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FACT FINDING FAITH

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Yes . . . [in] other words, it is between me and Jehovah; not the courts . . . I'm willing to take my chances . . . now get that straight¹

Death and dying are the second ethical concern fundamental to good health care Medicine must learn to manage people's dying Citing the "You won't die — not in *my* hospital, anyway" philosophy prevalent in some institutions, he pleaded that we must recognize and allow people to make decisions about death based on values important to them — not based on medicine's values.²

I INTRODUCTION AND SCOPE OF THE PROBLEM

That persons should be able to make decisions about death based on values important to them sounds like a self-evident truth. One hardly recognizes that it may not only be suggesting a "radical rearrangement"³ of our health care system but of the judicial analysis of issues involving death and dying as well.

The Jehovah's Witness cases which involve the issue of whether competent adults can refuse blood transfusions, which in most instances are viewed as a simple cure or a means of effectuating a cure, turn almost inevitably on a medical-value analytical paradigm rather than on a personal-value analytical paradigm.

The leading cases addressing the Jehovah's Witness' right to refuse blood transfusions span over twenty years.⁴ A range of complex legal, moral and public policy questions have arisen from the facts and procedures of these cases.⁵ Former Chief-Justice Burger (then circuit judge) dissenting in *In re*

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1. *In Re Osborne*, 294 A.2d 372, 374 (D.C. 1972).

2. *Catholic Health World*, Sept. 15, 1986, at 4, col. 1.

3. *Id.*

4. Moore, *Their Life is in the Blood: Jehovah's Witnesses, Blood Transfusions, and the Courts*, 10 N. KY. L. REV. 281 (1983).

5. Paris, *Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?*, 10 U.S.F. L. REV. 1, 12 (1975).

President and Directors of Georgetown College, Inc., questioned whether any "Judicially cognizable issue is presented when a legally competent adult refuses, on grounds of conscience, to consent to a medical treatment essential to preserve life."⁶ This question has not been examined by the courts with the same intensity that traditional criteria have been analyzed. The state's interests that have been used by the courts to justify the appointment of guardians to consent to blood transfusions for Jehovah's Witnesses have ranged from the state's interest in preserving life, to *parens patriae*, to preventing suicide.⁷ In addition, the right of doctors to practice medicine in accordance with their professional ethics, the right of the hospital to render care within the expectations of prevailing medical therapy, and the right of both to be free from fear of civil or criminal liability have prevailed⁸ to support judicial determinations ordering blood transfusions notwithstanding Witnesses' refusals based on personal religious belief.

Numerous commentators have analyzed and reanalyzed these criteria.⁹ The courts have been accused of "characteristic superficiality" in evaluating both society's interest in preserving life and the individual's right to exercise his religion.¹⁰ Judicial substantiation of the state's interest and the negative characterization of a patient's interest in order to facilitate a court's decision to order treatment has been called an "unnecessary and arbitrary exercise of the power of the state over the individual."¹¹ Courts have also been cited for using an inappropriate balancing test in weighing conflicting interests which threaten a limitation of the preferred right of freedom to exercise one's religious beliefs.¹²

In a well documented review of the judicial decisions in the Jehovah's Witness blood transfusion cases, not only were the legal and theoretical inconsistencies¹³ in the traditional criteria shown, but also shown were the

6. *In Re President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *reh'g denied*, 331 F.2d 1010, 1015 (D.C. Cir. 1964) (Burger, J., dissenting).

7. Moore, *supra* note 4, at 300.

8. *United States v. George*, 239 F. Supp. 752, 754 (D. Conn. 1965); *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 579, 279 A.2d 670, 673 (1971).

9. E.g., Paris, *supra* note 5; Note, *Compulsory Medical Treatment and Constitutional Guarantees: A Conflict?*, 33 U. PITT. L. REV. 628 (1972) [hereinafter *Constitutional Guarantees*]; Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293 (1966) [hereinafter *State's Interest Re-evaluated*].

10. Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386, 389 (1967).

11. *Constitutional Guarantees*, *supra* note 9, at 637.

12. E.g., Moore, *supra* note 4; Paris, *supra* note 5; *Constitutional Guarantees*, *supra* note 9; *State's Interest Re-evaluated*, *supra* note 9.

13. Paris, *supra* note 5, at 14-30.

lack of factual support for decisions based on the anti-suicide analysis¹⁴ and the fear of possible criminal charges.¹⁵ Thus it was concluded, that in view of the present constitutional hierarchy, all of the counterclaims of state interest — preserving the “status quo, police power, *parens patriae*, anti-suicide designs, doctor’s conscience, malpractice dangers, and informed consent — falter in the case[s] . . . of competent adult Jehovah’s Witness[es].”¹⁶ Recently, the judiciary has begun to subordinate the physician’s interest¹⁷ and to lessen the fear of malpractice suits arising from acquiescence to blood transfusion refusals.¹⁸ Though the importance of some of these traditional criteria seems to be changing, ultimately, the personal convictions of the judge will prevail:

Courts will probably continue to hold that a state’s interest in preserving life is more important than any constitutional right of the patient, even when weighed in an ad hoc balancing test. This will depend upon the philosophy of the individual court, as well as on the facts of the case.¹⁹

It appears that individual judicial philosophies and the selective use, interpretation and meaning ascribed to the facts of each case seem to be influenced excessively by the medical-value paradigm and insufficiently by a personal-value paradigm. More legislative action is necessary to provide guidelines in these cases.²⁰ Yet, any useful judicial or legislative guidelines in this area necessitate some articulation and clarification of the underlying values of the analytical paradigm that appear to control the way the legal issues are framed and analyzed by the courts. Equal attention must be given also to the human factors that ultimately control decisions made by people for and about people.

The apparent presumptive and unexamined weight given to the values of medicine and to the medical profession, as distinct from the individual’s values, are evidenced in the half century of cases that assume the ordinariness of a blood transfusion and its curative value, admit uncorroborated or unexamined medical testimony that gives controlling preference to the practice and profession of medicine.

The United States District Court for the District of Connecticut in *United*

14. *Id.* at 23.

15. *Id.* at 27.

16. *Id.* at 30-31.

17. *Randolph v. City of New York*, 117 A.D.2d 44, 48, 501 N.Y.S.2d 837, 841 (N.Y. App. Div. 1986).

18. *Randolph*, 117 A.D.2d at 47, 501 N.Y.S.2d at 840.

19. Moore, *supra* note 4, at 302.

20. See Moore, *Proxy Consent for Incompetent Non-Terminally Ill Adult Patients*, 6 J. LEGAL MED. 1 (1985).

States v. George, characterized the refusal of a blood transfusion as dictating to the "treating physician a course of treatment amounting to malpractice."²¹ The controlling weight given to the simplicity of a blood transfusion and medical treatment is clearly evidenced in *John F. Kennedy Memorial Hospital v. Heston*²² where it was found that blood transfusions were viewed as non-deadly options and presented no serious risk of death or permanent injury.

In stating that "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,"²³ the court clearly evidenced a preference for medicine which bypasses the personal values of the individual and focuses judicial inquiry primarily on the efficacy of medical procedures. Generally, the doctors' allegations are accepted, without corroboration, leading to the suggestion that a uniform standard of medical proof must be established.²⁴

Several courts²⁵ appear to suggest that crossing the threshold of the hospital door and submitting oneself to treatment raises the presumption that one forfeits his rights or, at the very least suggests that constitutionally preferred rights do not have equal weight against a physician's professional interest.²⁶ It has been held that a Jehovah's Witness' submission to treatment does not give him the authority to present hospitals and doctors with an impossible choice.²⁷ Such positions, however, ignore the inviolable right of competent adults to make their own medical decisions,²⁸ the consensual nature of the physician-patient relationship and the legal and ethical right of autonomy.²⁹

The apparent bias toward the medical-value paradigm together with the minimization of the preferred constitutional right of the freedom of religion, provokes one commentator to argue energetically that the medical profes-

21. *United States v. George*, 239 F. Supp. 752, 754 (D. Conn. 1965).

22. *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 579, 279 A.2d 670, 673 (1971). This case predates the current knowledge of the risks of blood transfusions resulting from the questionable reliability of screening procedures for the AIDS virus.

23. *Id.*

24. *State's Interest Re-evaluated*, *supra* note 9, at 293, 304.

25. See *In Re President & Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), *reh'g denied*, 331 F.2d 1010, 1015 (D.C. Cir. 1964); *George*, 239 F. Supp. 752; *John F. Kennedy Memorial Hosp.*, 58 N.J. 576, 279 A.2d 670.

26. *Paris*, *supra* note 5, at 25-26; *Constitutional Guarantees*, *supra* note 9, at 634-37; *State's Interest Re-evaluated*, *supra* note 9, at 301.

27. *In Re President & Directors of Georgetown College*, 331 F.2d at 1009.

28. *State's Interest Re-evaluated*, *supra* note 9, at 293-94.

29. See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH; MAKING HEALTH CARE DECISIONS, THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 64, 64-66 (1982).

sion is not entitled to the uncontrolled discretion that it enjoys. He advocates that "instead of putting people under the control of physicians, the control of physicians should be under the thumbs of laymen."³⁰

The bias in favor of medical therapy and the medical profession's values ultimately challenges the credibility and legal quality of the basic judicial process of fairness in the right and opportunity to present testimony at a hearing and to have it weighed and balanced against some objective legal criteria. Given this medical-value bias, the judiciary jeopardizes the entire judicial process by equating the important social interest of doctors to practice with the constitutionally protected religious rights of patients. In so doing, as has been argued, they ultimately use the less stringent "rational basis" test instead of the "compelling interest" test required for limiting the exercise of a preferred right. The result is that a physician's popular understanding prevails over judicial determinations. A doctor's interest in the exercise of professional judgment and conscience reigns superior to the person's constitutionally preferred right of religious conscience.³¹

Criticisms concerning the use or results of a proper balancing test could be explained as the inevitable results of human perception and judgments. However, such criticisms as the absence of the perception of a fundamental fairness in being heard or of distorted legal reasoning and bias toward minority religious positions are less tolerable in our judicial system.³² This lack of fundamental openness is evidenced in the numerous *ex parte* hearings which are held without notice even to families who were present in the hospital³³ or who could have been contacted.³⁴ The minimization of the religious issue or its significance to the person is further evidence of this fundamental unfairness.

One court characterized the party's religious conviction as a scruple.³⁵ Another called such refusals "pestersome practices . . . [that] have clogged the dockets . . . for half a century," but also acknowledged the existence of "state sponsored insensitivity to their practice of articles of their faith."³⁶ They have also been termed peculiar religious indoctrinations over which

30. How, *Religion, Medicine and Law: The Blood Transfusion Cases, a Legal, Religious and Medical Issue*, 3 CAN. B.J. 365, 414 (1960).

31. Paris, *supra* note 5, at 25-27.

32. How, *supra* note 30, at 367, 370-74.

33. *In re Brooks*, 32 Ill. 2d 361, 363, 364, 205 N.E.2d 435, 437, 438 (1965).

34. *In re Dorone*, 502 A.2d 1271, 1280 (Pa. Super. Ct. 1985) (Beck, J., dissenting).

35. *In Re President & Directors of Georgetown College*, 331 F.2d 1000, 1009 (D.C. Cir.), *reh'g denied*, 331 F.2d 1010, 1015 (D.C. Cir. 1964).

36. *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985).

common sense will prevail in the pressure of imminent death.³⁷ These characterizations of religious convictions are insensitive on their face. Such minimizations are intolerable when evidence shows that even when they have previously experienced a family member's death attributable to a refusal of a transfusion, Jehovah's Witnesses continue to adhere to their beliefs.³⁸ The dismissal of the significance of this belief to a Jehovah's Witness is also evident in such conclusions as the following: "The doctrine forbidding transfusions does not appear to be a fundamental belief in the Jehovah's Witnesses religion. It is not a part of the religious ceremony, and its absence will not prevent continued practice of the religion."³⁹ Their explicit beliefs⁴⁰ and the fact that dis-fellowshipping⁴¹ (separation from the congregation which requires a reconciliation process for the individual to be reunited to the congregation) may also result from voluntarily receiving a blood transfusion negates such a conclusion. Finally, a forced blood transfusion has been analogized to the traumatic violence of rape.⁴²

Though it has often been argued that the Constitution protects personal beliefs, thoughts, emotions and sensations including the most unorthodox minorities,⁴³ judges decide cases not "solely by reference to law," but according to other factors hidden from view — values that are peculiarly the decision-maker's "own" values and not necessarily those he is directed to invoke."⁴⁴

II. PERSONAL VALUE DECISION-MAKING PARADIGM

A judicial analysis that commences with values important to the person may be able to promote the protection of preferred constitutional rights and respect the interests, dignity and freedom of all individuals concerned. A recent Pennsylvania Superior Court case involving a Jehovah's Witness, *In*

37. Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. U.L. REV. 212, 222 (1964).

38. *In Re Osborne*, 294 A.2d 372, 374 (D.C. 1972); *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1961).

39. Note, *supra* note 10, at 402.

40. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., INTERNATIONAL BIBLE STUDENTS ASSOCIATION, *JEHOVAH'S WITNESSES AND THE QUESTION OF BLOOD* (1977).

41. Telephone Interview with Larry M. Stogsdill, Elder, Minister of Jehovah's Witnesses (Dec. 8, 1986) [hereinafter Stogsdill Interview].

42. Paris, *supra* note 5, at 28 n.176; Stogsdill Interview, *supra* note 41.

43. *American Communications Ass'n. v. Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 448 (1928) (Brandeis, J., dissenting).

44. W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS, AN INTRODUCTION TO LAW AND LEGAL METHOD* 26 (1972).

Re Dorone,⁴⁵ though accepting a medical-value paradigm, provocatively states that before it could give probative value to a medical alert card allegedly carried by the Jehovah's Witness, it would need to make its own independent findings concerning the quality and intensity of the individual's faith in the face of death. This statement invites consideration of the possibilities of judicial inquiry of such a personal value as faith.

Factual Background

The Pennsylvania Superior Court ruled that the trial court's two orders, both issued at *ex parte* hearings on August 1 and 3, 1984, appointing a hospital administrator as temporary guardian to consent to blood transfusions for a Jehovah's Witness, were properly issued.⁴⁶ It is not clear whether the twenty-two year old unmarried Jehovah's Witness was conscious when he was taken to the first hospital immediately following his automobile accident on July 30, 1984. The opinion indicates that "[s]urgery was performed, but he lapsed into a coma and was transported by helicopter"⁴⁷ to appellee hospital.

The appellants were the Witness' parents. The young man had purportedly signed a medical alert card to the effect that for religious reasons he did not wish to be given a blood transfusion. Though this medical alert card was not admitted as evidence, the trial court was advised at the August 1 hearing that the patient had been carrying "some kind of card identifying him as a Jehovah's Witness and indicating something about a blood transfusion."⁴⁸ The testimony at the first hearing was limited to that of the treating physicians, the surgeon and the hospital administrator. The second hearing on August 3 included all the testimony presented at the August 1 hearing and in addition, included the testimony of an attorney who verbally entered his appearance by phone for the patient. During the extended colloquy which ensued between the court, the attorney and counsel for appellee, the appellant's attorney described his own medical alert card and the contents and statements contained thereon, in order to demonstrate the contents of the card which appellants' son allegedly possessed but did not have on his person when he was transported by helicopter to appellees hospital.⁴⁹

The appellants argued that they should have been appointed the temporary guardian of their son and that the orders authorizing transfusions infringed on their son's right to self-determination and his first amendment

45. *In Re Dorone*, 502 A.2d 1271, 1280 (Pa. Super. Ct. 1985) (Beck, J., dissenting).

46. *Id.* at 1279.

47. *Id.* at 1276.

48. *Id.* at 1277.

49. *Id.* at 1276, 1277.

right to freedom of religion.⁵⁰ They argued further that the evidence found in the patient's possession, specifically the medical alert card, and his standing as a Jehovah's Witness, should have warranted the naming of his parents as guardians and the application of the doctrine of substituted judgment.⁵¹ The court, however, framed the issue as follows: "[W]as the evidence that the patient would refuse a blood transfusion of such quality that the court should not have appointed a temporary guardian to consent to a transfusion being given?"⁵²

After addressing the procedural questions at issue, the superior court focused on the testimony of the doctors concerning the patient's condition that was received into evidence at the *ex parte* hearings. The court rejected the appellants' arguments for application of the doctrine of substituted judgment.⁵³ It relied on a previous District of Columbia Court of Appeals decision, *In re Osborne*,⁵⁴ which sustained forced blood transfusion. *Osborne* held that when an initial appraisal of a patient's personal desires and ability for rational choice cannot be determined judicially, it is "better to give weight to the known instinct for survival which can, in a critical situation, alter previously held convictions."⁵⁵ The *Dorone* court ended its analysis with an indication of the type of evidence and the standard of proof of the individual's faith that it would require in order to rule against a forced blood transfusion. Specifically addressing the value of the medical alert card the court concluded that it would require:

evidence on whether the patient had signed the card as an affirmation of faith and statement of unity with other members of his congregation, or whether he had really contemplated it as binding in a death threatening situation . . . and whether the patient's faith

50. *Id.* at 1273. The court did not discuss the infringement upon the first amendment right to any degree. In a footnote, the court indicated that the appellants did not have standing to raise their son's first amendment rights. The appellants had standing to argue whether they should have been appointed their son's temporary guardian. In order to address that question, the court needed to consider if their son's rights had been violated. The court's refusal to appoint the appellants as guardians violated no right of the appellants.

51. *Id.* at 1277. Substituted judgment is an attempt to execute a judgment decision as one believes the patient would decide if able to act for himself.

52. *Id.* at 1275.

53. The court's rejection was based on three reasons: (1) there were no Pennsylvania appellate decisions applying the doctrine of substituted judgment to allow refusal of medical treatment; (2) where the doctrine had been applied, it was typically to allow refusal of life preserving treatment on behalf of incompetent persons who were terminally ill; and (3) there were no cases that allow the doctrine to be used to refuse, in an emergency and against the treating physician's advice, the provision of life preserving treatment to a young adult. *Id.* at 1277.

54. *In Re Osborne*, 294 A.2d 372, 374 (D.C. 1972).

55. *Id.* at 374.

would not waver even in the face of death.⁵⁶

The bold assertion of an inquiry into "faith" elicits simultaneously contradictory reactions. Faith is religion and mystery, it is not within the proper scope of judicial inquiry; it is the precise object of constitutional protection. However, to label the inquiry as one of faith both identifies and prioritizes the personal values jeopardized in these cases. Certainly, the least that can be said is that the court's proposed inquiry by focusing on "faith" appears to give appropriate attention to preferred constitutional rights and to shift the decision-making paradigm from medical values to the individual's personal values.

The court's disjunctive inquiry of evidence on whether the patient's signature on the card is "an affirmation of faith and a statement of unity with other members of his congregation *or* whether he had really contemplated it as binding in a death threatening situation"⁵⁷ is curious. It would appear to suggest a presumption that needs to be overcome: namely, that conscious, communal or symbolic actions have no presumed real meaning or significance for the person in the situation contemplated by their action. The court's requirement of a certitude concerning the degree of firmness and finality and the unwaverability of the person's faith in the face of death, however, is expected.

These criteria present several interesting questions for advocates of a personal-value decision-making paradigm: Can faith be a subject of judicial fact finding? What type of evidence reveals the relationship between one's personal affirmation of faith and unity with a congregation and his firm, present intent in the face of death? What is the probative value of that evidence for a finding of fact concerning the intensity, firmness and finality of one's faith in the face of death? Can extrinsic evidence reach the standard of proof suggested by the court?

III. CAN FAITH BE THE SUBJECT OF JUDICIAL FACT FINDING?

"We Americans turn over more of our society's disputes, decisions and concerns to courts and lawyers than does any other nation."⁵⁸ Such an inclination has been attributed to popular perceptions of the judicial decision-making process as "quasi-scientific, objective and ultimately successful because of the technical expertise of judges and lawyers."⁵⁹ Even with our popular bias toward judicial conflict resolution, our perception of the quasi-

56. *In Re Dorone*, 502 A.2d at 1278-79.

57. *Id.* at 1278 (emphasis added).

58. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (D. Kairys ed. 1982).

59. *Id.*

scientific and objective nature of the judicial decision-making process may incline us to dismiss such an inquiry into faith as impossible or at least inappropriate in the judicial forum. In popular usage, faith usually is the "label" used for that phenomena which quasi-scientific reasoning, logic and expertise cannot explain.

Recent studies in the phenomena of the development of human faith cause one to pause and reconsider an initial resistance to the court's statement. It seems that the first criterion of the *Dorone* court's inquiry may be, or has been, the subject of judicial scrutiny. An initial resistance to fact finding faith came from a narrow definition of faith, variously defined as the "inner light of the soul, intermediate between the light of natural reason and the light of glory"⁶⁰ an illusion,⁶¹ or dynamic phenomena edged with mystery.⁶² However, faith is also a human way of seeing the world, and knowing and interpreting reality and experiences.⁶³ Despite its mysterious and illusive characteristics, faith has been studied as a developmental universal human phenomenon, so fundamental that none can live long without it⁶⁴ and more basic than credal identifications.⁶⁵ In fact, faith, which is fundamentally different from belief,⁶⁶ does not need to have any particular religious thematization. According to James W. Fowler, "the unthinking modern identification of faith with belief" is an Archie Bunker problem.⁶⁷

The non-doctrinal content of faith is that vision which enables one to find meaning in the world and in his own life. This meaning is the profound, ultimate and stable center of value which enables persons to face catastrophe and confusion unperturbed.⁶⁸ This universally human experience, differentiated from religious belief, but described as faith⁶⁹ and seen as the conviction, commitment or center of trust⁷⁰ which functions in a person's life to give him meaning, can obviously be the subject of judicial fact finding.

In the context of a Jehovah's Witness' renunciation of a blood transfusion, the definitional approach suggested here focuses the inquirer on the function of the person's belief in his life — not on its theological or logical content.

60. THE FAITH THAT DOES JUSTICE 10 (J. Haughey ed. 1977).

61. *Id.* at 49.

62. J. FOWLER, STAGES OF FAITH: THE PSYCHOLOGY OF HUMAN DEVELOPMENT AND THE QUEST FOR MEANING 1, 32-33 (1981).

63. *Id.* at 98.

64. *Id.* at xiii.

65. *Id.* at 5.

66. *Id.* See also THE FAITH THAT DOES JUSTICE, *supra* note 60, at 10-15.

67. J. FOWLER, *supra* note 62, at 33.

68. *Id.* at 11, 14.

69. *Id.* at 91-92 (concerning this use of the term "faith").

70. THE FAITH THAT DOES JUSTICE, *supra* note 60, at 13.

Judicial scrutiny would thus be directed toward external evidence concerning the person's convictions and commitment which shows the relationship of his lifestyle and choices to his statements and social relationships. Such inquiries would thus make the person the referent for determining the appropriateness of a given treatment and not the ease of administration or the advanced technology of the therapy. Since the court's inquiry is focused on the qualities of the individual and not the religious system⁷¹ there is no constitutional reason to avoid such an inquiry nor is it outside the competence of the judiciary. There is no inherent risk of trespassing into doctrinal matters by a judicial inquiry into the content of faith defined as those realities, values and commitments in which an individual finds meaning which are distinct from theologically substantive inquiries.⁷²

The generic definition of faith proposed here is consistent with the issues discussed in the 1983 report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.⁷³ That report, though not using the term faith, stresses the need to identify the person's "stable values," preferences and goals.⁷⁴ These have been identified above as the content of faith. This type of inquiry can be done in the emergency setting of most of the hearings in blood transfusion cases.

In *In Re Osborne*,⁷⁵ both the trial and the appellate court centered the evidentiary hearing on the personal values of the patient. Given the above broadened definition of faith, these inquiries could be characterized appropriately as evidence of faith. The appellate tribunal, praising the lower court's handling of the case, sought additional evidence on some issues doubtful in the trial court's record. Specifically, it sought evidence concerning the patient's desire to continue his present physical life. The court recognized that life's meaning is both a physical and spiritual reality.⁷⁶ With that recognition, it considered the scope and depth of the patient's beliefs concerning the relationship between a court ordered transfusion and his chances for "everlasting life."⁷⁷ Finally, the court sought evidence of the effect of the forced blood transfusion on the patient's religious self perception.

Given the span of three days between the first surgery and the two hear-

71. J. FOWLER, *supra* note 62, at 11.

72. *Id.* at 273.

73. See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH: DECIDING TO FORGO LIFE-SUSTAINING TREATMENT: A REPORT ON THE ETHICAL, MEDICAL, AND LEGAL ISSUES IN TREATMENT (1983) [hereinafter PRESIDENT'S COMMISSION].

74. *Id.* at 128-29.

75. *In Re Osborne*, 294 A.2d 372 (D.C. 1972).

76. *Id.* at 374.

77. *Id.*

ings in *In Re Dorone*, these inquiries seem to have been possible. That such inquiries were not made is possibly a result of the bias of the underlying paradigm of a medical-value analysis. It is also the result of the unconscious dismissal of the potentially significant relationship between the force of one's personal values consciously expressed in community and one's intent about life at the moment facing death. The court is right in requiring some evidentiary link between past acts and present intent. This is precisely what should be the primary subject of the fact finding process at the hearing. Some fact finding of faith may have been possible had evidence been introduced concerning the Witness' convictions and commitments. This inquiry necessitates a preference for testimony from family and community.

IV. AFFIRMATION OF CONGREGATIONAL RELATIONSHIP: DISJUNCTIVE OR CONJUNCTIVE EVIDENCE?

If one accepts the fact that the human experience of faith is a social and relational process,⁷⁸ he is sensitized to the disjunctive of the *Dorone* court formula. The *Dorone* formula is stated in the disjunctive, "an affirmation of faith and a statement of unity with other members of his congregation, or whether he had really contemplated it as binding in a death-threatening situation."⁷⁹ The court is correct in implying that a relationship with a congregation, however strong the evidence may reveal it to be, does not allow the conclusion that one's belief in the face of death is equally firm. However, the disjunctive may be too extreme. The disjunctive could easily have been a conjunctive. A conjunctive implies a potentially positive evidentiary relationship between one's deliberate, symbolic and communal acts and one's personal center of value, commitment, conviction and trust. This relationship is inconclusive, not exclusive or disjointed.

The relationship between one's living, consistent affirmations of faith and continuous congregational membership is interrelated with and indictative, though not conclusive, of the potential intensity or durability of one's faith affirmations in the face of death. "Faith is a relational enterprise, triadic or conventional in shape Our commitments and trusts shape our identities. They determine (and are determined by) the communities we join."⁸⁰ James Fowler indicates that the very structuring activity that is faith involves both the describable operations of a person's knowing and valuing and the powers of the symbols, beliefs and practices of the faith community

78. J. FOWLER, *supra* note 62, at 18.

79. *In Re Dorone*, 502 A.2d at 1271, 1280 (Pa. Super. Ct. 1985) (Beck, J., dissenting).

80. J. FOWLER, *supra* note 62, at 18.

of which that person is a part.⁸¹

A determination concerning the potential probative value of one's affirmation of faith and congregational membership necessitates testimony from the family and from the persons who comprise the Witness' community. If the paradigm of personal-values decision-making and the faith inquiry is to be integral, this evidence must be received and weighed. The identification of competent witnesses and the weight and credibility to be given the testimony is determined by the court as in any other evidentiary hearing.

In an article entitled *Limits of Guardian Treatment Refusal: A Reasonable Standard*, Robert Veatch argues for special deference to be given to "bonded" guardians.⁸² Though he argues that bonded guardians (family and associates) best know the patient's beliefs and values,⁸³ he also recognizes that often the guardian only has evidence of general values and beliefs and cautions that the guardian's own biases may be confused for that of the patient.⁸⁴ He buttresses the argument for bonded guardians on the inherent rights of the family and its legal importance as a primary associational unit whose integrity the state should not injure.⁸⁵ By analogy, this ethical reasoning appears to be consistent with the relational realities of faith as generically described by Fowler. Therefore, the testimony of bonded persons should be preferred in a personal-value based decision-making paradigm.

The *Dorone* court simply excluded any testimony of the parents from consideration because of its unarticulated bias, not because the court reasonably concluded on evidence before it that the parties failed to meet their burden of proof or that they convinced the court that they could not differentiate their subjective values from those of the patient. The recognition of the relatedness of the community and of the relevance of its information to the determination of the possibility or the probability of the requisite firmness and unwaverability of the Jehovah's Witness' present conviction and commitment would reduce the use of *ex parte* hearings and therefore reduce claims of fundamental unfairness.⁸⁶

V. THE STANDARD OF PROOF FOR FINDING THE FACT OF FIRM FAITH

The obvious problem, especially in the case of a suddenly comatose or

81. *Id.* at 273.

82. Veatch, *Limits of Guardian Treatment Refusal: A Reasonableness Standard*, 9 AM. J. L. & MED. 427 (1984).

83. *Id.* at 447.

84. *Id.* at 440.

85. *Id.* at 446-47.

86. How, *supra* note 30.

impaired young patient, is the probative value and weight to be given the evidence of the bonded witnesses and of the previous acts and general statements of the Jehovah's Witness. But these judgments are precisely what courts are called upon to make in any fact finding process.

In a personal-value analytical paradigm, it is less likely that the results in Jehovah's Witness cases will be a matter of the arbitrariness of the judiciary, or its hidden values. The result will be related to the success of the proponents in meeting an appropriate burden of proof. If that burden is not met, then judicial reliance on the assumed universal instinct for survival is ethically and legally required.

The *Dorone* court suggests that the standard of proof to be applied to the finding of faith is that the Witness' faith be presently firm, final and unwavering in the face of death. This standard goes beyond a reasonable doubt burden and suggests one of certitude. The fact situations often found in the Jehovah's Witness cases—youthful, healthy persons, in a non-terminal illness, suddenly and temporarily incompetent but with a prognosis of certain or near certain recovery with a blood transfusion—compel such a standard.

The analysis thus far applauds a focus on the ultimate personal value—faith. It suggests that judicial inquiries can provide evidence of faith and, further, that such an inquiry necessitates evidence from one's bonded community. Yet, recognition of the full realities of faith as mystery and as internal to the person do suggest that third parties may not be able to meet the evidentiary burden necessitated by the fact situation in determining the force of one's convictions in the unexpected crisis of an ultimate, irreversible choice. As cognizance is taken of the human universal of faith in individual lives, equal cognizance should be given to mystery which may make finding the certitude of faith ultimately beyond judicial resolution.

The judicial standard of proof—certitude—is linked to the implicit requirement for a conscious, mature level of conviction. In the context of this degree of certitude required by courts, a disjunctive statement is more understandable, even if it remains too extreme. Perhaps the judicial disjunctive is but an implicit recognition that an individual's maturation in faith is developmental. Faith's developmental stages have been linked to the natural evolution of one's life experiences that are associated usually with chronological aging.⁸⁷

While identification of general norms concerning the individual stages and social dimensions of human faith is possible,⁸⁸ it is one's specific life experiences and crises that force a specific examination and evaluation of previ-

87. See generally J. FOWLER, *supra* note 62.

88. *Id.* at 114.

ously tacit and unexamined values.⁸⁹ Through these experiences, one either reaffirms formerly tacit values or reshapes and perhaps discards them.⁹⁰ This transition from tacit or generally accepted rules to conscious, personally assumed convictions and commitment requires time, experience and challenge.⁹¹ A judicial acceptance of the disjunctive impliedly requires evidence of this transition. Regrettably, however, only after a particular crisis experience and reflection thereon, can one know the junction of a given belief in his life; for it is truly an internal faith experience.

It is obvious that the significance of a faith experience may not be totally discernable to third parties. For a competent person as in *In Re Osborne*, the person spoke for himself and insisted that he was willing to "take his chances."⁹² For an incompetent young person, such as in *In Re Dorone*, testimony may be available from family and friends concerning past expressions of one's convictions, beliefs, and actions evidencing the necessary level of human faith development required for judicial action. Even if some testimony is available, however, there is still a potential evidentiary problem.

This evidentiary problem regarding the standard of proof is inherent in the complex nature of faith which is multi-dimensional and has been analogized to a multi-sided cube which:

[f]rom any one angle of vision, . . . the observer can see and describe at least three sides of the cube. But the cube has back-sides, a bottom and insides as well. Several angles of vision have to be coordinated simultaneously to do any real justice in a characterization of faith. . . . Unlike some other topics on which we might do research and reflect, we cannot easily externalize faith and make it the detached object of our inquiry . . . faith, as a mystery, is perplexing because we are *internal* to it.⁹³

In addition to the internal and cubical nature of faith where an observation of one dimension may change or be inconsistent with an observation of another dimension, it must also be recognized that it is possible that "faith at times can co-exist with actions that are inconsistent with itself."⁹⁴ Faith is not subject to a simple "show and tell" or a mathematical formula. This reality is further complicated by the inherent difficulties in simple communication. Giving present specific meaning to past actions is always a complicated process, requiring human judgment concerning meaning and intent.

89. *Id.* at 7.

90. *Id.* at 31, 100.

91. *Id.* at 114.

92. *In Re Osborne*, 294 A.2d 372 (D.C. 1972).

93. J. FOWLER, *supra* note 62, at 32 (emphasis added).

94. THE FAITH THAT DOES JUSTICE, *supra* note 60, at 39.

Even explicit communication of a person in a life threatening situation involves subtle interpretations by the observer of the real meaning of another's statements.⁹⁵

While the experience of faith in the broad sense as described may be universal and even subject to generalization about its developmental stages, the precise function of it in a specific person facing death may be something that third parties cannot testify to with the degree of certainty required for judicial actions allowing refusals of transfusions which will result in imminent death. While it may generally be possible to describe stages of human faith development, ultimately religious faith, which is the final issue in Jehovah's Witness cases, is God's business.

What has been described so far is only the human side of faith. The full experience of faith involves a relationship with the transcendent other. One writer admits that the matured experience of faith is not confined by self-designed models, but lies in the "radical freedom of God" which is the "central and indispensable testimony" of faith.⁹⁶

The source of conflicting reaction to the *Dorone* court's statement of inquiry into faith rests in the standard of proof it necessarily requires, not in the inquiry itself. It appears that because faith is ultimately a mysterious relationship with the transcendent, it will be very difficult to reach the legitimate standard of certitude required, especially by hearsay evidence. Given this problem of evidentiary proof, even with a judicial analysis rooted in a personal-value paradigm, the judicial result may be the same: namely, that a court impels a blood transfusion. The articulated justification may be the same — the state's interest in preserving life and our human knowledge of the force of our human instinct for survival. However, the personal-value paradigm as the reasoning process supporting such a result is more respectful of persons, more reflective of the personal fact situations, and more protective of legal rights and the community's expectation of the judicial process.

VI. CONCLUSIONS

Few would argue that there is only one right answer to any judicial resolution of conflicting interests⁹⁷— especially when human beings must balance their perceptions of the facts and their understanding of legal and communal values. Few, if in a judge's position in these or similar cases, could arrive easily at a conclusion which could result in death, however perfect the con-

95. PRESIDENT'S COMMISSION, *supra* note 73, at 92.

96. J. FOWLER, *supra* note 62, at 302.

97. L. CARTER, REASON IN LAW 239-41 (1979).

stitutional analysis might be. For the community good and for the viability of the law as a way to resolve conflict in a pluralistic society, what are needed are fallible human judges who impose the human condition into judicial reasoning. What is important to the community is the quality of legal reasoning and its resonance with the facts and values of the community and the credibility between results and justification for results. A community needs to have confidence that its courts harmonize conflicting values fairly.⁹⁸ Those holding minority positions need to believe that they will have a fair hearing in court.

The constitutional analytical criticisms of the *ex parte* hearings, and the analogizing of the Jehovah's Witness' refusal for a blood transfusion to an attempted suicide or an abandonment of children are not intrinsically credible in view of the real facts of the parties' lives in *Dorone*. The characterization of a twenty-two year old married Jehovah's Witness "as a neglected minor" even when four hours before he lost consciousness he fully, competently and consciously refused a transfusion⁹⁹ is an unnecessary stress on the credibility of, and ultimately the durability of the judicial process. Results, even good results, should not be too distanced from the reasoning advanced for their justification. If this becomes the general practice, improper and unjust results will require no better judicial justification.

It appears that an analysis based on a personal-value paradigm lessens the credibility gap between the result and the reasoning in these cases. It seems close to human experience to conclude that one must compel a blood transfusion because we humans, however hard we tried, could not meet an evidentiary burden of proof reasonably related to what has been learned about our human experience of the developmental process of maturation in faith than to say a believer is scrupulous, a neglected child, or even suicidal. If the value is enough to force an individual to court, he has a fair chance to prove his case. Though the burden of proof is difficult, the real opportunity exists for it to be met. That we may not be able, however honest our judicial attempt, to reach a level of judicial certitude is a result of the mystery of life itself, not "arbitrariness" or "characteristic superficiality" or "state insensitivity." Judicial analysis starting from a person's values, particularly his value of faith, is the best effort that can be made to guarantee personal and constitutional freedoms. After all, angels can do no more.

98. *Id.* at 239.

99. *Holmes v. Silver Cross Hosp. of Joliet, Ill.*, 340 F. Supp. 125, 128 (N.D. Ill. 1972).

