

*Fall 1967*

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#### Recommended Citation

William C. Cunningham, *Indicated Blood Transfusions and the Adult Jehovah's Witness: Trial Judge's Dilemma*, 2 Val. U. L. Rev. 55 (1967).

Available at: <https://scholar.valpo.edu/vulr/vol2/iss1/3>

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## INDICATED BLOOD TRANSFUSIONS AND THE ADULT JEHOVAH'S WITNESS: TRIAL JUDGE'S DILEMMA

WILLIAM C. CUNNINGHAM, S.J.\*

*"If you could just see facts flat on,  
without that horrible moral squint . . ."*

—A Man For All Seasons

### INTRODUCTION

No serious student of constitutional law can fail to be impressed at the efforts made in the past by Jehovah's Witnesses to clarify the meaning of various state and federal laws when these laws seemed to conflict with the provisions of the First Amendment of the Constitution of the United States securing the free exercise of religion. This litigation has done much to sharpen our thinking and discussion of a basic human right and, as members of a pluralistic society, we stand in their debt for forcing us to do some hard thinking about such difficult questions. In an age which now may be referred to as pre-ecumenical, the Jehovah's Witnesses attest the need for, and value of, tolerance for an opinion, a belief, or a practice that is not common to all. Just as their efforts had value in the past, so do the continued efforts of the Jehovah's Witnesses have value today. More particularly, I have in mind the interesting questions that have been raised concerning the legality or constitutionality of court orders authorizing the administration of blood transfusions to adult Jehovah's Witnesses against their explicit wishes and against their belief that to receive a blood transfusion is a violation of God's law. The legal and constitutional problems raised by the issuance of these court orders are, to be sure, of rather recent origin. There have been few appellate court opinions written on the questions presented in this situation. But even with comprehensive opinions from two appellate courts on essentially the same question, I am inclined to believe that the problem has not yet been laid finally to rest.

For the sake of ordering the discussion, I shall present: 1) a statement of the problem, 2) the factual situation in the cases in which some opinion has been written, 3) the issues raised by these cases, 4) the solutions offered, and 5) a discussion of whether a real problem still remains, and, if so, what it is. In conclusion, I shall suggest a solution for what I see as the real problem behind these cases.

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### STATEMENT OF THE PROBLEM

In the cases in which hospital administrators or doctors have requested court orders to authorize the administration of blood transfusions to adult Jehovah's Witnesses against the latter's wishes, the patient usually faced death within a matter of hours, the doctors warned, if the blood transfusion was not given. The trial judge in such cases faced a cruel dilemma. He could authorize the blood transfusion to avert the possibility of an imminent death. But then he faced the possibility that it would ultimately be decided that he had denied the individual's legal and constitutional right freely to exercise his reasonable religious belief. Or the trial judge could refuse to authorize the blood transfusion, in which case he faced a possible accusation of failing to act when a life hung in the balance. This is the dilemma presented to the trial judge—to deprive the adult Jehovah's Witness of either his physical or his spiritual life. Not all trial judges see the issues in such dramatic terms, but some of them have given us a graphic portrayal of the agony of decision that confronts them when asked to rule on such a question.

As urgent as a decision may seem to be to the trial court judge, though, the question is not so pressing when it comes to the appellate court for review. The opinions written concerning the legality or constitutionality of authorizing a blood transfusion for an adult Jehovah's Witness have generally been written by appellate judges who are sitting in judgment at a considerable distance from the cruel dilemma facing the trial judge. To be sure, this very distance can promote an objective and dispassionate scrutiny of the issues raised at the trial court level, and can, in turn, foster an aesthetic as well as sound legal judgment on the question. But once the decision has been made by the trial court judge, and the transfusion is ordered or refused, the real issue has been almost definitively settled. The crucial issue of life or death has been decided; there is then serious question of whether any legally viable question or controversy remains to be determined. The determinative nature of this issue is clear from the fact that the appellate courts, in dealing with the transfusion question, invariably begin their opinions by arguing that the question has not really been rendered moot by the trial court's order.

The argument that the courts make is that these cases constitute an exception, and that the issues presented should be dealt with because of important considerations. The considerations mentioned include the public interest in the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question presented. One concludes from

such reasoning that the appellate courts seek to assist, occasionally to instruct, the lower trial court judges in their work. Undeniably this is part of the purpose of an appellate court, and this function is necessary for the efficient administration of justice. But when appellate courts undertake to act on an appeal in such situations, it is, I think, crucial that they deal with the problem presented in all of its complexity. And as helpful as an opinion can be on the constitutionality of the actions of a court in compelling a blood transfusion, the opinions should attempt to reach the total problem that faces the trial judge for decision. I suggest that there are more than constitutional considerations confronting the trial judges who are called upon to decide these cases with a human life hanging in the balance. It would be asserting the obvious to say that these cases involve an emotional issue, but it would be ignoring the obvious to deal with them as though they did not also have a moral dimension. In dealing with a legal problem in which law and morality intersect we are, as one writer has put it, rounding the Cape Horn of jurisprudence. But the clarity resulting from such a treatment of the problem justifies the attendant risk.

The appellate opinions written thus far fail to provide a satisfactory solution of this problem. This failure is explainable by the lack of a satisfactory treatment or discussion of the moral-theological dimension of the problem. I suggest that if the moral-theological dimension of this legal problem is addressed, there will be an infinitely greater possibility of reaching a satisfactory solution—a solution that will get at the deeper question behind the dilemma confronting the trial judge in making his decision.

This article is limited to those cases in which there has been a transfusion ordered for an *adult* Jehovah's Witness. Accordingly, I am not concerned with those cases dealing with the transfusion for children of Jehovah's Witnesses.

#### FACTUAL EXPERIENCE IN THE CASES

*Application of the President and Directors of Georgetown College, Inc.*<sup>1</sup> appears to be the first case in the United States to deal with the problem under consideration in this article. On September 17, 1963, Mrs. Jesse Jones was brought by her husband to the Georgetown Hospital in Washington, D.C., for emergency medical care. She had lost two-thirds of her body's blood supply from a ruptured ulcer. Having no personal

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1. 331 F.2d 1000, 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). Some writers point to the case of *Erickson v. Dilgard*, 252 N.Y.S.2d 705 (Special Term 1962), as an earlier case dealing with this same problem. But the opinion in *Erickson* nowhere mentions that the patient's objection to a blood transfusion in that case was founded upon his religious belief.

physician, she relied solely on the hospital staff. Mrs. Jones and her husband were both Jehovah's Witnesses, the teachings of which sect, according<sup>5</sup> to their interpretation, prohibited the injection of blood into the body. When death became imminent without a blood transfusion, the hospital, on the advice of counsel, applied to the United States District Court for the District of Columbia for permission to administer whole blood. The District Court denied the application and the hospital immediately applied to Judge J. Skelly Wright, as a member of the Court of Appeals, for an appropriate emergency writ.<sup>2</sup>

Judge Wright immediately telephoned the hospital and confirmed the representations of counsel for the hospital. He next went to the hospital where he spoke with Mr. Jones, the husband of the patient. Mr. Jones advised Judge Wright that on religious grounds he would not approve a blood transfusion for his wife, but that if the court ordered the transfusion, the responsibility was not his. He also declined the Judge's invitation to be represented by counsel. Having obtained Mr. Jones' permission to see his wife, Judge Wright first consulted the doctors assigned to the case. All of them were of the opinion that the patient, Mrs. Jones, would die without blood, but that there was a better than 50 percent chance of saving her life with the transfusion. Judge Wright then attempted to confer with the patient herself, but the only intelligible reply she made was "Against my will." Asked whether she would oppose a blood transfusion if the court ordered it, she seemed (to Judge Wright) to indicate that she would not then be responsible for it. Neither the efforts of the president of Georgetown University in pleading with Mr. Jones, nor any amount of medical exegesis of the relevant scriptural passages<sup>3</sup> by the doctors in attendance, could move Mr. Jones to authorize the indicated transfusion. Judge Wright thereupon entered an order "allowing the hospital to administer such transfusion as the doctors should determine were necessary to save her life."<sup>4</sup>

The next case to raise a similar problem for an adult Jehovah's Witness was *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*.<sup>5</sup> In this case the hospital brought an action in the Chancery Divi-

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2. *Id.* at 1006. The text of the All Writs Statute, 28 U.S.C. § 1651 (1966), is as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

3. *Acts* 15:28-29; *Deuteronomy* 12:16; *Ephesians* 1:7; *Genesis* 9:4; *Hebrews* 9:14, 10:29; *John* 6:53-54; *Leviticus* 7:26-27, 17:11-12, 14.

4. 331 F.2d at 1007.

5. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

sion of the Superior Court of New Jersey seeking authority to administer blood transfusions to the defendant, Willimina Anderson, "in the event that such transfusions should be necessary to save her life and the life of her unborn child."<sup>6</sup> The pregnancy of the defendant was beyond the thirty-second week; the child she carried was quick. Mrs. Anderson had notified the hospital explicitly that she did not wish to undergo blood transfusions. She stated that to undergo blood transfusions would be contrary to her religious convictions as a Jehovah's Witness. There was evidence establishing a probability that at some point in the pregnancy Mrs. Anderson would hemorrhage severely, and that both she and the child she was then carrying would die unless a blood transfusion was administered. The trial judge in this case held that the judiciary could not intervene where the defendant was an adult and the child was as yet unborn. Despite an immediate argument of the hospital's appeal in the Supreme Court of New Jersey, the court was advised that Mrs. Anderson, against the advice of the attending physician and the hospital, had left the hospital.

About the same time that the *Raleigh Fitkin* case was being argued, a similar problem was raised in the case *In re Estate of Brooks*.<sup>7</sup> In that case, on or around May 7, 1964, a Mrs. Bernice Brooks was in McNeal General Hospital, Chicago, suffering from a peptic ulcer. She was attended by a physician whom she had informed repeatedly during a period of two years prior to her hospitalization that her religious and medical convictions precluded her from receiving blood transfusions. Mrs. Brooks, her husband, and their two adult children were all members of the Jehovah's Witnesses. Among the beliefs they held as members of this sect was the principle that blood transfusions are a violation of the law of God. Mrs. Brooks had delivered to her physician a publication, "Blood, Medicine and the Law of God," in which the foregoing principle was stated in some detail, giving the appropriate biblical texts to support the Jehovah's Witnesses' interpretation.<sup>8</sup> Both the defendant and her husband had signed a document releasing her physician and the hospital from any civil liability resulting from the failure to administer blood transfusions to the defendant. Mrs. Brooks was then assured that there would be no further efforts to persuade her to undergo a blood transfusion.

Her own physician, however, together with several assistant state's attorneys, and the attorney for the public guardian for Cook County, Illinois, went before the probate division of the circuit court with a

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6. *Id.* at 537.

7. 32 Ill.2d 361, 205 N.E.2d 435 (1965).

8. *Id.* at 362.

petition by the public guardian requesting the appointment of that officer to act as conservator for Mrs. Brooks. They also requested an order authorizing the conservator to consent to the administration of a transfusion of whole blood to the patient. No notice of this proceeding was given to any member of the Brooks family. At the proceeding, a conservator of the person of Mrs. Brooks was appointed. In turn, the conservator consented to the administration of a blood transfusion for her. A transfusion was administered, and despite some complaint about distress caused by a "circulatory overload," the transfusion was a success.<sup>9</sup>

The last case is *Powell v. Columbian Presbyterian Medical Center*.<sup>10</sup> On or around December 22, 1965, Mrs. Willie Mae Powell, a post-operative, Caesarian-section patient in Columbian Presbyterian Hospital, suffered extensive bleeding. As a result of this bleeding Mrs. Powell, in the opinion of the physicians in attendance had become "critically ill and . . . been placed on the danger list."<sup>11</sup> Based upon her beliefs as a member of the Jehovah's Witnesses, Mrs. Powell refused to give prior written authorization for the administration of blood transfusions—despite the pleas of the hospital staff, her own husband and other members of her family. She apparently did, however, consent to release the hospital from liability for any consequences flowing from the failure to administer blood transfusions. Mrs. Powell was the mother of six children. Absent the indicated transfusion, her death seems to have been imminent. On these facts, the trial judge of the New York Supreme Court entered an order that the hospital, acting through its physicians, could administer "such transfusions as are in the opinion of the physicians in attendance *necessary to save the life of Willie Mae Powell*."<sup>12</sup> The blood transfusions apparently were administered, with the result that Mrs. Powell's life was saved.

Before we pass to a discussion of the issues raised by these cases, I want to re-emphasize the dilemma faced by the judge. Two of the foregoing cases contain indications of the anxious problem for the judge who must decide whether or not to authorize blood transfusions for adult Jehovah's Witnesses. In the *Powell* case, Judge Markowitz put it this way:

No one doubted or contested the existence of a justiciable controversy in this proceeding by Eugene Powell for injunctive relief—nor could I forget for one moment my convictions with

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9. *Id.* at 365-66.

10. 49 Misc. 2d 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965).

11. *Id.* at 451.

12. *Id.* (Italics in original).

regard to the individual's right to be let alone—or crucially important—that a human life hung in the balance.

Never before had my judicial robe weighed so heavily on my shoulders. . . . I read Application of President and Directors of Georgetown College, Inc. . . . and was convinced of the proper course from a legal standpoint. Yet, ultimately my decision to act to save this woman's life was rooted in more fundamental precepts. . . .

How legalistic minded our society has become and what an ultra-legalistic maze we have created to the extent that society and the individual have become enmeshed and paralyzed by its unrealistic entanglements!

I was reminded of "The Fall" by Camus, and I knew that no release—no legalistic absolution—would absolve me or the Court from responsibility if I, speaking for the Court, answered "No" to the question "Am I my brother's keeper?" This woman wanted to live. I could not let her die!<sup>13</sup>

In the *Georgetown College* case Judge Wright, although sitting in the Circuit Court of Appeals for the District of Columbia, was asked to decide whether or not to grant an emergency writ to give relief "from the action of the United States District Court for the District of Columbia denying the hospital's application for permission to administer blood transfusions to an emergency patient."<sup>14</sup> This had the effect of placing the issue of life or death that usually faces the trial judge squarely before him as an appellate judge. At the conclusion of his opinion in this case Judge Wright said:

The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the *status quo*. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.<sup>15</sup>

Quite apart from whether their decisions were right or wrong, objectively speaking, the foregoing language reveals the inward struggle that confronts the judge who must decide a controversy like this with a human life hanging in the balance. Even though the life or death issue

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13. *Id.* at 451-52.

14. 331 F.2d at 1001.

15. *Id.* at 1009-10.



might be regarded as one of the more emotional issues of these cases, it nonetheless constitutes part of the total factual experience that must, I think, be taken into account in dealing with this problem.

#### THE ISSUES RAISED BY THE CASES

It will be helpful in trying to understand the total problem facing the trial judge to note the issues that have been discussed in the cases. Also, a look at some comments and articles on this problem reveals some additional issues.

##### *Procedural Issues*

In *Georgetown College* there was a thorough discussion by Judge Wright on whether or not there was a case or controversy before the court.<sup>16</sup> In holding that a controversy was presented, Judge Wright argued that, had the patient raised a protest against the planned treatment, the judiciary unquestionably could have decided the respective rights and duties of the patient and the hospital:

In this area [said Judge Wright], failure of the courts to declare the law would not place the responsibility for the decision in the executive or legislative branches of government. Judicial abdication would create a legal vacuum to be filled only by the notions, and remedies, of the private parties themselves. And if the courts are to act in this area, damage suits *post facto* are a poor substitute for timely declaratory or injunctive relief. Thus if Mrs. Jones had brought an action to restrain the hospital from administering the transfusions, a justiciable controversy would certainly have been presented. The fact that it was the hospital which sought judicial declaration of its rights does not make the controversy less justiciable. Moreover, while the question presented is itself of utmost importance to those concerned, it is of such infrequent occurrence as to be unlikely to attract the attention of the legislature. Courts sit to decide such questions.<sup>17</sup>

In *Georgetown College*, the additional problem of mootness was raised at least obliquely. When an appeal court decides to pass on the propriety of the actions of the lower court in these cases, usually the grant or the denial of authorization to administer the indicated blood transfusion would result in the issue becoming moot before the appeal could be taken.

In the *Georgetown College* case, however, the emergency writ that

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16. *Id.* at 1003-04.

17. *Id.* at 1004 (footnote omitted).

was granted by Judge Wright was meant merely "to maintain the *status quo* and prevent the issue respecting the rights of the parties in the premises from becoming moot before full consideration was possible."<sup>18</sup> He was convinced that the imminence of death, absent the indicated blood transfusion, had been amply demonstrated. But in the Petition for Rehearing En Banc filed in this case, which was denied in a *per curiam* order, several of the judges dissented from this reasoning. Judge Danaher would have dismissed the appeal for a lack of case or controversy.<sup>19</sup> Judge Miller, joined by Judges Bastian and Burger, dissented on somewhat the same grounds, but carried his argument a bit further:

I object to the order which merely denies the petition for rehearing, without more, because it leaves in effect the two orders of September 17 as orders of this court which may be cited hereafter as precedent, not only for the summary administration of blood transfusions against the will of the patient, but also for the proposition that one judge of this court, without summoning two of his colleagues to act with him and without any record before him, may take the drastic and unprecedented action which was taken in this matter.<sup>20</sup>

Furthermore, Judge Miller argues, the order entered by Judge Wright did not merely preserve the status quo, but really granted "fully and finally all of the relief sought, thus disposing of the matter on its merits. This fact," Judge Miller urged, "is confirmed, perhaps unwittingly, by the majority's order denying the petition for rehearing *en banc*, which implicitly relies on mootness."<sup>21</sup> Judge Burger reached the same conclusion when he said that the action taken by Judge Wright in granting the emergency writ was "not only a form of instant relief but perhaps also instant mootness."<sup>22</sup> From the views expressed in *Georgetown College*, it appears that the determination of whether a case or controversy is presented, along with the question of mootness in those cases where the transfusion has already been administered, looms as a central, jurisdictional issue.

In this regard *Georgetown College* is not unlike the other cases we have considered. Of course, all the cases are distinguishable on their facts. But even in the New Jersey case in which no transfusion was

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18. *Id.* at 1007.

19. *Id.* at 1011.

20. *Id.* at 1013.

21. *Id.* at 1014.

22. *Id.* at 1017 n.5.

ordered by the trial court judge, the appellate court, at the request of the parties, agreed to determine the issues "since it is likely that the matter would arise again at the instance of an interested party. . . ." <sup>23</sup>

*Brooks* raised the mootness question squarely. The opinion for a unanimous court dealt with the mootness issue on the authority of an earlier case that had ordered compulsory medical treatment—a blood transfusion—for a child with a serious illness.<sup>24</sup> That earlier case had established criteria for determining whether there was a substantial public interest sufficient to justify an exception to the rule that a moot question should not be considered by the courts. Among the criteria which would indicate a substantial public interest were factors such as the public or private nature of the question presented, the desirability of an authoritative determination for future guidance of public officers, and the likelihood of future recurrence of the question.<sup>25</sup> The Illinois Supreme Court seemed to recognize the desirability of providing some instruction for the guidance of public authorities who, if a similar case occurred in the future, would be required to act promptly in this highly sensitive area. Because of these considerations, the court in *Brooks* was unwilling to dismiss the case as moot.<sup>26</sup>

There are other issues, in addition to the decision of whether or not a case or controversy is presented, or whether the case has been mooted by the trial judge's action. In *Georgetown College*, although Judge Wright warned that the opinion was being written only "in connection with the emergency order authorizing the blood transfusions 'to save her life'," <sup>27</sup> he thought that other issues had to be discussed to determine the likelihood of eventual success on appeal. For this determination, he thought it important to decide whether an emergency writ should issue.<sup>28</sup> He stated that the state courts, as *parens patriae*, can order compulsory medical treatment of children for any serious illness or injury, even against the religiously based objection of the child's parents. This District Court in this case should, by analogy, Judge Wright argued, act for Mrs. Jones who was *in extremis* and hardly *compos mentis* at the crucial time at which the decision had to be made. She was, said Judge Wright, "as little able competently to decide for herself as any child would be."<sup>29</sup> He also argued that since the state, as *parens*

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23. 201 A.2d at 538.

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

25. 205 N.E.2d at 364.

26. *Id.* at 364-65.

27. 331 F.2d at 1007.

28. *Id.*

29. *Id.* at 1008.

*patriae*, would not allow the mother to abandon her child, the state should not allow this mother to abandon her seven-month-old child by the most radical act of abandonment—choosing to die.<sup>30</sup> Whether or not the child would have been abandoned when the father remained to care for it was not discussed.

*“Human Life in the Balance” Issues*

Another argument advanced by Judge Wright dealt with whether attempted suicide was a crime in the District of Columbia, and, if so, whether Mrs. Jones’ decision to forego transfusion when facing death was in any way an attempted suicide. Judge Wright was touching here, I believe, at the very nerve center of the problem. But he concluded that the law in the District of Columbia on this point was uncertain.<sup>31</sup> He passed over this problem by concluding that the “Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die.”<sup>32</sup> What convinced him of Mrs. Jones’ determination not to die was her voluntary presence in the hospital as a patient seeking medical assistance.

Finally, Judge Wright questioned whether Mrs. Jones had any right to put the doctors and/or the hospital in the position of exposing themselves to the possible risk of civil and criminal liability. He concluded that neither the principle that life and liberty are inalienable rights nor the principle of liberty of religion “provide an easy answer to the question whether the state can prevent martyrdom.”<sup>33</sup> As he saw it, the effect of his order was to preserve the life she wanted without forcing her to sacrifice her own religious beliefs.

But the final and, as Judge Wright termed it, “compelling” reason for his use of the emergency writ was that a human life hung in the balance of his decision. Absent the opportunity for complete research and reflection on the problem, he “determined to act on the side of life.”<sup>34</sup> One hesitates to call this a “gut reaction.” And it is tempting to call it humanitarian. But perhaps it indicates most clearly that there are certain inarticulated premises that constitute a significant part of the real problem that confronts the judges who must make these decisions.

*Raleigh Fitkin* is unique among these cases in presenting the issue of whether or not an adult Jehovah’s Witness who is carrying a child in her womb may be forced to submit to transfusions to save the life of her child, if not her own life. The court in *Raleigh Fitkin* dealt with this

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30. *Id.*

31. *Id.* at 1009.

32. *Id.*

33. *Id.*

34. *Id.* at 1009-10.

issue by arguing that the life of the mother and child were so "intertwined and inseparable that it would be impracticable to attempt to distinguish between them."<sup>35</sup> The blood transfusions could, therefore, be administered to save the life of the mother *or* the life of her child. Once again we find the court relying on the power of the state, as *parens patriae*, to act for the welfare of the child—in this case as yet unborn—notwithstanding the religiously based objection of the parents.

### *Constitutional Issues*

*Brooks* presents several new issues. In that case the patient, Mrs. Brooks, was not pregnant. Nor had she any minor children. The issues considered by the court in *Brooks* were that the actions taken by the probate division of the circuit court were unconstitutional. Two grounds of unconstitutionality were alleged: 1) the failure to give notice to Mrs. Brooks or her husband of the proceeding to determine her competency, which, they argued, amounted to a denial of due process of law,<sup>36</sup> and 2) a denial of free exercise of religious liberty in forcing her to undergo a blood transfusion against her explicit religious beliefs. The Illinois Supreme Court ruled squarely on these points.<sup>37</sup>

*Brooks* dealt with the problem in its constitutional dimension, raising only constitutional issues. And yet if the opinion is to be of help in the future in guiding public officers, it should attempt to discuss whatever problems faced the trial judge in deciding whether or not to order the transfusion for Mrs. Brooks. For example, in ruling on the question of whether Mrs. Brooks had been deprived of her freedom of religion, the court had to decide whether the exercise of religious belief in this case endangered, "clearly and presently, the public health, welfare or morals."<sup>38</sup> The court held that the exercise of religious belief in this case would not constitute such a danger. However, in arguing the existence of a danger, both Mrs. Brooks and the State raised the issue of whether or not her actions would have been suicide.<sup>39</sup> The court ignored this issue. Perhaps some treatment of this admittedly thorny question would be of help to the trial judge who in the future might be faced with the sort of decision called for in this case. As difficult as the suicide question would have been to handle, it does seem fair to characterize it as one, or at least part of one, of the issues presented by the parties in this case.

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35. 201 A.2d at 538.

36. 205 N.E.2d at 365.

37. *Id.* at 373-74.

38. *Id.* at 372.

39. Brief for Appellant at 32, Brief for Appellee at 7-9, *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

In *Powell* the court dealt with the case as one in which "the crux of the problem lay, not in Mrs. Powell's religious convictions, but in her refusal to sign a prior written authorization for the transfusion of blood." She did not object, said Judge Markowitz, "to receiving the treatment involved—she would not, however, direct its use."<sup>40</sup> The opinion in *Powell* is so brief as to be elliptical. But it is clear that once the assumption was made that Mrs. Powell really wanted to live, the judge felt obligated to be his "brother's keeper."<sup>41</sup> It is again tempting to speculate whether some treatment of the question of suicide and its legality or morality might not have been instructive for possible future cases like this.

#### THE ISSUES RAISED BY THE COMMENTATORS

Finally, let us look briefly at some of the articles and notes on this question to see what issues they raise in addition to the issues raised in the cases. Of course, to the extent that the insights revealed there have not been incorporated into the opinions written thus far, they are of less importance for our analysis of the factual experience of the cases. But with problems that are so difficult and complex, and especially with problems of first impression, any insight is helpful.

The earliest writing on this problem was an article published initially by Father John Ford in *Linacre Quarterly*,<sup>42</sup> a journal dealing with the philosophy and ethics of medical practice. The article appeared nearly nine years before the first litigation concerning the instant problem, and could perhaps have furnished some insight into the dimensions of the whole problem involved in such a judicial procedure. The article dealt with 1) the scriptural basis for the Jehovah's Witnesses' belief; 2) the moral obligations of the parties concerned; 3) the legal liability of physicians and hospitals, and 4) the public policy which should be formulated to deal with this type of problem. It is interesting to note that, as a Catholic moral theologian, Fr. Ford concluded that the adult Jehovah's Witness was not morally obliged to use the procedure of blood transfusion, and accordingly, neither was the physician morally obliged to give it to him.<sup>43</sup> It is a short step from this premise to conclude that neither is the judge morally obliged to order a transfusion for an

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40. 267 N.Y.S.2d at 451.

41. *Id.* at 452.

42. Ford, *Refusal of Blood Transfusions by Jehovah Witnesses* (pts. 1-2), 22 LINACRE QUARTERLY 3, 41 (1955) reprinted in 10 CATHOLIC LAW. 212 (1964). The citations I will make from this article will be from the reprinted article in *Catholic Lawyer*. Although Father Ford wrote the article first for physicians, his background as both moral theologian and lawyer suited him to deal with the complex questions involved in transfusions of Jehovah's Witnesses.

43. *Id.* at 215.

adult Jehovah's Witness (except, perhaps, in a situation like *Raleigh Fitkin* in which the adult Jehovah's Witness was pregnant, and the transfusion was as necessary for the child as for the mother). Of course, none of the judges appeared to be arguing from a strictly moral obligation theory. But perhaps one should give serious thought to whether, in some cases, it might be not only illegal and unconstitutional to order an adult Jehovah's Witness to undergo an involuntary blood transfusion, but also *immoral*. The effective guarantee of religious liberty can be a matter not only of constitutional and legal significance, but theological and moral as well.<sup>44</sup> And finally, Fr. Ford argues that, in his opinion, it would be bad public policy "to concede to the State the right to force an adult to take this means [blood transfusion] of staying alive against his own sincere religious convictions."<sup>45</sup> From this article the issues of moral obligation and public policy can be seen as part of the total problem raised by the indicated blood transfusion situation.

One note dealt with this problem as a challenge for law and morals.<sup>46</sup> The writer concludes that in situations such as the *Georgetown College* case, the government, in any of its branches, lacks the right to compel the individual to undergo a blood transfusion. In arguing to this conclusion he notes the importance of religious freedom in the struggle

44. One example that comes to mind is the statement of the general principle of religious freedom enunciated recently by the Second Vatican Council in the Declaration on Religious Freedom, Art. 2:

This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.

Father Ford, commenting on the question of legal liability that might arise from an involuntary surgical procedure or blood transfusion, has this to say:

There does not seem to be any legal machinery by which a court order can be obtained to empower a physician to operate on an unwilling adult or by which a surgical treatment can be forced on him. In my opinion this is as it should be. The bodily integrity of an individual should enjoy a very high degree of immunity from invasion by public authority, as will be asserted below. This is especially so when conscientious convictions are at stake.

*Id.* at 221-22.

45. *Id.* at 222. Father Ford sees public policy as extending to this area of blood transfusions when there is a conflict or apparent conflict between the individual conscience and what the public good or the rights of other individuals may require. In this regard:

It is [says Fr. Ford] the task of moralists and lawmakers . . . to try to draw a practical line which will delimit the powers of the State and the right of the individual—a line which will protect against religious fanaticism and at the same time do justice to natural law principles and to sincere religious convictions whether erroneous or not.

*Id.* at 223.

46. Milhollin, *The Refused Blood Transfusions: An Ultimate Challenge for Law and Morals*, 10 NATURAL L.F. 202 (1965).

for the "good life," and points up the inability of the majority to deal with religious minorities in an impartial way.<sup>47</sup> He does not raise the issue of whether the court lacks jurisdiction absent a case or controversy, but rather whether, even conceding there is a case or controversy, the court has the inherent power to order a transfusion in a case like this.

A sampling of the range of issues inherent in cases involving the involuntary blood transfusions of adult Jehovah's Witnesses includes: justiciability, mootness, freedom of religion, due process, moral obligation, public policy, and want of authority. It will be of interest, next, to see what responses and suggestions have been made regarding the issues raised in case and comment.

### SOLUTIONS OFFERED

In discussing the solutions that have been offered for the problems that arise when courts are asked to order the involuntary blood transfusion of an adult Jehovah's Witness, it may be helpful to treat the previous solutions as falling into one or more of three categories: 1) those taking the "case or controversy" approach (either by itself or together with the mootness argument), 2) those taking the constitutional law approach, and 3) those taking the approach of balancing the interests of society against the rights of the individual.

#### *Case or Controversy Approach*

*Georgetown College* clearly raised the issues of whether there was a case or controversy, and whether or not the cause had been mooted by Mrs. Jones' recovery. In the dissents filed to the per curiam order there appeared to be a strong desire to have the court handle the constitutional law arguments presented in the Petition for a Rehearing filed by Mrs. Jones.<sup>48</sup> But the per curiam order denied the petition, and the constitutional law arguments were not considered extensively in the opinion. Thus, one judge of the Circuit Court of Appeals disposed of this case by granting an application for an emergency writ.

Judge Wright emphasized that the transfusions were limited both in time and number by his adding to the order requested in the original application the words "to save her life." "Such a temporary order," said Judge Wright, "to preserve the life of the patient was necessary if the cause were not to be mooted by the death of the patient."<sup>49</sup> We have seen in the preceding section that a number of Judge Wright's colleagues thought that the temporary order to preserve the status quo had the

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47. *Id.* at 212-13.

48. 331 F.2d at 1012-13.

49. *Id.* at 1003.



effect of fully and finally determining the case, and at the same time mooted the cause for appeal. And so it was important for Judge Wright to show that a case or controversy was present.

Judge Wright's argument that there was a justiciable controversy in *Georgetown College* bottomed on his contention that since the patient could certainly have sought a declaration of her own and the hospital's rights and duties, the issue was no less justiciable because the hospital sought the declaration. In arriving at this decision he relied on two additional reasons: 1) judicial abdication here would leave a legal vacuum, for the problem would never attract legislative or executive concern; and 2) courts sit to decide this type of question.

*Raleigh Fitkin* presents a solution to its unique problem that puts the case almost outside the class of cases considered in this article. The ruling in *Raleigh Fitkin* relied heavily on the fact that the life of the mother and child were so intertwined and inseparable as to be practically indistinguishable. That same court had held in another case that the state's concern for the welfare of an infant justified the administration of blood transfusions, notwithstanding the objection of the parents (who were Jehovah's Witnesses). The court had also previously held that a cause of action for negligent injury could accrue to an unborn child.<sup>50</sup> These prior holdings supported the court's conclusion that they could order a blood transfusion if necessary to save Mrs. Anderson's life or the life of her child. But this approach brings the ruling so close to the cases involving a sick child whose parents object on religious grounds to medical treatment or transfusion that we must limit its authority to its own facts for the purposes of this discussion. With regard to whether there was a case or controversy remaining after the patient left the hospital, the court resolved the doubt in favor of ruling on the appeal because the parties had requested it, and because there was a likelihood of future recurrence.<sup>51</sup>

The ruling in *Raleigh Fitkin* seems the only possible approach to take. The law developing regarding the rights of the unborn plaintiff urges the conclusion to which the New Jersey Supreme Court came. And one might agree that a ruling like the New Jersey court's might be of great help in the future to the judges who face this anxious decision. But could the court here have been somewhat influenced also by the fact that the patient had fled the hospital even after the trial court had refused to order the transfusion? At any rate, the appellate court entered a broad and specific judgment which would have granted full

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50. 201 A.2d at 538.

51. *Id.*

and final relief to the plaintiff hospital. But to what avail? The court had before it a mooted case, and the peculiar facts of this case limit its holding severely. The opinion may be important, however, in focusing our attention on the trial judge's dilemma, rather than the pronouncements of the appellate courts.

*Brooks* deals with the mootness argument on the authority of *People ex rel. Wallace v. Labrenz*<sup>52</sup> which holds, *inter alia*, that there must be an exception to the dismissal-for-mootness rule when there is a substantial public interest in the question presented. Public interest is indicated by 1) the public or private nature of the question involved, 2) the desirability of an authoritative determination for the future guidance of public officers, and 3) the likelihood of the future recurrence of the question. The Illinois Supreme Court seems to have relied not only on *Labrenz* generally, but particularly on the criterion stressing the supervisory or instructive role of the appellate court.

#### *Constitutional Law Approach*

All of these cases are distinguishable on their facts and the peculiar factual contexts dictate the approach to be adopted by the court. In *Brooks* the adult Jehovah's Witness had informed her doctor of her religious beliefs and had released both the doctor and the hospital from possible civil liability resulting from the failure to administer the blood transfusion. Nevertheless, a conservator was appointed without her knowledge and he consented to the transfusion.<sup>53</sup>

Predictably, Mrs. Brooks argued that she had been deprived of her liberty without due process of law by the court's failure to notify her of the proceedings in the probate division. She also argued that she had been deprived of her free exercise of religious liberty. It would have been strange if the court failed to decide the case on constitutional grounds, when the facts so obviously presented those issues. But one wonders why the trial judge took the action that he did in this case. If the problem presented such obvious constitutional questions, what would prompt a trial judge to deny obvious constitutional guarantees and force a blood transfusion on this woman?

The opinion for the unanimous court ends on the note that the action of the circuit court "was unquestionably well-meaning and justified in the absence of decisions to the contrary."<sup>54</sup> This merely highlights the need for the court to speak to all the problems raised—or to the problem in all its complexity. The Illinois Supreme Court was right, I believe,

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52. 104 N.E.2d at 622-26.

53. 205 N.E.2d at 362-64.

54. *Id.* at 374.

in concluding that there were no decisions to the contrary on this point. Both *Georgetown College* and *Raleigh Fitkin* seem to hold that this transfusion may be ordered even against the wishes of an adult Jehovah's Witness. But in *Brooks* the issue was presented more starkly. The trial judge could not be concerned about a minor or an as yet unborn child. Again, one asks what would cause a trial judge to order a transfusion in this case? And when both sides argue the suicide question before the appellate court, one wonders whether the trial judge may have been influenced by some feeling of a moral obligation to prevent what he considered to be at least a morally, if not legally, impermissible suicide. But this anticipates my later discussion. This much is clear, though, Mrs. Brooks never had an opportunity to argue the suicide question before the trial judge because she was not notified of the hearing at which a conservator was appointed. Any argument on that point, then, would have been made, if at all, unilaterally by the State. But this is the argument on the question of suicide as it was dealt with by the State in its brief:

If society can pass legislation aiding and improving an individual's life, they necessarily have the right to attempt to preserve that life. Society has an interest of its own to protect, namely, self-preservation. Society's self-preservation depends on its constituents. Life is precious. The state has saved life. The state has acted properly.<sup>55</sup>

The point is that when the court sees a case like this as an exception to the dismissal-for-mootness rule then the court should speak to all of the issues. When the court takes a solely constitutional law approach, however, it precludes a comprehensive treatment. The Illinois Supreme Court had an opportunity to discuss this question when it declared that every individual has an absolute constitutional right "to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals."<sup>56</sup> Mrs. Brooks' choice to die may or may not have conflicted with public health, welfare or morals. Impliedly the Illinois Supreme Court did this. I suggest that an explicit treatment might have provided better guidance in the future for public officers.

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55. Brief for Appellee at 9, *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

56. 205 N.E.2d at 372.

### *Balancing Interests Approach*

The *Powell* case approached the problem of ordering a transfusion of an adult Jehovah's Witness in terms of balancing the interests of society against the rights of the individual. As I have previously stated, the opinion is so short as to be elliptical. But if, as Judge Wright said, courts sit to decide these hard questions, they nonetheless sit as arms of the government. And if any portion of society is to speak to the individual in these cases, it will be through the courts. It is important, then, that the courts represent the viewpoint of enough of society to allow a latitude of practices wide enough to testify to their tolerance. An approach such as the one taken in the *Powell* case seems almost to imply that the rights of the individual did not outweigh the interests of society in having its people live. Although the court's opinion did not say that in so many words, other writers have been more explicit.

One case comment on this balancing of interests approach seems worthy of note. This comment argues that the right of the individual freely to exercise his religious liberty must be subordinated to the interests of society. "The thesis of this comment," says the writer, "is that the rendition of emergency lifesaving medical treatment on the person of the objecting adult patient is proper."<sup>57</sup> The author regards this treatment as proper because he believes that in cases like this the individual's religious freedom is not greatly curtailed. He argues that no criminal sanctions are imposed on the patient.<sup>58</sup> Secondly, the author argues that the one who seeks to object to such involuntary treatment on religious grounds "is allowed to practice the dictates of his religion in all but the most limited circumstances: the life and death situation."<sup>59</sup> There are a surprising number of case comments dealing with the cases discussed in this article that argue the ascendancy of the state's interests or society's interest over the individual's right. I confess to being a bit apprehensive at this, when there is at stake so precious a right as the free exercise of what one obviously and sincerely believes is a reasonable religious belief.

### THE REAL PROBLEM FOR THE TRIAL JUDGE

In setting the problem in context at the beginning of this article, I said that I would suggest that a real problem in this type of case remains for the trial judge because an important dimension of the problem has not yet been satisfactorily treated or discussed. I said that

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57. Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860, 861 (1965).

58. *Id.*

59. *Id.* at 872-73.

I would also suggest that if the moral-theological dimension of this problem is addressed by the courts, there will be an infinitely greater possibility of reaching a satisfactory solution to the problem in all its complexity. I wanted to reach what I thought was the deeper problem behind the cruel dilemma that confronts the trial judge who must make this decision. To put the question this way is, in a way, arch. Arch because I have already begun to answer it before stating it formally, but arch also in the sense that it gets at one of the principal issues in this whole problem.

### *Moral-theological Dimension*

In *Georgetown College* there was a discussion by Judge Wright of whether Mrs. Jones' action could be called suicide. To him it seemed to be unclear whether attempted suicide was a crime in the District of Columbia. But he passed over that difficulty when he concluded that Mrs. Jones did not want to die. So the trial judge who in the future might face a request similar to the one faced by Judge Wright in this case would receive little help from Judge Wright's opinion on the question of whether the action taken or refused amounted to a suicide, or attempted suicide, and, if so, whether it was legal. And if in the future the trial judge read the dissents filed in *Georgetown College*, he would find Judge Burger saying this:

Confronted by a unique episode such as this, it seems to me we must inquire where an assumption of jurisdiction over such matters could lead us. Physicians, surgeons and hospitals—and others as well—are often confronted with seemingly irreconcilable demands and conflicting pressures. Philosophers and theologians have pondered these problems and different religious groups have evolved different solutions; the solutions and doctrines of one group are sometimes not acceptable to other groups or sects. Various examples come to mind: a crisis in childbirth may require someone to decide whether the life of the mother or the child shall be sacrificed; absent a timely and decisive choice both may die. May the physician or hospital require the courts to decide? A patient may be in a critical condition requiring, in the minds of experts, a certain medical or surgical procedure. If the patient has objections to that treatment based on religious conviction, or if he rejects the medical opinion, are the courts empowered to decide for him?<sup>60</sup>

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60. 331 F.2d at 1017.

There are some rather interesting assumptions made and questions asked by Judge Burger in that excerpt. And the excerpt provides a temptation to speculate on an approach to the problem that might combine the insights from two disciplines that might profitably be applied toward this problem—law and theology, or, more specifically, moral theology.

One assumption that may have been made by Judge Burger—though it is not clear from his dissent—is that philosophers and theologians having pondered the problems raised in this type of case, different religious groups have arrived at different solutions. If he meant to suggest that there is general disagreement over the morality of the proposed refusal in this case, I think that his position must be questioned. If one consults the Jehovah's Witnesses on this practice of refusing transfusions of whole blood, one will, I think, find unanimity on the doctrinal point that to receive the transfusion involuntarily would be a violation of God's law.<sup>61</sup>

The question of who among the Jehovah's Witnesses is able to speak authoritatively on this or any other of their teachings may present more of a difficulty. Stokes, in his treatment of the Jehovah's Witnesses, says that "they have no specially ordained clergymen."<sup>62</sup> And another writer states that "the public ceremony of water emersion sets one apart as a minister of Jehovah, with four classes of clergy to which a Witness may belong."<sup>63</sup> This much seems clear: each person who is a Witness is a minister, at least in the sense that he can interpret a passage of Scripture for himself. They are, as their Yearbooks say, a worldwide "society of ministers."<sup>64</sup> The practical result of this is that in the cases discussed thus far no Jehovah's Witness has said anything other than that in his opinion the law of God forbids a Jehovah's Witness to receive a transfusion of whole blood. Quite clearly they are qualified to pronounce on their own teachings. This will be of importance when we discuss how their expertise on doctrinal matters of their religious beliefs and practice may be used to inform the court deciding the questions

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61. G. HÉBERT, *LES TÉMOINS DE JÉHOVAH* 215-18 (1960). This book, written in French, presents a rather complete treatment of the history and teaching of the Jehovah's Witnesses. The section referred to deals specifically with blood transfusions. It seems to Hebert that the prohibition against blood transfusions is of rather recent origin, mentioned perhaps for the first time in *Watchtower*, July 1, 1945. But the best first hand source of their teaching on blood transfusions would be *Blood, Medicine and the Law of God*, a pamphlet mentioned in *Brooks*, and which is their own publication. Brief for Appellant appendix, *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

62. STOKES, 3 *CHURCH AND STATE IN THE UNITED STATES* 541 (1950).

63. J. HARDON, *THE PROTESTANT CHURCHES OF AMERICA* 300 (rev. ed. 1958). (The four classes he lists are: Publishers, Pioneers, Special Pioneers and General Pioneers.)

64. M. COLE, *Jehovah's Witnesses* 173 (1955).

involved in the cases discussed in this article.

It is interesting that moral theologians from another religion argue on other grounds, but arrive at the same conclusion, that the adult Jehovah's Witnesses are not objectively obliged by the moral law to undergo a blood transfusion, even when they are facing almost certain death without it.

The State [says Fr. Ford] should not be empowered to force a transfusion of an adult Witness who is in his right mind and who, because of his religious convictions, refuses it. First, because this would be an unwarranted invasion of his rights of conscience. The State cannot show that interference with individual liberty in such a case is justified. There is involved here no urgent need of protecting the common good, no pressing necessity of protecting the rights of others.

Secondly, for the Witness, given his frame of mind, the use of a blood transfusion is an extraordinary means of preserving life to which he is not objectively obliged by the moral law. . . . The State should certainly not be empowered to force an individual to make use of a surgical procedure to save his own life, when the moral law itself does not oblige him, in the circumstances, to do so. If the moral law leaves him free to risk his life to that extent, the State should leave him free also.<sup>65</sup>

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65. Ford, *supra* note 42, at 225. Writing in *Theological Studies* on current moral theological trends, Father John Connery, S.J., had an interesting comment to make and distinction to point up on Father Ford's conclusion. Said Fr. Connery:

I think everyone will agree with Fr. Ford that a sincere Jehovah's Witness is not subjectively guilty of wrongdoing in refusing a transfusion. But I prefer the second explanation offered by him to support his conclusion. I would rather consider the transfusion an ordinary means and excuse the patient on the basis of invincible ignorance. The Witness does not regard the transfusion as an extraordinary means, that is, one which he may use but is not obliged to use. He regards it an illicit means which he may not use at all. Even if the Witness regarded it as an extraordinary means, I would not like to admit that his mistaken frame of mind actually makes it such. Although good moralists allow it, I am reluctant to let the distinction between ordinary and extraordinary means rest on subjective dispositions, especially on an erroneous conscience. I would rather say that such people are not responsible either because of overwhelming emotion or because of erroneous conscience.

Connery, Notes on Moral Theology, 16 THEOLOGICAL STUDIES 558, 571 (1955). Remember that this was written after Fr. Ford's article had appeared for the first time in *Linacre Quarterly*. Here at least, then, we have two Catholic moral theologians agreeing that the sincere adult Jehovah's Witness in refusing to undergo a blood transfusion when facing death is not subjectively guilty of wrongdoing. And one (Fr. Ford) arguing that the State should not have the power to force an individual adult Jehovah's Witness to undergo a blood transfusion against his will. What they would say about the refusal in *Georgetown College* and *Raleigh Fitkin*, I do not know. But clearly, they seem to speak to the *Brooks* situation.

Although it would be interesting to know what other theologians would hold on this point, the point does not seem to have been widely written on. It seems safe to say, however, that the assertion that there are "different religious groups" evolving "different solutions" to this problem is not altogether accurate. They seem to agree on the right of the individual to be secure in his conscientious refusal to undergo a blood transfusion he believes to be a violation of God's law.

It appears that Judge Burger had the whole suicide question in mind when he spoke about where the court would be led by an assumption of jurisdiction in a situation, for example, in which a patient in critical condition required, in the minds of experts, certain medical procedures, but refused to accept either the medical opinion or treatment. Judge Burger asked whether in that case the courts had the power to decide for the patient. It appears from his dissent that Judge Burger thought that the courts were not empowered to decide such issues. But here I would agree with Judge Wright, courts do sit to decide such questions, and I would think a court properly briefed on such an issue could decide the question wisely. This is why Judge Burger's remark piques my curiosity. For if he does think that the court lacks jurisdiction to decide questions such as the ones he postulated, who would deal with these questions? He speaks of the medical experts, but I am sure that he does not want, any more than I do, to create a class of Platonic guardians, whether they be expert in medicine or not, to determine what is best for our society. The point that seems worth making is that when a patient rejects a medical opinion or treatment on religious grounds, the court might profitably call expert theological witnesses to inform itself more fully on the conflicting claims advanced by the parties. I realize, of course, that time is usually of the essence in these cases—a point made strongly by Judge Wright in *Georgetown College*. It is enough for now, though, to argue that if medical and theological experts discussed the problem raised in *Georgetown College*, they would, I think, inevitably discuss the issue of suicide.

On the issue of suicide, I set forth a portion of Fr. Ford's argument in his article on the refusal of blood transfusions by Jehovah's Witnesses:

Someone may object: If the State has the power to make attempted suicide a crime and to prevent a person from committing suicide, then, *a pari*, it should have the power of forcing a transfusion on an unwilling conscientious objector. For to refuse the transfusion is the equivalent of committing suicide. In our opinion there is no adequate parity between the two cases. The person who commits suicide violates a negative precept of



the law of God: "Thou shalt not kill." The moral situation of one who fails to take affirmative measures to keep himself alive is quite different, especially when the measures concerned are artificial surgical procedures. It is not inconceivable that there should exist a legal tradition of obligatory self-preservation, a tradition which would impose the affirmative legal duty of taking certain minimum measures to stay alive—for instance, to take food and drink. But I find it hard to conceive a theory of jurisprudence in which the State would be empowered to impose on me an affirmative legal duty to make use of highly developed surgical techniques in order to prolong my earthly existence. To kill one's self is one thing. Not to avail oneself of surgery is quite another.<sup>66</sup>

What applicability that reasoning would have to *Georgetown College*, I cannot say. But it seems rather clearly applicable to the facts in *Brooks*.

If testimony were available from an expert moral theologian or a number of experts in this area, whether Jehovah's Witnesses, Catholic, Protestant or Jewish,<sup>67</sup> such testimony might be of help to the trial judge in his anxious hour of decision. There are, of course, other opinions that might be sought by the trial judge. Although I have no idea what the opinion of medical experts in general would be on this question, there was a rather interesting reaction by one member of the medical profession to the decision in *Brooks*. Dr. Edward A. Piszczek, then president of the Illinois Medical Association, was reported to have said that the decision "amounted to the approval of the right to commit suicide."<sup>68</sup> He was also quoted as having said that the *Brooks* case held "massive implications for medical ethics and public health," and that doctors were "bound by scientific advances in saving human life."<sup>69</sup> Dr. Piszczek went on to speak of the Jehovah's Witnesses generally, saying they have always been troublesome. "This is not alone an individual thing. It is a community affair. We do not legalize suicide, but this is what would happen if blood is refused."<sup>70</sup> I do not mean to be unfair to the medical profession in this treatment of the question. I am just emphasizing that there is a difference of opinion among different groups

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66. Ford *supra* note 42, at 225.

67. I do not presume to know or say what Protestant or Jewish theologians expert in moral and ethical problems might say on such a problem. But I feel safe in saying that I would welcome their reaction to the suggestion that they have a possible contribution to make to a problem that concerns a religious liberty which is the very cornerstone of our Constitution.

68. N.Y. Times, March 20, 1965, at 18, col. 5 (city ed.).

69. *Id.*

70. *Id.*

of experts. Then, too, it is clear that at least some doctors think of the refused transfusion problem in terms of attempted suicide. But ultimately the doctors seem to want the courts to decide this question, for Dr. Piszczek was also quoted as having said that the courts would have to decide "what is a religion," although he questioned whether a religious belief should be accepted if it resulted in "self-destruction."<sup>71</sup>

Perhaps *Brooks* decided the question of suicide impliedly when the opinion for a unanimous court said that there was "no overt, immoral activity."<sup>72</sup> Later in the opinion the court also said: "no overt or affirmative act of appellant offers any clear and present danger to society—we have only a governmental agency compelling conduct offensive to appellant's religious principles."<sup>73</sup> If this was the court's reply to the question (raised by the parties in their briefs) of whether the refusal of the blood transfusion in this case was an attempted suicide, the opinion could have been clearer. I would submit that a real problem behind *Georgetown College, Raleigh Fitkin, Brooks and Powell*, a problem that has not yet been adequately treated, is whether the refusal of an adult Jehovah's Witness to receive an indicated blood transfusion constitutes an attempted suicide. That question and its determination seems to be of such a complex nature that legal, medical, and theological expertise would be required to deal adequately with it. Until such expertise is brought to bear on the question through legal machinery, I believe that the problem could well persist in plaguing trial court judges.

### *Expert Testimony*

This brings me to the last portion of this section. If expert medical and theological testimony and opinion would help a trial judge balance the conflicting claims that are presented in a case such as this, there remains the problem of how to introduce such testimony. Doctors are, of course, not strangers to the courts, and the concept of calling them to testify as expert witnesses is in no way novel. The range of opinions that may be given by doctors who qualify as expert witnesses must be, one would suppose, as broad as the diversified specialties that make up the aggregate of their medical knowledge. Would it be too novel to suggest that where there is a question that calls for technical knowledge and experience beyond the capacity of the average judge, those persons should be called to testify who have the necessary experience and technical knowledge?

At least one novel complication might result if a judge is going

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71. *Id.*

72. 205 N.E.2d at 368.

73. *Id.* at 373.

to call religious or theological experts to testify on the morality of the refusal to undergo a transfusion. The judge will have to be ready to decide whether he will accept the testimony of the Jehovah's Witness as an expert in his own case—and if he accepts this testimony the judge must determine what weight to give it. I realize that the pressing nature of the time element in these cases does not allow the research, reflection and thoroughness the trial judge would want for such an important problem. In the *Brooks* case, where there was an alleged incompetency, could experts have disagreed on the competency of Mrs. Brooks to make a decision to refuse an indicated blood transfusion? I find it hard to believe that expert testimony could not have helped in deciding this complex question. It seems clear that the question of suicide would have entered the testimony if different experts had been called. To what extent the appellate court is free to deal with this problem of using expert testimony, I do not now say. But appellate courts have in the past felt free to use sociological and other statistical data to bring understanding to their work, and to furnish instruction and guidance to the lower courts.

The attempted suicide question is one of the most important problems—if not *the* real problem—presented by the indicated blood transfusion situation. Admittedly it would be a challenging task to keep testimony on this point restricted to the legal question to be decided. Yet if the question to be decided is a mixed medical, moral and legal problem, the challenge seems worth accepting in view of the liberty at stake. It would be no consolation to know that science and medicine were advanced at the cost of deprivation of so precious a thing as one's religious liberty. And it would be sad in the extreme if a trial judge failed to protect a person's religious liberty because he mistakenly believed that the threatened refusal was absolutely immoral. Whatever steps may be taken to air this problem in its complexity seem worth the effort.

#### CONCLUSION

It would be tempting at this point merely to summarize the arguments advanced in this article, and then conclude by calling for great energy and understanding on the part of the medical and legal professions in a common effort to solve this vexing problem. But if this problem is important enough to merit serious discussion, then perhaps a suggested solution or approach to the problem is not out of place. Before any solution is suggested, however, I want to say that I have the most profound respect for the judges and doctors who in the past have tried to decide the difficult questions involved in this problem. And it must be clear by now that I also have the most profound respect for the

sincerity of belief manifested by the Jehovah's Witnesses in the litigation considered in this article. When the matter came before Judge Wright it was, as he said, *res novae*, and the press of time for a quick decision does not allow the research and argument that might bring deeper insight into this problem. Where the facts differed from past decisions, distinctions were made by the courts. And in most cases, especially *Georgetown College*, the argument proceeded by analogy. This was as it had to be. But if these present decisions fail to consider the moral-theological dimension of this problem, then some effort must be made to speak to this portion of the problem. To do this and still remain within the legal procedure will tax the ingenuity of the trial judge.

At the head of this article is an epigraph taken from the text of Robert Bolt's play *A Man For All Seasons*. At one point early in that play Cardinal Wolsey has called Sir Thomas More, Lord Chancellor of England, to talk with him about a matter of asking the Pope, as More put it, "to dispense with [a]. . . dispensation" that had been granted to Henry VIII in order to allow him to marry the Spanish Princess, Catherine. More persists in trying to see the whole problem because, as he says, "There must be something simple in the middle of it." It is at that point that Cardinal Wolsey expresses his regret that More can not see facts "without that horrible moral squint." Cardinal Wolsey seems to be suggesting that this way of looking at things impairs a man's vision of plain, simple facts. But when one reflects on the remark one begins to see that this is the way men in their deeper and more reflective moments often look at things. If this were not so, Cardinal Wolsey never would have made the observation, for he too saw things in this manner when he allowed himself to see the problem in all its complexity.

But to what avail all this talk of More and moral squint? Simply this: I suggest that it *would* be helpful for the trial judge in handling problems such as those discussed in this article to look at the whole problem with that "horrible moral squint." As difficult as it may be to balance and to decide the competing claims for the effective practice of medicine and the effective protection of free exercise of religious liberty, the challenge invites the creative ingenuity that marks the great trial judge. I would submit that in looking at the whole problem with that moral squint, one inevitably sees the question of suicide. Whether a judge will handle this question on legal or moral grounds, or both, may vary with the judge. But to ignore the question completely would be to treat the whole problem less thoroughly than it should be treated.

The trial judge, given sufficient time, could call theological as well as medical experts to testify on the whole problem presented by a

religiously based objection to a medically indicated blood transfusion.<sup>74</sup> Or the court could call such experts on its own motion in order to make a decision on a matter involving knowledge and experience beyond the capacity of the average trial judge. By calling these experts, time permitting, the trial judge gives himself a more adequate basis for his judgment.

What about the practice of appellate court judges? If the issue of suicide has been raised in the briefs of the parties to the appeal, I see no reason why the court cannot speak to that problem with all the authority it can muster. I realize that it is a fundamental exercise of judicial restraint to decide constitutional questions on as narrow a ground as possible. But where, as in *Brooks*, an exception is made to the dismissal-for-mootness rule to protect the substantial public interest in having an authoritative determination for the future guidance of public officers, there seems to be a concomitant duty to treat the whole problem as thoroughly as possible. A discussion in *Brooks* of the point raised by the parties about suicide could, I think, have given the guidance to the trial court judges so necessary in these cases.

There is one point remaining that demands comment. Suppose that a trial court judge has before him for decision a case such as this: an adult woman who is a Jehovah's Witness is diagnosed as facing imminent death if she does not soon receive a medically indicated blood transfusion. She has no minor children. Nor is she pregnant. She has informed her attending physician that she refuses on religious grounds to undergo a blood transfusion. She and her husband have released her physician and the hospital in which she is a patient from any civil liability that might arise from the failure to administer blood transfusions to save her life. She will not, nor will her husband, authorize a blood transfusion. The hospital and her physician seek an order from the court authorizing a blood transfusion to save her life. The trial court judge has called medical and theological experts and has satisfied himself that to authorize this transfusion, while it objectively seems to be medically prudent, at the same time objectively it would not seem morally wrong to refuse to issue the order.

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74. See Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1432 (1967). I shall not stop at this point to suggest the procedure to be used in calling the expert theological witness, nor the way in which the hypothetical question might be put in order to inform the court on the morality of the refusal of the transfusion that is medically indicated. That is better left to an article that deals with the range of expert testimony. I merely want to suggest that expert witnesses in the field of moral theology might give the trial court judge, in cases like the ones discussed in this article, a more adequate notion of what is and what is not involved in the decision of these cases.

The trial judge knows that there is authority in *Brooks* for the proposition that a transfusion ordered by the court would be an unconstitutional deprivation of the free exercise of religious liberty. What should the trial court judge decide in such a case? Everything points to the soundness of his refusing to authorize the blood transfusion. And what, one asks, would public reaction be to such a refusal—especially if the patient died? It is, of course, difficult to predict public reaction under any circumstances. But to those who might criticize the trial court judge for failing to act, is not the answer that the public must understand that it is to the Jehovah's Witnesses that their disapproval must be expressed?

I would not want to be considered cavalier in making suggestions and offering solutions to the complex problem presented by these cases. And I want here to affirm resoundingly my own reverence for life as well as for religious liberty. But while there is time to reflect on this rather recent problem, perhaps it would be well to set up dialogue among the many groups and professions interested in so vital a problem.