should he allege specific acts of negligence he must prove them as such, thereby being prevented from relying upon the permissible inference allowable under res ipsa loquitur.

The element of control has undergone a great change from its early connotation of "being in the exclusive control of the defendant." Where the instrumentality is shown to have been partially in the control of the plaintiff or a third party, the advantage of res ipsa loquitur will still be allowed under certain circumstances.

E. RILEY CASEY

COMPULSORY MEDICAL TREATMENT—ANOTHER STEP IN THE STATE'S EXPANDING POWER OVER CHILDREN?

WITHIN the past few years almost every aspect of the problem of civil liberties has been the frequent subject of both lay and legal comment. One very limited aspect of the field, however, would appear to have been virtually overlooked. This is in the sensitive area of the conflicting interests of the state and of parents in assuring the proper care of children. Specifically, it is the power of the state, through its courts, to invade the field of parental authority and order medical treatment of a child over the objections of the child's parents. There have been only a few cases dealing with the problem, and because of their nature, they have only rarely reached the stage of appellate review. But they present an extremely interesting problem, and it is the object of this note to examine into the power of a state to take a child from its parents, order medical treatment for it over their objection and then, if the treatment is successful, return the child to the custody of the parents.

HISTORY

At common law the father's right to custody and control of his children was regarded as a sacred right with which the courts would not interfere unless the parent, by his immoral conduct, had become so unfit that he had forfeited his standing to claim the rights of a father toward the child.[1] Early in English legal history it was established that jurisdiction in such cases was in the Court of Chancery.[2] Just how such jurisdiction arose is not clear. The widely accepted theory is that it had its origin in the King's power as *parens patriae* and was delegated by the King to

[1] *In re* Agar-Ellis, 24 Ch. D. 317 (1883); *In re* Goldsworthy, 2 Q.B.D. 75 (1876).

[2] Eyre v. Shaftsbury (Countess of), 2 P. Wms. 103, 24 Eng. Rep. 659 (Ch. 1722).

Chancery.[3] Whatever its origin, however, it is clear that the jurisdiction existed at an early date.[4] Although it has been said, even fairly recently, that the court would not exercise its jurisdiction unless the child had property,[5] this was merely a requisite for the *exercising* of jurisdiction, and a mere allegation of property was sufficient for Chancery to make him a "ward of the court" and subject him to its control.[6]

In the United States, inherent power over the custody and control of infants also rests in the equity courts.[7] The origin of this jurisdiction here is also obscure, but at this late date it cannot be doubted that it does exist. Extensive legislative enactments in the field, however, have reduced the need for its exercise.

The legislative enactments which have reduced the need for the exercise of this jurisdiction have been of almost infinite variety. Almost all states have in common, however, at least two types of statutes in this field. The first of these is the imposition of criminal sanctions on parents who fail to provide care, support and maintenance for their minor children. While this type of statute is of only passing interest in the present discussion, it is important as showing an almost unanimous legislative purpose to insure proper care for infants. The second type of statute is the so-called "Juvenile Court Act." This is the act usually invoked in support of any judicial action of the type under discussion. Before discussing this latter in detail, however, it might be worthwhile to consider just briefly the first type of statute and its application. At least one aspect of its application throws considerable light on the power of the state in involuntary medical treatment of minor children.

CRIMINAL SANCTIONS

Nearly every state has a statute making it a crime (usually a misdemeanor) for a parent or guardian to neglect or refuse to furnish neces-

[3] See the statement of the Chancellor in *Eyre v. Shaftsbury (Countess of), supra,* n. 2. Pomeroy doubts that this theory is correct. 4 Pomeroy, *Equity Jurisprudence* § 1304, n. 14 (5th ed., Symons, 1941). By the Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, S. 16, jurisdiction over the custody of infants was extended to the common law courts, but by c. 66, S. 25 (10), the rules of equity were to prevail. See *Thomasset v. Thomasset,* L.R. [1894] P. 295; In re *Goldsworthy,* 2 Q.B.D. 75 (1876). The statutory provisions are now contained in the Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. V, c. 49, SS. 18, 44.

[4] Eyre v. Shaftsbury (Countess of), *supra,* n. 2; 4 Pomeroy, *op. cit. supra,* § 1304, n. 4.

[5] Cotton, L.J., in *In re* Agar-Ellis, *supra,* n. 1, at 332.

[6] See the statement of Lord Chancellor Eldon in *Wellesley v. Beaufort (The Duke of),* 2 Russ. 1, 21, 38 Eng. Rep. 236, 243 (Ch. 1827).

[7] Hine v. Morse, 218 U.S. 493, 505 (1910); Thomas v. Thomas, 250 Ill. 354, 363-364, 95 N.E. 345, 348 (1911); *In re* Bort, 25 Kan. 308, 37 Am. Rep. 255 (1881).

saries to his children. These statutes vary considerably in their wording. Some require the furnishing of "support and maintenance,"[8] while others are more specific, requiring, for example, "proper shelter, food, care and clothing."[9] Quite a number include specifically "medical attendance" or some similar phrase.[10] But even where the language is not specific the courts have generally construed the statutes to require the furnishing of reasonable medical attention to avoid the criminal sanctions.[11] While the criminal penalties imposed for failure to provide proper care for minor children are generally light, the statutory duty spelled out is clear. If, therefore, a child should die because its parent refused to give it needed medical attention, this statutory duty could provide the base upon which a prosecution for criminal homicide could be rested. Even without reference to such a statute, the courts of several states have upheld manslaughter convictions against parents who have failed to summon medical attention for a seriously ill child.[12] In such cases culpable negligence in failing to secure medical aid is all that is necessary to be proved.[13] It would seem, *a fortiori*, that where a statute exists conviction would be assured.[14]

The fact that the parent has not called a doctor because of religious convictions is no justification.[15] Neither is the lack of adequate funds if it is shown that medical attention could have been obtained free or from a charitable institution.[16] It would seem logical to assume that if a state can take such drastic punitive action when a child dies because of the parent's neglect to furnish needed medical care, it could take the one further step of direct action to protect the child by furnishing the needed medical aid before the happening of the unfortunate consequences.

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[8] This is probably the most common wording. It appears, for example, in the statutes of Alabama, Ala. Code 1940, Tit. 34, § 90; Kansas, Kan. Gen. Stat. 1949, § 21-442; Maine, Sec. 1 of Ch. 125, Rev. Stat. Maine 1944.

[9] *E.g.*, Michigan, Mich. Stat. Ann. § 28.358 (1951 Cum. Supp.).

[10] *E.g.*, Idaho, Idaho Code 1947, § 18-401 (2); Minnesota, M.S.A. 617.56; Montana, Section 94-301, Revised Codes of Montana 1947.

[11] *See* State v. Moran, 99 Conn. 115, 121 Atl. 277 (1923); People v. Booth, 390 Ill. 330, 61 N.E.2d 370 (1945).

[12] State v. Staples, 126 Minn. 396, 148 N.W. 283 (1914); Stehr v. State, 92 Neb. 755, 139 N.W. 676 (1913); State v. Barnes, 141 Tenn. 469, 212 S.W. 100 (1919). *Contra:* Bradley v. State, 79 Fla. 651, 84 So. 677 (1920).

[13] Commonwealth v. Breth, 44 Pa. Co. Ct. 56 (1915).

[14] See dissent, Bradley v. State, 79 Fla. 651, 84 So. 677 (1920).

[15] Commonwealth v. Hoffman, 29 Pa. Co. Ct. 65 (1903). *Cf.* State v. Chenoweth, 163 Ind. 94, 71 N.E. 197 (1904); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).

[16] Stehr v. State, 92 Neb. 755, 139 N.W. 676 (1913). *Contra:* State v. Noakes, 70 Vt. 247, 40 Atl. 249 (1897).

JUVENILE COURTS

By 1945, when Wyoming passed a juvenile court law, all the states had enacted statutes providing either for separate juvenile courts or for specialized jurisdiction in children's cases in existing courts.[17] Many of these followed the pattern of the original Juvenile Court Act enacted in Illinois in 1899, which gave circuit and county courts jurisdiction over dependent, neglected, and delinquent children,[18] while others have drawn upon the Standard Juvenile Court Act.[19] Although the various acts vary considerably in their terms, most of them have in common at least the following major provisions relating to the subject under discussion:

(1) The establishment of juvenile courts or juvenile divisions of existing courts;

(2) The describing of the children over whom the court may take jurisdiction in such terms as to make it clear that it is the children of unfit parents that the statute is aimed at;

(3) Authority for taking the child from the custody and control of the unfit parents and making it a "ward of the court";

(4) Authority for awarding custody and control, either permanently or temporarily, to a guardian, subject to the continuing order of the court.

It can be seen, therefore, that if the failure to provide medical or surgical aid is ground for declaring a parent "unfit" for custody and control of a child, then by the use of this statute, a juvenile court could readily deprive a parent of custody, appoint a temporary guardian, order the guardian to consent to medical or surgical treatment, and if all goes well, return the child to the custody of its parents when it recovers.

THE DECIDED CASES

Of the very few American cases decided in this field of conflicting parental and state authority the earliest is *Heinemann's Appeal.*[20] Although this case was decided prior to the time of the Juvenile Court Acts, it laid down several principles upon which all courts which have considered the problem could agree upon. There, an order of the Orphan's

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[17] National Conference on Prevention and Control of Juvenile Delinquency, *Report on Juvenile Court Administration,* p. 2 (U.S.G.P.O. 1947).

[18] Laws of 1899, p. 131, Smith-Hurd Ill. Ann. Stat., c. 23, § 190.

[19] National Probation Association, The Standard Juvenile Court Act, quoted in full in National Conference on Prevention and Control of Juvenile Delinquency, *Report on Juvenile Court Laws,* pp. 9-20 (U.S.G.P.O. 1947).

[20] 96 Pa. St. 112, 42 Am. Rep. 532 (1880).

Court depriving a father of the custody of his two children and appointing a guardian for them was challenged. The basis of this deprivation was that in the last illness of his wife and three oldest children he had refused to summon medical aid until they were beyond help. The order of the court took the surviving two children from the father. In upholding this order the court stated:[21]

> The general rule is, that the father is entitled to the custody of his infant children, that right growing out of his obligation to maintain and educate them. But this is not on account of any absolute right in the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. It is a mistake to suppose that the father has an absolute, vested right to the custody of the infant; [citation omitted]. When a court is asked to appoint a guardian of the person of a child, it will investigate the circumstances and act according to a sound discretion, the primary object being the good of the child.

In this case the court had as a guide a statute which provided for appointing guardians for children whose mother had died and who were neglected by their father. Further, there had been an actual neglect with the demonstrated effect of the death of the mother and the three oldest children. Actually, therefore, this case can be of little help to a court faced with an immediate decision in a case of an impending surgical operation which may seriously endanger the life of the child and the effect of which may be the subject of disputed expert medical testimony.

In New York in at least two cases in this field which have reached the stage of appellate review,[22] the Children's Court Act[23] has been applied. Under this Act, as in the acts of several other states,[24] medical care has been specifically included in the definition of a "neglected" child. The New York statute provides, *inter alia*, that a neglected child is one ". . . whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child. . . ."[25] It further provides that the court may, in its discretion, cause any child within its jurisdiction to be examined by a physician appointed by the court, and if the child appears to the court to be in need of medical or surgical care, it may make an order for the treat-

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21 96 Pa. St. 112, 114, 42 Am. Rep. 532, 532 (1880).

22 *In re* Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933); *In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Children's Ct., King's County 1941).

23 Crim. Code (Children's Court Act).

24 *E.g.*, Alabama, Ala. Code 1940, Tit. 13, § 350; Georgia, Georgia Code, Ann. Supp. § 24-2408 (4); Minnesota, M.S.A. 260.01; Ohio, Section 1639-3 General Code of Ohio.

25 Crim. Code (Children's Court Act § 2).

ment.[26] In the case of In re *Vasko*[27] the Appellate Division of the New York Supreme Court held this part of the Children's Court Act constitutional and then went on to find that the Children's Court had not abused its discretion in ordering the removal of a child's eye over the objection of its parents where the medical examination showed that it had a malignant growth which would probably cause the child's death unless surgery was performed. The only other reported case of a similar nature in New York is In re *Rotkowitz*.[28] In that case the Court ordered an operation to correct a deformity of a child's foot which had been brought on by poliomyelitis.

In each of these New York cases it would appear that the courts accepted the wording of the statute as a legislative determination of the State's authority as *parens patriae*. In the *Vasko* case there was a finding that the proposed operation was necessary to save the life of the child. In the *Rotkowitz* case, however, it was held that the operation was necessary in order that the child might have a "sense of security" and might not feel "different from others" or suffer a "sense of rejection."[29] In commenting on this aspect of the case the court said that:[30]

> . . . it was the intention of the legislature to give power to the Justices of this Court to order an operation not only in an instance where the life of the child is to be saved but also in instances where the health, the limb, the person or the future of the child is at stake.

This latter case goes considerably beyond the earlier pronouncement of the *Vasko* case.

In the State of Washington a similar statute is called the Juvenile Court Act. Unlike the statute of New York, however, it does not include specifically in its definition of a "dependent" child one whose parent neglects or refuses to provide medical or surgical care. The Act defines a dependent child as:[31]

> . . . any child under the age of eighteen years:
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> . . .
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> (7) Who is destitute; or
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> (8) Whose home by reason of neglect, cruelty or the depravity of its parents or either of them, or on the part of its guardian, or on the part of the person in

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[26] Crim. Code (Children's Court Act § 24).

[27] 238 App. Div. 128, 263 N.Y. Supp. 552 (1933).

[28] 175 Misc. 948, 25 N.Y.S.2d 624 (Children's Ct., King's County 1941).

[29] 25 N.Y.S.2d 624, 626 (Children's Ct., King's County 1941).

[30] 25 N.Y.S.2d 624, 627 (Children's Ct., King's County 1941).

[31] Rev. Code of Wash., § 13.04.010.

whose custody or care it may be, or for any other reason, is an unfit place for such child; or

. . .

(15) Whose father, mother, guardian or custodian is an habitual drunkard, or does not provide properly for the child, and it appears that such child is destitute of a suitable home or of adequate means of obtaining an honest living, or who is in danger of being brought up to lead an idle, dissolute or immoral life; or where such child is without proper means of support; . . .

This statute, in its definition, is fairly typical of the definitions of a dependent or neglected child in the statutes of those states where specific reference is not made to medical or surgical care.

In the case of In re *Hudson*,[32] Washington's Juvenile Court Act was construed by their Supreme Court as not giving the Juvenile Court the power to order surgical treatment endangering the life of a child over the objection of the child's parents. In this case a 12 year old girl's left arm was congenitally deformed so that it was almost as large as the trunk of her body. Expert medical testimony was to the effect that the arm was entirely useless and that the child would remain in a weakened condition until the arm was removed. Further, because of this weakened condition the child was easy prey for infection; her heart was overburdened by having to pump blood to this useless extremity; and her chest and spine were becoming deformed. The medical experts testified further that amputation was the only known treatment, and while there was some degree of risk involved, they recommended amputation. The child's father refused to make a decision. The mother refused to consent, saying she didn't want to take the responsibility; she preferred to wait until the child was old enough to make her own decision.

The Juvenile Court found that the parents were not unfit for the custody of the child in any respect except their refusal to submit to the operation. Without depriving the parents of their child's custody, the court entered an order for the amputation of the child's arm. The Supreme Court of Washington reversed this order reasoning that the right to the custody of a minor child is in the parents. This right cannot be taken away from them unless they show themselves to be unfit for such custody. They have the right to use their judgment as to what is best for the welfare and health of the child. Only when the parents have been adjudicated unfit can the court step in and appoint a guardian for the child.

Unfortunately, those who might be looking for a clear and definitive answer to our question from this case will have to search further, because this decision depends to a large extent on the procedural and mechanical

[32] 13 Wash. 2d 673, 126 P. 2d 765 (1942).

aspects of the case. The Juvenile Court had found expressly that because of the parents' refusal to consent to the operation, the child was "destitute" of a suitable home.[33] Further, it had also expressly found that *only* in respect to the failure to furnish adequate medical care were the parents neglectful of their parental duties. The Juvenile Court did not, therefore, deprive the parents of custody and appoint a guardian for the child. It merely entered an order for the amputation of the child's arm.[34]

Relying on the form of this order, the Supreme Court of Washington reasoned that:[35]

> . . . no court is vested with authority to deprive a parent, who is a fit person (the court expressly found appellant was a fit person) to have custody and control of his or her minor child, of custody and control of the child. When that right of custody and control is forfeited by neglect of parents to care for the child, guardianship of the child may be awarded to another, who thereby succeeds to all the rights of the natural guardian. . ."

It would appear, therefore, that had the juvenile court found that the failure of these parents to furnish needed medical care rendered them "unfit" under the law (it would seem to the writer that this finding was at least to be implied from the juvenile court's order), then it could have appointed a guardian to take *temporary*[36] custody and control of the child and order the operation. This order would apparently have been upheld by the Supreme Court of Washington. For, according to that court, only the two elements are necessary—(1) the finding of unfitness of the parents and the resulting "dependency" of the child, and (2) the appointment of a guardian to take custody and control.[37]

Three judges dissented from the views of the majority in the *Hudson* case. They reasoned that the formal step of ordering a change of custody was necessary only where custody was the major issue. In such an order as the one in this case, the change in temporary custody could be implied from the order for the operation.[38] The judges who dissented based their

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[33] *In re* Hudson, 13 Wash. 2d 673, 678, 126 P.2d 765, 769 (1942).

[34] *Ibid.*

[35] *In re* Hudson, *supra,* at 700, 126 P. 2d at 778.

[36] Rev. Code of Wash., § 13.04.100.

[37] At one point the court states: "Conceding, arguendo, that the court correctly found that the child is a dependent child, there has been no determination, as the statute requires, of the question of the custody and control of the child. Until legally deprived of custody and control of her child, the court may not override her objection to amputation of her child's arm. Until appellant, the child's natural and legal guardian, is deprived of the guardianship, custody and control of the child awarded to another, the child may not be subjected to a surgical operation without appellant's consent." In re *Hudson,* 13 Wash. 2d 673, 709, 126 P. 2d 765, 782 (1942).

[38] *In re* Hudson, 13 Wash. 2d 673, 732, 126 P. 2d 765, 791 (1942).

reasoning on the theory that a child is "destitute" if it lacks necessaries. Medical and surgical care are necessaries. The Hudson child was therefore "destitute," and the order of the juvenile court was correct.

A more recent case in Illinois, *People v. Labrenz*,[39] considered essentially the same problem free of the procedural matter which complicated the decision in the *Hudson* case. In this case there was presented the problem of an eight day old child with an Rh blood condition. Medical testimony was to the effect that unless an immediate and complete blood transfusion was given, the child would almost certainly die; and even if she lived, she would be mentally impaired for life. The parents refused to consent, basing their refusal on religious convictions. The trial court appointed its chief probation officer as the child's guardian and directed him to consent to the blood transfusion. The transfusion was administered, and when the child had recovered, the court discharged the guardian and released the child to her parents. Despite the fact that this action had rendered the case moot, the Supreme Court of Illinois allowed the writ of error and proceeded to consider the merits because of, *inter alia*, ". . . the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question."[40]

The definition of dependent and neglected children under the Illinois statute[41] is similar to that of the Washington statute. In its opinion, however, the Supreme Court of Illinois did answer in clear and unmistakable terms the substantive question which the Washington court would appear to have left unanswered. The Illinois court said:[42]

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[39] 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (Oct. 13, 1952).

[40] People v. Labrenz, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952).

[41] Smith-Hurd Ill. Ann. Stat. § 23-190 provides, "For the purpose of this Act, the words 'dependent child' and 'neglected child' shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, for any reason, is destitute . . . or has not proper parental care or guardianship . . . or has a home which by reason of neglect, cruelty or depravity, on the part of its parents, guardian or any other person in whose care it may be, is an unfit place for such a child. . . ." It is to be noted that Section 200 of the Illinois act (Smith-Hurd Ill. Ann. Stat. § 23-200) makes provision for the court to " . . . order the guardian to cause such child [one found dependent, neglected or delinquent] to be placed in a public hospital or institution for treatment or special care. . . ." It would appear from the wording of this latter section that it was meant to apply only to children previously adjudicated dependent or neglected and while under the care of a guardian came to need medical care. The fact that the court in the *Labrenz* case did not mention this particular section of the statute would seem to support this supposition.

[42] People v. Labrenz, 411 Ill. 618, 624, 104 N.E.2d 769, 773 (1952).

> The question here is whether a child whose parents refuse to permit a blood transfusion, when lack of a transfusion means that the child will almost certainly die or at best will be mentally impaired for life, is a neglected child. *In answering that question it is of no consequence that the parents have not failed in their duty in other respects.* We entertain no doubt that this child, whose parents were deliberately depriving it of life or subjecting it to permanent mental impairment, was a neglected child within the meaning of the statute. [Italics supplied.]

This opinion in the *Labrenz* case, however, is somewhat weakened by a light dismissal of the *Hudson* case and a similar Pennsylvania case, In re *Tuttendario,*[43] as "obviously not in point," on the theory that they dealt with operations involving "substantial risk of life."[44] It is submitted that even in this modern medical age it is an exaggeration to say that a wholesale blood transfusion in an eight day old infant is, as one of the medical experts testified in the *Labrenz* case, no more hazardous than "taking an aspirin."[45] At least it is not so much less hazardous than an operation to correct a deformity caused by rickets, as in the *Tuttendario* case, that it could be so lightly dismissed.

In re *Tuttendario*[46] remains as the only other reported case on the subject which needs discussion. In that case the refusal of the parents was to a proposed operation to straighten their child's legs, which had become deformed because of rickets. In refusing to order the operation over the objection of the parents the court stated:[47]

> We have not yet adopted as a public policy the Spartan rule that children belong, not to their parents, but to the state. . . .
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> . . .
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> The science of medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolutely correct . . . prognosis. There is always a residuum of the unknown, and it is this unknown residuum which scientists, by a necessary law for the development of science, disregard, but which parents, in their natural love for their children, regard with apprehension and terror. . . . The law of average . . . is of no benefit to the exceptional individual who succumbs. For him there is no longer a percentage of chances. His loss is total.
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> It is this contingency which every adult person weighs whenever a serious operation is to be performed, and no one has ever questioned his legal right to decide the question for himself. When, however, infants are concerned, the choice must be exercised by their guardians.

The statement of the Pennsylvania court that ". . . no one has ever

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[43] 21 Pa. Dist. R. 561 (1911).

[44] People v. Labrenz, 411 Ill. 618, 625, 104 N.E.2d 769, 773 (1952).

[45] 411 Ill. 618, 620, 104 N.E.2d 769, 771 (1952).

[46] See n. 43, *supra.*

[47] *Id.* at 563.

questioned his legal right to decide the question for himself . . ." while probably accurate when made in 1911, is today open to question in at least three fields. Two of these, compulsory vaccination and sterilization of the mentally defective, will be discussed later under the due process problem. The third is in the field of workmen's compensation. In this latter field it seems to be well-settled that the unreasonable refusal of an injured workman to submit to a surgical operation which competent medical testimony indicates will reduce the extent of the disability is ground for discontinuance of compensation.[48] The theory behind such a rule would appear to be that an injured workman owes a primary duty to society to make use of every available and reasonable means to make himself whole. Should he fail in this duty, then the employer is discharged from the secondary duty of compensation.[49] There is a fundamental difference, however, in terminating workmen's compensation for failure to undergo surgery and the direct action taken in forcing a person to undergo surgery over his objections. And even in this field the refusal will not be considered unreasonable and the compensation will not be terminated where the operation is attended with an appreciable danger to the life of the patient,[50] or extraordinary suffering,[51] or the medical testimony conflicts as to the probable beneficial effect of the operation.[52]

THE DUE PROCESS PROBLEM

Up to the present time none of the decisions involving compulsory medical treatment of infants over the parents' objections have reached the final arbiter on the question of due process of law under the 14th amendment of the United States Constitution.[53] Assuming that such a case could get to the Supreme Court without first becoming moot, what

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[48] Some states have specifically so provided in their workmen's compensation statutes. *E.g.*, Smith-Hurd Ill. Ann. Stat. § 48-156 (d); Purdon's Pa. Stat. Tit. 77, § 531. In other states such a result has been reached without a specific statutory provision. *E.g., Gentry v. Williams Bros., Inc.*, 135 Kan. 408, 10 P.2d 856 (1932); *Kricinovich v. American Car & Foundry Co.*, 192 Mich. 687, 159 N.W. 362 (1916).

[49] Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N.W. 362 (1916).

[50] Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938). At least one court has adopted the rule that an injured workman will not be forced to submit to a major operation if there is even the *slightest* risk of death. *K. Lee Williams Theatres v. Mickle*, 201 Okla. 279, 205 P.2d 513 (1949).

[51] Zant v. United States Fidelity & Guaranty Co., 40 Ga. App. 38, 148 S.E. 764 (1929).

[52] Beaulieu's Case, 24 Me. 83, 126 Atl. 367 (1924).

[53] A petition for certiorari was filed in the case of *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952) but certiorari was denied. *Labrenz v. People*, 344 U.S. 824 (Oct. 13, 1952).

would be the outcome in the light of the decision of the Supreme Court in related fields? A review of them would seem to indicate that a decision such as that in the *Labrenz* case would meet no constitutional objections.

Although it is well settled that a surgical operation may not be performed on a person until he consents thereto,[54] a nonconsented-to operation has been upheld by the Supreme Court as not depriving the patient of liberty without due process of law in at least two types of situations. The first, compulsory vaccination, was allowed under the Constitution in the case of *Jacobson v. Massachusetts*.[55] The second, the sterilization of a mental defective, was held not to be a denial of substantive due process in the celebrated case of *Buck v. Bell*.[56]

In each of these situations, however, the decision was rested on the police power of the state. In each of them the Supreme Court held that the *public* health or welfare would be served by the statutes put in question. In each case the Court held that a *public* good could be shown which would empower the state to subordinate the rights of the individuals involved to the purpose to be accomplished. Can it be said that a *public* good will flow from requiring a child to submit to a surgical operation over the objections of its parent? At least one recent decision of the Supreme Court would seem to indicate that that court would find such a public benefit. Further, the same case would seem to give the Supreme Court's answer to a case in which the objections were grounded on religious convictions. The case is *Prince v. Massachusetts*.[57]

In the *Prince* case the Supreme Court considered the conviction of a Jehovah's Witness for allowing her minor ward (niece) to "sell" religious tracts on the street. The statute under which appellant was convicted prohibited children under certain ages from selling newspapers, periodicals, or other articles of merchandise or exercising any trade in any street or public place, and imposed penalties on anyone furnishing any article to a minor for such sale. The Supreme Court held that this statute, as applied in this case, did not abridge either the aunt's freedom of religion or parental right. While first recognizing that, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations

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[54] Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914); Nolan v. Kechijian, 75 R.I. 165, 64 A.2d 866 (1949).

[55] 197 U.S. 11 (1905).

[56] 274 U.S. 200 (1927).

[57] 321 U.S. 158 (1944).

the state can neither supply nor hinder."[58] Mr. Justice Rutledge, speaking for the Court, went on to say:[59]

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [citations omitted] And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.
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> . . . .
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> The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. . . .

Admittedly the Court was here speaking of child labor and the attendant dangers. But it would appear to apply with equal force when a child's health is endangered by a parent's refusal to give him adequate medical attention. If this theory be adopted, the state's interest in the "society of the future" would be a sufficient interest to allow it to exercise a control within its police power. The Supreme Court's attitude seems to be expressed in its statement:[60]

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

An interesting comparison to that view is afforded by the following words, quoted earlier from the opinion of the Pennsylvania court in In re *Tuttendario*:[61]

> We have not yet adopted as a public policy the Spartan rule that children belong, not to their parents, but to the state.

SUMMARY

The number of cases discussed above is admittedly small, but this number is apparently all that have been reported. Because of this and also because of the divergent philosophical, moral and emotional forces which are brought to bear in each case, it would be dangerous for the writer to draw any conclusions from the foregoing. But if this note is

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[58] *Id.* at 166.

[59] *Id.* at 166, 168.

[60] *Id.* at 170.

[61] 21 Pa. Dist. R. 561, 563 (1911).

to serve any purpose, at least a tentative summary of the law as it exists today is necessary. Perhaps at least the following could be safely stated in summary.

(1) As evidenced by the Juvenile Court Acts and the cases which have interpreted them, the state has a primary interest in the health and welfare of "neglected and dependent" children which will allow the state to deprive "unfit" parents of their custody and control.

(2) In states where the definition of a dependent or neglected child includes a specific reference to the furnishing of medical or surgical care, the Juvenile Court can order such treatment over the objection of the child's parents.

(3) In states where the definition is not so specific, the failure to render medical or surgical aid may or may not be grounds for declaring a child neglected or dependent. It may depend on: (a) the determination of whether or not medical and surgical aid are necessaries, and (b) whether the projected aid entails substantial danger to the life or health of the child.

(4) Should a state decide to exercise its power in this field, there would be no constitutional objection under the 14th amendment of the United States Constitution.

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