Legal Right to Refuse Medical Treatment in the USA

Keywords
Botsford, cases, compel, decline, Georgetown, Heston, law, legal, medical, order, privacy, refuse, right, Saikewicz, Schloendorff, transfusion, treatment

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Introduction

This essay discusses the history of judicial opinions that hold a mentally competent adult patient has the legal right in the USA to refuse continuing medical treatment for any reason, even if that refusal will hasten his/her death. The scope of this essay is restricted to mentally competent adults, and includes *neither* children, insane adults, retarded adults, *nor* inmates in prisons. This essay specifically does *not* include parent(s) choosing to decline medical treatment for their child.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Basis for Right to Refuse Treatment

history

The history of the right to refuse medical treatment in the USA is often traced back to two judicial opinions:

- *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251 (1891) (Botsford sued railroad for concussion resulting from alleged negligence of railroad. Railroad wanted surgical examination of her injuries. Request of railroad denied. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.");

- *Schloendorff v. Society of New York Hospital,* 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.").

In addition to the patient's personal interest in autonomy, self-determination, bodily integrity, freedom from battery, etc.,[1] the right to refuse medical treatment is a corollary to the doctrine of informed consent.

- *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 270 (1990) ("The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.");

- *In re Brown,* 478 So.2d 1033, 1040 (Miss. 1985) ("The informed consent rule rests upon the bedrock of this state's respect for the individual's right to be free of unwanted bodily intrusions no matter how well intentioned. Informed consent further suggest a corollary: the patient must be informed of the nature, means and likely consequences of the proposed treatment so that he may 'knowingly' determine what he should do one of his options being rejection.");

- *Cruzan v. Harmon,* 760 S.W.2d 408, 417 (Mo. 1988) ("The doctrine of informed consent arose in recognition of the value society places on a person's autonomy and as the primary vehicle by which a person can protect the integrity of his body. If one can consent to treatment, one can also refuse it. Thus, as a necessary corollary to informed consent, the right to refuse treatment arose.");

- *Matter of Guardianship of L.W.,* 482 N.W.2d 60, 65 (Wis. 1992) ("The logical corollary of the doctrine of informed consent is the right not to consent — the right to refuse treatment.");

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[1] In interests of brevity, I will refer to these values simply as "autonomy" in this essay.

- *In re Fiori,* 673 A.2d 905, 910 (Pa. 1996) ("The doctrine of informed consent declares that absent an emergency situation, medical treatment may not be imposed without the patient's informed consent. A logical corollary to this doctrine is the patient's right, in general, 'to refuse treatment and to withdraw consent to treatment once begun.' [citations omitted]");

- *Stouffer v. Reid,* 993 A.2d 104, 109 (Maryl. 2010) ("We explained that the 'fountainhead of the doctrine [of informed consent] is the patient's right to exercise control over his own body, ... by deciding for himself [or herself] whether or not to submit to the particular therapy.' *Mack, ...* 618 A.2d [744] at 755 (Maryl. 1993) (quoting *Sard v. Hardy, ...* 379 A.2d 1014, 1019 (Maryl. 1977)).).

The doctrine of informed consent partly comes from the fiduciary duty of the physician to the patient:

> The relationship between a doctor and his patient is one of trust calling for a recognition by the physician of the ignorance and helplessness of the patient regarding his own physical condition. *Canterbury v. Spence,* 464 F.2d [772] at 781 [(D.C.Cir. 1972), *cert. denied,* 409 U.S. 1064 (1972)]. The duty of the doctor to inform the patient is a fiduciary duty. [citing two cases] The patient is entitled to rely upon the physician to tell him what he needs to know about the condition of his own body. The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity. *Canterbury v. Spence,* supra, 464 F.2d at 782.

Miller v. Kennedy, 522 P.2d 852, 860 (Wash.App. 1974), *aff'd per curiam,* 530 P.2d 334 (Wash. 1975). Cited in *Woolley v. Henderson,* 418 A.2d 1123, 1128, n.3 (Me. 1980). See also *Lambert v. Park,* 597 F.2d 236, 239, n.7 (10thCir. 1979) ("The duty of the doctor to inform the patient is in the nature of a fiduciary duty; thus, the patient has the right to decide what medical procedure he will undertake and the doctor must supply the patient with the material facts the patient will need in order intelligently to make that decision.");

Nonconsensual surgery is a battery. However, the physician's failure to disclose either (1) a significant risk or (2) the existence of alternative treatment(s) — either one is a lack of "informed consent" — is negligence: *Salgo v. Leland Stanford Jr. University Bd. of Trustees,* 317 P.2d 170, 181 (Cal.App. 1957) (first reported judicial opinion to use phrase "informed consent" in medical context) and *Natanson v. Kline,* 350 P.2d 1093 (Kan. 1960). In the later case, the Kansas Supreme Court summarized informed consent to medical treatment in a medical malpractice case:

> Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.

Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960). Quoted in *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 305 (1990) (Brennan, J., dissenting).

Lawyers did very little with this legal right to refuse medical treatment until the 1960s, when (1) lawyers for hospitals began to petition courts to order blood transfusions to save the life of patients who were Jehovah's Witnesses, a sect that refuses blood transfusions, and (2) medical malpractice cases became common. Beginning in the 1970s, the right to refuse medical treatment was used to justify disconnecting life support from patients in persistent vegetative states. See the list of cases, beginning at page 33, below. Sadly, there is also a line of cases[2] in which judges ordered a blood transfusion — or even a cesarean section operation — in violation of a mentally competent adult patient's clearly expressed refusal.

In addition to its common-law origin, the doctrine of informed consent — and the corollary right to refuse medical treatment — is now included in statutory law of many states, particularly including patients' bill of rights, see, e.g.,

- California Health & Safety Code § 1262.6(a)(3) (enacted 2001) ("Each hospital shall provide each patient, upon admission or as soon thereafter as reasonably practical, written information regarding the patient's right to the following: **...** Participate actively in decisions regarding medical care. To the extent permitted by law, participation shall include the right to refuse treatment.");

- Florida Statutes § 381.026 ("Each health care facility or provider shall observe the following standards: **....** A patient has the right to refuse any treatment based on information required by this paragraph, except as otherwise provided by law.");

- 215 Illinois Compiled Statutes 134/5 (enacted 2000) ("A patient has the right **...** to refuse any treatment to the extent permitted by law, ...");

- Massachusetts General Laws, Chapt. 111, § 70E ("Every patient or resident of a facility [i.e., hospital, nursing home, clinic, etc.] shall be provided by the physician in the facility the right: (a) to informed consent to the extent provided by law; ....");

- Minnesota Statutes § 144.651, subdivision 12 ("Competent patients and residents shall have the right to refuse treatment based on the information required in subdivision 9.");

- New Jersey Statutes, 26:2H-12.8 (enacted 1989) ("Every person admitted to a general hospital ... shall have the right: ... (d) To receive from the physician information necessary to give informed consent prior to the start of any procedure or treatment ...; (e) To refuse treatment to the extent permitted by law and to be informed of the medical consequences of this act; ....");

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[2] See the list of cases, beginning at page 39, below.

- New York Public Health Law, Chapt. 25, Article 28, § 2805-d (enacted 1975) (title: "Limitation of medical, dental or podiatric malpractice action based on lack of informed consent");

- New York Public Health Law, Chapt. 45, Article 28, § 2803-c (enacted 1975) ("Every patient [in a nursing home] shall have the right ... to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.");

- Texas Civil Practice & Remedies Code, Title 4, Chapt. 74, Subchapt. C (enacted 2003) (civil liability for failure to obtain informed consent);

- Washington Revised Code, 7.70.050 (enacted 1975) (civil liability for failure to obtain informed consent).

There is also a right to refuse treatment in some state statutes regarding mental health.

definition of "mentally competent"

The definition of "mentally competent" in the context of refusing medical treatment means that the patient can understand the risks and benefits of the proposed treatment, and the patient is able to make an informed choice. In some situations, psychiatric patients are "mentally competent" for purposes of refusing medical treatment. See, e.g., *Rogers vs. Commissioner of the Department of Mental Health,* 458 N.E.2d 308, 314 (Mass. 1983); *Rivers v. Katz,* 495 N.E.2d 337, 341-343 (N.Y. 1986); *Myers v. Alaska Psychiatric Institute,* 138 P.3d 238, 242-244 (Alaska 2006); and cases cited therein.

common law right to refuse medical treatment

In March 1976, the New Jersey Supreme Court wrote the first reported appellate case in the USA involving disconnection of life-support from a patient (Karen Quinlan) in a persistent vegetative state:

> The [U.S. Supreme] Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.' 381 U.S. [479] at 484, 85 S.Ct. at 1681, 14 L.Ed.2d at 514. Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions. *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 727, 35 L.Ed.2d 147, 177 (1973).

Matter of Quinlan, 355 A.2d 647, 663 (N.J. 1976).

In a landmark case in 1977, the Massachusetts Supreme Court wrote:

> There is implicit recognition in the law of the Commonwealth, as elsewhere, that a person has a strong interest in being free from nonconsensual invasion of his bodily integrity. [citations omitted] In short, the law recognizes the individual interest in preserving "the inviolability of his person." *Pratt v. Davis,* 118 Ill.App. 161, 166 (1905), *aff'd,* 79 N.E. 562 (Ill. 1906). One means by which the law has developed in a manner consistent with the protection of this interest is through the development of the doctrine of informed consent. While the doctrine to the extent it may justify recovery in tort for the breach of a physician's duty has not been formally recognized by this court, [citations omitted], it is one of widespread recognition. As previously suggested, one of the foundations of the doctrine is that it protects the patient's status as a human being. [citation omitted]
>
> Of even broader import, but arising from the same regard for human dignity and self-determination, is the unwritten constitutional right of privacy found in the penumbra of specific guaranties of the Bill of Rights. *Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 328, 13 L.Ed.2d 339 (1965). As this constitutional guaranty reaches out to protect the freedom of a woman to terminate pregnancy under certain conditions, *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), so it encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances. *In re Quinlan,* supra 70 N.J. at 38-39, 355 A.2d 647. **....**

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977).

This declaration in *Saikewicz* has two parts: The first is basically a freedom from battery argument that was enunciated in *Schloendorff v. Society of New York Hospital,* 105 N.E. 92, 93 (N.Y. 1914). The second is a somewhat vague privacy argument. The vagueness can be removed if one recognizes the original meaning of right to privacy in the 1800s was the "right to be let alone" — the right not to be compelled or bothered by either government or individual people. If a government were to compel a person to accept a blood transfusion, surgery, or specified medical treatment, then the government would be invading that person's private sphere, and implicating constitutional privacy law.

Later in the 1977 opinion, the Massachusetts Supreme Court said:

> ... we believe it is not inconsistent to recognize a right to decline medical treatment in a situation of incurable illness. The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

In 1986, the Massachusetts Supreme Court added more about autonomy in the right to refuse medical treatment:

> The right of self-determination and individual autonomy has its roots deep in our history. John Stuart Mill stated the concept succinctly: "[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He

> cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right." Mill, ON LIBERTY, in 43 Great Books of the Western World 271 (R. Hutchins ed. 1952), quoted in *In re Caulk,* 125 N.H. 226, 236, 480 A.2d 93 (1984) (Douglas, J., dissenting).
>
> It is in recognition of these fundamental principles of individual autonomy that we sought, in *Saikewicz,* to shift the emphasis away from a paternalistic view of what is "best" for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved, whether that person be competent or incompetent. As to the latter type of person, we concluded that the doctrine of substituted judgment, while not without its shortcomings, best served to emphasize the importance of honoring the privacy and dignity of the individual.[footnote omitted] Thus, we stated that "we recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Saikewicz,* [370 N.E.2d 417 at 427 (Mass. 1977)].

Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 633-634 (Mass. 1986). Notice that the last sentence asserts "human dignity" is the basis for informed consent to medical treatment, and the consequent right to refuse medical treatment.

no paternalism

Several judges have declared the right to refuse medical treatment includes the right to make unwise or foolish decisions. This lack of paternalism follows from the privacy right to be let alone.

- *In re Brooks' Estate,* 205 N.E.2d 435, 442 (Ill. 1965) ("No overt or affirmative act of appellants offers any clear and present danger to society — we have only a governmental agency compelling conduct offensive to appellant's religious principles. Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences. In the final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views based upon religious convictions. Such action cannot be constitutionally countenanced.");

- *In re Yetter,* 62 Pa. D. & C.2d 619, 623-624 (Com.Pl. June 1973) ("If the person was competent while being presented with the decision and in making the decision which she did, the court should not interfere even though her decision might be considered unwise, foolish or ridiculous. **....** The ordinary person's refusal to accept medical advice based upon fear is commonly known and while the refusal may be irrational and foolish to an outside observer, it cannot be said to be incompetent in order to permit the State to override the decision.");

- *Downer v. Veilleux,* 322 A.2d 82, 91 (Me. 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others"), quoted in *Cruzan,* 497 U.S. 261, 306 (1990) (Brennan, J., dissenting);

- *Harnish v. Children's Hosp. Medical Center,* 439 N.E.2d 240, 242 (Mass. 1982) ("Every competent adult has a right 'to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession.' *Wilkinson v. Vesey,* 110 R.I. 606, 624, 295 A.2d 676 (1972)."), quoted with approval in *Shine v. Vega,* 709 N.E.2d 58, 63 (Mass. 1999);

- *U.S. v. Charters,* 829 F.2d 479, 495 (4thCir. 1987) ("Individual freedom here is guaranteed only if people are given the right to make choices that would generally be regarded as foolish ones. [quoting 2 F. Harper & F. James, Jr., THE LAW OF TORTS §17.1 (1986)]"), see also *Bee v. Greaves,* 744 F.2d 1387, 1392 (10thCir. 1984) (same);

- *Norwood Hosp. v. Munoz,* 564 N.E.2d 1017, 1021 (Mass. 1991) ("It is for the individual to decide whether a particular medical treatment is in the individual's best interests. As a result, '[t]he law protects [a person's] right to make her own decision to accept or reject treatment, whether that decision is wise or unwise.' *Lane v. Candura,* 6 Mass.App.Ct. 377, 383, 376 N.E.2d 1232 [at 1236] (1978)."), quoted with approval in *Shine v. Vega,* 709 N.E.2d 58, 63 (Mass. 1999);

- *Thor v. Superior Court,* 855 P.2d 375, 385 (Cal. 1993) ("For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities.");

- *Steele v. Hamilton Cty. Community Mental Health Board,* 736 N.E.2d 10 (Ohio 2000) (At 20: "If a court does not find that the patient lacks such capacity [to give or withhold informed consent regarding treatment], then the state's parens patriae power is not applicable and the patient's wishes regarding treatment will be honored, no matter how foolish some may perceive that decision to be. [citations omitted]" At 21: "Only when a court finds that a person is incompetent to make informed treatment decisions do we permit the state to act in a paternalistic manner, making treatment decisions in the best interest of the patient.").

U.S. Supreme Court

In 1982, the U.S. Supreme Court tersely traced the history of the right to refuse medical treatment:

> Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, e.g., *Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 738–739, 370 N.E.2d 417, 424 (1977); W. Prosser, LAW OF TORTS § 18 (4th ed. 1971).

Mills v. Rogers, 457 U.S. 291, 294, n.4 (1982).

In 1990, in a case involving disconnecting a patient in a persistent vegetative state from food and water, the U.S. Supreme Court wrote:

> After *Quinlan,* however, most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 15-11, p. 1365 (2d ed. 1988). In *Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728, 370 N.E.2d 417 (1977), the Supreme Judicial Court of Massachusetts relied on both the right of privacy and the right of informed consent to permit the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia. Id., at 737-738, 370 N.E.2d, at 424. Reasoning that an incompetent person retains the same rights as a competent individual "because the value of human dignity extends to both," the court adopted a "substituted judgment" standard whereby courts were to determine what an incompetent individual's decision would have been under the circumstances. Id., at 745, 752-753, 757-758, 370 N.E.2d, at 427, 431, 434. Distilling certain state interests from prior case law — the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession — the court recognized the first interest as paramount and noted it was greatest when an affliction was curable, "as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended." [*Saikewicz,*] at 742, 370 N.E.2d at 426.

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 271 (1990).

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. [citing *Jacobson v. Massachusetts,* 197 U.S. 11, 24-30 (1905); *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957) ("As against the right of an individual that his person be held inviolable ... must be set the interests of society ..."); and three other cases.]

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990).

> [FN7] Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See *Bowers v. Hardwick,* 478 U.S. 186, 194-195, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986).

> But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990).

This view was reiterated by the U.S. Supreme Court in 1997:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to **....** and to abortion, *Casey,* supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U.S. [261] at 278-279, 110 S.Ct. [2841] at 2851-2852.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

Justice Brennan, joined by Justices Marshall and Blackmun, dissented in *Cruzan:*

> The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care. Earlier this Term, this Court held that the Due Process Clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical treatment. *Washington v. Harper,* 494 U.S. 210, 221-222, 110 S.Ct. 1028, 1036-1037, 108 L.Ed.2d 178 (1990). Today, the Court concedes that our prior decisions "support the recognition of a general liberty interest in refusing medical treatment." See ante, at 2851. The Court, however, avoids discussing either the measure of that liberty interest or its application by assuming, for purposes of this case only, that a competent person has a constitutionally protected liberty interest in being free of unwanted artificial nutrition and hydration. See ante, at 2851-2852. Justice O'CONNOR's opinion is less parsimonious. She openly affirms that "the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause," that there is a liberty interest in avoiding unwanted medical treatment, and that it encompasses the right to be free of "artificially delivered food and water." See ante, at 2856.
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> But if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'CONNOR concede, it must be fundamental. "We are dealing here with [a decision] which involves one of the basic civil rights of man." *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, "those liberties that are 'deeply rooted in this Nation's history and tradition' " are among them. *Bowers v. Hardwick,* 478 U.S. 186, 192, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986) (quoting *Moore v. East Cleveland,* supra, 431 U.S., at 503, 97 S.Ct., at 1938 (plurality opinion). "Such a tradition commands respect in part because the Constitution carries the gloss of history." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589, 100 S.Ct. 2814, 2834, 65 L.Ed.2d 973 (1980) (BRENNAN, J., concurring in judgment).
>
> The right to be free from medical attention without consent, to determine what shall be done with one's own body, is deeply rooted in this Nation's traditions, as the majority acknowledges. See ante, at 2847. This right has long been "firmly entrenched in American tort law" and is securely grounded in the earliest common law. Ibid. See also *Mills v. Rogers,* 457 U.S. 291, 294, n. 4, 102 S.Ct. 2442, 2446, n. 4, 73 L.Ed.2d 16 (1982) ("[T]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician"). "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment." *Natanson v. Kline,* 186 Kan. 393, 406-407, 350 P.2d 1093, 1104 (1960). "The inviolability of the person" has been held as "sacred" and "carefully guarded" as any common-law right. *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251-252, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). Thus, freedom

> from unwanted medical attention is unquestionably among those principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). **FN5**
>
> > FN5. See, e.g., *Canterbury v. Spence,* 150 U.S.App.D.C. 263, 271, 464 F.2d 772, 780, cert. denied, 409 U.S. 1064 (1972) ("The root premise" of informed consent "is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body' ") (quoting *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.)). See generally *Washington v. Harper,* 494 U.S. 210, 241, 110 S.Ct. 1028, 1047, 108 L.Ed.2d 178 (1990) (STEVENS, J., dissenting) ("There is no doubt ... that a competent individual's right to refuse [psychotropic] medication is a fundamental liberty interest deserving the highest order of protection").

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 304-305 (1990) (Brennan, J., dissenting).

I think the U.S. Supreme Court is wrong when it does not consider the right to refuse medical treatment as a privacy right. The law recognizes physician-patient communications as confidential. Many people regard their health and medical treatment as private matters, which they do not disclose to other people. And the decision about whether or not to continue medical treatment is personal, in that the patient must live with the consequences (e.g., pain, disability, side effects of treatment, hastened death, delayed death, financial cost, etc.). The right to privacy can be traced back to the "right to be let alone" in the 1800s — the right not to be compelled by government or other people. Many state courts have accepted the right to refuse medical treatment as a privacy right. *Andrews v. Ballard,* 498 F.Supp. 1038, 1049 (S.D.Tex. 1980) (citing 10 cases); *Armstrong v. Montana,* 989 P.2d 364, 379, n.8 (Mont. 1999) (adding 16 cases to list in *Andrews*). For cases discussing privacy as a justification for the right to refuse medical treatment, see, e.g., *Foody v. Manchester Memorial Hosp.,* 482 A.2d 713, 717-718 (Conn.Super. 1984); *In re Brown,* 478 So.2d 1033, 1039-1040 (Miss. 1985); *Rasmussen by Mitchell v. Fleming,* 741 P.2d 674, 681-683 (Ariz. 1987); *Mack v. Mack,* 618 A.2d 744, 755 (Maryl. 1993) (citing 10 cases).

emergency exception

There is an exception to informed consent in which an unconscious patient in a hospital emergency room is presumed to want the best available medical treatment, including blood transfusions. See, e.g.,

- *Schloendorff v. Society of New York Hospital,* 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. [citations omitted] This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.");

- *Canterbury v. Spence,* 464 F.2d 772, 788 (D.C.Cir. 1972) ("Two exceptions to the general rule of disclosure have been noted by the courts. **....** The first comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment.");

- *Cobbs v. Grant,* 502 P.2d 1, 10 (Cal. 1972) ("A patient should be denied the opportunity to weigh the risks only where it is evident he cannot evaluate the data, as for example, where there is an emergency or the patient is a child or incompetent. For this reason the law provides that in an emergency consent is implied (*Wheeler v. Barker* (1949) 92 Cal.App.2d 776, 785, 208 P.2d 68; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57-58, 196 P.2d 113), ...");

- *Fosmire v. Nicoleau,* 551 N.E.2d 77, 80 (N.Y. 1990) ("It should be emphasized that it is not always necessary for a doctor or a hospital to obtain a court order before providing treatment to a patient in an emergency. If a patient in need of immediate medical attention is unconscious or otherwise unable to consent, the doctor may treat the condition under the emergency doctrine recognized at common law and by statute, which is based on the assumption that most persons would consent to treatment under these circumstances. *Matter of Storar,* 420 N.E.2d 64[, 70 (N.Y. 1981)].");

- *Shine v. Vega,* 709 N.E.2d 58, 63-65 (Mass. 1999) (conscious patient being treated in emergency room had right to refuse intubation);

- *Miller ex rel. Miller v. HCA, Inc.,* 118 S.W.3d 758, 767 (Tex. 2003) ("... the general rule in Texas is that a physician who provides treatment without consent commits a battery. [footnote omitted] But there are exceptions. For example, in *Gravis v. Physicians & Surgeons Hospital,* [427 S.W.2d 310, 311 (Tex. 1968)] this Court acknowledged that 'consent will be implied where the patient is unconscious or otherwise unable to give express consent and an immediate operation is necessary to preserve life or health.' ");

- *Stewart-Graves v. Vaughn,* 170 P.3d 1151, 1155, ¶12 (Wash. 2007) ("It is generally recognized that in emergency situations where immediate action is necessary for the protection of life, consent will be implied when it is impractical to obtain actual consent from a patient or the patient's authorized representative.").

The emergency exception to consent is codified in the RESTATEMENT SECOND OF TORTS, § 62 (1965).

need compelling state interest

The U.S. Supreme Court has held that infringements on either constitutional rights, personal liberty, or privacy rights can be legally justified only by finding a "compelling state interest" after balancing the individual's rights against the state interest(s). See, e.g.,

- *Scull v. Com. of Va. ex rel. Committee on Law Reform and Racial Activities,* 359 U.S. 344, 352-353 (1959) ("In *N.A.A.C.P. v. State of Alabama,* 357 U.S. 449, 460-466, ... this Court held that such areas of individual liberty cannot be invaded unless a compelling state interest is clearly shown.");

- *Bates v. City of Little Rock,* 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. [citing 7 cases]");

- *National Association for Advancement of Colored People v. Button,* 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.");

- *Griswold v. Connecticut,* 381 U.S. 479, 497 (1965) ("Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating (state) interest which is compelling' [quoting *Bates v. City of Little Rock,* 361 U.S. 516, 524 (1960).] ....") (Goldberg, J., concurring);

- *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest."), *overruled on other grounds by Edelman v. Jordan,* 415 U.S. 651 (1974);

- *Dandridge v. Williams,* 397 U.S. 471, 520 (1970) ("... if the classification affects a 'fundamental right,' then the state interest in perpetuating the classification must be 'compelling' in order to be sustained. [citing two cases]");

- *Roe v. Wade,* 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' [citing three cases] ....");

- *Richardson v. Ramirez,* 418 U.S. 24, 78 (1974) ("To determine that the compelling-state-interest test applies to the challenged classification is, however, to settle only a threshold question. 'Compelling state interest' is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights.") (Marshall, J., dissenting);

- *Maher v. Roe,* 432 U.S. 464, 486 (1977) ("Most recently, also in a privacy case, the Court squarely reaffirmed that the right of privacy was fundamental, and that an infringement upon that right must be justified by a compelling state interest. *Carey v. Population Services International,* 431 U.S. 678 ... (1977).");

- *Chavez v. Martinez,* 538 U.S. 760, 775 (2003) ("The Court has held that the Due Process Clause also protects certain 'fundamental liberty interest[s]' from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg,* 521 U.S. 702, 721, ... (1997).").

The above-cited cases in the U.S. Supreme Court, amongst others, establish the legal test for determining whether the individual's interest in autonomy is trumped by a compelling state interest. This balancing test has been consistently applied in the right-to-die cases in state courts, as shown by the following cases:

- *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417, 427 (Mass. 1977) ("... we are satisfied that [the probate court judge's] decision was consistent with a proper balancing of applicable State and individual interests. **....** To be balanced against these [four] State interests was the individual's interest in the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity and privacy.");

- *Matter of Welfare of Colyer,* 660 P.2d 738, 743 (Wash. 1983) ("In *Quinlan* [355 A.2d 647, 663-664 (N.J. 1976)], the court balanced the degree of bodily invasion against the state's interest in preserving life. **....** Therefore, applying the *Quinlan* balancing test, we conclude that Bertha Colyer's privacy right was greater than the state's interest in preserving her life.");

- *Matter of Conroy,* 486 A.2d 1209, 1225 (N.J. 1985) ("On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death.");

- *Matter of Farrell,* 529 A.2d 404, 411 (N.J. 1987) ("When a party declines life-sustaining medical treatment, we balance the patient's common-law and constitutional rights against these four state interests.");

- *Cruzan by Cruzan v. Harmon,* 760 S.W.2d 408, 419 (Mo. 1988) ("Neither the right to refuse treatment nor the right to privacy are absolute; each must be balanced against the State's interests to the contrary."), *aff'd,* 497 U.S. 261, 279 (1990) ("... whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests. [citing two cases]");

- *In re Estate of Longeway,* 549 N.E.2d 292, 299 (Ill. 1989) ("The next step is to balance an eligible patient's right to discontinue sustenance against any interests the State may have in continuing it.");

- *In re Guardianship of Browning,* 568 So.2d 4, 14 (Fla. 1990) ("Cases decided by this Court have identified state interests ..., and have balanced them against an individual's right to refuse medical treatment.");

- *McKay v. Bergstedt,* 801 P.2d 617, 621 (Nev. 1990) ("Courts have consistently balanced the fundamental right of the individual to refuse medical treatment against the four state interests enumerated above. [citing six cases]");

- *In re Fiori,* 673 A.2d 905, 910 (Pa. 1996) ("This right [to refuse medical treatment], however, is not absolute. The right of the patient to abstain from medical treatment must be balanced against interests of the state.").

I mention in passing that there is a minority view, in which state interests can *never* trump an individual's right to autonomy and self-determination. In this minority view, there is no need to balance state interests, since the state interests will *always* be found inferior to the individual's interest in autonomy. Instead, the court should immediately "ask what would the individual want?" The answer can come from — in order of preference, with best choice first — testimony of a conscious patient, an advance directive (e.g., "living will"), choice made by an agent appointed by the individual, or by testimony from family and friends ("substituted judgment"). In this minority view, the right to refuse medical treatment is an *absolute* right, which is *never* subordinate to *any* state interest. See page 31, below, for more on this minority view.

four state interests

Quinlan

In the context of the right to refuse medical treatment, in 1976 the New Jersey Supreme Court considered a case of an adult in a persistent vegetative state. She was unconscious and unable to express either consent or refusal to further treatment, and she had never discussed the issue with anyone prior to becoming unconscious. Her parents petitioned the court for an order to disconnect her ventilator. In deciding this case, the New Jersey Supreme Court identified a state interest "in the preservation of life". *Matter of Quinlan,* 355 A.2d 647, 651, 661, 663-665 (N.J. 1976). There was a second state interest in "the right of the physician to administer medical treatment according to his best judgment", *Quinlan* at 663. This second state interest is no longer accepted and I do not discuss it here. I mention *Quinlan* only because it was the first published appellate right-to-die case and because the judges there explicitly balanced the patient's rights against the two state interests.

Saikewicz

In November 1977, the Massachusetts Supreme Court, in *Saikewicz,* enunciated four state interests that continue to be used today. While one can, with difficulty,[3] trace some of these four state interests to earlier cases in other states,[4] the impression is that the four state interests suddenly appeared in final form in *Saikewicz,* like Athena springing fully formed from the head of Zeus in Greek mythology.

The facts of *Saikewicz* involve a profoundly retarded 67 y old man, who had lived in state institutions since 1923, who was diagnosed with leukemia in April 1976. It was decided not to treat his leukemia, because of both the side-effects of therapy and poor prognosis. He died in Sep 1976. In a careful legal review, the Massachusetts Supreme Court first discussed the right of mentally competent adults to refuse "potentially life-prolonging treatment". As a second step, the Court discussed how to apply this legal right to incompetent people, an issue that is outside the scope of this essay.

> We have undertaken a survey of some of the leading cases to help in identifying the range of State interests potentially applicable to cases of medical intervention.
>
> In a number of cases, no applicable State interest, or combination of such interests, was found sufficient to outweigh the individual's interests in exercising the choice of refusing medical treatment. To this effect are *Erickson v. Dilgard,* 44 Misc.2d 27, 252 N.Y.S.2d 705 (N.Y.Sup.Ct. 1962) (scheme of liberty puts highest priority on free individual choice); *In re Estate of Brooks,* 32 Ill.2d 361, 205 N.E.2d 435 (1965) (patient may elect to pursue religious

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[3] The difficulty is that the earlier cases did not explicitly identify "state interests".

[4] See page 19, below.

beliefs by refusing life-saving blood transfusion provided the decision did not endanger public health, safety or morals); see *In re Osborne,* 294 A.2d 372 (D.C.App. 1972); *Holmes v. Silver Cross Hosp. of Joliet, Ill.,* 340 F.Supp. 125 (D.Ill. 1972); Byrn, Compulsory Lifesaving Treatment for the Competent Adult, 44 FORDHAM L.REV. 1 (1975). See also *In re Guardianship of Pescinski,* 67 Wis.2d 4, 226 N.W.2d 180 (1975).

Subordination of State interests to individual interests has not been universal, however. In a leading case, *Application of the President & Directors of Georgetown College, Inc.,* 118 U.S.App.D.C. 80, 331 F.2d 1000, *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964), a hospital sought permission to perform a blood transfusion necessary to save the patient's life where the person was unwilling to consent due to religious beliefs. The court held that it had the power to allow the action to be taken despite the previously expressed contrary sentiments of the patient. The court justified its decision by reasoning that its purpose was to protect three State interests, the protection of which was viewed as having greater import than the individual right: (1) the State interest in preventing suicide, (2) a parens patriae interest in protecting the patient's minor children from "abandonment" by their parent, and (3) the protection of the medical profession's desire to act affirmatively to safe life without fear of civil liability. In *John F. Kennedy Memorial Hosp. v. Heston,* 58 N.J. 576, 279 A.2d 670 (1971), a case involving a fact situation similar to *Georgetown,* the New Jersey Supreme Court also allowed a transfusion. It based its decision on *Georgetown,* as well as its prior decisions. See *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson,* 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032 (1964); [**FN8**] *State v. Perricone,* 37 N.J. 463, 181 A.2d 751, *cert. denied,* 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962). The New Jersey court held that the State's paramount interest in preserving life and the hospital's interest in fully caring for a patient under its custody and control outweighed the individual decision to decline the necessary measures. See *United States v. George,* 239 F.Supp. 752 (D.Conn. 1965); *Long Island Jewish-Hillside Medical Center v. Levitt,* 73 Misc.2d 395, 342 N.Y.S.2d 356 (N.Y.Sup.Ct. 1973); *In re Sampson,* 65 Misc.2d 658, 317 N.Y.S.2d 641 (Fam.Ct. 1970), *aff'd,* 37 App.Div.2d 668, 323 N.Y.S.2d 253 (1971), *aff'd per curiam,* 29 N.Y.2d 900, 328 N.Y.S.2d 686, 278 N.E.2d 915 (1972); *In re Weberlist,* 79 Misc.2d 753, 360 N.Y.S.2d 783 (N.Y.Sup.Ct. 1974); *In re Karwath,* 199 N.W.2d 147 (Iowa 1972).

FN8. While *Quinlan* [355 A.2d 647 (N.J. 1976)] would seem to limit the effect of these decisions, the opinion therein does not make clear the extent to which this is so.

This survey of recent decisions involving the difficult question of the right of an individual to refuse medical intervention or treatment indicates that a relatively concise statement of countervailing State interests may be made. As distilled from the cases, **the State has claimed interest in: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession.**[5]

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424-425 (Mass. 1977).

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[5] Boldface added by Standler. These four state interests continue to bedevil judges today. For those of us who believe in an absolute right of mentally competent adults to refuse medical treatment, these factors have allowed judges to erroneously compel patients to undergo treatments.

Despite the importance of these four state interests, subsequent cases simply copied these interests from *Saikewicz,* as shown by the list of citations beginning at page 20, below. One law review article recognized that "Other courts have accepted this listing of the relevant state interests without further analysis of their origins or justification." Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 757, n. 265 (1986).

In 1996, the en banc Ninth Circuit discussed *six* state interests in determining whether physician-assisted suicide should be allowed. *Compassion in Dying v. State of Washington,* 79 F.3d 790, 816-832 (9thCir. 1996), *rev'd,* 521 U.S. 702 (1997), discussed in my essay at http://www.rbs2.com/pas.pdf . Four of the six state interests are identical to the interests in *Saikewicz.*

origin of four state interests

Notice that the Massachusetts Supreme Court did *not* accept the near absolute right of mentally competent adults to refuse medical treatment in Illinois and New York. Instead, Massachusetts followed *Georgetown,* 331 F.2d 1000 (D.C.Cir. 1964) — a case in which a single judge of the U.S. Court of Appeals hastily issued an emergency order compelling a blood transfusion to a patient whose religion forbade transfusions. There were serious procedural problems with the order in *Georgetown,* as explained at page 42, which probably made the order a legal nullity. I have identified at least six substantive errors in *Georgetown,* as argued below, beginning at page 44. In short, any "law" that comes from *Georgetown* is tainted and should not be used. Nonetheless, *Georgetown* identified several of the state interests later asserted in *Saikewicz:*

1. **preservation of life** Not explicitly mentioned as a state interest in *Georgetown,* but the word "life" appears *many* times in the opinion and the judge did use his judicial powers to preserve life.
2. **protection of innocent third parties** Explicitly mentioned in one terse paragraph that says "The state, as parens patriae, will not allow a parent to abandon a child...." *Georgetown,* 331 F.2d at 1008 (Judge J. Skelly Wright in chambers).
3. **prevention of suicide** Mentioned in three paragraphs, but weakened because it was "in doubt" whether attempted suicide was a crime in the jurisdiction. *Georgetown,* 331 F.2d at 1008-1009 (Judge J. Skelly Wright in chambers).
4. **maintaining ethics of physicians** Judge Wright does not mention "ethics", but does mention avoiding "civil and criminal liability" for the physicians and hospital. *Georgetown,* 331 F.2d at 1009 (Judge J. Skelly Wright in chambers).

Further, *Saikewicz* draws support from *John F. Kennedy Memorial Hospital v. Heston,* 279 A.2d 670 (N.J. 1971). Beginning at page49, I argue that *Heston* was wrongly decided. However, *Heston* does mention state interests in preserving life and preventing suicide.

nationwide acceptance

I have searched the judicial opinions for the highest state court[6] in each of the eight most populous states in the USA — plus Massachusetts, New Jersey, and Washington — to assemble the following citations to the relevant state interests. I cite the original case, followed by the most recent case as of 8 June 2012.

U.S. Supreme Court:

- *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261 (1990) (At 271: "Distilling certain state interests from prior case law — the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession — .... [citing *Saikewicz,* 370 N.E.2d 417 at 426 (Mass. 1977)]." At 280: "Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States — indeed, all civilized nations — demonstrate their commitment to life by treating homicide as a serious crime.");

- *Washington v. Glucksberg,* 521 U.S. 702, 728, n.20 (1997) ("The court [below] identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses [*Compassion in Dying,* 79 F.3d 790, 816-832 (9thCir. 1996).]");

- *Vacco v. Quill,* 521 U.S. 793, 808-809 (1997) ("New York's reasons for recognizing and acting on this distinction — including [1] prohibiting intentional killing and preserving life; [2] preventing suicide; [3] maintaining physicians' role as their patient's healers; [4] protecting vulnerable people from indifference, prejudice, and psychological pressure to end their lives; and [5] avoiding a possible slide towards euthanasia — are discussed in greater detail in our opinion in *Glucksberg,* .... These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.").

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[6] Michigan, Ohio, and Texas Supreme Courts have not used these phrases, so I also looked at lower courts in those three states.

California:

- *Thor v. Superior Court,* 855 P.2d 375, 383 (Cal. 1993) (".. . the right to be free from nonconsensual invasions of bodily integrity is not absolute. Four state interests generally identify the countervailing considerations in determining the scope of patient autonomy: preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties.").

Florida:

- *Satz v. Perlmutter,* 379 So.2d 359 (Fla. 1980) (Approving decision in *Perlmutter,* 362 So.2d 160, 162 (Fla.App. 1978.): "As *Saikewicz* [(Mass. 1977)] points out, the right of an individual to refuse medical treatment is tempered by the State's: 1. Interest in the preservation of life. 2. Need to protect innocent third parties. 3. Duty to prevent suicide. 4. Requirement that it help maintain the ethical integrity of medical practice.");

- *Krischer v. McIver,* 697 So.2d 97, 102 (Fla. 1997) ("... there is a constitutional privacy right to refuse medical treatment. Those cases recognized the state's legitimate interest in (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession.").

Illinois:

- *In re Estate of Longeway,* 549 N.E.2d 292, 299 (Ill. 1989) (quoting *Saikewicz,* 370 N.E.2d 417, 425 (Mass. 1977)).

Massachusetts:

- *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417, 425 (Mass. 1977) ("As distilled from the cases [on the right of an individual to refuse medical intervention or treatment], the State has claimed interest in: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession."),

- *Massachusetts v. Pugh,* 969 N.E.2d 672, 690 (Mass. 2012) (citing *Saikewicz* with approval).

Michigan:

- *In re Rosebush,* 491 N.W.2d 633, 636, n.2 (Mich.App. 1992) ("... the right to refuse life-sustaining treatment may, in rare cases, be outweighed by countervailing state interests. Four such state interests have been identified: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession.");

- *In re Martin,* 538 N.W.2d 399, 402 (Mich. 1995) (right-to-die case: "If we are to err, however, we must err in preserving life.");

- *Michigan v. Kevorkian,* 639 N.W.2d 291, 305 (Mich.App. 2001) ("... the [U.S. Supreme] Court [in *Glucksberg*] determined that a state has legitimate and countervailing interests in preserving life, preventing suicide, ...").

New Jersey:

- *In re Conroy,* 486 A.2d 1209, 1223 (N.J. 1985) ("Courts and commentators have commonly identified four state interests that may limit a person's right to refuse medical treatment: preserving life, preventing suicide, **....** [¶] The state's interest in preserving life is commonly considered the most significant of the four state interests.");

- *New Jersey v. Pelham,* 824 A.2d 1082, 1088 (N.J. 2003) (same).

New York:

- *Application of Eichner,* 423 N.Y.S.2d 580 (N.Y.Sup. 1979), *modified sub. nom, Eichner v. Dillon,* 426 N.Y.S.2d 517, 543-544 (N.Y.A.D. 1980) (four state interests), *modified sub nom., Matter of Storar,* 420 N.E.2d 64 at 71, 438 N.Y.S.2d 266 at 273 (N.Y. 1981) ("The State has a legitimate interest in protecting the lives of its citizens. **....** In other cases the State may be able to assert additional interests, such as, prevention of suicide or ....");

- *Fosmire v. Nicoleau,* 551 N.E.2d 77, 81-82 (N.Y. 1990) ("The State has a well-recognized interest in protecting and preserving the lives of its citizens. **....** The State will intervene to prevent suicide (Penal Law § 35.10[4], [5][b])....").

Ohio:

- *Leach v. Akron General Medical Center,* 426 N.E.2d 809, 814 (Ohio Com.Pl. 1980) ("Generally, four basic areas of [state] interest have been identified: Preservation of life; protection of third parties; maintenance of the ethical integrity of the medical profession; and, prevention of suicide.");

- *In re Guardianship of Crum,* 580 N.E.2d 876, 880 (Ohio Probate 1991) (same).

Pennsylvania:

- *In re Fiori,* 673 A.2d 905, 910 (Pa. 1996) ("The right of the patient to abstain from medical treatment must be balanced against interests of the state. The four state interests most commonly recognized by the courts are: 1) protection of third parties; 2) prevention of suicide; 3) protection of the ethical integrity of the medical community; and 4) preservation of life.").

Texas: (does <u>not</u> appear to accept the four state interests)

- *Miller ex rel. Miller v. HCA, Inc.,* 36 S.W.3d 187, 194 (Tex.App.–Houston 2000) ("On the contrary, if anything, the state's interest in preserving life is greatest when life can be preserved and then weakens as the prognosis dims."), *aff'd,* 118 S.W.3d 758 (Tex. 2003).

Washington:

- *Matter of Welfare of Colyer,* 660 P.2d 738, 743 (Wash. 1983) ("This right to refuse treatment, be it founded on constitutional or common law precepts, is not absolute, for the state has an interest in protecting the sanctity of the lives of its citizens. See *Saikewicz,* [370 N.E.2d 417, 426 (Mass. 1977)]; *Quinlan,* [355 A.2d 647, 663 (N.J. 1976)]. This state interest has been identified in four areas: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) maintenance of the ethical integrity of the medical profession. *Saikewicz, ...* 370 N.E.2d 417 [at 425].");

- *McNabb v. Department of Corrections,* 180 P.3d 1257, 1263, ¶19 (Wash. 2008) ("Compelling state interests include "(1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) maintenance of the ethical integrity of the medical profession." *Colyer, ...* 660 P.2d 738, 743 **....**").

The conclusion is that these four state interests from *Saikewicz* are now accepted nearly nationwide. In 2010, the Maryland Supreme Court summarized the law:

> In acknowledging this common law right of a mentally competent patient to refuse medical treatment under non-emergency circumstances, we emphasized that it is not an absolute right. It is a right subject to "at least four countervailing State interests: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession. *Mack, ...* 618 A.2d [744] at 755, n. 7 [(Maryl. 1993)] (quoting *Brophy, ...* 497 N.E.2d 626, 634 (Mass. 1986)).

Stouffer v. Reid, 993 A.2d 104, 109-110 (Maryl. 2010). *Mack* cites *Brophy* in Massachusetts, and *Brophy* cites *Saikewicz.*

discussion of four state interests

1. preservation of life

In *Saikewicz,* the Massachusetts Supreme Court explained:

> It is clear that the most significant of the asserted State interests is that of the preservation of human life. Recognition of such an interest, however, does not necessarily resolve the problem where the affliction or disease clearly indicates that life will soon, and inevitably, be extinguished. The interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation. There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended. **....**

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425-426 (Mass. 1977).

In 1985, the New Jersey Supreme Court wrote:

> The state's interest in preserving life is commonly considered the most significant of the four state interests. See, e.g., *Spring,* supra, 380 Mass. at 633, 405 N.E.2d at 119; *Saikewicz,* supra, 373 Mass. at 740, 370 N.E.2d at 425; President's Commission Report, supra, at 32.

> It may be seen as embracing two separate but related concerns: an interest in preserving the life of the particular patient, and an interest in preserving the sanctity of all life. Cantor, "*Quinlan,* Privacy, and the Handling of Incompetent Dying Patients," 30 RUTGERS L.REV. 239, 249 (1977); see Annas, "*In re Quinlan:* Legal Comfort for Doctors," HASTINGS CENTER REP., June 1976, at 29.
>
> While both of these state interests in life are certainly strong, in themselves they will usually not foreclose a competent person from declining life-sustaining medical treatment for himself. This is because the life that the state is seeking to protect in such a situation is the life of the same person who has competently decided to forego the medical intervention; it is not some other actual or potential life that cannot adequately protect itself. Cf. *Roe v. Wade,* supra, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (authorizing state restrictions or proscriptions of woman's right to abortion in final trimester of pregnancy to protect viable fetal life); *State v. Perricone,* 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962) (affirming trial court's appointment of guardian with authority to consent to blood transfusion for infant over parents' religious objections); *Muhlenberg Hosp. v. Patterson,* 128 N.J.Super. 498, 320 A.2d 518 (Law Div. 1974) (authorizing blood transfusion to save infant's life over parents' religious objections).
>
> In cases that do not involve the protection of the actual or potential life of someone other than the decisionmaker, the state's indirect and abstract interest in preserving the life of the competent patient generally gives way to the patient's much stronger personal interest in directing the course of his own life. See, e.g., *Quackenbush,* supra, 156 N.J.Super. at 290, 383 A.2d 785; Cantor, supra, 30 RUTGERS L.REV. at 249–50. Indeed, insofar as the "sanctity of individual free choice and self-determination [are] fundamental constituents of life," the value of life may be lessened rather than increased "by the failure to allow a competent human being the right of choice." *Saikewicz,* supra, 373 Mass. at 742, 370 N.E.2d at 426; see also Cantor, supra, 30 RUTGERS L.REV. at 250 ("Government tolerance of the choice to resist treatment reflects concern for individual self-determination, bodily integrity, and avoidance of suffering, rather than a deprecation of life's value.").

Matter of Conroy, 486 A.2d 1209, 1223-1224 (N.J. 1985).

I think *Conroy* confuses the significant difference between (1) a single mother who refuses a life-saving transfusion for herself, despite making an orphan of her child, and (2) a child who needs a life-saving transfusion, but the one parent/guardian refuses to consent. The first invokes the right of an adult to refuse medical treatment for herself, the second wrongfully deprives a child of the chance to live. In the second example, the parent is declining medical treatment for someone else, when that someone was never competent to make a choice, because they are a minor.

In 1993, the California Supreme Court wrote:

> The state's paramount concern is the preservation of life, which embraces two separate but related aspects: an interest in preserving the life of the particular patient and an interest in preserving the sanctity of all life. In this context, however, these considerations can only assert themselves at the expense of self-determination and bodily integrity, matters all the more intensely personal when disease or physical disability renders normal health and vitality impossible. Accordingly,
>
> > The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity. [citation omitted] It is antithetical to our scheme of ordered liberty and to our respect for the

> autonomy of the individual for the State to make decisions regarding the individual's quality of life. It is for the patient to decide such issues.
>
> *Brophy,* 497 N.E.2d 626 at 635 [(Mass. 1986)]; .... In this situation, "the value of life is desecrated not by a decision to refuse medical treatment but 'by the failure to allow a competent human being the right of choice.' " *In the Matter of Farrell,* 529 A.2d 404 at 411 [(N.J. 1987)], quoting *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417, 426 (Mass. 1977).

Thor v. Superior Court, 855 P.2d 375, 383 (Cal. 1993).

This last sentence, if taken literally, suggests that the state's interest in preservation of life should *always* yield to the individual, mentally competent, adult patient's interest in self-determination.

The California Supreme Court also said:

> Moreover, the state has not embraced an unqualified or undifferentiated policy of preserving life at the expense of personal autonomy. See *Cruzan,* 497 U.S. 261 at 314, n.15 (1990) (Brennan, J., dissenting). As a general proposition, "[t]he notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct." *In re Osborne,* 294 A.2d 372, 375, n.5 (D.C. 1972).) **....**

Thor v. Superior Court, 855 P.2d 375, 384 (Cal. 1993).

In 1973, Prof. Cantor, in a landmark article, wrote:

> Restraint by courts [i.e. "non-interference in an individual's decision to refuse treatment"] would be impelled by profound respect for the individual's bodily integrity and religious freedom, not by disregard or disdain for the sanctity of life. Human dignity is enhanced by permitting the individual to determine for himself what beliefs are worth dying for.

Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," 26 RUTGERS L.REV. 228, 244 (1973). Honoring an individual's choice should always trump the state's interest in preservation of life.

In my separate essay at http://www.rbs2.com/pas.pdf in the section titled "Does Government 'own' our lives?", I criticize the current law that the state always has a legal interest in "preserving life" and "preventing suicide".

2. protection of innocent third parties

In *Saikewicz,* the Massachusetts Supreme Court explained:

> A second interest of considerable magnitude, which the State may have some interest in asserting, is that of protecting third parties, particularly minor children, from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse life-saving or life-prolonging treatment. Thus, in *Holmes v. Silver Cross Hosp. of Joliet, Ill.,* 340 F.Supp. 125 (D.Ill. 1972), the court held that, while the State's interest in preserving an individual's life was not sufficient, by itself, to outweigh the individual's interest in the exercise of free choice, the possible impact on minor children would be a factor which might have a critical effect on the outcome of the balancing process. **....**

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

In 1987 the New Jersey Supreme Court summarized the law:

> When courts refuse to allow a competent patient to decline life-sustaining treatment, it is almost always because of the state's interest in protecting innocent third parties who would be harmed by the patient's decision. "[F]or example, courts have required competent adults to undergo medical procedures against their will if necessary to protect the public health, ... or to prevent the emotional and financial abandonment of the patient's minor children." *Conroy,* 486 A.2d 1209 [at 1225 (N.J. 1985)]; see, e.g., *Application of President & Directors of Georgetown College,* 331 F.2d 1000, 1008 (D.C.Cir.), *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964) (ordering transfusion because of a mother's "responsibility to the community to care for her infant"); *Holmes v. Silver Cross Hosp.,* 340 F.Supp. 125, 130 (N.D.Ill. 1972) (noting that a father can similarly be forced to undergo a transfusion if his refusal would devastate his dependents); *John F. Kennedy Memorial Hosp. v. Heston,* 58 N.J. 576, 279 A.2d 670 (1971) (ordering blood transfusion for a pregnant woman).

Matter of Farrell, 529 A.2d 404, 412 (N.J. 1987).

Farrell is correct that a judge's concern for protection of minor children is the most common reason to compel a mentally competent adult to have unwanted medical treatment. However, I still have doubts whether such a reason is adequate to reject an adult's personal decision.

For me, the protection of young children from loss of a parent is the most difficult issue. Below, beginning at page 52, I discuss the issues in ordering a blood transfusion in a mother of young children, in violation of her sincere religious belief. I conclude that the right of a mentally competent adult to refuse medical treatment should be absolute, and — unfortunately — this means that some children will have zero or one living parent.

3. prevention of suicide

In *Saikewicz,* the Massachusetts Supreme Court explained:

> The interest in protecting against suicide seems to require little if any discussion. In the case of the competent adult's refusing medical treatment such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the specific intent to die, and (2) even if he did, to the extent that the cause of death was from natural causes the patient did not set the death producing agent in motion with the intent of causing his own death. [citations omitted] Furthermore, the underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life.

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426, n.11 (Mass. 1977).

In 1985, the New Jersey Supreme Court wrote:

> It may be contended that in conjunction with its general interest in preserving life, this state has a particular legislative policy of preventing suicide. **....** This state interest in protecting people from direct and purposeful self-destruction is motivated by, if not encompassed within, the state's more basic interest in preserving life. Thus, it is questionable whether it is a distinct state interest worthy of independent consideration.

> In any event, declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury. [citing three cases: *Saikewicz* (Mass. 1977), *Satz v. Perlmutter* (Fla. 1980), *Colyer* (Wash. 1983)]

Matter of Conroy, 486 A.2d 1209, 1224 (N.J. 1985).

Two years later, the New Jersey Supreme Court quoted this second paragraph from *Conroy* and added more citations:

> Courts in other jurisdictions have consistently agreed that refusal of life-supporting treatment does not amount to an attempt to commit suicide. See, e.g., *Bartling v. Superior Court,* supra, 163 Cal.App.3d at 195-97, 209 Cal.Rptr. at 225-26; *Foody v. Manchester Memorial Hosp.,* 40 Conn.Supp. 127, 482 A.2d 713, 720 (Super.Ct. 1984); *Satz v. Perlmutter,* supra, 362 So.2d at 162-63; *Brophy v. New England Sinai Hosp.,* supra, 398 Mass. at 438, 497 N.E.2d at 638; *In re Eichner,* supra, 52 N.Y.2d at 377-78 n. 6, 420 N.E.2d at 71 n. 6, 438 N.Y.S.2d at 273 n. 6; *Leach v. Akron General Medical Center,* 68 Ohio Misc. 1, 10, 426 N.E.2d 809, 815 (Ohio Com.Pl. 1980); *Colyer,* supra, 99 Wash.2d at 121, 660 P.2d at 743.

Matter of Farrell, 529 A.2d 404, 411 (N.J. 1987). See also the list of citations in my essay on right-to-die cases at http://www.rbs2.com/rtd.pdf .

It seems to me that the New Jersey Supreme Court in *Conroy,* quoted two paragraphs above, destroyed "prevention of suicide" as a state interest. First, they argued that "prevention of suicide" was really part of "preservation of life". Second, using the legal fiction that the cause of death is the underlying disease (i.e., cause of death is *not* a suicide) means that "prevention of suicide" is *never* a valid state interest in cases involving the right to refuse medical treatment. This is a very important point.

In 1986, an intermediate appellate court in California wrote in a case involving Elizabeth Bouvia, a quadriplegic woman with cerebral palsy, an irreversible neurological disease — and also suffering from severely crippling arthritis — who wished to die:

> Here Elizabeth Bouvia's decision to forego medical treatment or life-support through a mechanical means belongs to her. It is not a medical decision for her physicians to make. Neither is it a legal question whose soundness is to be resolved by lawyers or judges. It is not a conditional right subject to approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is her's alone.
>
> ....
>
> It is, therefore, immaterial that the removal of the nasogastric tube will hasten or cause Bouvia's eventual death. Being competent she has the right to live out the remainder of her natural life in dignity and peace. It is precisely the aim and purpose of the many decisions upholding the withdrawal of life-support systems to accord and provide as large a measure of dignity, respect and comfort as possible to every patient for the remainder of his days, whatever be their number. This goal is not to hasten death, though its earlier arrival may be an expected and understood likelihood.

> Real parties [i.e., hospital and physicians] assert that what petitioner really wants is to "commit suicide" by starvation at their facility. **....**
>
> Overlooking the fact that a desire to terminate one's life is probably the ultimate exercise of one's right to privacy, we find no substantial evidence to support the [trial] court's conclusion. **....** As a consequence of her changed condition, it is clear she has now merely resigned herself to accept an earlier death, if necessary, rather than live by feedings forced upon her by means of a nasogastric tube. Her decision to allow nature to take its course is not equivalent to an election to commit suicide with real parties aiding and abetting therein. *Bartling v. Superior Court,* supra, 163 Cal.App.3d 186, 209 Cal.Rptr. 220; *Lane v. Candura,* supra, 376 N.E.2d 1232.

Bouvia v. Superior Court, 225 Cal.Rptr. 297, 305-306 (Cal.App. 1986).

In 1993, the California Supreme Court wrote:

> The fact that an individual's decision to forego medical intervention may cause or hasten death does not qualify the right to make that decision in the first instance. *Bouvia,* 225 Cal.Rptr. 297 [at 305-306 (Calif.App. 1986)]; *In the Matter of Farrell,* supra, 108 N.J. 335, 529 A.2d at p. 410. Particularly in this day of sophisticated technology, the potential medical benefit of a proposed treatment is only one of the factors a patient must evaluate in assessing his or her perception of a meaningful existence. Since death is the natural conclusion of all life, the precise moment may be less critical than the quality of time preceding it. Especially when the prognosis for full recovery from serious illness or incapacitation is dim, the relative balance of benefit and burden must lie within the patient's exclusive estimation: "That personal weighing of values is the essence of self-determination." *In re Gardner,* 534 A.2d 947 at 955 [(Me. 1987)]; *Conservatorship of Drabick,* 245 Cal.Rptr. 840 [at 854-855] [(Cal.App. 1988)]; *Barber,* 195 Cal.Rptr. 484 [at 492 (Cal.App. 1983)]; *Rasmussen v. Fleming,* 741 P.2d 674, 683 [(Ariz. 1987)].) As Justice Brennan explained in his dissenting opinion in *Cruzan,* supra, "The possibility of a medical miracle [may] indeed [be] part of the calculus, but it is a part of the patient's calculus." *Cruzan,* 497 U.S. [261] at 321, 110 S.Ct. at 2873 (Brennan, J, dissenting).

Thor v. Superior Court, 855 P.2d 375, 383-384 (Cal. 1993).

In 1975, a law professor concluded that the "claimed state interest in preventing suicide or by a paternalistic exercise of police power" would never justify interference with the patient's right to refuse lifesaving medical treatment.[7]

In 1986, a law review article said:

> No reported case has held that a competent patient must undergo medical treatment he has refused in order to vindicated the state's interest in the prevention of suicide.

Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 760, n. 276 (May 1986). This observation makes the state's interest in prevention of suicide superfluous in considering the right to refuse medical treatment.

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[7] Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 FORDHAM LAW REVIEW 1, 36 (Oct 1975).

In my separate essay at http://www.rbs2.com/pas.pdf in the section titled "Does Government 'own' our lives?", I criticize the current law that the state always has a legal interest in "preserving life" and "preventing suicide".

4. maintaining medical ethics

In *Saikewicz,* the Massachusetts Supreme Court explained:

> The last State interest requiring discussion is that of the maintenance of the ethical integrity of the medical profession as well as allowing hospitals the full opportunity to care for people under their control. [citations omitted] The force and impact of this interest is lessened by the prevailing medical ethical standards. [citation omitted] Prevailing medical ethical practice does not, without exception, demand that all efforts toward life prolongation be made in all circumstances. Rather, as indicated in *Quinlan,* the prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment. Recognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores; such a doctrine does not threaten either the integrity of the medical profession, the proper role of hospitals in caring for such patients or the State's interest in protecting the same. It is not necessary to deny a right of self-determination to a patient in order to recognize the interests of doctors, hospitals, and medical personnel in attendance on the patient. Also, if the doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity, see *Union Pac. Ry. v. Botsford,* 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), and control of one's own fate, then those rights are superior to the institutional considerations.

Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426-427 (Mass. 1977).

This last sentence, if taken literally, suggests that the state's interest in ethical integrity of the medical profession should *always* yield to the individual, mentally competent, adult patient's interest in self-determination.

The New Jersey Supreme Court wrote in 1985:

> The third state interest that is frequently asserted as a limitation on a competent patient's right to refuse medical treatment is the interest in safeguarding the integrity of the medical profession. This interest, like the interest in preventing suicide, is not particularly threatened by permitting competent patients to refuse life-sustaining medical treatment. Medical ethics do not require medical intervention in disease at all costs. As long ago as 1624, Francis Bacon wrote, "I esteem it the office of a physician not only to restore health, but to mitigate pain and dolours; and not only when such mitigation may conduce to recovery, but when it may serve to make a fair and easy passage." F. Bacon, NEW ATLANTIS, quoted in Mannes, "Euthanasia vs. The Right to Life," 27 Baylor L.Rev. 68, 69 (1975). More recently, we wrote in *Quinlan,* supra, 70 N.J. at 47, 355 A.2d 647, that modern-day "physicians distinguish between curing the ill and comforting and easing the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes refused to treat the hopeless and dying as if they were curable." Indeed, recent surveys have suggested that a majority of practicing doctors now approve of passive euthanasia and believe that it is being practiced by members of the profession. See sources cited in *Storar,* supra, 52 N.Y.2d at 385–386 n. 3, 420 N.E.2d at 75–76 n. 3, 438 N.Y.S.2d at 277–78 n. 3 (Jones, J., dissenting), and in Collester, "Death, Dying and the Law: A Prosecutorial View of the Quinlan Case," 30 Rutgers L.Rev. 304, n. 3, 312 & n. 27.

> Moreover, even if doctors were exhorted to attempt to cure or sustain their patients under all circumstances, that moral and professional imperative, at least in cases of patients who were clearly competent, presumably would not require doctors to go beyond advising the patient of the risks of foregoing treatment and urging the patient to accept the medical intervention. *Storar,* supra, 52 N.Y.2d at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273; see *Colyer,* supra, 99 Wash.2d at 121–23, 660 P.2d at 743–44, citing *Saikewicz,* supra, 373 Mass. at 743–44, 370 N.E.2d at 417. If the patient rejected the doctor's advice, the onus of that decision would rest on the patient, not the doctor. Indeed, if the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole.

Matter of Conroy, 486 A.2d 1209, 1224-1225 (N.J. 1985).

Again, this last sentence, if taken literally, suggests that the state's interest in ethical integrity of the medical profession should *always* yield to the individual, mentally competent, adult patient's interest in self-determination.

In 2010, the Maryland Supreme Court wrote:

> Although [the Patient] has both a common law and constitutional right to refuse unwanted medical treatment, *Mack,* 329 Md. at 210-11, 618 A.2d at 755; see also *Cruzan,* 497 U.S. at 277, 110 S.Ct. at 2851, 111 L.Ed.2d at 241, in the present case we base our decision on [the Patient's] common law right to refuse medical treatment and therefore need not reach the constitutional question. As noted by courts in other jurisdictions, a patient's right of self-determination, ordinarily, is superior to the considerations of the medical profession as to treatment options. See *Thor,* 21 Cal.Rptr.2d 357, 855 P.2d at 386 (noting that "patient autonomy and medical ethics are not reciprocals; one does not come at the expense of the other"); *Myers,* 399 N.E.2d [452] at 458 [(Mass. 1979)](noting that the interest in maintaining the integrity of the medical profession is not controlling because a "patient's right of self-determination would normally be superior to ... institutional concerns" of the government and medical profession).

Stouffer v. Reid, 993 A.2d 104, 119 (Maryl. 2010).

In 1975, a law professor wrote "The law of informed consent would be rendered meaningless if patient choice were subservient to conscientious medical judgment. ... The rule of the supremacy of the 'doctor's conscience' finds no real support in law."[8] In the same article, the law professor concluded that concern for medical ethics would *not* "impinge upon the competent adult's freedom to reject lifesaving medical treatment."[9]

I think maintaining medical ethics is the easiest state interest to satisfy. No physician should be compelled by the state to participate in treatment that is morally repugnant to the physician.

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[8] Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 FORDHAM LAW REVIEW 1, 29 (1975).

[9] *Ibid.* at 35.

are four interests needed?

In 1996, Prof. Annas, an eminent expert in health law at Boston University, wrote:

> Although courts have mentioned four potentially compelling state interests, no appellate court has ever ultimately required any competent adult to undergo treatment for any of these reasons. See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz,* 370 N.E.2d 417 (Mass. 1977); *In re Quinlan,* 348 A.2d 801 (N.J.Super.Ch.Div. 1975), *modified,* 355 A.2d 647 (N.J. 1976), *cert. denied,* 429 U.S. 922 (1976).

George J. Annas, "The 'Right to Die' in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian," 34 DUQUESNE LAW REVIEW 875, 876, n.2 (Summer 1996). On the next page, he says:

> So the law is, and has always been, that competent adults have the right to refuse any treatment for any reason.

Ibid. at 877.

As shown in my list of cases, beginning on page 39 of this essay, there are several appellate court opinions that have ordered medical treatment against the wishes of the patient. However, none of those appellate courts considered the four state interests. The closest to considering these interests is *John F. Kennedy Memorial Hospital v. Heston,* 279 A.2d 670, 674 (N.J. July 1971) (22 y old Jehovah's Witness ordered to have lifesaving blood transfusion: "we find that the interest of the hospital and its staff, as well as the State's interest in life, warranted the transfusion of blood under the circumstances of this case.").[10] Even if further legal research (or future cases) provides a *few* exceptions, Prof. Annas is certainly correct in stating the rule of law used in the majority of courts in the USA.

Incidentally, this article by Prof. Annas motivated me to write this separate essay on the right to refuse medical treatment, which I began by moving text from drafts of two other essays plus doing substantial legal research.

Starting from Prof. Annas' observation that appellate courts never find any of the four state interests are superior to the rights of individual patients, then it seems that the four state interests should be abolished. The four state interests have existed at least since *Saikewicz* in 1977, and appellate courts during 35 years have consistently found the state interests inferior to the rights of individual people. Continuing to use the four state interests only invites erroneous orders by courts, like those cited beginning on page 39 of this essay.

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[10] I criticize the opinion in *Heston* beginning at page 49, below.

judicial recognition of almost absolute right

There are a few isolated quotations from judicial opinions that hint at an *absolute* right to refuse medical treatment, which means *any* state interest will *always* be inferior to the individual's right of autonomy and self-determination.

- *Matter of Conroy,* 486 A.2d 1209, 1225 (N.J. 1985) ("On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death.");

- *Matter of Farrell,* 529 A.2d 404, 413 (N.J. 1987) ("Generally, a competent informed patient's 'interest in freedom from nonconsensual invasion of her bodily integrity would outweigh any state interest.' *Conroy,* 98 N.J. at 355, 486 A.2d 1209 [at 1226 (N.J. 1985)].");

- *In re Estate of Longeway,* 549 N.E.2d 292, 299 (Ill. 1989) ("Normally, none of these [four] interests [in *Saikewicz*] will override a patient's refusal of artificially administered food and water. Adequate safeguards exist to protect life and third parties, and to prevent suicide.");

- *In re A.C.,* 573 A.2d 1235, 1252 (D.C. 1990) (en banc) ("We emphasize, nevertheless, that it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a caesarean section. Throughout this opinion we have stressed that the patient's wishes, once they are ascertained, must be followed in 'virtually all cases,' ante at 1249, unless there are 'truly extraordinary or compelling reasons to override them,' ante at 1247. Indeed, some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarean section, against that person's will.").

In 1993, the California Supreme Court wrote:

> Moreover, "[n]o state interest is compromised by allowing [an individual] to experience a dignified death rather than an excruciatingly painful life." [quoting] *Donaldson v. Lundgren,* ... 4 Cal.Rptr.2d 59 [at 63 (Cal.App. 1992)].

Thor v. Superior Court, 855 P.2d 375, 385 (Cal. 1993).

This quotation suggests that patients with chronic pain, who believe they have an *un*acceptable quality of life, have the right-to-die without paternalistic interference from courts who apply the four state interests.

On 15 June 2012, the Massachusetts Supreme Court came close to admitting that a mentally competent adult's interest in autonomy will *always* trump the four state interests:

> The right to refuse medical treatment, although strongly rooted in our constitutional and common law, is not absolute. "As distilled from the cases, the State has claimed interest in: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." *Superintendent of Belchertown State Sch. v. Saikewicz,* 373 Mass. 728, 741, 370 N.E.2d 417

> (1977). **In certain very limited circumstances, these State interests may override a competent individual's privacy rights.**[11] *Id.* **Any attempt by the State to override a competent adult's decision about her medical care, however, is carefully scrutinized. In virtually every instance where we have considered the issue, we have upheld the "right of a competent individual to refuse medical treatment,"** *Shine v. Vega,* 429 Mass. 456, 463, 709 N.E.2d 58 (1999), quoting *Norwood Hosp. v. Munoz,* 409 Mass. 116, 122, 564 N.E.2d 1017 (1991), and the Commonwealth has not cited any cases to the contrary. Even "the State's interest in the preservation of life does not invariably control the right to refuse treatment," *Commissioner of Correction v. Myers,* 379 Mass. 255, 263, 399 N.E.2d 452 (1979),[footnote omitted] and individuals, including pregnant women, therefore retain their right to forgo medical treatment even in life-threatening situations. See *Shine v. Vega,* supra at 467, 709 N.E.2d 58.

Massachusetts v. Pugh, 969 N.E.2d 672, 690 (Mass. 2012). Note that the continued use of the four state interests is *in*consistent with the lack of paternalism. The lack of paternalism is especially asserted by Massachusetts courts, see cases cited above, at page 8.

List of Cases

This section lists cases that assert the right of adults to refuse medical treatment. There are too many reported cases in the USA to list *all* of them here. I have concentrated on judicial decisions from the highest state courts in the largest states (e.g., California, New York, Florida, Illinois, Pennsylvania) plus New Jersey and Massachusetts. I have also included early cases from any jurisdiction, as well as frequently cited cases.

- *England v. Louisiana State Bd. of Medical Examiners,* 259 F.2d 626, 627 (5thCir. 1958) ("... we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills, ..."), *cert. denied,* 359 U.S. 1012 (1959);

- *Erickson v. Dilgard,* 252 N.Y.S.2d 705, 706 (N.Y.Sup. Oct 1962) (Refused to order blood transfusion to an adult with internal bleeding. "... the Court concludes that it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.");

- *In re Brooks' Estate,* 205 N.E.2d 435 (Ill. Mar 1965) (Jehovah's Witness could refuse blood transfusion for bleeding peptic ulcer);

- *Winters v. Miller,* 446 F.2d 65 (2dCir. May 1971) (59 y old Christian Scientist involuntarily committed to mental hospital and forced to receive "tranquilizers, both orally and intramuscularly", despite no judicial finding of mental incompetence. Court held she had a right to refuse medical treatment.), *cert. denied,* 404 U.S. 985 (1971);

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[11] Boldface added by Standler.

- *Holmes v. Silver Cross Hospital of Joliet, Ill.,* 340 F.Supp. 125, 130 (N.D.Ill. Jan 1972) (Blood transfusion to adult who refused on religious grounds. The court "... conclude that a state-appointed conservator's ordering of medical treatment for a person in violation of his religious beliefs, no matter how well intentioned the conservator may be, violates the First Amendment's freedom of exercise clause in the absence of some substantial state interest.");

- *Canterbury v. Spence,* 464 F.2d 772, 780 (D.C.Cir. May 1972) ("The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .' [quoting *Schloendorff v. Society of New York Hospital,* 105 N.E. 92, 93 (N.Y. 1914)]"), *cert. denied,* 409 U.S. 1064 (1972);

- *In re Osborne,* 294 A.2d 372 (D.C. July 1972) (refusal of blood transfusion honored even if injured man has two young children);

- *Cobbs v. Grant,* 502 P.2d 1, 9 (Cal. Oct 1972) ("... a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.");

- *In re Yetter,* 62 Pa. D. & C.2d 619 (Com.Pl. June 1973) (Schizophrenic and delusional 60 y old woman committed to state hospital was found mentally competent to refuse operation for suspected breast cancer.);

- *Matter of Quinlan,* 355 A.2d 647 (N.J. Mar 1976) (first reported case that withdraws life-support from patient in persistent vegetative state, establishes that the right to refuse medical care extends to unconscious patients);

- *Matter of Melideo,* 390 N.Y.S.2d 523 (N.Y.Sup. Dec 1976) (23 y old patient, who was both childless and nonpregnant, had right to refuse blood transfusion);

- *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417, 425 (Mass. Nov 1977) (case involved mentally retarded patient with leukemia. The Massachusetts Supreme Court declared four state interests to consider: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession.");

- *Matter of Quackenbush,* 383 A.2d 785 (N.J. Morris Cty. Jan 1978) (Reclusive patient, 72 y old, had gangrene in both legs. He refused an operation to remove the source of the bacterial infection. Probate judge concluded: "Quackenbush, therefore, as a mentally competent individual, has the right to make his informed choice concerning the operation and I will not interfere with that choice.");

- *Lane v. Candura,* 376 N.E.2d 1232, 1236 (Mass.App. May 1978) (Adult patient may refuse lifesaving amputation of gangrenous leg. "The law protects her right to make her own decision to accept or reject treatment, whether that decision is wise or unwise.");

- *Satz v. Perlmutter,* 362 So.2d 160 (Fla.App. 1978) (At 162, endorses four state interests from *Saikewicz*), *approved,* 379 So.2d 359 (Fla. Jan 1980) ("... a competent adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment where all affected family members consent.");

- *Andrews v. Ballard,* 498 F.Supp. 1038, 1049 (S.D.Tex. July 1980) (discussing right to refuse medical treatment as a privacy right, citing 10 cases);

- *Davis v. Hubbard,* 506 F.Supp. 915, 930-932 (N.D.Ohio Sep 1980) (discussing history of right to refuse medical treatment);

- *Zant v. Prevatte,* 286 S.E.2d 715, 717 (Ga. 1982) (Inmate in state prison had privacy right to starve himself, specifically he could refuse force feedings.);

- *Taft v. Taft,* 446 N.E.2d 395 (Mass. Mar 1983) (Pregnant woman needed sutures in her cervix to continue pregnancy. Woman refused on religious grounds. Court held that sutures could *not* be ordered.);

- *Bartling v. Superior Court,* 209 Cal.Rptr. 220, 225 (Cal.App. Dec 1984) ("The right of a competent adult patient to refuse medical treatment has its origins in the constitutional right of privacy."), approved by *Conservatorship of Wendland,* 28 P.3d 151, 159 (Cal. 2001);

- *Foody v. Manchester Memorial Hosp.,* 482 A.2d 713 (Conn.Super. Mar 1984) (enjoin hospital from continuing artificial ventilation of semicomatose patient with multiple sclerosis);

- *Matter of Conroy,* 486 A.2d 1209, 1223 (N.J. Jan 1985) (case involved incompetent, elderly patient with nasogastric feeding tube. Accepting four state interests in *Saikewicz.*);

- *St. Mary's Hosp. v. Ramsey,* 465 So.2d 666, 668 (Fla.App. Mar 1985) (refusing to order blood transfusion to Jehovah's Witness with kidney disease: "... this competent, sick adult has the right to refuse a transfusion regardless of whether his refusal to do so arises from fear of adverse reaction, religious belief, recalcitrance or cost. However, that is not to say we would permit him to make that same decision for others.");

- *In re Brown,* 478 So.2d 1033 (Miss. Oct 1985) (Court refused to order blood transfusion to Jehovah's Witness, although the state needed her as a witness in a future criminal trial.);

- *Bouvia v. Superior Court,* 225 Cal.Rptr. 297 (Cal.App. Apr 1986) (quadriplegic patient who wished to die. At 301: "The right to refuse medical treatment is basic and fundamental. It is recognized as a part of the right of privacy protected by both the state and federal constitutions. [citations omitted] Its exercise requires no one's approval. It is not merely one vote subject to being overridden by medical opinion." At 302: "[Citing seven cases] are but a few examples of the decisions that have upheld a patient's right to refuse medical treatment even at risk to his health or his very life."), approved by *Conservatorship of Wendland,* 28 P.3d 151, 159 (Cal. 2001);

- *Mercy Hosp., Inc. v. Jackson,* 489 A.2d 1130 (Maryl.App. 1985) (Trial court and appellate court both refused hospital's request to order blood transfusions in pregnant woman who underwent cesarean section operation. Patient was a Jehovah's Witness, hospital was operated by Catholic Church.), *vacated,* 510 A.2d 562 (Maryl. June 1986) (case was moot);

- *Brophy v. New England Sinai Hosp., Inc.,* 497 N.E.2d 626 (Mass. Sep 1986) (persistent vegetative state);

- *In re Milton,* 505 N.E.2d 255 (Ohio Feb 1987) (Patient in mental hospital had a long-standing "psychotic delusion ... that she was the spouse of Rev. LeRoy Jenkins, a faith healer and evangelist who is well known in the central Ohio area." State sought to compel Patient to undergo medical treatment for malignant tumor. At 260: "... we hold that the state may not compel a legally competent adult to submit to medical treatment which would violate that individual's religious beliefs even though the treatment is arguably life-extending.");

- *Randolph v. City of New York,* 501 N.Y.S.2d 837 (N.Y.A.D. 1 Dept. 1986) (Jehovah's Witness could refuse blood transfusion during Caesarean section operation.), *modified on other grounds,* 507 N.E.2d 298, 514 N.Y.S.2d 705 (N.Y. Mar 1987) (granting new trial);

- *Matter of Farrell,* 529 A.2d 404, 410 (N.J. June 1987) (disconnection of ventilator from ALS patient: "While we held that a patient's right to refuse medical treatment even at the risk of personal injury or death is primarily protected by the common law, we recognized that it is also protected by the federal and state constitutional right of privacy. [citing *Conroy* and *Quinlan*] [¶] Numerous other courts have upheld the right of a competent patient to refuse medical treatment even if that decision will hasten his or her death. [citing 9 cases]");

- *Rasmussen by Mitchell v. Fleming,* 741 P.2d 674 (Ariz. July 1987) (disconnect nasogastric tube from patient in persistent vegetative state);

- *Public Health Trust of Dade County v. Wons,* 500 So.2d 679 (Fla.App. 1987), *approved,* 541 So.2d 96 (Fla. Mar 1989) (State's interest in having children reared by two parents was *not* sufficient reason to order a Jehovah's Witness to have a blood transfusion.);

- *In re Estate of Longeway,* 549 N.E.2d 292 (Ill. Nov 1989 (withdraw food and water from 76 y old irreversibly comatose patient);

- *In re E.G.,* 549 N.E.2d 322, 328 (Ill. Nov 1989) (17 y old Jehovah's Witness with leukemia could refuse blood transfusion: "... we find that a mature minor may exercise a common law right to consent to or refuse medical care, ...");

- *Fosmire v. Nicoleau,* 536 N.Y.S.2d 492 (N.Y.A.D. 2 Dept. 1989), *aff'd,* 551 N.E.2d 77 at 81, 551 N.Y.S.2d 876 at 880 (N.Y. Jan 1990) (Mother needed transfusion after Cesarean section, but she was a Jehovah's Witness and refused the transfusion. "[Citing three cases] we reaffirmed the basic right of a competent adult to refuse treatment even when the treatment may be necessary to preserve the person's life.");

- *In re A.C.,* 573 A.2d 1235 (D.C. April 1990) (en banc) (vacating order to perform Caesarean section operation on a woman who was dying of cancer);

- *In re Guardianship of Browning,* 568 So.2d 4, 10 (Fla. Sep 1990) ("An integral component of self-determination is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment.");

- *Norwood Hospital v. Munoz,* 564 N.E.2d 1017 (Mass. Jan 1991) (Jehovah's Witness, who was mother of minor child, had right to refuse blood transfusion.);

- *Thor v. Superior Court,* 855 P.2d 375 (Cal. July 1993) (At 380: "Until recently, the question of a patient's right to refuse life-sustaining treatment has implicated potentially conflicting medical, legal, and ethical considerations. The developing interdisciplinary consensus, however, now uniformly recognizes the patient's right of control over bodily integrity as the subsuming essential in determining the relative balance of interests. (See *In the Matter of Farrell* (N.J. 1987) ... 529 A.2d 404, 410-412 and cases cited.)" At 381: "Because health care decisions intrinsically concern one's subjective sense of well-being, this right of personal autonomy does not turn on the wisdom, i.e., medical rationality, of the individual's choice. [citing 3 cases]");

- *Matter of Dubreuil,* 629 So.2d 819 (Fla. Nov 1993) (Upheld right of "married but separated woman who chose not to receive a blood transfusion for religious reasons". Rejected lower court's reasoning that her death "would cause the abandonment of four minor children.");

- *In re Baby Boy Doe,* 632 N.E.2d 326 (Ill.App. April 1994) (Court refused to order Cesarean section operation, which pregnant woman had refused. At 330: "It cannot be doubted that a competent person has the right to refuse medical treatment." At 330: "We hold today that Illinois courts should not engage in such a balancing ['the rights of the unborn but viable fetus which was nearly at full term' vs. the rights of a competent pregnant woman], and that a woman's competent choice in refusing medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus." At 334: "None of those [four] state interests justifies overriding Doe's decision here.");

- *In re Fiori,* 673 A.2d 905, 910 (Pa. Apr 1996) ("A logical corollary to this doctrine [of informed consent] is the patient's right, in general, 'to refuse treatment and to withdraw consent to treatment once begun.' *Mack v. Mack,* 618 A.2d 744 at 755 (Maryl. 1993).");

- *Stamford Hosp. v. Vega,* 674 A.2d 821 (Conn. Apr 1996) (Common-law right to bodily integrity means that woman hemorrhaging after birth of her child could *not* be forced to receive blood transfusion.);

- *In re Brown,* 689 N.E.2d 397 (Ill.App. Dec 1997) (During surgery, a pregnant woman bled more than anticipated. Because she was a Jehovah's Witness, she refused transfusions, despite a hemoglobin level of 4.4 grams per 100 cm^3 (normal is 11). The appellate court reversed the trial court's order for transfusions. At 405: "... we hold that the State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus."), *appeal denied,* 698 N.E.2d 543 (Ill. 1998).;

- *Armstrong v. Montana,* 989 P.2d 364, 379, n.8 (Mont. Oct 1999) (adding 16 cases to list in *Andrews,* 498 F.Supp. 1038, 1049 (S.D.Tex. 1980).);

- *In re Duran,* 769 A.2d 497 (Pa.Super. Feb 2001) (Jehovah's Witness underwent liver transplant operation with explicit instructions for no blood transfusions. "... Maria's unequivocal refusal of blood transfusion therapy is protected by Pennsylvania common law and that the trial court erred when it appointed an emergency guardian to abridge this right.");

- *Conservatorship of Wendland,* 28 P.3d 151, 158 (Cal. Aug 2001) ("One relatively certain principle is that a competent adult has the right to refuse medical treatment, even treatment necessary to sustain life.");

- *Salandy v. Bryk,* 864 N.Y.S.2d 46 (N.Y.A.D. Sep 2008) (Jehovah's Witness refused blood transfusion. Physician ignored patient and did the transfusion. Held patient could sue physician for medical malpractice and infliction of emotional distress.);

- *Burton v. Florida,* 49 So.3d 263 (Fla.App. Aug 2010) (reversing trial court's order for pregnant woman's "detention in the hospital for enforcement of bed rest, administration of intra-venous medications, and anticipated surgical delivery of the fetus [by Cesarean section]." State failed to show that fetus was viable ex utero and, furthermore, state failed to show "whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment.").

My essay on right-to-die at http://www.rbs2.com/rtd.pdf discusses the major cases involving patients who are in a persistent vegetative state and thus unable to express a wish, including *Quinlan* and *Conroy.* That essay also discusses cases involving quadriplegic patients who wish to die (e.g., *Bouvia*), but who are physically unable to disconnect their ventilator or feeding tube.

State Sometimes Orders Treatment

In 1977, the Massachusetts Supreme Court in *Saikewicz* listed four state interests that might justify the state ordering an adult person to receive medical treatment. Modern cases appear to routinely hold that the individual patient's right to autonomy trumps all four state interests. However, there are a few cases in which the state ordered a mother to receive lifesaving medical treatment (typically a blood transfusion) so that her children would continue to be reared by their mother.

- *Application of President and Directors of Georgetown College, Inc.,* 331 F.2d 1000, 1007-1008 (D.C.Cir. Feb 1964) (Judge J. Skelly Wright in chambers) (Judge Wright ordered blood transfusions to save life of Jehovah's Witness with bleeding stomach ulcer, who was mother of 7-month old child. "[Patient] sought medical attention and placed on the hospital the legal responsibility for her proper care. **....** ... [Patient] was in extremis and hardly compos mentis at the time in question.... **....** The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."), *rehearing en banc denied,* 331 F.2d. 1010 (1964), *cert. den.,* 377 U.S. 978 (1964);

- *Raleigh Fitkin-Paul Morgan Memorial Hospital and Ann May Memorial Foundation in Town of Neptune v. Anderson,* 201 A.2d 537 (N.J. June 1964) (transfusion could be ordered to save life of eight-months pregnant woman and her unborn child), *cert. den.,* 377 U.S. 985 (1964);

- *Collins v. Davis,* 254 N.Y.S.2d 666 (Sup.Ct. Dec 1964) (dying patient's wife refused consent to surgery, judge ordered surgery: "[This case] does involve a patient who sought medical attention from the hospital and placed on the hospital the legal responsibility for his proper care. **....** Once this patient came into the hospital, it was the responsibility of the hospital and its doctors to treat him.");

- *United States v. George,* 239 F.Supp. 752, 754 (D.Conn. Mar 1965) (Jehovah's Witness, father of four children, with bleeding stomach ulcer ordered to have transfusion. "The patient may knowingly decline treatment, but he may not demand mistreatment. Therefore, this Court, as Judge Wright, 'determined to act on the side of life' in the pending emergency. 331 F.2d at 1010.");

- *Powell v. Columbian Presbyterian Medical Center,* 267 N.Y.S.2d 450 (Sup.Ct. Dec 1965) (Mother of six children, a Jehovah's Witness, bled during Cesarian section operation, but she refused transfusions. Transfusion ordered by judge.);

- *John F. Kennedy Memorial Hospital v. Heston,* 279 A.2d 670, 674 (N.J. July 1971) (22 y old Jehovah's Witness ordered to have lifesaving blood transfusion: "we find that the interest of the hospital and its staff, as well as the State's interest in life, warranted the transfusion of blood under the circumstances of this case.");

- *In re Dell,* 1 Pa. D. & C.3d 655 (Pa.Com.Pl. Jan 1975) (Transfusion ordered for man with bleeding duodenal ulcer, despite man's refusal of consent for religious reasons.);

- *Jefferson v. Griffin Spalding County Hospital Authority,* 274 S.E.2d 457 (Ga. Feb 1981) (pregnant woman with placenta previa ordered to have Cesarean section and transfusion to save life of unborn child);

- *Crouse Irving Memorial Hosp., Inc. v. Paddock,* 485 N.Y.S.2d 443 (N.Y.Sup. Jan 1985) (transfusions ordered to woman during childbirth, woman was a Jehovah's Witness. Follows *Matter of President and Directors of Georgetown Col.,* 331 F.2d 1000.);

- *Application of Jamaica Hospital,* 491 N.Y.S.2d 898 (N.Y.Sup. April 1985) (pregnant woman refused transfusion because of her religious beliefs, transfusion ordered to protect life of 18-week old fetus. Incidentally, she was the mother of ten children.);

- *Application of Winthrop University Hospital,* 490 N.Y.S.2d 996 (N.Y.Sup. June 1985) (mother of two young children faced surgery for kidney stones, but refused blood transfusions on religious grounds, court ordered transfusions if necessary);

- *in re Madyun,* 114 Daily Wash.L.Rptr. 2233 (D.C.Super. 26 July 1986) (ordering Cesarean section operation against wishes of patient), quoted in appendix to *In re A.C.,* 573 A.2d 1235, 1259-1264 (D.C. 1990);

- *In re Estate of Dorone,* 502 A.2d 1271 (Pa.Super. 1985), *aff'd,* 534 A.2d 452 (Pa. Dec 1987) (Patient was an adult Jehovah's Witness who needed blood transfusion during surgical operations after automobile accident. Courts refused to hear testimony from parents as substitute decisionmakers. Trial court, affirmed by two appellate courts, ordered transfusions. Pennsylvania Supreme Court held: "... where there is an emergency calling for an immediate decision, nothing less than a fully conscious contemporaneous decision by the patient will be sufficient to override evidence of medical necessity. See generally, *Application of the President and Directors of Georgetown College, Inc.,* 331 F.2d 1000, ...");

- *Pemberton v. Tallahassee Memorial Regional Medical Center,* 66 F.Supp.2d 1247 (N.D.Fla. Oct 1999) (Because plaintiff's previous pregnancy involved a Cesarean section, Florida state court issued order compelling plaintiff to have Cesarean section operation in her second pregnancy. After the successful operation, plaintiff sued in federal court for violation of her constitutional rights. At 1251: "Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.").

Note that most of these cases are from the 1964 to 1987 era. I have found few cases involving compulsory judicial orders for medical treatment of mentally competent adults in the 25 years since 1987. Since 1987, there have been a few cases where a trial court granted an order compelling treatment, but an appellate court reversed the order. See, e.g., *In re A.C.,* 573 A.2d 1235 (D.C. 1990); *In re Brown,* 689 N.E.2d 397 (Ill.App. 1997); *In re Duran,* 769 A.2d 497 (Pa.Super. 2001); *Burton v. Florida,* 49 So.3d 263 (Fla.App. 2010). I believe that *all* of the judicial orders compelling treatment for a competent adult were erroneously granted.

Criticism of Ordering Treatment

I fear that these cases involving judicially compelled medical treatment are the tip of the iceberg. Such judicial orders are hastily granted[12] and rarely challenged in an appellate court that would generate a reported case.[13]

A. criticism of *Georgetown*

The *Georgetown* case, 331 F.2d 1000 (D.C.Cir. 1964) (Judge J. Skelly Wright in chambers), appears to be the first reported case of a judge ordering an adult patient to undergo medical treatment that she had refused. Because it appears to come from the U.S. Court of Appeals for the District of Columbia, it carries a special aura of respectability and prestige. In fact, there are serious procedural problems with this order by Judge Wright that may make his order a nullity. Furthermore, there are at least six major substantive problems with his opinion.

procedural

After Judge Wright issued his order, the patient issued a formal, written request for a rehearing en banc, which request was denied. Judge Wilbur K. Miller — joined by Judges Walter Bastian and Warren Burger — dissented from denial of an en banc rehearing. The following paragraphs quote from Judge Miller's dissenting opinion.

After the U.S. District Court Judge Tamm denied the Hospital's request to sign an order, the attorneys for the Hospital

> appeared, unannounced, at the chambers of a judge [J. Skelly Wright] of [the U.S. Court of Appeals] and requested an immediate review of Judge Tamm's action denying [the order] .... They did not file a written petition for review of Judge Tamm's refusal to sign the order but

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[12] Veronika E. Kolder, Janet Gallagher, Michael T. Parsons, "Court-Ordered Obstetrical Interventions," 316 NEW ENGLAND JOURNAL OF MEDICINE 1192, 1193 (7 May 1987) (in 88% of 16 cases, judicial order issued less than six hours after application); Teresa Stanton Collett, 1 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS 177, 177 (1996) (boasting of obtaining order for transfusion in less than one hour).

[13] See, e.g., Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," 26 RUTGERS L.REV. 228, 230, n.9 (1973); Veronika E. Kolder, Janet Gallagher, Michael T. Parsons, "Court-Ordered Obstetrical Interventions," 316 NEW ENGLAND JOURNAL OF MEDICINE 1192 (7 May 1987)("court decisions in this area are often unpublished or sealed and not readily accessible for research", their survey of physicians found "36 attempts to override a maternal refusal of therapy" in the five years before Feb 1986); Janet Gallagher, "Prenatal Invasions & Interventions: What's Wrong With Fetal Rights," 10 HARVARD WOMEN'S LAW JOURNAL 9, 11 (Spring 1987) (At a time when there was only one reported case in a law library of a court-ordered cesarean-section operation, the author found 11 cases in "news reports, medical literature, and contacts with lawyers, judges, and doctors".).

> merely orally requested a single judge to take the action which Judge Tamm had just refused to take.

Georgetown, 331 F.2d 1010, 1011-1012 (D.C.Cir. 1964) (Miller, J., dissenting from denial of en banc rehearing). This lack of a written motion — indeed the lack of a written appeal — is a striking informality in the U.S. Court of Appeals.

There are enormous procedural problems with the issuance of the order by Judge Wright, as Judge Miller says:

> It seems clear to me, however, that the matter did not properly come before this court and that, had it been duly presented on appeal, one judge of this court was not authorized to make a summary disposition of the matter on the merits. These procedural defects are, therefore, fatal to the validity of the purported orders entered September 17 by a single judge when no appeal had actually been filed. **....**
>
> 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 precedents, 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.

Georgetown, 331 F.2d 1010, 1013 (D.C.Cir. 1964) (Miller, J., dissenting).

Judge Miller concluded:

> I do not mean to impugn the motives of our colleague who signed these orders. He was impelled, I am sure, by humanitarian impulses and doubtless was himself under considerable strain because of the critical situation in which he had become involved. In the interval of about an hour and twenty minutes between the appearance of the attorneys at his chambers and the signing of the order at the hospital, the judge had no opportunity for research as to the substantive legal problems and procedural questions involved. He should not have been asked to act in these circumstances.
>
> I suggest it is not correct to suppose that, where there is a serious emergency in life, a judge of a district or a circuit court may act to meet it, regardless of whether he is empowered by law to do so. This situation shows the truth of the adage that hard cases make bad law.

Georgetown, 331 F.2d 1010, 1014-1015 (D.C.Cir. 1964) (Miller, J., dissenting).

There is also a question whether this case presents a legal controversy. Judge Burger — later Chief Justice of the U.S. Supreme Court — believed there was no justiciable controversy in *Georgetown.* 331 F.2d at 1015-1018 (Burger, J., statement). One law student commentator characterized the case: "It would seem that the hospital stood not in the position of a party in interest in an adversary proceeding but in the position of one who is bringing a situation to the attention of the sovereign."[14]

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[14] John D. O'Connell, "The Right to Die — A Comment on the *Application of the President and Directors of Georgetown College,*" 9 UTAH LAW REVIEW 161, 163 (Summer 1964).

Turning now to the substance of Judge Wright's opinion, there are at least six major substantive problems with his opinion. I note in passing that Judge Wright issued his written opinion 138 days after he issued the order for the transfusion, so he had plenty of time to find good reasons for his order. That's in contrast to the 80 minutes from the time the Hospital's attorney first appeared in Judge Wright's chambers until Judge Wright signed their proposed order, with one change. *Georgetown,* 331 F.2d at 1001-1002.

1. no religious freedom

First, Judge Wright totally ignored the patient's religious freedom under the free exercise clause of the First Amendment to refuse a blood transfusion for religious reasons. Judge Wright mentions at least six times in his opinion that the patient's refusal was on religious grounds. But Judge Wright says death was "an unwanted side effect of a religious scruple." *Georgetown,* 331 F.2d at 1009. In fact, refusal of blood transfusions is much more than a mere "scruple" — it is a major tenet of the Jehovah's Witness sect. Moreover, as explained below beginning at page 53, Judge Wright *mis*characterized the belief of the Jehovah's Witness religion.

2. no autonomy

Second, Judge Wright totally ignored the patient's "common law rights to privacy, bodily integrity, self-determination, ..." Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 758 (1986). Judge Wright *could* have cited *Schloendorff v. Society of New York Hospital,* 105 N.E. 92, 93 (N.Y. 1914) or *Erickson v. Dilgard,* 252 N.Y.S.2d 705, 706 (N.Y.Sup. 1962), but those cases oppose Judge Wright's decision.

3. no balancing test

Without recognizing either the patient's religious freedom or the patient's autonomy, there is no legal right of the patient to balance against the state interest(s). As a result of ignoring the patient's legal rights, Judge Wright ensured that the state interest(s) would prevail, and the transfusion would be ordered. Instead of using the proper balancing test that requires finding a "compelling state interest" (see page 14, above), Judge Wright used the wrong test.

4. protection young daughter

Fourth, Judge Wright tersely cited a few cases in which counts ordered "compulsory medical treatment of children for any serious illness or injury."

> The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother.

Georgetown, 331 F.2d at 1008 (Judge J. Skelly Wright in chambers).

Judge Wright made a parens patriae argument to compel the transfusion to the mother, so that mother could continue to rear her young daughter, instead of "this most ultimate of voluntary abandonments" of her daughter. 331 F.2d at 1008. Judge Wright cites no case, and he cites no other authority, in support of his argument. The daughter would *not* be abandoned, because the father was still available to care for her. And it is *not* a "voluntary" abandonment, because the patient "wanted to live", as Judge Wright twice says at 331 F.2d at 1009. In 1986, a law review article made a similar criticism of Judge Wright's opinion.[15]

Note that a child is *always* incompetent to choose/refuse medical treatment. However, as shown in the later right-to-die cases, an adult can make a valid choice *before* they become incompetent and then have that past choice honored during their incompetency. When Judge Wright treated this adult patient as a child, he denied her legal right as an adult to make choices that would determine her life.

5. concern for physicians and Hospital

Fifth, Judge Wright was concerned about the physicians and the Hospital.

> Before proceeding with this inquiry, it may be useful to state what this case does not involve. This case does not involve a person who, for religious or other reasons, has refused to seek medical attention. It does not involve a disputed medical judgment or a dangerous or crippling operation. Nor does it involve the delicate question of saving the newborn in preference to the mother. Mrs. Jones sought medical attention and placed on the hospital the legal responsibility for her proper care. In its dilemma, not of its own making, the hospital sought judicial direction.

Georgetown, 331 F.2d at 1007 (Judge J. Skelly Wright in chambers).

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[15] Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 758-759 and n.272 (1986).

Two pages later, Judge Wright says:

> A third set of considerations involved the position of the doctors and the hospital. Mrs. Jones was their responsibility to treat. The hospital doctors had the choice of administering the proper treatment or letting Mrs. Jones die in the hospital bed, thus exposing themselves, and the hospital, to the risk of civil and criminal liability in either case. [footnote saying in part: "Death resulting from failure to extend proper medical care, where there is a duty of care, is manslaughter in the District of Columbia. *Jones v. United States,* ... 308 F.2d 307, 310 (1962)."] It is not certain that Mrs. Jones had any authority to put the hospital and its doctors to this impossible choice. The normal principle that an adult patient directs her doctors is based on notions of commercial contract which may have less relevance to life-or-death emergencies. **....**

Georgetown, 331 F.2d at 1009 (Judge J. Skelly Wright in chambers).

Judge Wright appears to believe that when a patient goes to a hospital, the patient loses her right to informed consent of medical treatment. If a patient refuses a particular treatment, then any consequences from that refusal are plainly the responsibility of the patient, not the physician.[16] The *Jones* case cited by Judge Wright involves a manslaughter charge against a mother who malnourished her 10-month old child, totally different facts from an adult refusing a blood transfusion for herself.

6. allegedly incompetent patient

Sixth, Judge Wright tersely cited (1) a few cases in which courts ordered medical treatment of a child and (2) one case in which a court punished a person who refused to be vaccinated against smallpox. The cases involving children can be distinguished, because the patient in this case is an adult. Refusing to be vaccinated implicates an important state interest in preserving public health, but that case is irrelevant here, because this patient does *not* threaten public health in any way.

> Of course, there is here no sick child or contagious disease. However, the sick child cases may provide persuasive analogies because Mrs. Jones was in extremis and hardly compos mentis at the time in question; she was as little able competently to decide for herself as any child would be. Under the circumstances, it may well be the duty of a court of general jurisdiction, such as the United States District Court for the District of Columbia, to assume the responsibility of guardianship[omitted footnote about "court shall have full power and authority to superintend and direct the affairs of persons non compos mentis"] for her, as for a child, at least to the extent of authorizing treatment to save her life. And if, as shown above, a parent has no power to forbid the saving of his child's life, a fortiori the husband of the patient here had no right to order the doctors to treat his wife in a way so that she would die.

Georgetown, 331 F.2d at 1008 (Judge J. Skelly Wright in chambers).

Judge Wright tersely declared as fact-finder that the patient was "hardly compos mentis". 331 F.2d at 1008. This means she was not competent to make a choice when Judge Wright spoke to her. But Judge Wright ignores the fact that she *was* competent earlier, when she initially refused

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16 See, e.g., Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 761 and n.284 (1986).

the transfusion, motivating attorneys for the Hospital to apply for a judicial order.[17] And her refusal on religious grounds is perfectly consistent with the belief of her religion (Jehovah's Witnesses),[18] so there is nothing either bizarre or irrational about her refusal. Judge Wright also ignores the fact that the patient's husband *also* expressed a refusal of transfusion — not only giving the patient's personal refusal evidentiary support, but also serving as a substitute decision maker. I suspect the incompetent finding was invented by Judge Wright to help justify his improper order.[19]

One law student commentator said: "Since most persons who refuse treatment essential to maintain life will go through a stage of mental incapacity in the process of dying, their legal right to refuse treatment could be circumvented by merely waiting for them to become incompetent and then ordering treatment."[20] Another law student observed: "A hospital would only have to wait until the patient is unable to make a considered decision, and could then administer the necessary treatment in blatant disregard of previously expressed wishes."[21]

conclusion about *Georgetown*

Subsequent judges and commentators have often both (1) accepted Judge Wright's finding that the patient was incompetent to make a choice and (2) used that finding to distinguish *Georgetown* from other cases in which a transfusion was ordered for a Jehovah's Witness. See, e.g., *In re Brown,* 478 So.2d 1033, 1039 (Miss. 1985) (Cases involving judicially ordered transfusions to mentally competent Jehovah's Witnesses "are, in a word, wrong."); *Mercy Hosp., Inc. v. Jackson,* 510 A.2d 562, 566 (Maryl. 1986); Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703, 751, n.229 (1986) (The cases

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17 Anonymous, Case Note, 77 HARVARD LAW REVIEW 1539, 1545 (June 1964).

18 Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 FORDHAM LAW REVIEW 1, 25 (1975); Dena S. Davis, "Does 'No' Mean 'Yes'? ...," 19 SECOND OPINION 35, 38 (Jan 1994).

19 Anonymous, Case Comment, 113 UNIV. PENNSYLVANIA LAW REVIEW 290, 294 (Dec 1964) ("That an individual's choice is seemingly inconsistent with the general mores of society should not, in itself, afford a basis for a finding of *non compos mentis.* However, there is little more in the record of the present case to support a finding that respondent was, in fact, incompetent."); Dena S. Davis, "Does No Mean Yes? ...," 19 SECOND OPINION 35, 39 (Jan 1994) ("It appears that Judge Wright, faced with the waste of a young life for reasons that doubtless seemed irrational to him, came up with a convenient fiction by which everyone can be said to have won.").

20 John D. O'Connell, "The Right to Die — A Comment on the *Application of the President and Directors of Georgetown College,*" 9 UTAH LAW REVIEW 161, 169 (Summer 1964).

21 Anonymous, Case Note, 39 NEW YORK UNIV. LAW REVIEW 706, 710 (June 1964).

involving judicially ordered transfusions to mentally competent Jehovah's Witnesses "were wrongly decided and should not be followed.").

The justification for the order in *Georgetown* has been rejected by many modern courts, most notably *Norwood Hospital v. Munoz,* 564 N.E.2d 1017, n.7 (Mass. 1991); *Matter of Dubreuil,* 629 So.2d 819, 824, n.8 (Fla. 1993) (criticizing *Georgetown*); *In re Brown,* 689 N.E.2d 397, 404 (Ill.App. 1997). See also, Dena S. Davis, "Does 'No' Mean 'Yes'? ...," 19 SECOND OPINION 35, 38 (Jan 1994) ("This opinion [*Georgetown*] is poorly reasoned, and it is unfortunate that it is often cited approvingly today."); Joelyn Knopf Levy, "Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of All Pregnant Women," 27 Journal of Law, Medicine & Ethics 171, 179-180 (Summer 1999) (Calling *Georgetown* "outmoded legal reasoning" and saying "legal scholars generally agree that the case has virtually no precedential value .... [citing four reasons]".).

There are two defenses for Judge Wright. First, this is an early case, from a time when there was no published case with similar facts, so Judge Wright had to think from first principles, instead of apply precedent. Second, Judge Wright made a decision on humanitarian grounds to let the mother of a 7-month girl live. But it is still an erroneous legal decision. Worse, because Judge Wright's opinion appears to come from a prestigious appellate court (instead of being a single judge on an 80-minute frolic), it had a strong influence on other judges.

Several commentators[22] have criticized Judge Wright for claiming he acted to preserve the "status quo ante", when he actually decided the case. I think this is an unfair criticism of Judge Wright, because *any* decision by Wright would "decide the case", given the nature of this emergency. Judge Wright plainly had *only two possible choices:*

1. **Order the transfusion.** Then the patient could appeal, which is what happened.
2. **Refuse to order the transfusion**, then the patient probably dies, but the hospital might appeal to clarify the law.

Note that the case is *not* moot either way, under the doctrine of "capable of repetition, yet evading review". *Roe v. Wade,* 410 U.S. 113, 125 (1973) (quoting *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911)). See also *Conroy,* 486 A.2d 1209, 1219 (N.J. 1985) (death of patient does not moot case); *In re A.C.,* 573 A.2d 1235, 1242 (D.C. 1990); *Norwood Hospital v. Munoz,* 564 N.E.2d 1017, 1020 (Mass. 1991) (nonconsensual blood transfusion); *Dubreuil,* 629 So.2d 819, 822 (Fla. 1993) (nonconsensual blood transfusion); *Stamford Hospital v. Vega,* 674 A.2d 821, 826-827 (Conn. 1996) (nonconsensual blood transfusion); *In re Duran,* 769 A.2d 497, 502, ¶10 (Pa.Super. 2001) (nonconsensual blood transfusion).

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[22] See, e.g., *Georgetown,* 331 F.2d 1010, 1014 (D.C.Cir. 1964) (Miller, J., dissenting from denial of en banc rehearing) ("... the orders completely changed the status quo ante by granting fully and finally all of the relief sought, thus disposing of the matter on its merits."); Anonymous, Case Comment, 113 UNIV. PENNSYLVANIA LAW REVIEW 290, 291, n.3 (Dec 1964); Curran, Hall, and Kaye, HEALTH CARE LAW, FORENSIC SCIENCE, AND PUBLIC POLICY, at p. 933 (4thed. 1990).

B. criticism of *Heston*

The facts of the *Heston* case are simple. Delores Heston was a 22 y old unmarried woman who was severely injured in an automobile accident. She had a ruptured spleen that required an operation with blood transfusions to repair. Because she was a Jehovah's Witness, both she and her mother refused to consent to the blood transfusion. At 01:30, the Hospital's lawyer contacted a judge, who appointed a guardian to consent to the blood transfusion. The operation was successful and Heston was discharged from the Hospital. Heston then sued to vacate the order. The trial court declined to vacate the order and Heston appealed. The New Jersey Supreme Court heard the appeal directly. *John F. Kennedy Memorial Hospital v. Heston,* 279 A.2d 670 (N.J. 1971).

The unanimous opinion of the New Jersey Supreme Court affirmed the order for blood transfusions. This is a strange opinion, in that it is terse, perfunctory, and full of irrelevant material. The published opinion has a length of only 4 pages in the ATLANTIC reporter, compared with 22 pages for *Quinlan,* 355 A.2d 647 (N.J. 1976).

In stating the so-called facts, the court mentions Heston "was in shock" on arrival at the hospital and "soon became disoriented and incoherent." *Heston,* 279 A.2d at 671. This could support a finding that she was incompetent, but the opinion does *not* that say that. *Not* mentioned by the court was that Heston had carried a card in her wallet for six years that explicitly stated her refusal of blood transfusions.[23]

The opinion says *nothing* about either autonomy, self-determination, or freedom from nonconsensual medical treatment. Note that Heston's refusal of a transfusion in no way threatens public health or safety.

The opinion has one paragraph about religious freedom, but that paragraph is irrelevant to the facts of this case in that the opinion mentions cases involving children (which are distinguishable from adults), snake handling in religious rituals, fluoridation of drinking water, and prohibiting polygamy. This treatment of religious freedom is embarrassingly *in*adequate.

Heston suffers from the same error as *Georgetown:* without recognizing either the patient's autonomy or the patient's religious freedom, there is no legal right of the patient to balance against the state interest(s). Instead of using the proper balancing test that requires finding a "compelling state interest" (see page 14, above), the New Jersey Supreme Court used the wrong test.

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[23] James F. Hoover, Note, "An Adult's Right to Resist Blood Transfusions: A View Through *John F. Kennedy Memorial Hospital v. Heston,* 47 NOTRE DAME LAWYER 571, 587 (Feb 1972).

Most of the substance of the opinion concerns the state interest in preventing suicide. The court observes correctly that "there is no constitutional right to choose to die." *Heston,* 279 A.2d at 672. But Heston did *not* want to die.[24] She only refused a blood transfusion for religious reasons. If she had died for lack of blood, that would have been an outcome unintended by Heston. Nonetheless, the court included three irrelevant paragraphs about suicide, which I quote here to show the poor quality of this judicial opinion.

> Complicating the subject of suicide is the difficulty of knowing whether a decision to die is firmly held. Psychiatrists may find that beneath it all a person bent on self-destruction is hoping to be rescued, and most who are rescued do not repeat the attempt, at least not at once. Then, too, there is the question whether in any event the person was and continues to be competent (a difficult concept in this area) to choose to die. And of course there is no opportunity for a trial of these questions in advance of intervention by the State or a citizen.
>
> Appellant suggests there is a difference between passively submitting to death and actively seeking it. The distinction may be merely verbal, as it would be if an adult sought death by starvation instead of a drug. If the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other. It is arguably different when an individual, overtaken by illness, decides to let it run a fatal course. But unless the medical option itself is laden with the risk of death or of serious infirmity, the State's interest in sustaining life in such circumstances is hardly distinguishable from its interest in the case of suicide.
>
> Here we are not dealing with deadly options. The risk of death or permanent injury because of a transfusion is not a serious factor. Indeed, Miss Heston did not resist a transfusion on that basis. Nor did she wish to die. She wanted to live, but her faith demanded that she refuse blood even at the price of her life. The question is not whether the State could punish her for refusing a transfusion. It may be granted that it would serve no State interest to deal criminally with one who resisted a transfusion on the basis of religious faith. The question is whether the State may authorize force to prevent death or may tolerate the use of force by others to that end. Indeed, the issue is not solely between the State and Miss Heston, for the controversy is also between Miss Heston and a hospital and staff who did not seek her out and upon whom the dictates of her faith will fall as a burden.

John F. Kennedy Memorial Hospital v. Heston, 279 A.2d 670, 672-673 (N.J. 1971).

The first paragraph quoted above mentions "a person bent on self-destruction", which is irrelevant to the facts of this case. Heston was injured in an automobile accident, *not* a suicide attempt. The second paragraph erroneously calls a "merely verbal" distinction between "passively submitting to death" and "actively seeking" death. "Passively submitting to death" was — and is — legal, but "actively seeking" death (e.g., physician-assisted suicide) was illegal in the USA at the time of this case. The third paragraph compares the nonexistent risk of a transfusion with the serious risk of her death without the transfusion, a comparison that is irrelevant in the law of informed consent. A nonconsensual blood transfusion is not more welcome to a Jehovah's Witness because there is no medical risk.

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[24] The court admits this when it says: "Nor did she wish to die." *Heston,* 279 A.2d at 673.

Nine years later, the part of *Heston* that holds that refusing a lifesaving transfusion is equivalent to suicide was overruled in *Conroy:*

> In any event, declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury. See *Satz v. Perlmutter,* supra, 362 So.2d at 162; *Saikewicz,* supra, 373 Mass. at 743 n. 11, 370 N.E.2d at 426 n. 11; *Colyer,* supra, 99 Wash.2d at 121, 660 P.2d at 743; see also President's Commission Report, supra, at 38 (summarizing case law on the subject). **....** In addition, people who refuse life-sustaining medical treatment may not harbor a specific intent to die, *Saikewicz,* supra, 373 Mass. at 743, n. 11, 370 N.E.2d at 426 n. 11; rather, they may fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs, and without protracted suffering, see *Satz v. Perlmutter,* supra, 362 So.2d at 162–63 ("The testimony of Mr. Perlmutter * * * is that he really wants to live, but [to] do so, God and Mother Nature willing, under his own power.").
>
> Recognizing the right of a terminally ill person to reject medical treatment respects that person's intent, not to die, but to suspend medical intervention at a point consonant with the "individual's view respecting a personally preferred manner of concluding life." Note, "The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State," 51 N.Y.U.L.REV. 285, 310 (1976). The difference is between self-infliction or self-destruction and self-determination. See Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 FORDHAM L.REV. 1, 16–23 (1975). **To the extent that our decision in *John F. Kennedy Memorial Hosp. v. Heston,* 58 N.J. 576, 581–82 , 279 A.2d 670 (1971), implies the contrary, we now overrule it.**[25]

Matter of Conroy, 486 A.2d 1209, 1224 (N.J. 1985). Note also that elsewhere on this page in *Conroy,* the New Jersey Supreme Court essentially destroyed "prevention of suicide" as a state interest, as explained on page 27, above.

The opinion then has two paragraphs about the role of physicians and nurses to repair injured patients, which is consistent with the state interest in preserving life. Again, this completely ignores that the treatment is *non*consensual and in violation of Heston's religious freedom.

Finally, the court spends three paragraphs discussing similar reported cases, and concludes "we find that the interest of the hospital and its staff, as well as the State's interest in life, warranted the transfusion of blood under the circumstances of this case." *Heston,* 279 A.2d at 674.

A commentator noted that "*Heston* apparently found a 'compelling state interest' in sustaining life for its own sake as a cog in the state machine."[26] In my view, the real function of the "state interests" in *Heston* was to justify violating her autonomy and justify violating her religious freedom.

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[25] Boldface added by Standler.

[26] James F. Hoover, Note, "An Adult's Right to Resist Blood Transfusions: A View Through *John F. Kennedy Memorial Hospital v. Heston,* 47 NOTRE DAME LAWYER 571, 580 (Feb 1972).

C. mother ordered to have transfusion

While I am an advocate for privacy rights, for many years I was ambivalent about these cases in which a mother of minor children is ordered to have a transfusion to save her life. In writing this essay, I came to the conclusion that a mentally competent adult *should* have an absolute legal right to refuse medical treatment for *any* reason.

1. religious freedom

First, there is generally a serious freedom of religion issue in these cases. This issue is *not* discussed in the judicial opinions because (a) these are emergency cases involving a dying patient, in which the judicial order is often issued the same day as the application, and (b) the dying patients is generally *not* represented by an attorney, so there is no one to do legal research and write a thoughtful brief. When a thoughtful analysis is made, free exercise of religion — guaranteed by the First Amendment — alone justifies allowing Jehovah's Witnesses to refuse blood transfusions. See, e.g., *In re Brooks' Estate,* 205 N.E.2d 435, 438-443 (Ill. 1965); *In re Brown,* 478 So.2d 1033, 1036-1039 (Miss. 1985). New York has ignored constitutional issues of religious freedom, because there was a clear common-law right to refuse medical treatment.[27]

2. caring for children

Second, caring for minor children is an important responsibility. The majority of people in the USA see blood transfusions as minimally invasive medical care. It *may* be that preserving the life of the parent of a minor child outweighs the temporary violation of that parent's autonomy. For judicial discussions of these difficult and conflicting issues, see *Fosmire v. Nicoleau,* 551 N.E.2d 77, 83-84 (N.Y. 1990) (rejecting argument that probable death of mother of baby would justify state to order lifesaving transfusion for mother, noting existence of father was adequate protection for baby); *Norwood Hosp. v. Munoz,* 564 N.E.2d 1017, 1024 (Mass. 1991) ("... the New York Court of Appeals apparently has held that the State's interest in protecting minor children will never be allowed to override the right of a competent individual to refuse medical treatment. The court explained that 'at common law the patient's right to decide the course of his or her own medical treatment was not conditioned on the patient['s] being without minor children or dependents.' *Fosmire,* 551 N.E.2d at 83."); *Matter of Dubreuil,* 629 So.2d 819, 824-828 (Fla. 1993) (existence of father prevented abandonment of four children), see also *Public Health Trust of Dade County v. Wons,* 541 So.2d 96, 97-98 (Fla. 1989).

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[27] *Fosmire v. Nicoleau,* 551 N.E.2d 77, 80 (N.Y. 1990) ("The question as to whether this order violates the patient's constitutional rights to religious freedom or to determine the course of her own medical treatment raises important and sensitive issues. However, they need not be resolved here because in our view the patient had a personal common-law and statutory right to decline the transfusions.").

3. mischaracterize belief of Jehovah's Witnesses

Third, if a court orders a blood transfusion for a patient who is a Jehovah's Witness, then — according to some judges — the responsibility for the transfusion is on the court, *not* the patient. See, e.g.,

- *Application of President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (D.C.Cir. 1964) (At 1007: "[Husband] advised me that, on religious grounds, he would not approve a blood transfusion for his wife. He said, however, that if the court ordered the transfusion, the responsibility was not his." Judge Wright then spoke to Wife, who had a bleeding stomach ulcer: "I asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility." At 1009: "... her religion merely prevented her consent to a transfusion. If the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious beliefs.");

- *U.S. v. George,* 239 F.Supp. 752, 753 (D.Conn. 1965) ("When the [Judge] introduced himself, [Patient]'s first remarks were that he would not agree to be transfused but would in no way resist a court order permitting it, because it would be the Court's will and not his own. His 'conscience was clear', and the responsibility for the act was 'upon the Court's conscience.' ");

- *Powell v. Columbia Presbyterian Medical Center,* 267 N.Y.S.2d 450 , 451 (Sup. 1965) ("She did not object to receiving the treatment involved [blood transfusion] — she would not, however, direct its use.");

- *In Interest of E.G.,* 515 N.E.2d 286, 289 (Ill.App. 1987) ("... the State focused on testimony by appellant and other members of her faith which indicated that her church would view court-imposed transfusions as the court's transgression, not her own, and would support rather than punish her."), *aff'd in part,* 549 N.E.2d 322 (Ill. 1989);

- *Application of Long Island Jewish Medical Center,* 557 N.Y.S.2d 239, 242 (Sup. 1990) ("However, [Patient] stated several times, that if the Court ordered the transfusion, it would not be his responsibility or sin.").

According to the Jehovah's Witness religion cited by these judges, judicial compulsion prevents the patient from being damned by the transfusion. Nevertheless, the court is imposing a treatment on the patient that the patient refused, and the transfusion distresses the patient.[28] A professor of religion, who is also an attorney, has said that these judges not only *mis*characterized the religion of Jehovah's Witnesses, but also disrespected the religious views of Jehovah's Witnesses and "committ[ed] a terrible assault against the dignity and autonomy of some patients."
Dena S. Davis, "Does No Mean Yes? ...," 19 SECOND OPINION 35 (Jan 1994).

I think the state *should* respect the sincere religious belief of patients who refuse medical treatment for religious reasons.[29] The above list of "no" means "yes" cases indicates to me that many judges do *not* take seriously the Jehovah's Witness belief that prohibits blood transfusions.

4. deference to physicians

Fourth, judges sometimes explain that when a person goes to a hospital that person is obligated to accept the treatment recommended by physicians or surgeons. That is a bogus argument! The patient does *not* surrender her right of autonomy, and her right to informed consent to medical treatment, by going to a hospital.[30] A patient can withdraw her consent to medical treatment at any time.[31]

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[28] *In re E.G.,* 549 N.E.2d 322, 324 (Ill. 1989) ("[Patient] further stated that when informed that she would undergo transfusions, she asked to be sedated prior to the administration of the blood. She testified that the court's decision upset her, and said: '[I]t seems as if everything that I wanted or believe in was just being disregarded.' "); *Clark v. Perry,* 442 S.E.2d 57, 60 (N.C.App. 1994) (Jehovah's Witness "upset and distraught about having been given a blood transfusion".); *In re Brown,* 689 N.E.2d 397, 400 (Ill.App. 1997) ("... Darlene Brown tried to resist the transfusion and the doctors 'yelled at and forcibly restrained, overpowered and sedated' her.").

[29] See, e.g., Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," 26 RUTGERS L.REV. 228, 232, n.19 (1973).

[30] There is an exception in which an *un*conscious patient in a hospital emergency room is presumed to want the best available medical treatment, including blood transfusions.

[31] *Mack v. Mack,* 618 A.2d 744, 755 (Maryl. 1993) ("A corollary to the doctrine [of informed consent] is the patient's right, in general, to refuse treatment and to withdraw consent to treatment once begun."). Quoted with approval in *Stouffer v. Reid,* 993 A.2d 104, 109 (Maryl. 2010); *Schreiber v. Physicians Insurance Co. of Wisconsin,* 588 N.W.2d 26, 31, at ¶21 (Wis. 1999); *In re Fiori,* 673 A.2d 905, 910 (Pa. 1996).

Conclusion

Mentally competent adults generally have the right to refuse medical treatment. See the list of cases, beginning at page 33 above. The reason for this rule of law is a common-law informed consent to medical treatment, in addition to constitutional privacy law that forbids the government to intrude on personal decisions. See the discussion, beginning at page 3 above.

The common law contains four state interests that *might* justify a judge to order medical treatment for an adult. In practice, as noted by Prof. Annas in 1996 and confirmed by my legal research, appellate courts do *not* use these four state interests to order medical treatment. See page 31 above. I suggest abolishing the four state interests, as they are a way for trial court judges to create mischief and violate rights of citizens. Specifically, the state interest in "preventing suicide" should be abolished for the reasons given by the New Jersey Supreme Court in *Conroy,* 486 A.2d at 1224, discussed at page 27 above.

I include a list of cases, beginning at page 39 above, in which a judge ordered a mentally competent adult to submit to medical treatment (e.g., blood transfusion and/or surgery) against the wishes of the patient. I believe these cases were all erroneously decided. Beginning at page 42 above, I criticize the opinion of Judge Wright in *Application of President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (D.C.Cir. 1964), an early opinion that influenced many later judicial opinions, including being the original source of some of the four state interests. Beginning at page 49 above, I criticize the opinion of the New Jersey Supreme Court in *John F. Kennedy Memorial Hospital v. Heston,* 279 A.2d 670 (N.J. 1971). Beginning at page 52 above, I criticize the cases in which a mother is forced to have medical treatment because of her young children.

For more than 100 years the law in the USA has been clear that a mentally competent adult has the right to refuse medical treatment, even if the treatment could save his/her life, and even if other people believe the patient made a foolish[32] choice. But, since the 1960s, the reality is that judges have ordered blood transfusions to nonconsenting adults, mostly to Jehovah's Witnesses, who refuse transfusions on religious grounds. My reading of cases gives me the impression that judges do *not* take seriously the belief by Jehovah's Witnesses that forbids blood transfusion. Jehovah's Witnesses should lobby state legislatures for a statute that gives legal recognition to the card in their wallet that expresses refusal of blood transfusions. Of course, the statute should recognize *any* card that refuses specific medical treatment(s), or all medical treatment, on the basis of a sincere religious belief.

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[32] See the section on "No Paternalism", above, beginning at page 8.

There are also some cases in which a pregnant woman is ordered by a judge to undergo a cesarean section operation, against the woman's personal choice. Dr. Kolder has shown that such nonconsensual medical treatment falls mostly on impoverished women who are in racial minorities.[33] In correcting this scandalous misuse of judicial power, I hope we can also abolish the four state interests and make refusal of medical treatment an absolute right for all mentally competent adults.[34]

Articles

The authority for this essay is the case law cited above. However, the following articles provide different perspectives.

George J. Annas, et alia, "The Right to Refuse Treatment: A Model Act," 73 AMERICAN JOURNAL OF PUBLIC HEALTH 918 (August 1983).

George J. Annas and Joan E. Densberger, "Competence to Refuse Medical Treatment: Autonomy vs. Paternalism," 15 UNIV. TOLEDO LAW REVIEW 561 (Winter 1984).

George J. Annas, "The 'Right to Die' in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian," 34 DUQUESNE LAW REVIEW 875 (Summer 1996).

Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 FORDHAM LAW REVIEW 1 (Oct 1975).

Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," 26 RUTGERS L.REV. 228 (1973).
Prof. Cantor's article is truly a landmark in health law, and has been cited in 15 judicial opinions that shaped the law in right-to-die cases.

April L. Cherry, "The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment," 69 TENNESSEE LAW REVIEW 563 (Spring 2002).

John Alan Cohan, "Judicial Enforcement of Lifesaving Treatment for Unwilling Patients," 39 CREIGHTON LAW REVIEW 849 (June 2006).

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[33] Veronika E. Kolder, Janet Gallagher, Michael T. Parsons, "Court-Ordered Obstetrical Interventions," 316 NEW ENGLAND JOURNAL OF MEDICINE 1192, 1193 (7 May 1987).

[34] See the proposed statute in George J. Annas, et alia, "The Right to Refuse Treatment: A Model Act," 73 AMERICAN JOURNAL OF PUBLIC HEALTH 918 (August 1983).

Dena S. Davis, "Does 'No' Mean 'Yes'? The Continuing Problem of Jehovah's Witnesses and the Refusal of Blood Products," 19 SECOND OPINION 35 (Jan 1994).

Janet Gallagher, "Prenatal Invasions & Interventions: What's Wrong With Fetal Rights," 10 HARVARD WOMEN'S LAW JOURNAL 9 (Spring 1987).

Veronika E. Kolder, Janet Gallagher, Michael T. Parsons, "Court-Ordered Obstetrical Interventions," 316 NEW ENGLAND JOURNAL OF MEDICINE 1192 (7 May 1987).

Joelyn Knopf Levy, "Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of All Pregnant Women," 27 JOURNAL OF LAW, MEDICINE & ETHICS 171 (Summer 1999).

Lawrence J. Nelson, Brian P. Buggy, and Carol J. Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," 37 HASTINGS LAW JOURNAL 703 (May 1986).

John J. Paris, "Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?," 10 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 1 (Summer 1975).

Marcus L. Plante, "An Analysis of 'Informed Consent'," 36 FORDHAM LAW REVIEW 639 (May 1968).

Charity Scott, "Resisting the Temptation to Turn Medical Recommendations Into Judicial Orders: A Reconsideration of Court-Ordered Surgery for Pregnant Women," 10 GEORGIA STATE UNIV. LAW REVIEW 615 (May 1994).

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