NOTES

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—JUDICIALLY MANDATED BLOOD TRANSFUSION FOR ADULT JEHOVAH'S WITNESS —*John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971).

Delores Heston, age 22, after being severely injured in an automobile accident, was taken to the emergency ward of John F. Kennedy Memorial Hospital. Her injury was diagnosed as a ruptured spleen, which would require both surgery and the transfusion of whole blood. Like her parents, Miss Heston was a Jehovah's Witness. In accordance with her religious beliefs,[1] Miss Heston, an adult, insisted that she refused to accept a blood transfusion, although the court noted that the evidence indicated she was in shock and incoherent.[2] Her mother also opposed the transfusion and signed a release purporting to relieve the hospital of all liability. The patient's father could not be found. Since, without a transfusion, death was imminent, the plaintiff hospital applied to the superior court seeking the appointment of a guardian in order to provide the necessary medical treatment. The court made the appointment, giving the guardian the authority to consent to blood transfusions " 'for the preservation of the life of Dolores Heston.' "[3] After receiving the necessary medical treatment, Miss Heston survived. Thereafter, the defendants, Delores Heston and her mother, moved to vacate the order, but this motion was denied. The Supreme Court of New Jersey granted certification and affirmed the trial court's decision.[4]

The Supreme Court held that a person's religious beliefs could not preclude the state from ordering a blood transfusion in an effort to save that person's life. The court recognized "no constitutional right to choose to die," and further noted that a person's religious beliefs could not confer such a right.[5] Although Miss Heston had the right

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1 This religious tenet is based upon their interpretation of various passages of the Bible. Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212, 212 (1964); *see, e.g., Leviticus* 17:10 (King James):

> And whatsoever man *there be* of the house of Israel, or of the strangers that sojourn among you, that eateth any manner of blood; I will even set my face against that soul that eateth blood, and will cut him off from among his people.

2 John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 578, 279 A.2d 670, 671 (1971).

3 *Id.* at 579, 279 A.2d at 671.

4 *Id.*

5 *Id.* at 580, 279 A.2d at 672. That the beliefs of Miss Heston were religious was unquestioned by the court. *See* Davis v. Beason, 133 U.S. 333, 342 (1890); Boyan, *Defining*

to believe that blood transfusions were irreligious, her refusal to allow such a transfusion was construed as conduct in pursuance of this belief and, consequently, was not "wholly immune from governmental restraint";[6] freedom to believe is absolute but acts reflecting those beliefs are not. In support of this position, the court quoted *Reynolds v. United States*,[7] stating: " '[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.' "[8] The court concluded that, in *Heston*, there was a "compelling State interest" which justified the State's interference.[9]

The American people generally subscribe to the notion that "the Lord helps those who help themselves." Society has taken a dim view of those who fail to follow this creed, and consequently those who ignore common medical practice have usually incurred society's wrath.[10] The Jehovah's Witnesses' refusal to accept what is considered a standard medical procedure is not, however, the only challenge some religions have posed to the general beliefs and mores of society. The religious beliefs of the Seventh-day Adventists came under judicial scrutiny when one of their members refused to work on Saturday and subsequently was denied workmen's compensation.[11] The Court of

Religion in Operational and Institutional Terms, 116 U. PA. L. REV. 479, 485-86 (1968); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 550-51 (1965). One authority has posited that to define religion is only to restrict it. Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964).

6 58 N.J. at 580, 279 A.2d at 672.

7 98 U.S. 145 (1878).

8 58 N.J. at 581, 279 A.2d at 672 (quoting from 98 U.S. at 163). This view has been the object of some criticism. *See* Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659 (1930); Comment, *Rendering unto Caesar: State Health Regulations and the Free Exercise of Religion*, 26 U. CHI. L. REV. 471, 473 (1959):

> Drawing the line between protected and unprotected exercises of religion on the basis of whether freedom to believe or freedom to act is involved may be criticized on several grounds. The language of the Amendment gives no hint of this distinction; the word "exercise" ordinarily would not be thought restricted to belief. Second, if Congress and the states were "deprived of all legislative power over [only] mere opinions," then it must be assumed that prior to the First Amendment Congress, and before the Fourteenth Amendment the states, could effectively control belief. The usual means of control, censorship or punishment, must, however, necessarily involve only the manifestation of a belief. Third, it may be suggested that restricting the guarantee of free exercise of religion to the free exercise of religious beliefs defeats the purpose of the guarantee itself. (footnotes omitted).

9 58 N.J. at 584, 279 A.2d at 674.

10 *See generally* Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 48-49 (1954).

11 Sherbert v. Verner, 374 U.S. 398 (1963).

Appeals of Kentucky interfered with a religious practice which used poisonous snakes in its ceremonies.[12] Additionally, religious beliefs have run afoul of the law on the issue of compulsory smallpox vaccination,[13] and the Mormons (members of the Church of Jesus Christ of Latter-day Saints) have set many legal precedents because of their avowed religious position on polygamy.[14] Even the practice of fortune-telling[15] and the use of drugs[16] as exercises of religion have been reviewed by the courts.

The Jehovah's Witnesses have had more than one day in court.[17] In the successive New Jersey cases of *State v. Perricone*,[18] *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[19] and finally *Heston*, they have found themselves on the losing side of the arguments. In *Perricone* the court was faced with circumstances in which an infant was in dire need of a blood transfusion. It was decided that the state's concern for the welfare of an infant, notwithstanding parental objection based on religious belief, justified the blood transfusion.[20] In the

12 Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942). *See also* State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 336 U.S. 942 (1949).

13 Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).

14 Mormon Church v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

15 State v. Neitzel, 69 Wash. 567, 125 P. 939 (1912) (vagrancy conviction of alleged minister in the "National Astrological Society" affirmed despite assertion that fortune-telling was part of his religious beliefs).

16 A few notable opinions on the use of drugs have been decided. Only the state of California has gone so far as to recognize the use of a drug as a proper exercise of religious freedom. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). In *Woody*, the court was dealing with the use of peyote by Indian members of the Native American Church of the State of California. *But see In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), decided the same day as *Woody*, where the same court ordered a new trial on the issue of the sincerity of defendant's belief.

Two decisions involving fact situations similar to that in *Woody* have ended in drug convictions. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd in part on other grounds*, 395 U.S. 6 (1969); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926). In *Leary* the court was dealing with a self-professed Hindu whose religion supposedly prescribed the use of hallucinogens. The court sustained the power of the government to outlaw the use of marihuana and then took issue with the relevance of marihuana to Hinduism. 383 F.2d at 859-60. In *Big Sheep* the Montana Supreme Court, entertaining the same issue as did the court in *Woody*, arrived at a contrary conclusion. 75 Mont. at 239, 243 P. at 1073.

17 The Supreme Court has reviewed a number of cases involving Jehovah's Witnesses, most notable are: West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witnesses were successful in challenging compulsory flag saluting in the public school system); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (license tax on solicitations by religious groups held unconstitutional); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Jehovah's Witness' conviction for soliciting without a license and for breach of peace reversed on first amendment grounds).

18 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962).

19 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

20 37 N.J. at 477-78, 181 A.2d at 759.

Anderson case the court was confronted with the problem of a non-consenting adult who was pregnant at the time of the operation. In reaching its decision that the operation could legally be performed and the blood transfused, the court, relying on *Perricone*, construed the fact of pregnancy as the determinative factor:

> [T]he welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop.[21]

The court rested its decision solely on the basis of the child's welfare. Specifically reserved in *Anderson* was the question of "whether an adult may be compelled to submit to such medical procedures when necessary to save his life."[22] Thus, the stage was set for the decision in *Heston*.

Other jurisdictions have entertained issues with substantially the same factual situations. In *Application of President & Directors of Georgetown College, Inc.*,[23] the court was also faced with a Jehovah's Witness who refused a blood transfusion. Attention was given to the fact that the patient was "*in extremis* and hardly *compos mentis*."[24] A second consideration was the fact that the patient was the mother of a seven-month-old infant. The court reasoned that, as *parens patriae*, the state had an interest in seeing that the child was not abandoned to become a ward of the state, and so, the transfusion was ordered.[25]

In re Brooks' Estate[26] is the only case holding contrary to *Heston* on religious grounds where a similar factual situation was presented.[27]

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21 42 N.J. at 423, 201 A.2d at 538.

22 *Id.*

23 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

24 *Id.* at 1008.

25 *Id.* In the case of United States v. George, 239 F. Supp. 752 (D. Conn. 1965), the court noted the decision in *Georgetown College* but, perhaps because of the patient's greater rational capacity, arrived at the same result through a more circuitous route.

> [T]he doctor's conscience and professional oath must also be respected. In the present case the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously he sought to dictate to treating physicians a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances. The patient may knowingly decline treatment, but he may not demand mistreatment.

Id. at 754.

26 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

27 In accord with the outcome of *Brooks* is Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). This court, however, did not arrive at its decision through the religious freedom clause but rather through a view towards the protection of the individual's rights.

> [I]t is the individual who is the subject of a medical decision who has the final

While the case was noted in the *Heston* opinion,[28] its reasoning was rejected by the New Jersey Supreme Court because of the Illinois court's failure to apply the proper judicial standard to actions concerned with religious beliefs, for failure to take cognizance of the hospital's interest, and for failure to consider whether the state had an interest in preserving life.[29]

The state's authority to interfere with a person's exercise of his religious beliefs has been upheld under the *parens patriae* doctrine and the state's police power. The former imposes upon the state the duty to respond when one of its citizenry is suffering from some sort of disability which may have a dangerous effect upon the individual or society.[30] This power is generally exercised for the protection of minors and mental incompetents.[31] Nothing can be considered more precious to an individual than his own life and, for that reason alone, competency has been of primary importance when considering whether a person's life or death decision should be given effect, especially in cases where no dependents are involved.[32] However, although the court in *Heston* alluded to the possibility that Miss Heston, due to shock, may have been incompetent to make a decision regarding her medical treatment,[33] it declined to place any reliance on this fact in reaching its ultimate decision. It is this tacit rejection of the *parens patriae* rationale which is the important distinguishing factor in *Heston*. All prior cases have ordered compulsory medical treatment under the state's *parens*

> say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.

Id. at 28, 252 N.Y.S.2d at 706.

28 58 N.J. at 583-84, 279 A.2d at 674.

29 *Id.* at 584, 279 A.2d at 674. The *Brooks* court applied the "clear and present danger" test.

30 This doctrine was clearly expressed in the case of Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955), *cert. denied*, 350 U.S. 942 (1956).

> [T]he power and duty imposed by the *parens patriae* doctrine . . . extends to the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc. . . . This jurisdiction and duty is called into play when it is found that such persons could be a danger to themselves or to the public if they were not taken and held under the protective custody of the sovereign.

Id. at 430-31, 114 A.2d at 5. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); McIntosh v. Dill, 86 Okla. 1, 3, 205 P. 917, 920, *appeal dismissed*, 260 U.S. 694, *cert. denied*, 260 U.S. 721 (1922).

31 Cases cited note 30 *supra*.

32 *Perricone* involved incompetency while *Anderson* and *Georgetown* involved dependents. *See also* Note, *Compelled Medical Aid v. Religious Freedom*, 23 WASH. & LEE L. REV. 154, 159 (1966).

33 58 N.J. at 578, 279 A.2d at 671.

patriae doctrine, involving either children, pregnant women, women with dependent children, or mental incompetents.[34] In contrast, *Heston* involved a 22-year-old single female who was without dependent children. It is this crucial distinction which makes the *Heston* opinion unique, and causes it to be categorized as a significant step beyond the holdings in the prior cases.

Although the *parens patriae* jurisdiction gives the sovereign extensive power to interfere with religious freedom, the state's greatest authority is derived from the police power doctrine,[35] and it is this power which was apparently utilized in *Heston*. One of the first cases recognizing the circumscription of first amendment rights by the state's police power was *Watson v. Jones*,[36] where the Court stated that a person's right to the free exercise of religion is limited to practices which do "not violate the laws of morality and property, and which [do] not infringe personal rights."[37] In analyzing the amendment from a historical perspective, the Supreme Court in *Reynolds v. United States*[38] upheld a bigamy conviction against the contention that defendant's religious liberties under the first amendment were being violated. The response to defendant's argument was the recognition of a distinction between the right to believe and the right to act.

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[39]

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34 *See* cases cited notes 18, 19 & 23 *supra*.

35 This power was described in detail in Stephens v. Bongart, 15 N.J. Misc. 80, 82, 189 A. 131, 132 (Essex County Juv. & Dom. Rel. Ct. 1937):

> It [the police power of the state] is founded on the right of the state to protect its citizens, provide for their welfare and progress, and to insure the good of society. It corresponds to the right of self-preservation in the individual. . . . It is the foundation of our social system, and upon it depends the securing of social order, the life and health of the citizen, the comfort of existence, the enjoyment of private and social life, and the beneficial use of property.

See also Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); Davis, Brody, Wisniewski v. Barrett, 253 Iowa 1178, 1180, 115 N.W.2d 839, 841 (1962) ("the power, inherent in the Sovereign, to prohibit or regulate certain acts or functions of the populace as may be deemed to be inimical to the comfort, safety, health and welfare of society."); State Bd. of Health v. City of Greenville, 86 Ohio St. 1, 21, 98 N.E. 1019, 1021 (1912) ("This power [police] includes anything which is reasonable and necessary to secure the peace, safety, health, morals, and best interests of the public.").

36 80 U.S. (13 Wall.) 679 (1871) (Court refused to entertain the issue of ownership of Church property where two factions alleged the other to be guilty of heresy.).

37 *Id.* at 728.

38 98 U.S. 145 (1878).

39 *Id.* at 164.

This distinction was reaffirmed in *Davis v. Beason*,[40] where its scope was expanded and the power of the state to regulate religious acts was held to include "acts inimical to the peace, good order and morals of society."[41] Further license was granted to the states in *Mormon Church v. United States*,[42] which contained the statement:

> The State has a perfect right to prohibit polygamy, *and all other open offences against the enlightened sentiment of mankind,* notwithstanding the pretence of religious conviction by which they may be advocated and practised.[43]

After the Court established that first amendment freedoms were not absolute, it gradually began to determine the extent to which the state's police power could be exercised in opposition to the rights protected by this amendment. *Schenck v. United States*[44] is the most noted case for the proposition that Congress possesses the power to limit the right to freedom of speech when the exercise of this right would "create a clear and present danger that . . . [would] bring about the substantive evils that Congress has a right to prevent."[45] Justices Black and Douglas, concurring in *West Virginia Board of Education v. Barnette*,[46] applied a variation of this test to freedom of religion. In agreeing with the majority's decision that a state had no right to compel a public school student to salute the flag in opposition to his religious convictions, they maintained that this statute was not "necessary to protect society as a whole from grave and pressingly imminent dangers."[47] In upholding a Pennsylvania statute which prohibited retail sales on Sunday, Chief Justice Warren in *Braunfeld v. Brown*[48] stated that the state's police power reaches "people's actions when they are found to be in violation of important social duties or subversive of good order."[49] The varying phraseology used in these first amendment cases was subsumed under

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40 133 U.S. 333 (1890) (upheld Mormon's conviction for falsely swearing at voter registration that he was not a member of an organization fostering polygamy).

41 *Id.* at 342.

42 136 U.S. 1 (1890) (upheld government's seizure of Mormon Church property and winding up of the corporation for violation of statute prohibiting the countenance or practice of polygamy).

43 *Id.* at 50 (emphasis added).

44 249 U.S. 47 (1919).

45 *Id.* at 52 (emphasis added). This is the same test as was applied in *In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

46 319 U.S. 624, 643-44 (1943).

47 *Id.*

48 366 U.S. 599 (1961).

49 *Id.* at 603.

the general heading of "compelling state interest" in *NAACP v. Button*:[50]

> The decisions of this Court have consistently held that only a *compelling state interest* in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.[51]

Heston and *Brooks*,[52] cases with parallel factual patterns, came to divergent conclusions concerning the appropriate standard to be utilized. *Heston*, by adopting the "compelling state interest" test, upheld the state's power to order a blood transfusion; whereas *Brooks*, by adopting the "clear and present danger" criterion, denied the state had such authority. The compelling interests which the *Heston* court advanced as justification for its position were, first, the State's "interest in sustaining life," and second, the hospital's interest when it is an involuntary custodian.[53]

A more recent United States Supreme Court statement on the "compelling state interest" test with relation to religious liberties has qualified it. *Sherbert v. Verner*[54] presented a situation in which a Seventh-day Adventist was denied unemployment compensation by South Carolina because of her refusal to work on Saturday due to her religious convictions. The Court declared the state's action unconstitutional since no interest was presented which would satisfy the following requisite:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" . . . .[55]

It is with relation to this standard that the "compelling interests" which the *Heston* court relied upon should be analyzed to determine whether they were of sufficient importance to justify the state's interference with Miss Heston's religious freedom.

One of the state's interests in sustaining life has its origin in the common law's proscription of suicide.[56] The rationale supporting the state's interest was defined in *Hales v. Petit*:[57]

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50 371 U.S. 415 (1963).

51 *Id.* at 438 (emphasis added).

52 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

53 58 N.J. at 584, 279 A.2d at 674.

54 374 U.S. 398 (1963).

55 *Id.* at 406 (quoting from Thomas v. Collins, 323 U.S. 516, 530 (1945)).

56 Hales v. Petit, 75 Eng. Rep. 387, 400 (C.B. 1562); 4 W. BLACKSTONE, COMMENTARIES 189 (5th ed. 1773).

57 75 Eng. Rep. 387 (C.B. 1563).

> [Suicide] is an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation, which is the principle of nature, for everything living does by instinct of nature defend itself from destruction, and then to destroy one's self is contrary to nature, and a thing most horrible. Against God, in that it is a breach of His commandment, *thou shalt not kill*; and to kill himself, by which act he kills in presumption his own soul, is a greater offence than to kill another. Against the King in that hereby he has lost a subject, and . . . he being the head has lost one of his mystical members. Also he has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offence against him.[58]

The state's interest was more succinctly stated by Blackstone:

> [T]he law of England wisely and religiously considers, that no man hath a power to destroy life but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects . . . .[59]

Since the present recognition of the state's interest in preserving life has been adopted from the common law with little examination of its basis, an analysis of the common law rationale supporting this interest is required in order to determine its applicability to contemporary legal thought.

According to *Hales*, there are three bases underlying this common law principle—God, nature and the sovereign.[60] As to the first, God, it appears that in view of the first amendment to the Constitution, it would no longer be valid today. To say that the state has an interest in preserving life, because of God's commandment, is to favor "those religions based on a belief in the existence of God, as against those religions founded on different beliefs."[61] Furthermore, to use this as a basis for the state's interest in *Heston* would be for the state to substitute its own interpretation of God's will for that of Miss Heston, which would directly contravene first amendment freedoms.[62]

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58 *Id.* at 400.

59 4 W. BLACKSTONE, COMMENTARIES 189 (5th ed. 1773).

60 75 Eng. Rep. at 400.

61 Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

62 The framers of the first amendment were hesitant to vest a civil magistrate with the power to sit in judgment of religious convictions because of the possibility that the magistrate would impose his own standards on others. Reynolds v. United States, 98 U.S.

By using "nature" as another basis, it appears that *Hales* was referring to the natural law.[63] This latter concept provides persuasive support for the state's interest in preserving life since it has been recognized as the underlying philosophy of the Constitution.[64] The Constitution is considered a manifestation of objective natural law,[65] which, as advocated by natural law proponents, condemns suicide as being opposed to man's natural instinct of self-preservation.[66] There are, however, several difficulties encountered in relying upon the natural law as a basis for the state's interest. As the natural law presupposes a perpetual source,[67] state adherence to this supposition, like relying on God's will, would be dubious in light of first amendment guarantees.[68] Even more important is the fact that the application of the

145, 163 (1878); Recent Development, *Authorization of Involuntary Blood Transfusion for Adult Jehovah's Witness Held Unconstitutional—In re Brooks' Estate*, 64 MICH. L. REV. 554, 557 (1966).

63 *See* Salmond, *The Law of Nature*, 11 L.Q. REV. 121, 122-24 (1895).

64 L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917 174-75 (1971); B. BROWN, THE NATURAL LAW READER 141 (1960); 4 C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 52-59, 77-80 (1930). *But cf.* Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 971 (1924) where the author admits that the natural law served a useful purpose in the formative period of American constitutional law but claims that it has now been "consigned . . . to the museum of juristic relics."

65 B. BROWN, *supra* note 64, at 141.

66 *See, e.g.*, T. AQUINAS, SUMMA THEOLOGICA, II-II, q. 64, art. 5.

67 Thomistic philosophy recognized the source of natural law as the "eternal law." T. AQUINAS, SUMMA THEOLOGICA, I-II, p. 93, art. 3. The early Greek philosophers perceived the source as nature. Salmond, *supra* note 63, at 124. The Stoics saw a "Diety" or "Universal Reason (Logos)" as the source. *Id.* at 125. The "metaphysical school," to which Hobbes and Grotius subscribed, recognized the source as the "dictate of right reason." *Id.* at 135-36. Kant identified the source as "pure reason." A. D'ENTRÈVES, NATURAL LAW 115 (1951). The one aspect on which all naturalists can agree is: "*[T]he laws made by a state or government are not the only directions of conduct which apply to men living in society.*" B. BROWN, *supra* note 64, at 2.

68 Freedom of religion has been held to embrace "the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." United States v. Ballard, 322 U.S. 78, 86 (1944). *See* Epperson v. Arkansas, 393 U.S. 97 (1968):

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Id. at 103-04. *See also* Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH L. REV. 679 (1969).

In United States v. Seeger, 380 U.S. 163, 187-88 (1965), the petitioner, seeking conscientious objector status, characterized his beliefs by adopting the following definition of religion: "some power manifest in nature . . . that helps man in ordering his life." In reversing petitioner's conviction for draft evasion, the Court held that this was in fact a religious belief within the rationale of the statute. Since the belief in some transcendent

natural law depends upon individual interpretation as to its specific canons. In the words of Justice Holmes: "We have been cock-sure of many things that were not so."[69]

Finally, the common law's reliance on sovereignty as a basis for sustaining the state's interest in preserving life is likewise questionable. At common law the sovereign's interest was founded on the premise that if a person were allowed to commit suicide, the king would have "lost a subject."[70] Today, a person may freely renounce his citizenship and leave the country without interference by the sovereign.[71] Yet, somewhat paradoxically, that very same person cannot legally choose either to allow his natural death, as in *Heston*, or to commit suicide. However, in both cases, whether a person renounces his citizenship or dies, the result is the same: the sovereign has lost a subject.

From this analysis of the common law bases for the state's interest in the preservation of the life of its citizens, the underlying reasons for this interest appear inapplicable in view of society's increased recognition of individual freedom. Therefore, if, in a situation solely affecting a competent adult, the state is to continue to assert an interest in preserving that person's life, in derogation of his religious beliefs, a more cogent rationale must be found.

In finding support for the state's interest in preserving life, the *Heston* court also made reference to the New Jersey statute prohibiting attempted suicide.[72] In so doing, it noted that "the Constitution does not deny the State an interest in the subject."[73] However, statutes prohibiting attempted suicide have never been attacked on the grounds that they may be unconstitutionally violating an individual's freedom of religion or right of privacy. More importantly, it is widely recognized that those

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power was recognized in *Seeger* as satisfying the requirement of religion, it follows that if the state's interest in preserving life is based upon the natural law, which necessitates belief in a transcendent power, serious first amendment questions would arise.

69 Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918). *See* A. D'ENTRÈVES, *supra* note 67, at 10:

> [M]any of the ambiguities of the concept of natural law must be ascribed to the ambiguity of the concept of nature that underlies it.

70 75 Eng. Rep. at 400.

71 8 U.S.C. § 1481 (1970); 25 U.S. REV. STAT. § 1999 (1868) provides:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; . . . any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

See Perez v. Brownell, 356 U.S. 44, 48-49 (1958) (dicta).

72 N.J. STAT. ANN. § 2A:170-25.6 (1970).

73 58 N.J. at 580, 279 A.2d at 672.

persons who commit suicide are suffering from a mental or emotional disturbance which would give the state authority to intervene under the *parens patriae* doctrine.[74] The decision in *Heston*, however, cannot be supported by means of this suicide analogy. Miss Heston did not seek to commit suicide and her passive refusal of medical treatment did not satisfy the requirement of intent necessary to constitute a violation of the suicide statute.[75] In the *Georgetown College* case, the court took note of the fact that the patient desired to live, and dismissed suicide as a basis for a State interest.[76] Furthermore, the passive refusal of medical treatment has never given rise to the successful prosecution of anyone for violation of an attempted suicide statute.[77] *Heston* did not involve a case where a person actively sought death, nor a situation where the state interceded to prevent a person from inflicting a mortal injury on himself.

Delores Heston had no desire to die but refused medical treatment on the basis of her religious convictions. The state ordered affirmative treatment to be administered to remedy an injury caused, not by an intentional act of the individual, but by an unintentional auto accident. On this basis, the situation in *Heston* is clearly distinguishable from the ordinary suicide attempt.

In addition to enunciating the state's interest in preserving life, the court also indicated that the "interest of a hospital or its staff when the patient is thrust upon them"[78] mandates that the state interfere with the person's religious freedom. Although the *Heston* court did not elaborate on the hospital's interest and did not relate it to the state's interest, the issue was considered in Justice Burger's dissent in the *Georgetown College* case. There, the duty of the hospital to give adequate care to a patient was deemed twofold: first, a duty to protect its

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74 FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION, THE NEW JERSEY PENAL CODE, VOL. II: COMMENTARY 167 (Oct. 1971) suggests that civil commitment statutes are adequate to deal with this problem and advocates the repeal of the criminal statute. On February 16, 1972, Governor Cahill signed Assembly Bill 265, Law of Feb. 16, 1972; ch. 450, [1971] N.J. Laws 1774, which repealed the statute.

75 *See* McMahan v. State, 168 Ala. 70, 53 So. 89 (1910).

> "Felo de se, or suicide, is where a man of the age of discretion [14 years at common law] and compos mentis voluntarily kills himself by stabbing, poison, or any other way."

Id. at 75, 53 So. at 91 (quoting from M. HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 411 (1st Am. ed. 1847)). *See also* Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293, 303 (1966); Note, 33 FORDHAM L. REV. 513, 514-15 (1965).

76 331 F.2d at 1009.

77 Ford, *supra* note 1, at 221.

78 58 N.J. at 584, 279 A.2d at 674.

pecuniary interests, and second, a moral duty to preserve life. The former can be satisfied by requiring a patient to sign a release, and the latter gives rise to no controversy which would be justiciable.[79] Furthermore, it should be noted that the hospital did not perform the blood transfusion without first obtaining a court order. By so doing, the hospital relieved itself of the burden of making the decision and its interests were effectively protected.

In actuality, the *Heston* decision represents the state making a determination that a belief held by Jehovah's Witnesses is irrational and contrary to the "enlightened sentiment of mankind."[80] Since Miss Heston was a competent adult, without dependents, any reliance on the state's interest in this case is a subterfuge when considering the paramount interest of the individual's religious freedom. It would be far better if what was done in this case is clearly recognized, namely, the refusal to give credence to a person's religious belief because it was in opposition to the predominant beliefs of this society. At least if this is recognized, it is hoped that a critical analysis will be undertaken before the rationale of this case is further extended. For, of what value is religious freedom when any religious belief, completely personal in character, can be invalidated by the state on the basis of some ill-defined "compelling state interest"?

The circumstances in *Heston* concern the ultimate relationship between the individual and the state and present jurisprudential questions of the first magnitude. No one can criticize the court for seeking, on the basis of humanitarian instincts, to prevent the death of Miss Heston. The purpose to be accomplished was a laudable one. However, are humanitarian instincts sufficient to override religious freedom?

Thomas D. Monte, Jr.

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79 331 F.2d at 1015-16 (Burger, J., dissenting).

80 This language was used to describe circumstances in which the state may regulate religious acts in Mormon Church v. United States, 136 U.S. 1, 50 (1890).