompetent to make binding decisions or to withhold her consent to a medical procedure.

The difficulty in the application of the majority opinion is, as mentioned by Justice Hawkins in his dissent, one of degree.[94] Cases involving the balancing of delicate and, by nature, imprecise rights do not readily avail themselves of concrete formulae. The ad hoc, case-by-case approach to "reasonableness" as approved in *Winston v. Lee* is a necessary method of settling disputed issues of personal freedoms.[95] The majority opinion in *Brown* correctly evaluated the facts at bar before holding that the state interest in having an eyewitness at trial was not superior to the privacy rights of Mattie Brown. The court did not hold that an individual's bodily privacy may never be delimited under any circumstances.

A qualification upon the right of an individual to bodily privacy does exist under *Brown*. The court concludes that no state authority exists to intrude upon a person's exercise of the right to privacy "absent evidence of imminent public danger."[96] Preservation of the state's ability to act in times of public emergency is thus kept intact. In its statement that the effect of a murderer being let loose upon the public is qualitatively less than an epidemic,[97] the court does not mention whether or not conditions, such as those created by a serial-killer could qualify as "epidemic" in magnitude. It is within the realm of modern criminal activities to envision a pattern of killings or terrorism sufficient to create a situation that meets the "imminent danger" test.[98] The

93. *In re* Brown, 478 So. 2d 1033, 1041 n. 8.

94. *In re* Brown, 478 So. 2d at 1042.

95. Winston v. Lee, 470 U.S. 753 (1985).

96. *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985).

97. *Id.* at 1041.

98. *E.g.*, People v. Gacy, 103 Ill. 2d 1, 468 N.E.2d 1171-1220, (1984) (defendant convicted of thirty-three counts of murder, one count of deviate sexual assault and one count of indecent liberties with a child; evidence included numerous incidents of torture and physical abuse); Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983) (multiple murder convictions for killings of young black males upheld despite defense references to extensive pre-trial publicity of the public's fear of a killer at large); Corona v. Superior Court, 101 Cal. Rptr. 411, 24 Cal. App. 3d 872 (1971) (murder case involving killings of twenty-five migrant farm workers). The quantity of victims in these cases may not approach the scale of an epidemic. The type of apprehension and the evasive measures taken by the public may, however, be of the same "quality" as those undertaken during an epidemic.

state's argument that a murder suspect should not be freed due to the lack of a key witness, when the use of a widely accepted medical procedure is available to help assure the health of that witness, is an appealing one. The state's argument suffers, however, from the difficulty of determining the degree of state intervention and to what witnesses, suspects, and others it is applicable.

The decision in *Brown* does not, and should not, settle the broad issue of who will be the victor when state interest and individual privacy collide. It does follow the reasoning of the United States Supreme Court in the decisions of *Roe v. Wade*[99] and *Winston v. Lee*[100] ascribing a high degree of purpose and protection to an individual's right to bodily self-determination. The inherent rights of the individual must not yield to fears of the moment. *Brown* establishes that the safeguards of an individual's bodily privacy are readily capable of expansion and are not to be enfeebled by state claims of lesser stature.

Marc S. Roy

99. Roe v. Wade, 410 U.S. 113 (1973).
100. Winston v. Lee, 470 U.S. 753 (1985).