Constitutional Law--Freedom of Religion and the Police Power

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has determined that a function is of a judicial or quasi judicial nature the court will award a writ of prohibition to prevent that body, regardless of its primary functions, from exceeding its jurisdictional powers. It appears that the West Virginia court will not grant the writ of prohibition if the functions of the agency are purely administrative in character.

The increase in the number of administrative agencies and the expansion of the scope of their power has necessitated a process of judicial review in an area not existing at the time the extraordinary remedies of prohibition and mandamus emerged. The process of judicial review of administrative action has developed in a piecemeal pattern similar to the commonlaw itself, in response to the pressure of particular situations and the influence of legislation. It is the complex of the old and the new. 2 Am. Jur.2d. Administrative Law § 555 (1962). The necessity to provide a control of quasi judicial functions has caused the writ of prohibition to be expanded to include this area. With ample precedent supporting the granting of the writ, necessity will dictate that the writ be awarded where commissions exceed their jurisdictional powers.

John Welton Fisher, II

Constitutional Law—Freedom of Religion and the Police Power

W suffered from an ulcer but refused a blood transfusion. She informed her doctor that religious convictions precluded her from receiving blood transfusions. W and H, her husband, signed a document releasing the doctor and hospital from all civil liability that might result from failure to administer the transfusion. However, W's doctor requested the circuit court to appoint a conservator of the person of W and to authorize the conservator to consent to the transfusion. The court appointed a conservator who gave his consent. W and H appealed. Held, reversed. The first amendment to the Constitution of the United States protects the right of the individual to freedom in his religious belief. This freedom is subject only to the qualification that its exercise may be limited by governmental action where such exercise clearly and presently endangers the public health, welfare or morals. In re Estate of Brooks, 32 Ill.2d 361, 205 N.E.2d 435 (1965).
The decision in the principal case concurs with the majority of decisions dealing with this problem. The basis for the decision is that the individual's belief was not an act against peace and good order. W was a competent adult. All the members of her family were adults. She had no dependents. Allowing her to refuse the transfusions would have interfered with no rights of society. Forcing her to submit to the transfusion was an unwarranted invasion of her rights of conscience. Ford, Refusal of Blood Transfusions by Jehovah's Witnesses, 10 Catholic Law 212 (1964).

A citizen has as his greatest right the inviolability of his person. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1903). Affirming the order for transfusions substituted judicial discretion for the individual's judgment. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1013 (D.C. Cir. 1964), cert. denied 377 U.S. 978 (1964) (dissenting opinion).

The instant case illustrates one facet of the problem which arises when public interests conflict with private interests. The right to believe is an absolute right as recognized in the first amendment to the constitution. Certainly, the right to practice that belief is not absolute. It may be restricted by the exercise of the state's police power to protect the public safety, welfare or morals. Prince v. Massachusetts, 321 U.S. 158 (1943); Comment, 9 Utah L. Rev. 161 (1964). In order to resolve the conflict an understanding of the first amendment and state police power is necessary.

The colonists of this country were aware of the oppressive measures adopted in Europe to compel conformance to an established religion. Davis v. Beason, 133 U.S. 333, 342 (1890). To prevent the proposed federal government from adopting similar oppressive measures the Constitution was amended to deny Congress the power to make laws prohibiting the free exercise of religion. "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. This is one of the broad restrictions placed on the federal government in the Bill of Rights in order to secure ratification of the new constitution. Pritchett, The American Constitution 367 (1959). In fact there were established state religions at this time. These included the Anglicans in Virginia, Puritans in Massachusetts and Catholics in Maryland. The first ten amendments, the Bill of Rights, were not aimed at curtailing any powers
of the various states. The purpose was not to discredit these existing state religions but to prohibit interference by the federal government. Marnell, The First Amendment 113 (1964).

During the reconstruction period which followed the Civil War the states adopted the fourteenth amendment to the federal constitution.

No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . . The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. U.S. Const. amend. XIV.

The Supreme Court has held that the language of the amendment is so broad that it incorporates a number of the provisions of the Bill of Rights. Therefore, by virtue of the fourteenth amendment, a number of the provisions of the first ten amendments have been extended to restrict the various state governments as they restrict the federal government.

In Gitlow v. New York, 268 U.S. 652 (1923), the Supreme Court held that the freedoms of speech and press, protected by the first amendment from impairment by the federal government, are among the liberties protected by the fourteenth amendment from impairment by the state governments. Similarly, seventeen years later, the Court held that religious freedom was among the liberties protected by the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). In effect, this interpretation meant that by adopting the fourteenth amendment the states (1) agreed to give up their power over religious practices and (2) gave the federal government the power to enforce that agreement. This does not mean the individual has an absolute right to practice his religion. The right must be exercised in a manner compatible with other rights essential to a democratic form of government, and through the police power the states can enforce this rule. The fourteenth amendment does not impair the police power which is inherent in the states. Barbier v. Connolly, 113 U.S. 27 (1885).

The police power is derived from the sovereign right of a government to promote the order, safety, health and welfare of society.
Barbier v. Connolly, supra. It is not granted in the Constitution but is a necessary attribute of every civilized government. State ex rel: Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861 (1912).

Blackstone described the police power as necessary in

the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. 4 Blackstone, Commentaries on the Laws of England 162 (Lewis ed. 1902).

The police power is not a precise law; it adjusts as conditions in the particular state change. It has been described as the law of necessity and extends to all great public needs. Etheredge v. City of Norfolk, 148 Va. 795, 139 S.E. 508 (1927).

Freedom of religion has been guarded by constitutional prohibitions against federal or state interference. However, the practice of religion frequently conflicts with the exercise of the police power. This raises the issue of whether the constitutional prohibition precludes the state's exercise of its police power where the two conflict. The majority of the decisions dealing with this issue have permitted such exercise when the practice of a particular religious belief threatens the safety, health or welfare of the public. A reasonable police regulation is not necessarily invalid merely because it affects some right guaranteed by the Constitution. Jacobsen v. Massachusetts, 197 U.S. 11 (1905). The police power of the states is limited by the fourteenth amendment only in that it must be exercised through due process of law. Barbier v. Connolly, supra.

The snake handling cases illustrate the exercise of the police power. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948). These cases involved the testing of statutes which forbade the handling of poisonous snakes in religious rites. It was held that such practices jeopardized the safety and health of the participants and spectators; these practices may not be protected by invoking the constitutional guaranty of religious freedom.

Government interference is equally necessary when individuals
refuse vaccination on religious grounds. *Jacobsen v. Massachusetts*, *supra*. A community has a right to protect itself against an epidemic of a loathsome disease by making vaccination compulsory. To allow religious practices in which an individual is permitted to refuse to submit to vaccination is tantamount to allowing the existence of a clear and present danger to society. Here the interference was not to protect the health of one individual but to protect the entire public. *Cantwell v. Connecticut*, *supra*.

Exercise of the police power is not restricted to situations of necessity. The police power may be utilized to provide a health service to the public. This right is illustrated by cases in which cities have put fluoride in the water to prevent dental decay. *Baer v. City of Bend*, 206 Ore. 221, 292 P.2d 134 (1956). The benefits derived from fluoridation exceed any objections based on religious grounds. The state has a right to protect the health and general welfare of the people from disease whether or not the disease is contagious. *Kaul v. City of Chehalis*, 45 Wash.2d 616, 277 P.2d 352 (1954).

A substantially different problem is presented when one party refuses medical care for another, as where a parent refuses care for his child. In these cases courts avoid the issue of freedom of religion by invoking the doctrine of parens patrie which gives the sovereign the power of guardianship over minors. Comment, 113 U. Pa. L. Rsv. 290 (1964). Courts have a responsibility to protect neglected children, those who have not been given the care their situation demands. *People ex rel. Wallace v. Labenz*, 411 Ill. 618, 624, 104 N.E.2d 769, 770 (1952). Although freedom of religion and rights of parenthood are to be accorded the highest possible respect, they are not absolute. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Societal interests will occasionally conflict with religious liberty. Except in the child neglect cases the courts have held that when religious practice is injurious to public health, morals or welfare, the state has a right to protect society by exercising the police power. However, where religious practices do not endanger public health, morals or welfare, state interference is unreasonable and prohibited by the constitutional guarantee of religious freedom.

*Hazel Armenta Straub*