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PRAYING FOR RELIEF FROM PARENS PATRIAE: SHOULD A CHILD BE ALLOWED TO REFUSE LIFE-SAVING MEDICAL TREATMENT ON RELIGIOUS GROUNDS?

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In People ex rel. D.L.E., the Colorado Supreme Court was faced with a boy who, when 14 years old, refused to take medicine to control his epileptic seizures.¹ In addition, his mother refused to require him to take the medicine.² As a result, D.L.E. had a series of seizures which, among other injuries, caused permanent damage to his left arm and leg.³ The undisputed medical testimony was that such seizures were life-threatening, if not medically treated.⁴ The court found D.L.E. to be a neglected child and remanded the case to the district court where an order would be entered requiring D.L.E.'s medical treatment.⁵

A further fact of interest was noted by the court: D.L.E. refused to take his medicine for religious reasons.⁶ "Neither D.L.E. nor his mother believes that medical treatment is warranted for his condition. They both believe that prayer and assistance by church elders will improve his condition."⁷ D.L.E. and his mother were members of the General Assembly and Church of the First Born, the tenets of which included the requirement to "eschew medical care or treatment" and rely on "faith healing."⁸ Both D.L.E. and his mother, therefore, objected to the court's ordering treat-

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² Id. at 272.
³ Id. at 273.
⁴ Id. at 275.
⁵ Id. at 275-76.
⁶ Id. at 272.
⁷ Id.
⁸ Id.
ment. Their grounds for this were that to require medical treatment for D.L.E. was a violation of the free exercise clause of the First Amendment of the Constitution.\(^9\)

The court, though, decided that such an order would not violate the First Amendment guarantee of free exercise of religion because when the state is "'[a]cting to guard the general interest in the youth's well being, [its] authority . . . as parens patriae,'\(^{10}\) is not nullified merely because a parent grounds his claim to control the child's . . . conduct on religion . . . ."\(^{11}\) In particular, "a parent's election against medical treatment for a child is not absolute in a life-endangering situation."\(^{12}\)

In many ways the resolution of D.L.E.'s case was similar to others concerning a child in need of medical treatment who, because of his parents' religious objections, had not been receiving it.\(^{13}\) However, three aspects of D.L.E. were surprising and important. The first was the judicial recognition that D.L.E. himself objected to the medical treatment on religious grounds.\(^{14}\) The second was that the court noted (when referring to an earlier case involving D.L.E.) that D.L.E. had, in its opinion, a limited right to refuse medicine on religious grounds.\(^{15}\) The third circumstance which deserves mention was that the court made absolutely no attempt to determine whether its decision infringed upon D.L.E.'s right to religious freedom by the decision in this case. The court's decision was based solely on the finding that D.L.E.'s mother had no right of refusal, on religious grounds, for her son.\(^{16}\)

The issue raised, but neither fully addressed nor, a fortiori, answered by the Colorado Supreme Court, is the subject of this essay: Does a child, at any time prior to his majority,\(^{17}\)

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9. Id. at 275. "Congress shall make no law . . . prohibiting the free exercise [of religion]" U.S. Const. amend. I.

10. "'Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

11. 645 P.2d 271, 276.

12. Id.


15. Id. at 272 (citing People ex rel. D.L.E., 200 Colo. 244, 614 P.2d 873 (1980)).

16. Id. at 275-76.

17. For a current chart listing the ages of majority and other perti-
have the constitutionally protected right to refuse medical treatment on religious grounds?\textsuperscript{18}

I will begin to answer this question by presenting the arguments in favor of such a right for children. Assuming, for the moment, the success of these arguments, the limits of the presumed right will be investigated through an analysis of the leading cases in which adults have been recognized as having the right to refuse medical treatment on the basis of their religious beliefs. Also analyzed, of course, will be those cases in which that right has been denied to adults. Typically, the adult's right will be denied only if that adult is needed as a parent for a young child. Otherwise, with the exception of the incompetent, an adult has the right to refuse even life-saving treatment on religious grounds.

In the course of this discussion of an adult's rights, I will criticize the claim made by some authors that competent adults ought never to be allowed to refuse treatment. Showing this view to be in error will leave intact an adult's right to refuse treatment. The dimensions of the adult's right delineated, a child's right should be co-extensive unless overriding considerations can be found.

That there are such overriding considerations is the topic of the succeeding section. I argue that refusing life-saving medical treatment is so significant a decision that special care must be taken to avoid allowing that decision to be made by those who are unable to make it. My claim is that the considerations in favor of children having the right of refusal fail to show that children have the capacity to make such decisions.

Nonetheless, the religious rights of older children surely exist and must be protected. Older children can have religious beliefs,\textsuperscript{19} and if a person can have religious beliefs, government information, see Capron, \textit{The Competence of Children as Self-Deciders in Biomedical Interventions}, in \textit{Who Speaks for the Child?} 57, 95-114 (1982).


19. It may be assumed that the very young child—the infant—has no religious rights of free expression of his own. Infants lack, after all, even the ability to believe the propositions which they would have to affirm if they had religious beliefs. So it is impossible for an infant to have religious attitudes. An infant has, therefore, no rights of his own regarding religion. (His parents may have the right to raise him in a religious manner, but that is their right, not the child's.) This does not mean the infant has no rights of any kind. By analyzing a representative case in which an infant's parents
ernment should, other things being equal, protect them. The issue becomes, then, determining the point at which the older child gains the right to have his religious activity protected as fully as is that of an adult.

There is, of course, an obvious solution: all minors will be treated as the infant is treated; adult rights are acquired only on the attainment of the child's majority. I will later argue that this solution is too restrictive and is insensitive to the religious beliefs an older minor can have. I will argue, on the other hand, that status as a "mature minor" is insufficient to grant the right to refuse life-saving treatment. This appears again to put the time at which this religious right is recognized and protected by the state at one's majority. If a mature minor ought not have this right, it might be said, surely no other minor should. Thus, only an adult ought to have it. However, the child need not wait for his majority. Rather, I will maintain that the time at which the child is emancipated is the proper time to begin to protect his right to choose, on religious grounds, to refuse life-saving medical treatment.

I. CONSIDERATIONS IN FAVOR OF OLDER CHILDREN HAVING A RELIGIOUS RIGHT TO REFUSE MEDICAL TREATMENT

An older child, at least, can have sincerely held religious beliefs. That this is so is supported by the recognition given such beliefs by the various branches of both Christianity and Judaism which allow a youngster to acquire the responsibilities of full membership in the religion.20

The view could be held that the state, too, should recognize the possibility of significant belief long before the child's majority.21 Indeed, it might be argued this recognition has already occurred. In *Tinker v. Des Moines School District*,22 the
Court held that public school students, aged 13, 15, and 16, had a constitutionally protected right to free speech. This right required school officials to allow the students to wear armbands in school as a form of political protest. The Court, then, has recognized that some youngsters have political or philosophical opinions which are worthy of constitutional protection. It is difficult, if not impossible, to see any significant difference between the ability to have such opinions and the ability to have sincere religious beliefs. But, if that is so, then the latter should have constitutional protection along with the former.

There are other reasons—reasons of consistency—for the state to recognize the constitutional right of freedom of religious exercise for children. A number of constitutional provisions and protections have been applied to minors. For example, the right to counsel and the privilege against self-incrimination were both found to apply to teenagers in *In re Gault*. Other recognized rights and protections have included the reasonable-doubt standard as applicable to proceedings involving a juvenile charged with violating a criminal law and due process protection when faced with suspension from school. It is not implausible to suppose that the application of these constitutional protections to children increases the likelihood that courts will and should also apply the free exercise clause to children.

Indeed, children are deferred to in an increasing number of official situations. They may be called as witnesses. And they may choose their own guardians. Both of these abilities

26. “Every person is competent to be a witness except as otherwise provided . . . .” Fed. R. Evid. 601. A state law may prohibit children under a certain age from testifying. However, children as young as four have been found competent. See, e.g., *In re Lewis*, 88 A.2d 582 (D.C. 1952).
27. At common law, a child could choose a guardian when the child was fourteen years old. The age now varies according to statute. With some qualifications, children as young as eleven have chosen their guardians. See *In re Howard*, 66 N.M. 445, 349 P.2d 547 (1960). See also S.H. v. R.L.H., 289 S.E.2d 186 (W.Va. 1982); *In re Estates of Carrigan*, 517 S.W.2d 817 (Tex. Civ. App. 1974).
are conferred on very young children as well as those who are older. The responsibility involved in these activities makes it reasonable to think that at least older children could handle the responsibility of religious freedom. Thus, it might be argued as well that older children have the right to refuse medical care on religious grounds.

If older children are to have this right, the extent of the right they would have must be determined. Perhaps it is best to begin by determining the extent of the right as it applies to adults.

II. The Limits of an Adult's Right to Refuse Medical Treatment on Religious Grounds

In In re Estate of Brooks, the court denied the propriety of forcing a patient to receive a blood transfusion when that procedure (although judged medically necessary to save her life) was contrary to the patient's religious convictions. The patient was Bernice Brooks, a Jehovah's Witness. The Jehovah's Witnesses interpret the Bible as prohibiting any blood transfusion. Bernice Brooks was married and the mother of two adult children. Both she and her husband had signed a release regarding any civil liability of the doctors or the hospital for not giving her the transfusion. Finally, although the patient may not have been competent at all times in the hospital, the doctor in charge of the case clearly knew of Mrs. Brooks' views on blood transfusions and of her desire never to be subject to one.

The court put the issue this way:

When . . . a theretofore competent adult without minor children . . . [is] properly . . . said to be incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept, knowing death would result from such refusal?

To answer this question, the court asked whether this exercise of religious freedom "endangers, clearly and presently,

28. 32 Ill.2d 361, 205 N.E.2d 435 (1965).
29. Id. at 436.
30. Id. at 437.
31. Id. at 442.
32. Id. at 438.
the public health, welfare or morals" and concluded that it did not. Further, as no minor children were involved, there was no question of the state's having "an overriding interest in the welfare of the mother . . . [to avoid the situation where] the children might become wards of the State." The court found, then, that all that was involved here was an interference with Mrs. Brooks' religious freedom with no compelling state interest to justify it. As such, interference was impermissible.

In re Osborne reached the same result as Brooks, even though minor children were involved. Here the court found that Charles P. Osborne, a Jehovah's Witness, thirty-four years old, married, and the father of two young children, was entitled to refuse a blood transfusion deemed necessary to save his life because, first, his children would be taken care of by his family in the event of his death, and second, his religious choice was competently made and clearly precluded even the merely passive acceptance of a court-ordered transfusion as religiously intolerable. Without some compelling

33. Id. at 441.
34. Id. at 442.
35. Id.
36. Id. For a good, brief analysis of this case, see Authorization of Involuntary Blood Transfusion for Adult Jehovah's Witness Held Unconstitutional—In re Brooks' Estate, 64 MICH. L. REV. 554 (1966). At the end of the article, regarding the court's interest in avoiding grave danger to the state, the author asks what the outcome would be if someone who was vital to a nationwide security or health program attempted to refuse treatment. The author suggests that, legally, the person could (and would) be kept alive against his own wishes and, further, that this would be morally unacceptable.

The reasoning in Brooks was reproduced in In re Melideo, 88 Misc.2d 974, 390 N.Y.S.2d 523 (1976), where the patient was a 23-year-old married woman who was neither pregnant nor had any children. Id. She also was a Jehovah's Witness. Id. at 974, 390 N.Y.S.2d at 524. The court held that, without a compelling state interest, the competent adult's decision to refuse treatment (in this case, a blood transfusion) must be respected. Id. at 975, 390 N.Y.S.2d at 524.

37. 294 A.2d 372 (D.C. Cir. 1972).
38. Id. at 375. That some Jehovah's Witnesses appear willing to accept transfusions, although refusing to authorize them, has led to some confusion among commentators. Thus, for example, in Abraham, Religion, Medicine, and the State: Reflections on Some Contemporary Issues, 22 J. CHURCH & SR. 423 (1980), the suggestion is made that the court can solve these blood transfusion difficulties by having the judge order the transfusion and take whatever sin there is on himself. (Abraham's suggestion is not in the context of transfusions for children, but the point remains the same as some Jehovah's Witnesses believe that an involuntary transfusion on a baby
state interest to override the patient’s choice, there was no justification for interfering with the exercise of his religious freedom.

These cases were rightly decided. When a competent adult risks death in what he sees as the service of his God, the state properly abstains from interference unless the adult’s action poses some danger to others. In support of this conclusion, one might note that it meets John Stuart Mill’s criterion for allowable conduct: “That principle [which is to govern the relationship between society and the individual] is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.”

Unfortunately, Mill’s principle is notoriously slippery when applied. Just what counts as self-protection—i.e. prevention of harm—is exceedingly difficult to say. Almost any action affects and possibly harms the rest of society. One could argue that while Mill’s principle looks as if it will support the decision to refuse treatment, in fact it supports the opposite view. That is, the death of any person deprives everyone of the talents and abilities of that person. Such deprivation is harm. Therefore, refusing life-saving treatment is impermissible on Mill’s principle.

affects that baby’s eternal life in a detrimental way.) Besides being somewhat condescending (Abraham puts the word “sin” in quotation marks when referring to the ideas of the Jehovah’s Witnesses), this solution will not succeed in the many cases (Osborne being one) in which all transfusions—whether voluntary or not—are seen as spiritually harmful.


40. If Mill’s approach leaves too much to be desired, a possible justification in the Vatican II document, Dignitatis Humanae, could be considered.

[All men are] bound by a moral obligation to seek the truth, especially religious truth . . . . However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore, the right to religious freedom has its foundation . . . in [man’s] very nature . . . . [Thus,] the exercise of this right [is not] to be impeded, provided that the just requirements of public order are observed.

Second Vatican Council, Dignitatis Humanae, in D. O’BRIEN and T. SHANNON, RENEWING THE EARTH: CATHOLIC DOCUMENTS ON PEACE, JUSTICE, AND LIBERATION 291, 293 (1977). That this is a statement in favor of religious freedom is beyond question. Whether it can be used to support the freedom to act, in the name of religion, so as to cause the loss of one’s own life is far from clear. The argument, after all, claims that religious freedom is a means to an end: truth. Dying ends that quest. So, on this view, self-sacrifice would appear to be impermissible.
Even if Mill's argument fails, there may be a successful method of showing the moral propriety of allowing religiously-based refusal of life-saving treatment. The refusal of medical treatment on religious grounds is an example of sacrificing oneself in the service of a principle higher than self-preservation. The principle in this case is obedience to God. Such a willingness to risk one's life can be compared with the moral propriety of risking one's life in other situations. Someone, perhaps because of friendship, may be willing to sacrifice his life so that another may live, or someone may willingly risk his life in a war to preserve the lives and freedom of others. These actions are clearly morally permissible and even admirable. And each of these cases is an instance of risking one's life for a value presumed to be more important than self-preservation. If friendship and liberty can have such a status, is it plausible to deny that obedience to God is also a morally permissible principle for which to risk one's life?

The argument, then, for allowing adults to refuse life-saving medical treatment on religious grounds has, at least, two parts. One is that our society values allowing individuals as much freedom as possible (within the constraints of having an orderly community). But the primary reason is surely that American society has always recognized the paramount importance of certain principles which give meaning to life and for which it is appropriate to risk death. Some of these principles are secular, such as political freedom, and some are religious, but the recognition of their legitimacy is clear. If an adult may properly risk his life in the cases under discussion, then Brooks and Osborne were rightly decided.

Nonetheless, in both of those cases, the courts mentioned limits. The limits to an adult's right to refuse treatment were competency and having young children in need of care. These circumstances have in fact been present in several important cases, and in these cases the patients who objected to medical treatment on religious grounds were treated anyway. The cases deserve a review both to clarify the criteria for refusing to allow rejection of treatment and to see the abuse to which those criteria have been put.

The first of these cases, In re the President and Directors of Georgetown College,41 involved a 25-year-old married woman

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41. 331 F.2d 1000 (D.C. Cir. 1964). For further analysis of this case, see Milhollin, The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals, 10 Nat. L.F. 202 (1965); Note, Application of President & Directors of Georgetown College, 60 Nw. U.L. Rev. 399 (1965-66); Case Comment,
who had a 7-month-old child. The woman was in need of a blood transfusion, but because she was a Jehovah's Witness, she refused to authorize the procedure.

This case is curious because of the way in which the court reached its decision. The opinion mentions the state's interest in preserving the mother's life so that she could care for the infant. But there is no investigation of the provisions that might have been made by the family for the event of her death. The woman's opposition to a transfusion is also noted. It is countered by the poorly supported conclusion that the woman was not competent. Finally, having presented little substantial argument, the court maintains that the ultimate reason for allowing the transfusion over the patient's objections was that "a life hung in the balance."

The general principles presented in this case are not so controversial as their application to these particular facts. It is reasonable to conclude that if a person is incompetent to make a decision, the court may decide to protect that person's life. Further, it is reasonable to be concerned about the welfare of a small child who might lose a parent. While the facts in Georgetown did not persuasively call for the application of these principles, the general principles may nevertheless indicate circumstances which will override a claim of religious freedom.

The contrast is startling between Georgetown and United States v. George in terms of principles which could justify a

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42. Strictly, the controversy was not decided: "This opinion is being written solely in connection with the emergency order . . . . It should be made clear that no attempt is being made here to determine the merits of the underlying controversy." 331 F.2d at 1007.

43. *Id.* at 1008.

44. Compare the court's behavior in Osborne. Admittedly, the time constraints were a factor here, but the woman's husband could have been asked about these things.

45. 331 F.2d at 1007.

46. The court advised the patient that the doctors agreed on the necessity of a transfusion. The opinion continues: "The only audible reply I could hear was 'Against my will.' It was obvious that the woman was not in a mental condition to make a decision." *Id.*

The court added that Mrs. Jones would not feel it was her responsibility if the court forced her to have the transfusion. This would be more significant had the court not decided that Mrs. Jones was incompetent before discovering what her views were on responsibility.

47. *Id.* at 1009.

48. *Id.* at 1008.

49. 239 F. Supp. 752 (D. Conn. 1965).
conclusion. In the *Georgetown* case, the correct principles, if not the appropriate facts, were present. In *George*, neither were available. Elishas George, a Jehovah’s Witness, 39 years old, married, and the father of four children, refused to authorize a blood transfusion required to save his life. The court ordered the transfusion, even though it found George to be “coherent, rational” in appearance.

The justification for this decision is not easy to discover. The court makes no argument concerning the children; rather, it offers several minor comments in justification of its action. The first of these, that the liability waiver could not “with certainty” be said to be effective, seems to be mere quibbling. The second, that doctors must be free to follow the dictates of their own consciences in medical procedures—and that this freedom outweighs the freedom to exercise one’s religious beliefs as one chooses—is sophistical at best. Finally, the third justification (reminiscent of *Georgetown*) is that the patient did not think God would hold him responsible for the transfusion if the court forced him to have it. George indicated he “would rather die than agree to a transfusion.” But this, presumably, did not impress the court, which challenged him to resist the court by placing his hand over the area to be injected. The court apparently took George’s failure to do this as indicating a lack of sincerity on his part or that the belief was unimportant to him. In any case, the transfusion was given.

This case fails to provide acceptable reasons for overriding the patient’s wishes. The court never presents any significant reasons for contravening George’s freedom of religion. A one-sentence attempt to indicate lack of competency is

50. *Id.* at 753.
51. *Id.*
52. *Id.* at 754.
53. The court opined that “The patient may knowingly decline treatment, but he may not demand mistreatment.” *Id.* In addition, requiring “these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances.” *Id.* The notion that the doctors’ consciences are more important than Mr. George’s freedom of religion is surely in need of supporting argument. It appears to be a seriously faulty comparison of the two values.
54. *Id.* at 753.
55. *Id.*
56. *Id.* The insincerity of the court in this exchange with Mr. George is astonishing. At one point the court said to him that “it had no power to force a transfusion upon him . . . .” *Id.* Given the outcome of the case, it is hard to take this seriously.
lacking in any persuasive force.\textsuperscript{57} Had the court been able to show the danger of the children becoming state wards, then the conclusion of the case might seem more plausible. As it stands, though, the court fails to justify its action. Its decision, therefore, is unacceptable.

A third case of this sort, \textit{John F. Kennedy Memorial Hospital v. Heston},\textsuperscript{58} again has a Jehovah's Witness refusing a transfusion. This was a 22-year-old, unmarried woman whom the court ordered transfused. In this instance, though, there was some genuine doubt about Miss Heston's beliefs, as she was apparently in shock when admitted to the hospital and remained incompetent until after the transfusion was given.\textsuperscript{59} And incompetency surely precludes a refusal of treatment by the patient.

Lastly, \textit{Fitkin Memorial Hospital v. Anderson}\textsuperscript{60} deserves mention, for there was a compelling state interest when the state determined to transfuse Mrs. Anderson, a 20-year-old Jehovah's Witness. Mrs. Anderson was eight months pregnant at the time and "the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them."\textsuperscript{61} The preceding cases show that an adult's right to refuse life-saving treatment on religious grounds is legally limited. When there is a compelling reason given to do so, the state may override the right to free exercise of religion. The two legitimate, compelling reasons are clear: (1) the protection of the patient himself, when truly incompetent and his views on the procedure have not been reliably obtained by his doctors; and (2) the protection of the quality of life of the patient's

\textsuperscript{57} "Psychiatric reports indicated the patient showed a lack of concern for life, and a somewhat fatalistic attitude about his condition was described as 'a variant of suicide.'" \textit{Id.} Since no further explanation is given, one can only imagine the reality behind this statement. Still, is it too much to believe that Mr. George's concern with eternal life and with obeying God would be described by a certain kind of doctor as showing "a lack of concern for life, and a somewhat fatalistic attitude..."?

\textsuperscript{58} 58 N.J. 576, 279 A.2d 670 (1971).

\textsuperscript{59} Under such circumstances, the life-saving treatment was never refused. There was evidence, though, of Miss Heston's beliefs given by a card she carried which stated that she would refuse blood transfusions. The difficulty with such cards is that when one changes one's mind, the card may still remain. In a life-or-death situation, relying on a card to justify refraining from treatment may be a serious error, at least when recovery is possible with treatment.

\textsuperscript{60} 42 N.J. 421, 201 A.2d 537 (1964).

\textsuperscript{61} \textit{Id.} at 423, 201 A.2d at 538.
children—keeping children from becoming dependent on the state for essential care.

It is obvious that incompetency must be a basis for refusing the requests of the patient. The need for the parent to care for the child is not so clear, although I think it is defensible. A child will, presumably, receive better care from his parent than from the state, but whether this benefit to the child is sufficient to outweigh the interference with the parent’s religious liberty is a judgment far more difficult to make than most legal decisions indicate. If the child is quite young, then his right to and need for parental care (assuming no one else in the family is capable of caring properly for him) probably does outweigh the parent’s religious freedom. However, in situations with older children whose need for care is less, interference with the parent’s choice should be taken with greater reluctance. It may be that at some point the parent’s choice should be given preference. This is by no means certain, but it would be reassuring if the courts would occasionally consider the possibility. That they do not do so leaves one with the impression that they are merely looking for an excuse—rather than a justification—for preventing the parent from risking his life.

In view of the legal and moral limits of the adult’s right to refuse treatment, an objection to the existence of that right deserves attention. The objection is that society’s interest in the life of its members will always outweigh any right to freely practice one’s religion, when that freedom is supposed to include the right to refuse life-saving medical treatment. If K.F. Hegland is right, then neither adults nor, of course, children can have this right of refusal.

Hegland claims that there is no general right to refuse medical treatment on religious grounds, even though there is nothing to indicate that such a refusal endangers others. To justify this, Hegland presents three categories of behavior prohibited by the state (euthanasia, snake-handling in religious rituals, and suicide) and argues that the state properly prevents these activities even though they harm no one other than those freely involved. With these prohibitions as precedent, Hegland maintains that the reasons for disallowing such behavior are identical with those for disallowing someone—even a competent adult—from refusing life-saving treatment.

63. Id. at 867.
medical treatment. I think Hegland is mistaken in his claims and will briefly explain why.

Hegland defends the illegality of euthanasia on two counts. The first "is society's interest in the life of the individual"; the second, that an exception to the notion of "the sanctity of life cannot but cheapen it." 64

Hegland has overstated his case. It is true that societies have (or ought to have) an interest in the life of each individual; but there are some clear limits to this idea, as Hegland interprets it, that one ought not let another die if one can help it. Consider a terminally ill patient whose life can be slightly prolonged only by extremely painful means. Hegland, who rejects the distinction between killing someone and letting him die, 65 would have to reject the judgment that society could properly let such a person refuse further treatment. But, allowing that patient to reject such treatment seems exactly right. 66 If, in that case, there is a reason for overriding society's interest in the individual's life, perhaps there is such a reason in the religious refusal as well. Hegland has failed to rule out that possibility.

The second notion, that of cheapening the value of life, is acceptable as an overriding concept only if—in the circumstances—the value of life really is cheapened. Given someone who rejects treatment because of allegiance to what he believes is God's command, the idea that the value of life is cheapened by allowing death can only be maintained if one supposes that continued living is always the highest good. There may be superior values—fidelity, honesty, freedom—which may have to be protected at the sacrifice of one's life. Unfortunately, Hegland overlooks this possibility.

Hegland next attempts to argue for disallowing an adult the right to refuse treatment on religious grounds by noting

64. Id.
65. Id. at 868.
66. Even those most opposed to euthanasia usually grant the legitimacy of such a case. For example,

When inevitable death is imminent in spite of the means used, it is permitted in conscience to take the decision to refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted.

that churches which practice snake-handling as part of their ritual have been legally prohibited from doing so partly on the basis that it is dangerous to those who participate.67 While this is true, it does not necessarily lead to the conclusion which Hegland suggests. Given the same facts, one might claim that the snake-handlers have been wrongly treated. The freedom to risk one's life to witness to one's religious beliefs may be claimed to be a higher value than the protection of one's life from danger. While the snake cases present the same issue as the refusal of treatment cases (the possibility of death as an unwanted side-effect of obeying a religious injunction), the fact that such snake-handling was prohibited does not settle the issue—it merely raises it in a different form.

Finally, Hegland compares refusal of treatment to suicide which, he notes, it is legal to prevent.68 Hegland's argument, however, suffers from never fully confronting the obvious distinction between most suicides and the refusal of medical treatment: the former is an act usually performed by someone who is in an irrational state of mind, the latter is a principled decision that some things are more important than life itself. Hegland does mention this distinction, but his argument against it begs the question. He writes:

Take, for example, two hospital patients both in dire need of blood transfusions. One rejects them because of a desire to die, the other because of religious conviction. Should the law allow the patient wishing to live but preferring death to breach of religious faith, to die, while forcing the one wishing to die, to live? To ask the question is to answer it.69

Obviously, though, the question has not been answered until the values of protecting religious obedience and that of maintaining life are weighed. That the weighing will always favor the latter is Hegland's conclusion. Unfortunately, it is also his assumption, and so his argument is less than persuasive.

A second article which argues for compulsory medical treatment has no better a presentation of the issues.70 In-

68. Comment, supra note 62, at 869.
69. Id. at 871.
deed, in some ways it is worse. This author contends, for example that any action which one undertakes knowing one is going to die is, by that fact alone, suicide.\textsuperscript{71} This is not an idiosyncratic definition,\textsuperscript{72} but it is a less than helpful one, uniting, as it does, actions which are undertaken with the \textit{intention} of dying with actions which the person performed when death is forseen, but \textit{not} intended. To tie such different concepts together is to contribute to a confusion which merely muddles an already difficult analysis.

Elsewhere, the author suggests, apparently to mitigate the appearance of interfering with the religious practices of others, that denying a Jehovah's Witness the right to refuse a life-saving blood transfusion is only a slight restriction. "The doctrine forbidding transfusions does not appear to be a fundamental belief in the Jehovah's Witnesses' religion. It is not part of the religious ceremony, and its absence will not prevent continued practice of the religion."\textsuperscript{73} That the author should imply that a belief is not particularly important in a religion, when the adherents of that religion are willing to die rather than contravene it, is astonishing. One of the few things more astonishing would be to base a legal or moral prohibition of refusal of treatment on such an argument. In addition, the author's point fails to address the refusal of treatment by members of those religions where such a tenet is undoubtedly central—Christian Science, for example.

These attempts to deny anyone the right to refuse medical treatment clearly have failed. Given the arguments earlier, we are now left with the view that adults, subject to limitations of competency and provisions for minors in their care, can legitimately reject treatment.

When asking to what extent a minor might have the right to refuse treatment, one might argue that the same limits apply: if competent and with no children of his own to support, the minor can refuse treatment. If there is no difference between adults and most older children on the question of religious freedom, then treating them identically is only right. In the next section, however, I will raise some

\textsuperscript{71} Id. at 396.
\textsuperscript{72} It is, in fact, Emile Durkheim's definition. "Suicide is applied to all cases of death resulting directly or indirectly from a positive or negative act of the victim himself, which he knows will produce this result." E. DURKHEIM, SUICIDE 44 (J.A. Spaulding & G. Simpson trans. 1951) \textit{quoted in} Margolis, Suicide, in ETHICAL ISSUES IN DEATH AND DYING 92 (T.L. Beauchamp and S. Perlin eds. 1978).
\textsuperscript{73} Note, \textit{supra} note 41, at 402.
problems for the view that adults and older children are, generally, on a par regarding religious rights.

III. CONSIDERATIONS OPPOSING THE RIGHT OF OLDER CHILDREN TO REFUSE MEDICAL TREATMENT

The right to refuse, on religious grounds, life-saving medical treatment is the right to make the decision that certain religious beliefs require the sacrifice of one's own life. Can a child with a sincere religious belief have the qualities required for an informed judgment concerning when his life is no longer worth living? It may well be true that any child with a sincere religious belief will have some marks of maturity and independence. He may understand "submission to authority, acceptance of responsibility, and the discharge of duty." But such a character, with such religious beliefs, provides evidence primarily of the child's ability to follow rules and guidelines. It is not evidence of the ability to understand or make long-range decisions. In particular, the ability to decide that one will die rather than submit to a blood transfusion is an ability without any necessary connection to the requirements for membership in a religious group. A minor, however mature, will hardly ever have an understanding of what it means to live his life independently. He will hardly ever have come to realize the worth of his life or be truly able to measure that worth against his perceived religious obligations.

Consider the decisions noted earlier. None of the rights granted to children in those decisions—even those granted in Tinker—require or even make it likely that the child has the sort of judgment to make an informed life-or-death decision. Being free to speak one's mind does not presuppose a high level of judgment. Being able to say what one thinks and having that right protected has almost no relation to being able to judge the quality of one's life and to judge whether or not to go on living (and having that right protected). Obviously,

75. Most religions—and current law—recognize this lack of foresight in youngsters by discouraging or disallowing marriages for younger teenagers. See, e.g., Wardle, Rethinking Marital Age Restrictions, 22 J. FAM. L. 1, 8 (1983-84) (no state allows marriage, without special permission, of men or women under 18). In the United States, nearly all religious groups follow the legal guidelines, even when, in principle, earlier marriage is permitted.
the other constitutional protections are even farther from any idea of protecting someone's opinions or judgments. They are purely procedural protections from which nothing in particular can be deduced about the child's level of maturity.

If the Supreme Court decisions provide no good reason for extending freedom of religion, as it applies to adults, to minors, what is to be said of D.L.E. who did not wish to take the epilepsy medication? Or, what about Pamela Hamilton, who did not wish, for religious reasons, to be treated for her cancer?76 Traditionally, the solution has been to treat all minors as literal infants. That approach, therefore, must be examined.

IV. MINORS AS INFANTS: THE PROTECTION OF CHILDREN FROM THE CHOICES OF THEIR PARENTS

The courts have been unanimous in denying a child's parents the right to choose, on religious grounds, to forego treatment for the child when that treatment is necessary to sustain life.77 For example, in People ex rel. Wallace v. Labrenz,78 the court ordered a transfusion to save the life of an eight-day-old infant whose Jehovah's Witnesses parents had refused permission. Interestingly, the court noted the mother's belief that a transfusion destroys "the baby's chances for future life." The court did not accept the mother's characterization of the situation, but that, at least in theory, cannot be the reason for the court's decision. The court is not allowed to decide the truth or falsity of the religious beliefs in question.79 So how did the court reach its conclusion?

The usual answer to this is to say that the court is to decide "in the best interests" of the child. Unfortunately, in these circumstances, that phrase is ambiguous and ultimately unhelpful. Either it includes spiritual interests, in which case the court must make decisions which it is neither legally nor theologically competent to make, or it includes only secular values, such as life itself, which begs the question from the beginning.

Some commentators have suggested the notion of "sub-

78. 411 Ill. 618, 104 N.E.2d 769 (1952).
stituted judgment": the court is to decide as the infant would if it were competent. The obvious problem, though, is deciding what that could mean. If its meaning requires a decision about what this child would decide if he had an adult's capacity, then the issue is far too speculative—what values is the person to have? Those of his parents? Those of the court? Or should the court decide for the child by substituting for the parents’ judgment the judgment of some "reasonable person?" A reasonable Jehovah's Witness?

The proper way to characterize the court's decision is not to look to "best interests" or "substituted judgment;" rather, it is to think of two rights in conflict—the parents' right to freedom of religion and the child's right to live. The issue then becomes whether one person's religious freedom can override another person's right to live. Put this way, it seems obvious that it cannot. The alternative is to suppose that one person's religious desire to sacrifice victims to a bloodthirsty deity allows that person to kidnap someone off the street to play the central role in his unusual ritual. The absurdity of that view shows that the court, when choosing between two conflicting rights in these situations, is correctly choosing the infant's right to live as paramount.

The infant's right to live, then, is carefully protected from any views harmful to that right which his parents may have. And, of course, the courts need never ask about the infant's religious views because infants cannot form such opinions. Precisely here is the difference between older children and infants. Older children can have religious attitudes and beliefs. To treat them as if they cannot—to treat them as infants is safe, because their right to live is always protected, but not just, because their religious rights are ignored.

V. THE CRITERION FOR ALLOWING A CHILD TO REFUSE LIFE-SAVING MEDICAL TREATMENT

The absurdity of the idea of treating all minors as infants can be seen in Holmes v. Silver Cross Hospital. Ernest J. Holmes, a Jehovah's Witness, was a 20-year-old married man with a young child. During a period of undoubted competency, he informed the doctors of his refusal to accept a needed blood transfusion. When, later, Holmes lost consciousness, the lower court allowed him to be declared incompetent as a minor and appointed a conservator to authorize a

blood transfusion. The grounds for the lower court's action do not appear in the opinion of the District Court. However, merely being incompetent at some time or other is an insufficient ground for the court to override one's clearly expressed desires. And this is surely true even though Holmes was a minor and therefore legally not entitled to all of an adult's rights. Indeed, the Holmes case is one which straightforwardly suggests a way to decide which group of minors should be granted the right to refuse life-saving treatment: the person who should be allowed to make such a decision is one who has begun living his own life and taking responsibility for the direction of that life.

I suggest that, pragmatically, a line can be drawn between two groups of children who have not yet reached their majority. The one group, which would receive all of the protections an adult receives, is precisely that group which is adult in its level of responsibility for itself—the minors who are emancipated from their parents and who are thus as responsible for themselves and for planning and living their own lives as any normal adult. The other group is, of course, the unemancipated one. The latter group's rights regarding religion will be drawn short of allowing life-or-death decisions, although not all rights would be denied, save in the case of infants too young to have any views. There will be, in a sense, degrees of freedom of religion.

81. *Id.* at 128.

82. "Emancipated minor [is a] person under 18 years of age who is totally self-supporting." BLACK'S LAW DICTIONARY 468 (5th ed. 1979). "Emancipation . . . is principally used with reference to the emancipation of a minor child by its parents, which involves an entire surrender of the right to the care, custody, and earnings of such child as well as a renunciation of parental duties. The emancipation may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent . . . ." *Id.*

83. Obviously the unemancipated group will include "mature minors." These are children who are able to make important decisions thoughtfully and are given, therefore, a special place in the law. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976), for example. Should these minors also have the right to refuse treatment? I think not. Maturity is, of course, always desirable; but it does not necessarily include that sense of one's own life which comes from being on one's own—being responsible for oneself—and that is the understanding crucial for making a life-or-death decision about oneself.

84. That "degrees" of a right is a workable idea may be seen by considering the decision in *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985), in which the right to privacy was held to be subject to various restrictions in scope in light of the age of the person (among other factors).
If I am correct about the importance of emancipation, and if the notion of degrees of freedom is a defensible distinction, it will follow that D.L.E. did not have a constitutionally protected right to refuse to take his medication, nor Pamela to refuse chemotherapy. Holmes, on the other hand, clearly had the right to refuse the blood transfusion.

Line-drawing of this sort cannot produce perfect results, although I think the line I have drawn is the most appropriate one in these circumstances. There will be some, on either side of the line, who could arguably be placed on the other. Given the seriousness of the right in question and the lives at stake, it is correct to draw the line high enough that only those minors whose lives are their own will have the right, and not low enough that all of those who could truly make the decision will be allowed to do so. For, in order to achieve the latter goal, some who are incompetent to decide would have the right, and the consequence of that is a clearly unjustified death.

Finally, the implications of minors having some degree of protected rights regarding freedom of religion may have vast importance for disputes between parent and child about the child's religious education. As far as rejection of life-saving medical treatment is concerned, however, I think it cannot be plausibly maintained that unemancipated minors have a moral right to make such decisions. They should not have a legal right to do so either.
