

Case Comments

Coerced Donation of Body Tissues: Can We Live with *McFall v. Shimp*?

McFall v. Shimp,¹ a case of first impression in any court, was an equitable action seeking an order compelling defendant to “donate”² bone marrow for transplantation to petitioner, terminally ill with anemia. In denying petitioner’s request, Pennsylvania Common Pleas Court Judge John Flaherty succinctly stated the conflict: “Morally, this decision rests with the defendant, and, in the view of this court, the refusal of the defendant is morally indefensible. [But,] for our law to *compel* the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded.”³

The case dramatically illustrates the nature of the problems arising from the rapidly expanding interface of law and medicine. That interface has in recent years been the spawning ground for an increasing amount of litigation in which the courts are asked to take an active and discomfoting role in the delivery of health care. The strikingly dissimilar orientations of the legal and medical professions are most evident in their respective views regarding the fundamental nature of man—a crucial issue underlying medico-legal litigation of this type. Medicine, to the extent it is a science, views the human organism as a machine—a machine to be pushed to its limits and fixed when it breaks. Law, to the extent it is grounded in philosophy, views man as a collection of rights and interests in continual conflict with other men and society at large. This difference in orientation clearly emerged from *McFall*. The court made the ultimate decision: whether *McFall* would live or die. The presence of sophisticated medical technology cast that decision less starkly, but fundamentally, life or death was the urgent⁴ issue that confronted counsel and the court.

The purpose of this article is to demonstrate that the treatment of legal issues centering around complex medical technology can be dispassionate and reasoned, giving full weight to the rights and interests of all parties concerned. This approach, familiar to the legal community in all other contexts, is the only means by which justice can be accomplished between

1. No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). The author would like to thank Judge John P. Flaherty, Jr., for providing him with copies of the briefs and opinion in the case.

2. While “donate” and “donee” imply the existence of donative intent, obviously not present in *McFall*, the terms will be used interchangeably to identify the acts and persons to which they usually refer in transplant situations.

3. No. 78-17711 at 2 [emphasis in original].

4. The complaint and a request for a preliminary injunction (compelling defendant to undergo further testing) were presented to Judge Flaherty on July 24, 1978. A hearing on the injunction was held July 25, and an opinion issued July 26.

parties without unleashing the potential for a brave new world of technocrats.⁵

After setting forth the facts of *McFall v. Shimp* and identifying the issues, the writer will offer an analytic construct that both allows for judicial relief in cases analogous to *McFall* and preserves the "central role of the physician"⁶ in the sphere of health care. The construct will be examined in light of relevant legal doctrines to determine whether the result in *McFall* was simply an application of existing law or was mandated by "every concept and principle upon which our society is founded."⁷

I. *McFall v. Shimp*: FACTS AND HOLDINGS

Robert McFall, thirty-nine, suffered from aplastic anemia, a disease in which the patient's bone marrow produces an inadequate supply of certain blood components.⁸ His condition was preliminarily diagnosed on June 22, 1978,⁹ and a search was begun for potential bone marrow donors, a bone marrow transplant being the preferred treatment for severe manifestations of the disease.

While transplantation of body tissues is a rapidly developing science, its progress is substantially impaired by the presence of the so-called "rejection barrier."¹⁰ "Rejection" is the term used to describe the process in which the recipient's immunological system attacks the transplanted tissue in the same way that it attacks invading bacteria. The immunological system operates by way of genetic discrimination, attacking only those substances that do not match the genetic composition of the host body cells. Thus, the greater the genetic differences between the donor and the donee, the more likely and the greater the severity of the immunological response to the graft.¹¹ The degree of similarity between the donor and donee is expressed in terms of "compatibility" between the two persons.¹²

5. The reference is, of course, to Aldous Huxley's classic novel. See Vukowich, *The Dawning of the Brave New World—Legal, Ethical and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189 (1971).

6. *Colautti v. Franklin*, 99 S. Ct. 675, 681 (1979).

7. No. 78-17711 at 2.

8. Record at 18-19, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). Citations to the record of the *McFall* case refer to the proceedings of July 25, 1978, at which the court heard brief oral arguments and the testimony of Dr. Pietragallo, Mr. McFall's attending hematologist. A copy of the record has been deposited with the Ohio State University College of Law Library.

9. *Id.* at 16.

10. Recent medical developments indicate that it may be possible to reduce the rejection barrier significantly. If the degree of compatibility required of donors decreases, the occasions for *McFall*-type action will decrease proportionately. See Tilney, Strom, Vineyard & Merrill, *Factors Contributing to the Declining Mortality Rate in Renal Transplantation*, 299 NEW ENG. J. MED. 1321 (1978).

11. Louisell, *Transplantation: Existing Legal Constraints*, in ETHICS IN MEDICAL PROGRESS, CIBA FOUNDATION SYMPOSIUM 78, 78 (G. Wolstenholme & M. O'Connor eds. 1966) [hereinafter cited as CIBA SYMPOSIUM]. See also GRADWOHL'S LEGAL MEDICINE 466 (3d ed. F. Camps ed. 1976).

12. This article discusses transplantation between human beings (homotransplantation); there are, however, procedures using animal donors (heterotransplantation).

The most likely source of an acceptable compatible donor is the pool of the patient's siblings. Mr. McFall had six, three brothers and three sisters. All were tested, but none was sufficiently compatible.¹³ The search then extended to collateral relatives and eventually led to McFall's first cousin, David Shimp, a forty-three-year-old crane operator.¹⁴

When first approached about the possibility of donating bone marrow, Mr. Shimp agreed to undergo compatibility testing at the University of Pittsburgh's hospital facilities. The results of the initial test indicated a high degree of compatibility between the two men.¹⁵ An appointment was then scheduled to conduct a final test to confirm that Mr. Shimp was a compatible donor.¹⁶ Mr. Shimp failed to appear for his appointment, stating in a later interview that his wife had asked him not to proceed.¹⁷ When Mr. McFall heard that his cousin had failed to appear at his scheduled appointment and presumably would refuse to schedule another, McFall turned in desperation to his attorney and ultimately to the court.¹⁸

The action was brought seeking a preliminary injunction ordering Shimp to submit to the mixed lymphocyte culture, and, if the results of that test indicated acceptable compatibility, an order compelling the donation of bone marrow for transplantation.¹⁹ The entire course of the litigation lasted only three days, ending with Judge Flaherty's refusal to issue the preliminary injunction.²⁰

Admitting that there existed no firm precedent, plaintiff argued that "several critical factors which are the touchstones of justice, i.e. ethics, morality and custom, as well as the best thinking of legal scholars and the

13. *Bad Samaritan*, NEWSWEEK, Aug. 7, 1978, at 35 [hereinafter cited as *Bad Samaritan*].

14. *Id.*

15. Record at 25, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). This test, termed a histocompatibility lymphocyte antigen (HLA) test, compares the genetic characteristics of the number six chromosome, which apparently stimulates the antigenic reaction that underlies rejection. *Id.* at 23.

16. In this test, a mixed lymphocyte culture, 50 cc. of blood drawn from the prospective donor are mixed with blood from the prospective donee to determine the degree of reactivity between the respective lymphocytes. *Id.* at 32.

17. *Bad Samaritan*, *supra* note 13, at 35.

18. McFall engaged his attorney on the Thursday following the missed appointment, July 20, 1978, and suit was filed the following Monday, July 24. Record at 4, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). The reason for this haste was that time was becoming critical. Candidates for bone marrow transplants need transfusions to maintain missing blood components during the period of the search, but are transfused as infrequently as possible because the introduction of foreign blood hypersensitizes those patients to grafts. *Id.* at 22.

19. The donation procedure was described by Dr. Pietragallo as the insertion of a curved needle into the iliac bones of the donor and the aspiration of approximately 5 cc. of marrow. Since at least 500 cc. are required, over 100 such taps would have to be performed on the donor. The physician described the risks to the donor, who would be placed under general anesthesia, as "very acceptable." *Id.* at 38-39, 44-45.

20. See note 4 *supra*. While the denial of the injunction did not end the case, further litigation would have been fruitless.

dicta of our courts compel the result sought. . . ."²¹ He cited a case²² in which a Louisiana court had refused to approve the donation of a kidney by a mentally incompetent minor to his ailing sister, arguing that the criteria articulated by the Louisiana court were satisfied in this case.²³ He listed examples of permissible intrusions into bodily security, including criminal searches and seizures, vaccinations, and civil blood tests.²⁴ Plaintiff spoke of the powers of equity, citing to the court the Second Statute of Westminster,²⁵ the source of the powers invested in chancery courts, of which, it was argued, the Pennsylvania court was a descendant.²⁶ Plaintiff acknowledged that defendant must be under a duty to act, citing two cases that appeared to support the existence of this duty²⁷ and offering the views of commentators that, if this duty did not exist at common law, it should be established in light of prevailing principles of law and justice.²⁸ His arguments ended with a plea:

The time for study is over. The exigencies require action in order to save a human life. Our noblest traditions as a free people and our common sense of decency, society and morality all point to the proper result in this case. We respectfully suggest that it is time our law did likewise.²⁹

21. Brief for Plaintiff at 2, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

22. *In re Richardson*, 284 So. 2d 185 (La. App. 1973). Plaintiff's reliance on this case was misplaced, however, because the doctrine urged in *Richardson* required the court to place itself in the position of the potential donor, who was unable to consent due to his disabilities, and substitute its judgment for his. This doctrine was first applied to transplantation in *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1968), in which the Kentucky Supreme Court approved the transplantation of an incompetent's kidney to his dying brother.

In 1957 the Supreme Judicial Court of Massachusetts allowed three minor children to donate kidneys to their identical twin siblings, but these unreported cases were decided on traditional principles of parental consent, rather than the "substituted judgment" doctrine announced by the court in *Strunk*. The cases are discussed in Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U.L. REV. 891 (1959). See also *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (1972), in which the court synthesized the doctrines of the Massachusetts cases and *Strunk* to grant permission for a minor to donate a kidney to his twin.

23. Brief for Plaintiff at 2, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

24. *Id.* at 3.

25.

Whensoever from thenceforth a writ shall be found in the Chancery, and in a like case falling under the same right and requiring a like remedy, no precedent of a writ can be produced, the Clerks in Chancery shall agree in forming a new one; lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors.

St. Westminster 2, 1285, 13 Edw. I, c. 24.

26. Brief for Plaintiff at 4, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

27. *Id.* at 5, citing *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947), and *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976). The cases are distinguishable from *McFall* in that the courts imposed a duty to rescue because of the relationship between the parties. *Hutchinson* dealt with a boat owner and his guest; *Farwell* dealt with two social companions on a drinking spree, a "special relationship" in which the court found an "implicit . . . understanding that one will render assistance to the other" *Farwell*, 396 Mich. at 291, 240 N.W.2d at 222.

28. Brief for Plaintiff at 5-8, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978), citing Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073 (1961); Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Note, *The Failure to Rescue: A Comparative Study*, 52 COL. L. REV. 631 (1952).

29. Brief for Plaintiff at 8, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

Defendant relied on two basic arguments: that he owed plaintiff no legal duty and that both the federal and Pennsylvania Constitutions protected his privacy as an individual. In support of his "no duty" argument, defendant cited a Pennsylvania Supreme Court case³⁰ that had adopted section 314 of the Restatement of Torts. Section 314 provides that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."³¹ After quoting Pennsylvania's constitutional guarantees of the natural rights of its citizens,³² defendant admonished:

Defendant's right to himself [choose] whether his body will be invaded for the benefit of another is fundamental and beyond question. The decision of whether to be a donor is that of the Defendant and the Defendant alone. No individual and, it is most respectfully submitted, no court ought to attempt to abrogate this "inherent and indefeasible right."³³

In denying the preliminary injunction, Judge Flaherty refused to recognize a duty on the part of the defendant to come to the rescue of the plaintiff. While admitting that the rule "on the surface, appears to be revolting in a moral sense,"³⁴ the judge felt that the lack of a duty was justified by principles comprising the "very essence of our . . . society."³⁵ Noting that plaintiff's brief contained references to the existence of the duty in other countries,³⁶ the judge stated that "[o]ur society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another."³⁷ He expressed concern about the effects of recognizing such a duty in the situation before him in which a significant intrusion upon the person of the defendant was requested, and stated: "To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn."³⁸ His reticence stemmed in part from his awareness of the special significance of the nature of the relief sought:

This request is not to be compared with an action at law for damages, but rather is an action in equity before a Chancellor, which, in the ultimate, if granted, would require the forceable submission to the medical procedure. For a society, which respects the rights of *one* individual, to sink its teeth into

30. *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959), cited in Brief for Defendant at 2, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). See note 73 *infra* for Dean Prosser's assessment of this decision.

31. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

32. PA. CONST. art 1, § 1.

33. Brief for Defendant at 4, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

34. No. 78-17711 at 2.

35. *Id.*

36. Brief for Plaintiff at 5-6, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). See also text accompanying notes 93-105 *infra*.

37. No. 78-17711 at 2.

38. *Id.*

the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.³⁹

Thus ended the case of *McFall v. Shimp*.⁴⁰

Robert McFall died on August 10, 1978.⁴¹ The analytic construct that follows suggests a more satisfactory method to deal with events such as those that led to *McFall v. Shimp*. It is intended to achieve, admittedly through coercive means, a minimum level of common decency and humanity as an element of the social contract.⁴²

II. THE CONSTRUCT

The fundamental nature of the rights asserted by both litigants in *McFall v. Shimp* demands that any analytic resolution of the conflict between those rights acknowledge the broader implications of the analysis. The construct that follows is offered to guide this analysis and to stimulate legislative consideration.

The construct envisions an equitable action initiated by the plaintiff/patient, praying for an order compelling the defendant/donor to cooperate in the transplantation procedure. The plaintiff is required to show satisfaction of four criteria, all related to the efficacy of the proposed treatment and the risk to the donor. This showing is made by using scientific data of independent significance, generally in the form of surveys, reports and statistical compilations, and expert medical opinion evidence. The court engages in a two-step process to determine whether the plaintiff is entitled to relief. The court first determines whether the plaintiff has carried his burden of producing evidence of satisfaction of all the criteria. The court then undertakes a balancing test to determine whether the anticipated benefit of the treatment justifies the intrusion and risks to the donor. If the court finds it warranted, an order issues directing the defendant/donor to cooperate in the proposed transplant procedure. A defendant who does not comply with the order subjects himself to contempt proceedings and possible criminal and civil liability.

The construct operates within a distinct set of situations. Transplantation therapy has been clearly identified as the preferred treatment for diseases of various tissues and organs.⁴³ Significantly, in no other form of

39. *Id.* at 2-3 (emphasis in original).

40. See note 20 *supra*.

41. The Washington Post, Aug. 11, 1978, at A-10, col. 1.

42. The term "social contract" is used here in a general sense to evoke the bond that forms the basis of all civilized societies. It partakes of, but does not totally incorporate, the philosophy expressed by J. Rousseau in *THE SOCIAL CONTRACT AND DISCOURSES* (American ed. 1950) (France 1762).

43. As of 1974, the following tissues and organs were transplantable with varying degrees of success: cornea, teeth, thymus gland, lung, heart, liver, pancreas, kidney, intestine, blood vessels, bone, bone marrow, skin, and tendons. J. DEATON, *NEW PARTS FOR OLD* 16 (1974).

medical treatment is the cooperation of another person—the donor—a prerequisite to the treatment's implementation or success.

As transplantation treatment becomes more common, the likelihood increases that individuals whose cooperation is vital will refuse to participate. It is to this problem that the construct and analysis are addressed. The issue is whether the law should be responsive to the plight of the patient and, if it should, what response is justified by principles of law and social policy.

The construct is also offered as a stimulus for legislative action. Legislation in accord with the policy and safeguards embodied in the construct would contribute toward achieving substantial justice in this area. This writer hopes that the construct and analysis will stimulate thoughtful debate among members of the legal, medical, philosophical, theological, and sociological communities. Each of these disciplines has much to contribute to the resolution of issues presented in the exploration of the juncture of law and morals. It is especially important that the medical community participate in the deliberations, since the decisions to be made in these cases are essentially medical in nature with the law and the courts providing the power to effectuate them.

The construct provides a basic framework for resolution of cases that arise when an afflicted plaintiff/patient is denied necessary transplantative therapy by the refusal of the defendant/donor to cooperate in the effort. In the discussion that follows, the facts and part of the record of *McFall* are used to illustrate the type of evidence to be introduced and decisions to be made. Procedural and substantive requirements are incorporated to restrict the operative scope of the construct to situations for which a sound policy foundation and supporting legal doctrine can be clearly articulated.

A. *Criteria*

Before the construct may be invoked, the situation of the plaintiff must be sufficiently grave to give rise to a "compelling" state interest in the protection and preservation of his life.⁴⁴ In effect, the plaintiff's illness must have reached such a critical stage that, without effective state intervention, he will almost certainly die. The following criteria are proposed to identify and define that stage.⁴⁵

To obtain relief, the plaintiff must show satisfaction of four criteria: (1) that he is in *imminent* danger of dying from a disease that can be treated by transplantation of an organ, tissue, or fluid from another; (2) that he

44. See text accompanying notes 153-57 *infra*.

45. In an attempt to remain within the confines of the issues raised by *McFall*, the writer considers only criteria that apply to diseases for which the desired relief is ultimately transplantation. There may or may not be other situations in which the same considerations would have to be recognized to fashion relief for a plaintiff suffering from a disease. The discussion demonstrates the types of issues and evidence that will increasingly confront the courts.

stands to experience *substantial benefit* from such a transplant with the defendant serving as donor; (3) that transplantation from the defendant is the *exclusive* mode of treatment that offers the prospect of *substantial benefit* to the plaintiff; and (4) that the organ, tissue, or fluid sought is *expendable* by the donor—given the quantity of tissue or fluid to be removed and its regenerative capacity—and that the removal of the organ, tissue, or fluid will not result in disfigurement.⁴⁶

Under the construct, the plaintiff must allege and prove facts that satisfy these criteria. After the submission of all the evidence—the plaintiff's, the defendant's, the court's—the decisionmaker determines whether, according to the definitions of the terms italicized above,⁴⁷ the plaintiff has satisfied all four criteria. If this threshold determination is favorable to the plaintiff, the decisionmaker proceeds to balance the respective strengths and weaknesses of the plaintiff's case, in effect balancing the benefit to the plaintiff against the risks to the defendant.

Minimum levels of consistency and precision are accomplished by requiring minimum showings for each of the criteria, which must be met or exceeded to permit the court to proceed to the balancing process. These minimum showings set the limits within which the operation of the construct may be supposed to significantly advance a legitimate policy objective.

I. *Imminence*

The imminence of the plaintiff's death could be proved by two types of evidence. The first takes the form of medical opinion evidence regarding the plaintiff's chance of survival without the transplant. In *McFall*, for example, plaintiff's expert witness testified to his opinion that McFall had a twenty to twenty-five percent chance of surviving one year without the bone marrow transplant.⁴⁸ The second consists of statistical compilations corroborative of the expert witnesses' testimony. This evidence should concentrate on case histories of other patients suffering from the disease. If the disease is one that manifests itself in differing degrees of severity, the evidence should concentrate on those patients whose conditions were similar to the plaintiff's.⁴⁹ Since it seems unlikely that the state can show a

46. Obviously, all surgical procedures result in some degree of disfigurement. This criterion refers to a disfigurement beyond that normally associated with a surgical procedure involving the organ, tissue, or fluid.

47. The terms are here defined as a means of setting bounds within which the construct operates for purposes of this Case Comment. Were these criteria to be embodied in legislation, however, the definitions would need to be tailored to allow courts flexibility in the balancing process described in the text. See text accompanying notes 56-58 *infra*.

48. Record at 40, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). The fact that this 20-25% chance eventually translated into 17 days indicates the unreliability of these predictions. Since, however, the "science" of medicine is generally imprecise, all available data and opinions should be presented, and the court should accord to each its proper weight in the decisionmaking process.

49. Dr. Pietragallo testified in *McFall* that the transplant centers had developed rather strict

compelling interest in the life of a patient whose unassisted survival chances are greater than fifty percent, the plaintiff's minimum showing on this criterion is that his chances of survival, absent the transplant, are less than fifty percent.⁵⁰

2. *Substantial Benefit*

Statistical and expert opinion evidence could be used in the same manner to show the prospect of a substantial benefit accruing to the plaintiff if the transplant is performed. The existence of a benefit is determined by comparing the projected survival chances of the plaintiff with and without the transplant. The determination of the substantiality of that benefit is a two-stage process. First, a plaintiff who is unable to show that the transplant will make it more likely than not that he will survive an additional two years is not entitled to relief. A lesser probability of benefit will not justify invasion of the defendant's fundamental rights to bodily integrity. While this requirement might be easily met by plaintiffs whose unassisted survival chances were slightly less than fifty percent, the requirement that the court balance the efficacy of the proposed treatment against the risks to the donor requires a very strong showing by these plaintiffs in the second stage of the substantiality test.⁵¹

Second, the *amount* of the increase in the chance of survival is examined. In this stage of the case, the plaintiff must show that he is at least twenty-five percent more likely to survive with the transplant than without it. McFall provides an excellent example. His post-transplant survival chances were forty to sixty percent,⁵² his chances for unassisted survival, twenty to twenty-five percent. Thus the potential benefit of the transplant to McFall was between fifteen and forty percent. If the court had found the forty percent chance of survival with the transplant more likely, McFall

criteria for the characterization of a patient's condition as "severe," and noted that McFall met all of them. He went on: "The survival [chance] is by no means uniformly fatal. There are some patients who live on with this disease. It's a small number when the disease is severe." Record at 20, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). Presumably, survival statistics could be obtained for most diseases remediable by transplantation.

50. Due to the deteriorating nature of these diseases, it is likely that the plaintiff's chances will decrease as time passes. If the court sees this as a real possibility in a case in which the unassisted survival chance is greater than 50%, but believes that it is likely that the plaintiff's showing on the other criteria will remain satisfactory, the court should be empowered to stay the action and retain jurisdiction for further proceedings. The court should realize that continued and repeated proceedings may allow the plaintiff to harass the defendant, and should take all steps necessary to guard against such conduct.

51. Note, however, that if the risks to the defendant are negligible, as in donating a pint of blood, the plaintiff's burden of proving substantial benefit is greatly reduced.

52. The doctor predicted the probable success as "forty to sixty percent, probably fifty percent would be a reasonable estimate." Record at 45, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). The 40-60% range is used in the text because of its illustrative value. The testimony is important to note, however, because if the doctor actually *did* decide on 50%, McFall would be out of court because he could not satisfy the minimum requirement for the criterion. In this type of proceeding testimony should be as precise as possible while still reflecting the true and valid opinion of the witness.

would have lost under this construct for two reasons. First, the maximum probability of his survival with the transplant would not have been greater than fifty percent. Second, his showing of a fifteen to twenty percent increase in survival chances would have been inadequate to satisfy the substantial increase requirement. If, however, the court had found that there was a sixty percent chance that McFall would survive with the transplant, McFall would have satisfied the minimum showing requirements of both stages of the substantiality test. With the transplant his survival would have been more likely than not, and he would have stood to experience a thirty-five to forty percent increase in his survival chances.

3. *Exclusivity*

The plaintiff's most difficult task is a two-step showing that a transplant from the defendant is the exclusive mode of treatment that offers a substantial benefit. First, the plaintiff must show that a diligent search has failed to produce an alternative *willing* donor.⁵³ The plaintiff cannot be expected to have tested every person in the nation, and the court must recognize that time is crucial. As time passes, the prospect of substantial benefit will likely decrease. The plaintiff ought not be denied relief by default.

Second, the plaintiff must show that other *means* of treatment are not available.⁵⁴ The alleged availability of other means should be closely scrutinized by the court, and only those that are demonstrably effective should be considered. The court should inquire whether such non-transplantative treatments are sufficiently beneficial that the plaintiff should be relegated to them.

4. *Expendability*

The final criterion, that the tissue be expendable by the defendant, can

53. Shimp's counsel raised this issue at the hearing. *Id.* at 41. He asked whether all of McFall's relatives of the second degree had been tested, but Dr. Pietragallo was unable to answer. Certainly, under the proposal, all the immediate family must have been tested, but it is for the court to decide whether, in light of time constraints and availability of relatives, testing must have been carried out to a specific degree of collateral relationship.

In the event that there is another *unwilling* donor of similarly acceptable compatibility, the defendant is entitled to implead the other person provided he can show that there is a substantial likelihood that the person to be impleaded would be as acceptable or superior to the defendant as a donor. For example, if the plaintiff were one of a set of identical triplets and the defendant another, the defendant would likely be able to implead the third sibling. While the genetic identity of the three would yield theoretically "perfect" matches, the presence of antibodies produced during previous illnesses or present disease might decrease the benefit or increase the risk to one, allowing a valid distinction to be made.

54. Mr. Shimp's counsel also raised this issue at the hearing. *Id.* Apparently, a chemical agent had been used in the treatment of aplastic anemia, but Dr. Pietragallo described it as "only a second choice" and "experimental." As pointed out in the text, the fact that it would be "only a second choice" should not be determinative; if it is truly experimental, however, its consideration as an alternative should be precluded. Just as a defendant should not be forced to submit to experimental techniques, a plaintiff should not be required to be a guinea pig when a proven means of saving his life exists.

In some courses of treatment, chemotherapy and irradiation are conjunctive measures of treatment to transplantation. In these cases, the court would assume this conjunctive course, and the evidence would relate to the effect of the transplant portion of the treatment.

be specifically defined. Unquestionably, the plaintiff cannot demand the defendant's heart, although heart transplantation is possible.⁵⁵ Other organs, for example kidneys, lungs, and skin, are more difficult to characterize. These organs are all transplantable, but their proposed transplantation in this context engenders feelings of substantial outrage. Removal of a single kidney or lung from a donor who has a pair is usually not life-threatening but does impair an important "back-up system." Skin grafting procedures are likely to produce severe disfigurement. Thus, paired vital organs might rationally be excluded from the operation of the construct but skin might be included if appropriate site and area restrictions were placed on its compelled donation.

5. *Balancing Process*

If the plaintiff satisfies these four criteria, the court moves to its greatest challenge under the construct—balancing the benefits shown as likely to accrue to the plaintiff against the risks to the defendant in acting as donor. As with the criteria, statistical and opinion evidence should be used to establish the risks imposed on the defendant by the donation procedure.⁵⁶ The inquiry is not confined to probabilities of death or disability. The court should feel free to examine more subtle considerations as well. The defendant's possible pain and suffering should be considered,⁵⁷ as should the family and occupational responsibilities with which he is charged.⁵⁸ Against these risks to the defendant are weighed the benefits to the plaintiff as established under the criteria.

As noted at the outset, the rights involved in these cases are fundamental and worthy of zealous protection. Therefore, the procedural framework under which this construct would operate is of critical importance. The plaintiff requires maximum efficiency to preclude defeat of his action by progressive physical deterioration and the defendant requires maximal protection of his rights and interests during the entire course of the proceedings. The next section suggests certain fundamental procedural safeguards that should be incorporated into this construct.

55. The first successful heart transplant was performed by Dr. Christiaan Barnard of Johannesburg, South Africa, on December 3, 1967. R. PORZIO, *THE TRANSPLANT AGE* 17 (1969).

56. Donor risks are apparently quantifiable with some precision. Dr. Hamburger, of the University of Paris, has determined the risks to a kidney donor to be 0.12%. Discussion, *Transplantation: The Clinical Problem*, CIBA SYMPOSIUM, *supra* note 11, at 19. This appraisal is supported by the observation that of the 3000 live donor kidney transplants reported as of 1972, only one had resulted in the death of the donor. *Hart v. Brown*, 29 Conn. Supp. 368, 373, 289 A.2d 386, 389 (1972). It is also significant that life insurance companies do not rate people who have undergone nephrectomy (removal of a kidney) as a higher risk than people with two kidneys. General Discussion, CIBA SYMPOSIUM, *supra* note 11, at 163.

57. One hundred taps into the iliac crest, the procedure for a bone marrow transplant, can be excruciatingly painful during the post-operative period.

58. For example, a certain degree of risk of partial loss of back strength may be acceptable to a single person whose job is basically sedentary, but may not be acceptable to a family breadwinner whose employment requires heavy lifting.

B. *Procedural Requirements*

The action is commenced by filing a petition for an order directing the defendant to submit to the necessary procedures for donation. The highest court in the state has original and exclusive jurisdiction.⁵⁹ Process, served on the defendant personally, includes a detailed statement of the unique rights accorded a defendant in this type of action.⁶⁰

The petition must set forth with particularity a *prima facie* showing by the plaintiff that his circumstances satisfy the criteria set out above. Any request for additional information from the defendant must be included at this time.⁶¹ As far as possible, all statements and allegations in the petition must be corroborated by attached affidavits of the attending physicians, making reference to and submitting as exhibits any relevant laboratory test results.

The pretrial period should be kept to the minimum necessary to allow the defendant to prepare his case. The court must guard against harassment of the plaintiff at this stage. Cooperation of the plaintiff should present no obstacles, as it is in his interest that the action move as quickly as possible.

The court appoints its own experts to supplement the testimony of the parties' witnesses. These experts should be as objective as possible without sacrificing the quality of their opinions.⁶² The plaintiff may be required to submit to a reasonable medical examination by both the court's and the defendant's medical experts.⁶³

If the plaintiff is able to establish, by clear and convincing evidence, his satisfaction of all four criteria, and the court finds that the risks to the defendant/donor are greatly outweighed by the benefits to the

59. There are two reasons for giving original jurisdiction to the state's highest court. The first is time; by their very nature, diseases amenable to treatment by transplantation require accelerated procedures. Second, members of the highest court are highly respected jurists who can be relied on for a just determination.

60. Service of process should be nationwide. Congress might act to provide for service similar to that authorized for interpleader in federal court. 28 U.S.C. § 2361 (1976). Alternatively, service of process could be effected under a state long-arm statute on the grounds that the defendant's refusal to cooperate is a tort committed within the state.

61. The *McFall* case was perhaps unique in that the defendant had already undergone one test that indicated the likelihood of being a compatible donor. In most such cases the defendant probably would refuse to cooperate from the start, and the plaintiff would request a preliminary injunction ordering the defendant to undergo initial compatibility testing. To avoid "fishing expeditions," the plaintiff should be required to introduce evidence of the statistical probability of obtaining acceptable results from the testing. Because compatibility is probable only among family members and because the requested invasion is relatively minor, the injunction should be granted if there is a reasonable probability of compatibility.

62. The quality of opinion should be the highest practicably obtainable. This issue arose at the hearing in *McFall*. Dr. Pietragallo's testimony was repeatedly objected to on grounds of hearsay and lack of qualifications as an expert since he had not personally performed a bone marrow transplant or mixed lymphocyte culture. Record at 13, 15, 29 and 36, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978). The objections were overruled by Judge Flaherty, probably a fair result in light of the short period available for preparation.

63. A "reasonable medical evaluation" should not be construed to include a searching examination by the defendant's examining witness. Unless a significant question exists regarding the validity of the medical data presented by the plaintiff to substantiate his condition, it should be sufficient for the defense to attack the *interpretation* of those data, not their veracity.

plaintiff/patient, an order should issue. The significance of this order is twofold. First, it provides a basis upon which the court itself can act to coerce the compliance of the defendant. Second, it serves as a judicial recognition of the existence of a duty owed by the defendant to the plaintiff. This duty can later serve as the basis for either a private civil action by the plaintiff or his survivors or a criminal prosecution. The first aspect of the order is of considerably greater importance than the second, however, since compliance with the order is the only means by which the plaintiff's life can be saved. Preservation of life is the principal goal of the construct and should be vigorously pursued. Possible methods of achieving this goal despite the donor's reluctance are set out in the next section.

C. Sanctions

Compliance might be obtained through the court's inherent powers of civil contempt.⁶⁴ A noncomplying defendant could be fined or imprisoned⁶⁵ until he complied or until his compliance would no longer be effectual.⁶⁶ Imprisonment, which is only available as a contempt sanction during the period in which the defendant could act in accord with the dictates of the order, should be the choice of the court attempting to secure compliance. The most coercive powers consistent with due process should be brought to bear upon a noncomplying defendant immediately. Subsequent civil action is available to provide appropriate compensation or to impose punitive damages.

Criminal sanctions could also be imposed for noncompliance. In most states the defendant could at least be found guilty of manslaughter for failing to carry out a duty imposed by law. In view of the wilful nature of the noncompliance, the defendant might even be prosecuted for premeditated and deliberate murder.⁶⁷ While these sanctions may seem severe, their efficacy as a coercive means of ensuring compliance can hardly be questioned.⁶⁸ It is important to remember that the ultimate goal is

64. "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

65.

Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing defendant to do what he had refused to do," . . . the remedy is one for civil contempt. . . . Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do.

Penfield Co. v. SEC, 330 U.S. 585, 590 (1947) (citations omitted).

66. Certainly, if the plaintiff died, the contempt citation would have to be lifted since the defendant would no longer "hold the keys to his cell." Whether he would be entitled to a hearing while the plaintiff was still alive to determine whether his compliance would still be required under the criteria of the statute would be a matter for the legislature or the court's discretion.

67. For purposes of their criminal codes, most states define "act" to include omissions when the offender is under a legally cognizable duty to act. *See, e.g.*, N.Y. PENAL LAW § 15.00(3), (5) (McKinney 1975); OHIO REV. CODE ANN. § 2901.21 (Page 1974); 18 PA. CONS. STAT. ANN. § 103 (Purdon 1973).

68. *See* text accompanying notes 93-105 *infra* for examples of foreign enactments imposing criminal sanctions on one who fails to aid another in peril.

ensuring compliance. Competing considerations might, however, justify the creation of a lesser offense in cases of this type.

D. *Costs*

The plaintiff is responsible for all costs associated with the defendant's donation including medication, therapy, and any medical examinations necessitated by the procedure. The plaintiff is also liable for any injury occasioned by the donation, even if that injury is not normally associated with the procedure.⁶⁹ The payments by the plaintiff might also be supplemented by a state-funded compensation scheme modeled after workmen's compensation systems that would provide benefits to the donor or to his dependents should he unexpectedly become disabled or lose his life as a result of the donation.

III. THE LEGAL DOCTRINES

In *McFall*, two legal issues required resolution: first, whether there was a duty on the part of Shimp to come to the rescue of McFall and, second, if that duty were established, whether its enforcement in the circumstances of that case would so infringe upon Shimp's right to bodily security that constitutional limitations on state action would be exceeded. The writer will now examine jurisprudential and constitutional aspects of these issues in the context of the foregoing construct.

A. *Jurisprudential Perspectives*

The common law provides that one has no duty to come to the aid of another in peril.⁷⁰ The periodical literature brims with scholarly dissertations decrying the inhumanity of this rule.⁷¹ Some courts have illustrated the heinousness of the rule with bizarre tales of fiction,⁷² yet most have dutifully applied it to equally bizarre sets of facts.⁷³

69. Injuries resulting from malpractice on the part of the physicians involved in the donation or ancillary procedures, however, are not the responsibility of the plaintiff and are recoverable only through a malpractice action against those physicians.

70. RESTATEMENT (SECOND) OF TORTS § 314 (1965); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.6 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56 (4th ed. 1971) [hereinafter cited as PROSSER].

71. See *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966) [hereinafter cited as *THE GOOD SAMARITAN*]; Ames, *supra* note 28; Bohlen, *The Moral Duty to Aid Others as a Basis for Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908); Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COL. L. REV. 196 (1946); Minor, *The Moral Obligation as a Basis of Liability*, 9 VA. L. REV. 420 (1923).

72.

Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.

Buch v. Amory Mfg. Co., 69 N.H. 257, 260, 44 A. 809, 810 (1898).

73. *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1966) (no duty to rescue child

The criticism has apparently not gone unnoticed; the law has come to mitigate some of the harsher results arising from a strict application of the rule. For example, the Restatement (Second) of Torts, while maintaining that there is no general duty to rescue,⁷⁴ contains two sections⁷⁵ in which an affirmative obligation to act for the benefit of another in peril is imposed upon certain classes of persons with respect to another class.

The duty stems from a special relationship between the parties, a relationship that courts have recognized as giving rise to a "special responsibility"⁷⁶ on the part of one of them. These exceptions to the general rule, however, are quite limited in their scope and seem designed to exact a price from those engaged in commerce and enterprise⁷⁷ rather than to enforce a moral duty.⁷⁸

Historically, the nonrecognition of a duty to rescue turns on the distinction between misfeasance and nonfeasance. The early common law courts, attempting to maintain some semblance of order in the countryside, "were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his omission to act."⁷⁹ Several justifications have been offered for the perpetuation of the rule. Some are grounded in practicality, others in social and political philosophy.

From a practical standpoint, objectors to the imposition of a duty to rescue argue a lack of precision in the determination of liability, an inability to tailor the rule to allow for human frailties, and the probability of increasing congestion in the courts. Dean Prosser, as reporter for the Restatement (Second) of Torts, offered as one explanation for the nonexistence of a duty to rescue "the difficulty of singling out the individual who is to be forced to give help, and held liable if he does not. A man is starving to death in the middle of a city, and no one feeds him.

licensee drowning in swimming pool); *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928) (proprietor of canoe rental service had no duty to rescue intoxicated patron whose canoe tipped over); *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (no duty to rescue business invitee who, at defendant's instance, jumped into a water-filled trench and drowned). "It would be hard to find a trio of more unappetizing decisions." PROSSER, *supra* note 70, § 56, at 340 n.60.

74. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

75. RESTATEMENT (SECOND) OF TORTS §§ 314A, 314B (1965). Neither section appeared in the original Restatement of Torts. Section 314B substantially duplicated RESTATEMENT OF AGENCY § 512 (1933). See also RESTATEMENT (SECOND) OF AGENCY § 512 (1957).

76. RESTATEMENT (SECOND) OF TORTS § 314A, Comment b (1965).

77. For example, §§ 314A and 314B impose a duty upon common carriers to their passengers, innkeepers to their guests, and employers to their employees.

78. Most of the commentators advocate imposition of a duty to rescue for purely moral reasons. Professor Ames, for example, states:

It is obvious that the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work. It is worth while to realize the great ethical advance of the English law in the past, if only as an encouragement to effort for future improvement.

Ames, *supra* note 28, at 113.

79. PROSSER, *supra* note 70, § 56 at 338.

Whom can he sue?"⁸⁰ A correlative argument is made that there are some situations, for instance when a child is drowning at a public beach, in which a rush of rescuers would actually increase the danger to the imperiled as well as to each other.⁸¹

Another practical objection is that some willing individuals may become psychologically or physically overwhelmed by the situation and consequently unable to help.⁸² It has been said that if the purpose of imposing the duty is to encourage the "moral" behavior of aiding others in distress, the application of the doctrine to those incapable of volitional action in emergencies would not serve that purpose. It is further urged that no amount of careful drafting would effectively restrict liability to those who maliciously choose not to act, the true targets of the rule.⁸³

The third practical objection is the possibility of a strain on the court dockets. With Americans becoming increasingly litigious each year,⁸⁴ it is argued that society should be greatly concerned about adding yet another weapon to the expanding arsenal of potential plaintiffs.

However convincing these arguments may prove against imposing a general duty to rescue, they are not persuasive in reference to the construct set forth above. The circumstances in which the construct operates are unique. By its own terms,⁸⁵ it requires that only one person be capable of rendering the necessary aid, and that that person be identified, informed of his position, and given a chance to refute the evidence offered by the plaintiff.

The objections based on human frailties are inapposite to the construct. The action demanded of the reluctant donor/rescuer is not spontaneous. While the circumstances might be considered overwhelming, the legal rights of the putative rescuer are scrupulously protected.

It is doubtful that docket congestion is ever a valid objection to a new development in the law.⁸⁶ It is especially inappropriate here. Cases in

80. THE AMERICAN LAW INSTITUTE: PROCEEDINGS—37TH ANNUAL MEETING 171 (1960).

81. Hale, *supra* note 71, at 215.

82. Note, *The Duty to Rescue*, 47 IND. L.J. 321 (1972).

83. *Id.* at 324-25. The author of the Note divided those persons who do not respond in an emergency situation into two categories, the "callous" and the "cowardly" (not in the traditional sense, but in the sense that the presence of an emergency is debilitating). The callous, it is asserted, are the persons at whom the duty is aimed since they deny the existence of even a moral duty to act, and, since it is impossible to attach liability to the callous but not the cowardly, no duty should be imposed. The flaw in this analysis, however, lies in its premises; first, the purpose of the duty is to save lives and prevent injuries, not to punish immoral acts or omissions; second, there is a wide range of character falling between the two extremes proposed as all encompassing. Note the discussion of the Kitty Genovese case in THE GOOD SAMARITAN, *supra* note 71, at ix-x, in which 38 persons watched or listened to a woman being murdered without even notifying the authorities. These are the types of persons at whom the duty is directed, those who "don't want to get involved."

84. In 1960, there were 59,284 civil cases filed in federal district courts. In 1977, 130,567 civil cases were filed—more than twice as many. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1978, at 185 (99th ed. 1978).

85. See text accompanying notes 53, 54, 59-64 *supra*.

86. "[C]ourts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely show society's pressing need for legal redress." Dillon v. Legg, 68 Cal. 2d 728, 735, 441 P.2d 912, 917, 69 Cal. Rptr. 72, 77 n.3 (1968).

which a donor's refusal to participate in a transplant will trigger legal compulsion are unlikely to occur in large numbers.

The social and political objections are less easily dealt with. Opponents of imposing a duty to rescue might well invoke concepts of "individualism" and "the American way," or even "socialism" or "slavery." Regardless of the epithet, the fears embodied in such remarks are fundamental ethical concerns that are not easily dismissed.

Professor Bohlen surmised that the original distinction between misfeasance and nonfeasance came not only from the crowded conditions of the courtrooms, but from a "primary conception of the common law . . . regard[ing] the individual as competent to protect himself if not interfered with from without."⁸⁷ Professors Harper and James attribute the distinction to "an attitude of rugged, perhaps heartless, individualism."⁸⁸

The "rugged individualism" of our forefathers, however, is greatly diluted in today's complex and interdependent society. Our reverence for individuality necessarily extends more to the cerebral than the physical,⁸⁹ as technological constraints and resource scarcity increasingly circumscribe physical liberty.

The argument that coerced transplantation violates the constitutional proscription of slavery and involuntary servitude is easily pierced. It is not the "will" of the ailing donee that forces the donor/rescuer to act, but rather the circumstances in which the helpless donee finds himself. Aplastic anemia, not Robert McFall's assertion of dominion, brought David Shimp to court.

The charge that a duty to rescue is socialistic comes closer to the mark.⁹⁰ Indeed, the philosophical—as distinguished from the political—concept of socialism may provide the soundest basis upon which to found a duty to aid one's fellows. The concept of social conscience is not, however, reserved to totalitarian states. The Supreme Court of Indiana, speaking about the duty to rescue, observed that "[t]here may be principles of social conduct *so universally recognized* as to be demanded that they be observed as a legal duty . . ."⁹¹ This universal recognition stems not from a revolutionary consciousness but rather from the Judeo-Christian ethic that teaches its followers to "love thy neighbor."⁹²

A duty to rescue can be imposed without undue social, political, or

87. Bohlen, *supra* note 71, at 221.

88. 2 F. HARPER & F. JAMES, *supra* note 70, § 18.6, at 1046.

89. This shift to the cerebral may, in fact, be a return to the essence of liberty. "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects. . . ." J.S. MILL, ON LIBERTY 11 (R. McCallum ed. 1946).

90. See Note, *supra* note 28, at 641.

91. L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 93-94, 40 N.E.2d 334, 337 (1942) (emphasis added).

92. Indeed, one of the most-cited references in cases dealing with the duty to rescue is the parable of the Good Samaritan, found in *Luke* 10:25-37. The irony is that the parable was related in response to

judicial disruption. As noted in the plaintiff's brief in *McFall*,⁹³ numerous European countries impose civil and criminal sanctions on those who are able to aid another in distress but do not. Germany is typical. Its criminal code provides:

Anybody who does not render aid in accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger, or if he would not thereby violate other important duties, shall be punished by imprisonment not to exceed one year or a fine.⁹⁴

In addition, Germany added a new provision to its criminal code in 1975:

Whoever fails to avoid the occurrence of a result that conforms to the definition of an offense, is punishable under this Code if principles of right require him to make sure that the result does not occur and if the failure to act is [morally] equivalent to bringing about the prohibited result by affirmative conduct.⁹⁵

The German statutes thus create a duty to act to avert danger in two types of situations. In the first, when the danger is a fortuity, one must render aid if the circumstances create an expectation of assistance. In the second, when the danger is impending as the result of the perpetration of some crime, the bystander is to act if "principles of right" require him to avert the probable result.

The obligation of the bystander under the first statute⁹⁶ is unclear. He certainly must act if he faces no risk of "considerable danger." The inclusion of the word "especially," however, indicates that there may be situations in which action is required even at the risk of considerable injury. In the second statute,⁹⁷ the risks to be faced by the putative rescuer are apparently prescribed by the language referring to "principles of right."

Professor Feldbrugge quotes statutes from twenty-three countries that impose a duty to rescue and punish its breach by criminal sanctions.⁹⁸ Russia's provision was first enacted in 1845,⁹⁹ Belgium's in 1961.¹⁰⁰ All the provisions require one who witnesses another in direct danger of his life to at least call the authorities. Some demand much greater action. Norway,

a question posed by a lawyer about who should be considered a neighbor in the rule "love thy neighbor." Throughout history, lawyers have apparently always been concerned with having an identifiable defendant.

93. Brief for Plaintiff at 6, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

94. StGB § 330(c), translated in Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 655-56 (1966).

95. StGB § 13, translated in Fletcher, *Criminal Omissions: Some Perspectives*, 24 AM. J. COMP. L. 703 (1976) (brackets in original).

96. See text accompanying note 94 *supra*.

97. See text accompanying note 85 *supra*.

98. Feldbrugge, *supra* note 94, at 655-57.

99. *Id.* at 630.

100. *Id.* at 655.

for example, requires action if the rescuer will suffer no "special danger or sacrifice."¹⁰¹

Professor Feldbrugge notes that there is "a fairly general consensus that failure to rescue is an offense which can only be committed intentionally."¹⁰² This means that the offender knew "that somebody was in specific danger, that he was able to help, and that this help would not entail specific danger to himself. . . ."¹⁰³ In almost all countries, one who innocently causes a traffic accident is bound to stop and render aid.¹⁰⁴ Feldbrugge states that the reason seems to be that "the person is designated by the circumstances, in a given situation, as the most suitable person upon whom a duty to give aid can be imposed."¹⁰⁵ This is exactly the reasoning underlying the operation of the construct, except that the defendant/donor is the *only* person upon whom the duty can be imposed to any avail, and the circumstances themselves give rise to the special relationship.

Perhaps the greatest obstacle to the achievement of a law in harmony with morals¹⁰⁶ in this area is the principle, most rigidly applied through the doctrine of *stare decisis*, that the law should be stable and predictable, not given to rapid or capricious changes. While this concern is certainly valid, especially since the law establishes rights and obligations that might affect the conduct of one's affairs,¹⁰⁷ rigid application of the principle can lead to serious injustices. Decisions regarding the course of the law should be made by reasoned analysis of the arguments on both sides, not merely on the basis of such traditional theories as the distinction between action and inaction.¹⁰⁸

101. Norwegian Crim. Code, art. 387, states:

Punishment by fines or imprisonment up to three months shall be imposed upon anybody who omits, although it was possible for him without any special danger or sacrifice to himself or others,

(1) to help according to his ability a person whose life is in obvious and imminent danger, or

(2) to prevent, by timely report to the proper authorities or otherwise according to his ability, fire, flood, explosion or similar accident, which may endanger human lives.

If anybody dies due to the misdemeanor, imprisonment up to six months may be imposed.

Feldbrugge, *supra* note 94, at 656.

102. *Id.* at 641.

103. *Id.* at 641-42.

104. *Id.* at 650 n.69.

105. *Id.* at 650.

106. *See* note 78 *supra*.

107.

The rule of *stare decisis* is a rule of policy grounded on the theory that when a legal principle is accepted and established, rights may accrue under it and security and certainty require that the principle be recognized and followed thereafter even though it later be found to be not legally sound.

Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 513, 8 N.W.2d 599, 607 (1943).

108. *See* text accompanying note 79 *supra*. We would do well to heed the advice of Lord Denning, who wrote: "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere." LORD DENNING, *THE DISCIPLINE OF THE LAW*, quoted in *Lord Denning, 80, Master of the Rolls*, Nat'l L.J., January 29, 1979, at 21.

B. *Constitutional Perspectives*

The states must be assured that they can adopt the construct's limited and special duty to rescue without running afoul of the United States Constitution. As Judge Flaherty noted in *McFall*, "[f]or our law to *compel* the defendant to submit to an intrusion of his body would change every concept and principle upon which our society was founded."¹⁰⁹ The following analysis will show that the Constitution, the embodiment of those concepts and principles, does not require that the state stand idly by in these cases.

Since there are no cases that deal directly¹¹⁰ with coercive measures designed to compel donation of body tissues, analogies must be drawn from related cases dealing with the same basic issue: whether a state may exert its power for the purpose of compelling a citizen to provide all or part of his body in order to save the life of another. The Supreme Court, deciding the only cases that have presented this issue—the abortion cases—has held that the state may indeed exert such compulsion in accord with constitutional guidelines.

In *Roe v. Wade*¹¹¹ the Court stated that in certain circumstances the state's interest in preserving the "potentiality of human life"¹¹² justifies the proscription of abortion, thereby forcing the pregnant woman to provide her body to sustain the fetus she carries. This analysis will examine the doctrines and reasoning employed in *Roe* and apply them by analogy to the operation of the construct.

Roe challenged a Texas statute¹¹³ proscribing all abortions except those determined upon medical consultation to be necessary for the preservation of the life of the mother. The Court assigned relative weights to the individual rights and state interests implicated at different times during pregnancy, balanced these rights and interests, and ruled the Texas statute unconstitutional. The opinion is especially important to the analysis here because the *Roe* Court determined the priority of the rights and interests at specifically identified times.

This analysis is grounded in an analogy drawn between the period of human existence examined by the Court in *Roe* and the period of human existence in which the construct would operate. Individual human existence begins upon the joinder of sperm and ovum and continues only as long as the trillions of cells generated by that joinder are able to function

109. No. 78-17711 at 2 (emphasis in original).

110. The cases that concern donation of organs by minors and incompetents serve as background; but because they do not deal with lack of consent and express refusal, they are of little value for the present analysis. See generally *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969); Curran, *supra* note 22.

111. 410 U.S. 113 (1973).

112. *Id.* at 164.

113. TEX. PENAL CODE ANN. tit. 1, §§ 1191-94, 1196 (Vernon 1961). When Texas adopted a new criminal code in 1973, prior to the Court's decision in *Roe*, these sections were transferred to TEX. HEALTH CODE ANN. tit. 71, §§ 4512.1-4, 4512.6 (Vernon Supp. 1974-1975). See 410 U.S. at 117-118.

synchronously. The totality of existence may be represented by a line¹¹⁴ that has as its endpoints the moments of conception, *C*, and death, *D*.¹¹⁵

In *Roe*, the Court examined a segment of this line, the gestational period, which has as its endpoints the moments of conception, *C*, and birth, *B*.¹¹⁶ The construct is concerned with another segment of the line, the dying period, which is bounded by the moments of affliction, *A*, and death, *D*.¹¹⁷ Affliction refers to that point at which the plaintiff/patient first contracts the disease that will eventually threaten his life.¹¹⁸

The analysis that follows will focus on similarities and differences between the line segments \overline{CB} and \overline{AD} .¹¹⁹ Relying on the Court's opinion in *Roe*,¹²⁰ the writer will use these comparisons to assess the probable constitutionality of the construct.

1. *The Gestational Period*

The *Roe* opinion recognized two points lying on the line segment \overline{CB} that are significant to a constitutional analysis: the end of the first trimester of pregnancy, *T*; and the point at which the fetus becomes viable, *V*. The end of the first trimester is uniform in all pregnancies, occurring, as a matter of definition, three months after conception. The point at which the fetus becomes viable, however, is not susceptible to uniform placement in the time period, or on the segment \overline{CB} . The *Roe* opinion defined it as that point at which the fetus "presumably has the capability of meaningful life outside the mother's womb."¹²¹ It has subsequently been defined as the point at which, "in the judgment of the attending physician on the facts of the particular case before him, there is a reasonable likelihood of the fetus'

114. The use of the term "line" is technically improper since a line does not have endpoints but is of infinite length. In order to minimize confusion, however, it is used here in contrast with what will subsequently be referred to as "line segments."

115. The *Roe* court intimates that conception may not be a moment at all, but a process. 410 U.S. at 161. The same may be said of death. The scientific niceties are unimportant in this context, since precise determination of either concept is not required.

For convenience, italicized capitals are used to replace the terms they symbolize. The line representing existence is represented:

C _____ *D*

116. Represented:

C _____ *B*

117. Represented:

A _____ *D*

118. Affliction may occur during the gestational period, as in the case of some birth defects, or even at the point of conception, as in the case of some hereditary disorders. The geometric representations will nevertheless treat the two segments as distinct.

119. Line segments will be represented in the text by their endpoints. Thus \overline{CB} is the line segment representing the period from conception to birth, \overline{AD} representing the period from affliction to death.

120. The analysis is based primarily on *Roe*, although it will refer to other abortion cases. It should be noted that the *Roe* Court's attention was called to the similarities between state authority to proscribe abortions and state authority to require donation of blood and other body tissue. See Brief of Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case at 21, in 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 639, 669 (1975).

121. 410 U.S. at 163.

sustained survival outside the womb, with or without artificial support."¹²² The segment \overline{CB} is thus divided into three smaller segments, conception to the end of the first trimester, \overline{CT} , the end of the first trimester to viability, \overline{TV} , and viability to birth, \overline{VB} .¹²³

The Court identified three parties and their respective interests during the gestational period: (1) the pregnant woman, claiming rights of privacy and control over her own body; (2) the fetus, for whom others claim on its behalf an ill-defined constitutional "right to life";¹²⁴ and (3) the state, claiming an interest in the protection of the other two parties.

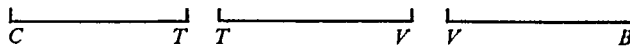
The Court found that the pregnant woman possessed a fundamental right to privacy, guaranteed by the fourteenth amendment, that was "broad enough to encompass her decision whether or not to terminate her pregnancy."¹²⁵ The Court went on to caution, however, that "[t]he pregnant woman cannot be isolated in her privacy";¹²⁶ that "this right . . . must be considered against important state interests in regulation."¹²⁷

The Court found important and legitimate state interests in the preservation and protection of both maternal health and potential human life: "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"¹²⁸ At the point at which these interests of the state rise to the "compelling" level, the state is justified in limiting the exercise of the woman's fundamental right through regulation of the abortion process.¹²⁹

The third party of concern to the Court was the fetus. As noted above, the state had a legitimate interest in protecting the fetus as a "potentiality of human life,"¹³⁰ but it was necessary to determine whether the fetus was guaranteed protection in its own right under the fourteenth amendment. The Court and the litigants were acutely aware of the crucial nature of this determination, since, if the fetus were protected, its "right to life would then be guaranteed specifically by the Amendment."¹³¹

122. *Colautti v. Franklin*, 99 S. Ct. 675, 682 (1979). See also note 175 *infra*.

123. Represented:



124. Numerous amici curiae briefs were presented to the Court in support of fetal rights to life under the Constitution.

125. 410 U.S. at 153.

126. *Id.* at 159.

127. *Id.* at 154.

128. *Id.* at 162-63.

129. *Id.* at 155. These regulations must be "narrowly drawn to express only the legitimate state interests at stake." *Id.*

130. *Id.* at 164.

131. *Id.* at 157. Indeed, at one point in oral arguments the state's attorney argued to the Court: "Gentlemen, we feel that the concept of a fetus being within the concept of a person, within the framework of the United States Constitution and the Texas Constitution, is an extremely fundamental

The Court held, after closely examining the use of the word "person" elsewhere in the Constitution, that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."¹³² At no point during the course of pregnancy, then, could the fetus, or one acting on its behalf,¹³³ assert a right that would circumscribe in any manner the woman's exercise of her fundamental right to choose whether to terminate her pregnancy.

The Court then proceeded to weigh the respective interests at various stages of the pregnancy. During the first trimester, *CT*, the Court held that the decision regarding termination of the pregnancy rested solely with the woman and her physician¹³⁴ and that the state was not justified in any attempts to abridge the exercise of the woman's fundamental right.¹³⁵

During the second stage of pregnancy, from the end of the first trimester to the point of fetal viability, *TV*, the Court found the state's interest in maternal health sufficiently compelling to justify state regulation of the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."¹³⁶

During the final stage of pregnancy, extending from viability to birth, *VB*, the Court found the state's interest in the preservation of potential life compelling enough to justify complete proscription of abortion "except when it is necessary to preserve the life or health of the mother."¹³⁷

In summary, the Court found no compelling state interest during the segment *CT*, meaning that the woman is afforded free exercise¹³⁸ of her fundamental right to choose whether to continue her pregnancy. During the segment *TV*, the state may circumscribe the exercise of this right upon a

thing." To this statement, the Court replied: "Of course, if you're right about that, you can sit down, you've won your case." 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 822 (1975).

132. 410 U.S. at 158.

133. It is important to note that the state's interest in protecting the "potentiality of human life" falls within the authority of the state to promote and protect the health, safety, morals, and general welfare of the community. It is *not* a derivative interest grounded in the doctrine of *parens patriae* through which the state exercises its "sovereign power of guardianship over persons under disability." BLACK'S LAW DICTIONARY 1269 (4th rev. ed. 1968).

134. The Court notes: "The State may define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." 410 U.S. at 165. This is clearly an example of state regulation of the abortion process even during the first trimester. The Court did not feel obligated to expose the compelling interest that justified this regulation, but it seems clearly to be the protection of maternal health through proscribing the unauthorized practice of medicine.

135. The Court appears prepared to allow some procedural regulation of the process throughout the time segment *CB*. For all abortions, the Court has upheld reporting and recordkeeping procedures that are "reasonably directed to the preservation of maternal health and . . . properly respect a patient's confidentiality and privacy. . . ." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976). The Court also appears to have upheld state authority to condition the availability of abortion to a minor upon obtaining either parental consent or an order from a court of competent jurisdiction, as long as the procedure for obtaining the order is not unduly burdensome. *Bellotti v. Baird*, 428 U.S. 132 (1976).

136. 410 U.S. at 163.

137. *Id.* at 164.

138. *But see* notes 134 & 135 *supra*.

showing that the circumscription is reasonably related to maternal health. During the segment \overline{VB} , the state, in protecting its interest in potential human life, may proscribe all abortions except those necessary to preserve maternal life or health. While the fundamental nature of the pregnant woman's right never changes, the state may constitutionally compel her to forego the exercise of that right and to provide her body for the benefit of the fetus, *which is itself without constitutional rights*.¹³⁹

2. *The Dying Period*

The Court has recognized the existence of two points, T and V , on the segment \overline{CB} that are significant for evaluation of abortion statutes. Similarly, on the segment affliction to death, \overline{AD} , there are two points at which, under the construct, the weights assigned the interests of the parties cause a shift in the balance. These points are labelled reversible, R , and irreversible, I .¹⁴⁰

Location of these points is accomplished by applying the criteria of the construct to the individual case. Reversibility, R , and irreversibility, I , serve as the endpoints for the segment \overline{RI} , the stage during which the plaintiff/patient is able to make a successful showing under the construct and thus obtain relief. In the stages represented by the segments lying to the left and right of \overline{RI} the criteria for relief will not be satisfied. During the stage affliction to reversibility, \overline{AR} , for example, the plaintiff/patient will not be able to show sufficient "imminence" of death to entitle him to relief.¹⁴¹ During the stage irreversibility to death, \overline{ID} , on the other hand, he will not be able to show a sufficiently substantial benefit to justify the transplant.¹⁴²

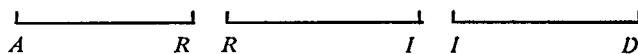
\overline{RI} , then, is the only stage in which the construct would operate and is the segment that requires constitutional analysis. It remains to identify the segment of the gestational period that is the best analogue to \overline{RI} and to use the *Roe* analysis of that segment to determine the constitutionality of the construct.

The parties involved in the dying period are: (1) the defendant/donor; (2) the state; and (3) the plaintiff/patient. These correspond, respectively, to: (1) the pregnant woman; (2) the state; and (3) the gestating fetus.

The defendant/donor has, throughout the dying period, a fundamental right to bodily security¹⁴³ similar to the pregnant woman's right to

139. See text accompanying notes 130-33 *supra*.

140. Thus, the segment \overline{AD} may be subdivided into three segments, \overline{AR} , \overline{RI} , and \overline{ID} , represented:



141. See text accompanying notes 48-50 *supra*.

142. See text accompanying notes 51, 52 *supra*.

143. "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 W. BLACKSTONE, COMMENTARIES *129.

privacy. The question of infringement of this right, which may be compared with the pregnant woman's right to privacy, is addressed below.¹⁴⁴

The state has an interest in the life of the plaintiff/patient similar to its interest in "the potentiality of human life."¹⁴⁵ The two interests are nevertheless distinct: the plaintiff/patient is unquestionably a "person" within the meaning of the fourteenth amendment, while the fetus is not.¹⁴⁶ The ramifications of this distinction are discussed below.¹⁴⁷

The constitutional "personhood" of the plaintiff/patient would seem to indicate, in the language of *Roe*, that his "right to life [is] guaranteed specifically by the [Fourteenth] Amendment."¹⁴⁸ This significantly strengthens the claim of a state interest in his life¹⁴⁹ and provides the basis upon which he can bring a suit on his own behalf. If the sanctions under the construct are civil only, it would be necessary for the plaintiff/patient in the original equitable action to establish, as a matter of standing, that his personal rights were being infringed upon by the defendant/donor's refusal to cooperate in the transplant procedure.¹⁵⁰

3. *The Analysis*

The state, by providing a means to implement the construct, infringes upon the fundamental right of the defendant/donor in order to protect its interest in the life of the plaintiff/patient. As pointed out above, this infringement only occurs during the stage of the dying period that is represented by \overline{RI} . In order to find a gestational analogue for \overline{RI} , the circumstances of the parties and the disease must be compared with the circumstances delineated in *Roe*. The greater the similarity of \overline{RI} to \overline{VB} , viability to birth, the more probable that the construct comports with the Constitution, for it is only for the period \overline{VB} that the *Roe* Court upheld the right of the state to infringe upon one person's fundamental right in order to assert its interest in the protection of another.

144. See text accompanying notes 180-97 *infra*.

145. 410 U.S. at 164.

146. See text accompanying notes 130-33 *supra*.

147. See text accompanying notes 153-57 *infra*.

148. 410 U.S. at 157.

149. If the Court's rather offhand language regarding the specific guarantee of a right to life is taken literally, an argument could be made that the fourteenth amendment places an affirmative obligation on the states to protect their citizens. This would be consonant with some political theorists' views of the function of the state. If men first banded together to protect themselves from external enemies and the state later assumed the role of protecting them from internal dangers by enacting criminal laws, the state should guard against *all* natural dangers, including disease. The United States government has certainly afforded economic protection through its social welfare programs and research and treatment grants. If the duty is recognized in economic terms, and if the government is within constitutional limits in enacting this proposed form of protection from natural forces, the affirmative state obligation argument would seem to have some validity.

150. "The question of standing . . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Proc. Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The situation of the plaintiff/patient during \overline{RI} is analogous to the situation of the fetus during the whole course of pregnancy. Both are dependent on another for their continued existence. The plaintiff/patient is in need of bodily tissue from the defendant/donor; the fetus is in need of the nutrients and oxygen being passed to it from the mother through the placenta.¹⁵¹

If \overline{RI} is to be found meaningfully similar to \overline{VB} , it must be shown that the situations of either the state or the mother and the defendant/donor are different during \overline{RI} and \overline{VB} than during the remainder of the dying and gestational periods. As noted above, the fundamental quality of the right possessed by the pregnant woman does not change,¹⁵² nor does its analogue possessed by the defendant/donor. Therefore, a distinction between the various stages of the gestational period or between the various stages of the dying period cannot be based on differences in the situations of the pregnant woman or the defendant/donor during those stages.

The state's posture during viability to birth, \overline{VB} , differs from its posture at all other times during the gestational period. The Court has been quite careful in avoiding an objective standard to be applied in determining viability. It has said that viability is the point at which the fetus is presumably capable of a meaningful life¹⁵³ and stands a reasonable likelihood of survival outside the mother's womb.¹⁵⁴ Why the hesitancy on the part of the Court to allow an arbitrary standard? *Not* because a viable fetus achieves protectable rights.¹⁵⁵ It is because viability signifies the attainment by the fetus of a sufficient "potentiality of human life"¹⁵⁶ that the state becomes justifiably concerned about its protection and preservation. Earlier in gestation, during the period \overline{CV} , when the potential of human life is not as strong, the state's interest is simply not compelling.

The plaintiff/patient, however, is not simply *potential: he is a living human being*. Therefore, the state has a legitimate and important interest in the preservation of his life. Under the construct, the assertion of the state's interest is properly deferred until the period \overline{RI} because that interest is not "compelling" when the plaintiff/patient's life is not in imminent danger or when the infringement of the defendant/donor's right is unlikely to yield substantial benefit to the plaintiff/patient. It is the interest of the state, then, that distinguishes \overline{RI} and \overline{VB} from the other segments and that justifies their use as analogues in this analysis.¹⁵⁷

151. Interruption of this flow has been compared to "cutting the air hose on a salvage diver." Commonwealth v. Edelin, 359 N.E.2d 4, 27 (Mass. 1976) (Hennessey, C.J., dissenting).

152. See text accompanying note 139 *supra*.

153. Roe v. Wade, 410 U.S. 113, 163 (1973).

154. Colautti v. Franklin, 99 S. Ct. 675, 682 (1979).

155. See text accompanying notes 130-33 *supra*.

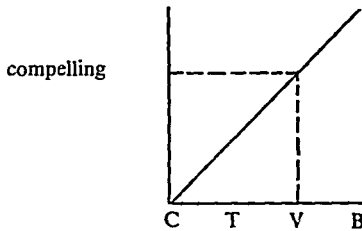
156. Roe v. Wade, 410 U.S. 113, 164 (1973).

157. The analogy becomes more clear when the state interest is diagrammed. The "state interest" curve during the gestational period is represented:

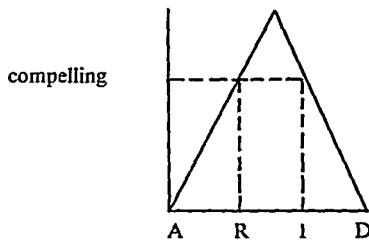
But what of the differences? Surely the defendant/donor almost never bears responsibility for the condition of the plaintiff/patient, in contrast to the pregnant woman who ordinarily¹⁵⁸ may be charged with responsibility for the existence of the fetus. To require a person to abstain from harming another is wholly different from requiring that a positive benefit be conferred. Furthermore, there may be greater risks in donating certain bodily tissues than in bearing a child.

These distinctions¹⁵⁹ deserve consideration. The first, the responsibility of the person whose right is infringed for the condition of the other, is the most troublesome. In most cases, the pregnant woman has deliberately engaged in the sexual intercourse that resulted in the existence of the fetus. In most cases, the defendant/donor will have had no part in the plaintiff/patient's contraction of the disease.¹⁶⁰ One of the great notions of our law is that everyone must take responsibility for the proximate results of his acts; one acts at his own peril.¹⁶¹ The woman's deliberate participation in coitus imposes upon her the duty to accept the consequences of the act, and it is therefore not "unfair" to require her to lend her body to the viable fetus.

Such arguments may buttress one's personal opinions on abortion, but it is wrong to ascribe constitutional validity to them on the basis of *Roe*. First, it is a recognized fact that pregnancies result not only from



The "state interest" curve during the dying period is represented:



Thus, the analogy arises because only during the periods \overline{VB} and \overline{RI} is the state interest compelling.

158. In cases of rape or seduction of an incompetent, of course, few would hold the woman chargeable with the results of the act. See text accompanying notes 160-64 *infra*.

159. This incomplete list of distinctions includes those that were most often expressed to the writer.

160. Indeed, if he did have a part—*e.g.*, through transmission of a contagious disease—his duty to aid might arise from the doctrine that those who negligently injure another are under a duty to render aid to those injured. See RESTATEMENT (SECOND) OF TORTS §§ 321, 322 (1965).

161. *Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 514 (2d Cir. 1931).

loving embraces but also from forcible intercourse. Although the *Roe* Court was well aware that many abortion statutes in existence at the time permitted abortions in cases of pregnancies resulting from rape,¹⁶² its opinion does not accord any special rights in this situation. Presumably, a rape victim carrying a *viable* fetus could be required to show that an abortion was “necessary to preserve [her] life or health,”¹⁶³ *in spite of the fact that she bears no responsibility for the pregnancy.*¹⁶⁴

More fundamentally, the comparative responsibility argument is simply not supported by the Court’s opinion in *Roe*. The Court took notice of three justifications for criminal abortion statutes: (1) deterrence of “illicit sexual conduct”¹⁶⁵; (2) concern over the safety of the procedure itself;¹⁶⁶ and (3) exercise of the “state’s interest—some call it a duty—in protecting prenatal life.”¹⁶⁷ Each of these justifications was dealt with and the Court’s opinion was tailored to accommodate them.¹⁶⁸ Not once in the opinion of the Court, nor in the concurring and dissenting opinions, is there a mention of a “duty” or “responsibility” that the pregnant woman owes as a result of her sexual conduct.

It is merely fortuitous that antiabortion statutes operate negatively to forbid an action, while the transplantation construct requires a positive act. In both instances, the state invades fundamental individual rights of bodily autonomy in order to protect another. The pregnant woman is compelled to keep within her body something that she does not want there; the transplantation defendant/donor is compelled to relinquish from his body something that he wants to retain.

162. The Court quoted the American Bar Association-approved Uniform Abortion Act that allowed victims of rape to secure abortions even after the generally applicable maximum limit of 20 weeks had passed. 410 U.S. at 146-47 n.40. The Court also referred to the text of the American Law Institute’s Model Penal Code § 230.3(2), which exempted rape victims from the general proscription of abortions. 410 U.S. at 140 n.37. See *Doe v. Bolton*, 410 U.S. 179, 205-06 app. (1973). The Court noted that fourteen states had adopted some form of the ALI statute. 410 U.S. at 140 n.37.

163. 410 U.S. at 164.

164. The Court brought up this issue at oral argument:

Mr. Floyd [state’s attorney]: Now the appellee does not disagree with the appellant’s statement that a woman has a choice. But, as we have previously mentioned, we feel that this choice is left up to the woman prior to the time she becomes pregnant. This is the time of the choice

The Court: Texas doesn’t grant any exemption in the case of a rape, where the woman’s pregnancy has resulted from rape—either statutory or otherwise—does it?

Mr. Floyd: There is nothing in our statute about that. Now the procedure—

The Court: And such a woman wouldn’t have had a choice, would she?

Mr. Floyd: . . . [A]s I understand the procedure when a woman is brought in after a rape, is to try to stop whatever has occurred, immediately, by the proper procedure in a hospital

75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 805 (1975).

165. 410 U.S. at 148.

166. *Id.* at 148-50.

167. *Id.* at 150.

168. The first was summarily dismissed by the Court because Texas did not offer it in defense of the statute and because it would have presented serious problems of overbreadth. *Id.* at 148. The other two justifications were recognized by the Court as interests in maternal health and potential human life, and dealt with as they arose during the gestational period. *Id.* at 148-52.

The difference in risks to be faced by the defendant/donor and the pregnant woman are difficult to quantify. The construct limits the risks faced by a defendant/donor,¹⁶⁹ but there is no authoritative articulation of the risks that must be faced by the pregnant woman during the period \overline{VB} . The closest case on point is *United States v. Vuitch*,¹⁷⁰ decided before *Roe*, in which the Court construed a District of Columbia statute proscribing all abortions except those necessary to save the life or health of the mother.¹⁷¹ The Court used Webster's Dictionary to determine that the word "health" included mental as well as physical health: A "[s]tate of being . . . sound in body [or] mind."¹⁷² The Court noted that the medical decision whether a particular procedure is necessary for the patient's health is routine.¹⁷³ Justice Douglas, dissenting, pointed out that a physician must nevertheless be aware that he is always vulnerable to criminal prosecution in which a jury may second-guess his "routine" decision.¹⁷⁴ The Court seems willing to reduce this vulnerability,¹⁷⁵ but cautious physicians are unlikely to perform a late-term abortion unless the risks to the woman are clear.

From the foregoing discussion, it is clear that the Court's reasoning in *Roe* does not invalidate the construct. Indeed, *Roe* can be invoked for its positive support. The state's interest in protecting the life of the plaintiff/patient is even stronger than its interest in protecting potential life because the plaintiff/patient has legally cognizable rights under the Constitution. Moreover, unlike the so-called "viable" fetus, whose likely chance of survival¹⁷⁶ can be preserved even upon deliberate removal from the uterine environment,¹⁷⁷ the plaintiff/patient is in imminent danger of death¹⁷⁸ if the court allows the defendant/donor to stand firm on his claimed constitutional rights.

Under the construct, the defendant/donor is afforded all protections reasonably appropriate to safeguard his interests, and it is only after a court of competent jurisdiction has considered evidence from attending physicians that there is any encroachment upon his rights. The right of the

169. See notes 56-58 and accompanying text *supra*.

170. 402 U.S. 62 (1971).

171. D.C. CODE § 22-201 (1973).

172. 402 U.S. at 72. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1043 (1966).

173. 402 U.S. at 72.

174. *Id.* at 75.

175. See *Colautti v. Franklin*, 99 S. Ct. 675 (1979). The *Colautti* Court held invalid a Pennsylvania abortion statute that required the attending physician to use the abortion procedure most likely to result in a live birth "if there is sufficient reason to believe that the fetus may be viable." 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977). The Court found the statute unconstitutionally vague, saying that "a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." 99 S. Ct. at 686.

176. 99 S. Ct. at 682.

177. A hysterotomy procedure, similar to a Caesarean section, is available and is the method of choice for late term abortions. This procedure would provide the best chance of live birth, since the fetus is not necessarily injured during the procedure. 4B R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶311.54(2) (3d ed. 1979).

178. See text accompanying notes 48-50 *supra*.

defendant/donor to bodily security, like the right of a pregnant woman to privacy, is not absolute.

4. *The Defendant/Donor's Claim to Bodily Security*

Mr. Shimp contended that his "right to himself [choose] whether his body will be invaded for the benefit of another is fundamental and beyond question. The decision of whether to be a donor is that of the Defendant and the Defendant alone."¹⁷⁹ Similar assertions regarding the existence of an absolute right to the control of one's own body were made in *Roe*. It was urged upon the Court that few rights could be considered "more basic, fundamental or worthy of protection than a woman's right to control her body and the nature, direction and quality of her life."¹⁸⁰ The Court was asked to recognize that "[t]he freedom to be the master of her own body, and thus of her own fate, is as fundamental a right as a woman can possess."¹⁸¹

The *Roe* Court was unimpressed. Justice Blackmun wrote:

[I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).¹⁸²

That the Court chose *Jacobson* and *Buck* to support its decision provides insight into its reasoning in *Roe*. The legislative enactments in *Jacobson* and *Buck* were upheld as legitimate exercises of the state's police power. By inference, state restriction of the right of a pregnant woman to an abortion is an exercise of police power.¹⁸³ Likewise, under the construct, interference with the defendant/donor's right to bodily security is also an exercise of police power.

The defendant in *Jacobson v. Massachusetts*¹⁸⁴ claimed that the state's compulsory smallpox vaccination law was

unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to

179. Brief for Defendant at 4, *McFall v. Shimp*, No. 78-17711 In Equity (C.P. Allegheny County, Pa. July 26, 1978).

180. Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 16, 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 563, 594 (1975).

181. Brief of the American College of Obstetricians and Gynecologists, The American Psychiatric Association, The American Medical Women's Association, The New York Academy of Medicine, and a Group of 178 Physicians as Amici Curiae at 16, 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 317, 347 (1975).

182. 410 U.S. at 154.

183. "[A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.*

184. 197 U.S. 11 (1905).

him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.¹⁸⁵

Justice Harlan, writing for the Court, denied that the law could be so characterized, since

the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. . . . "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's will. . . ."¹⁸⁶

At issue in *Buck v. Bell*¹⁸⁷ was the constitutionality of a Virginia statute that authorized selective sterilization of mental incompetents. The incompetent pressing the claim, Carrie Buck, was the daughter of a "feeble minded mother . . . and the mother of an illegitimate feeble minded child."¹⁸⁸ The state court that originally issued the sterilization order found that she was "the probable potential parent of socially inadequate offspring, likewise afflicted, that she [could be] sexually sterilized without detriment to her general health and that her welfare and that of society [would be] promoted by her sterilization."¹⁸⁹

Carrie Buck urged the Court that the statute was unconstitutional because it violated her "right of bodily integrity and [was] therefore repugnant to the due process clause of the Fourteenth Amendment"¹⁹⁰ and denied her equal protection of the laws.¹⁹¹ The Court, speaking through Justice Holmes, was unpersuaded:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes¹⁹²

Jacobson and *Buck* exemplify judicial balancing of rights and interests when an important exercise of the police power conflicts with a citizen's right to bodily security.¹⁹³ In *Jacobson* and *Buck*, as in *Roe*,

185. *Id.* at 26.

186. *Id.* at 26-27 (citing *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

187. 274 U.S. 200 (1927).

188. *Id.* at 205.

189. *Id.* at 207.

190. *Id.* at 201.

191. *Id.* at 202.

192. *Id.* at 207.

193. This type of balancing test can also be found in criminal search and seizure cases, an area in which the courts have increasingly subordinated a suspect's right to bodily integrity to the need for effective law enforcement. The movement began with *Terry v. Ohio*, 392 U.S. 1 (1968), in which the

skilled rhetoricians unsuccessfully pressed upon the Court emotional arguments designed to narrow the focus of the cases to the fundamental right of bodily security. In *McFall v. Shimp*, the rhetoric worked.¹⁹⁴ The court acknowledged defendant's assertion of his right to bodily security as an insurmountable obstacle to plaintiff's demand. The court was unable to articulate a doctrine that would appropriately allow the state¹⁹⁵ to assert its interest. This ruling, probably proper under the present state of the law,¹⁹⁶ failed to deal effectively with the defendant's clearly defective claim of an absolute right to bodily security.¹⁹⁷

IV. CONCLUSION

Our system of law must confront the issues presented by rapidly developing biomedical technology. *McFall v. Shimp* was not unique in presenting profound ethical and scientific issues that are difficult for a court to decide fairly under traditional rules of American law.¹⁹⁸ The writer has proposed a construct to guide the just resolution of one such issue: compulsion of an unwilling donor in a transplantation that would significantly prolong the life of a donee who otherwise faces imminent death. The analysis offered to support the construct will allow accomplishment of justice without heightening the emotions that are necessarily aroused when fundamental rights are in conflict. The title of this article asks whether we, as members of a moral society experiencing explosive technological growth, can live with the result of *McFall v. Shimp*. This writer respectfully submits that our answer to that query, as it was for Robert McFall, must be in the negative.

Fordham E. Huffman

Court held lawful a policeman's "stop-and-frisk" search of a suspect who " 'didn't look right to [the policeman] at the time.' " *Id.* at 5. The subordination apparently reached its zenith in *United States v. Crowder*, 543 F.2d 312 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977). In *Crowder*, the trial court ordered the surgical removal of a bullet from a criminal defendant, upon a showing that the bullet was likely to prove that the defendant took part in a murder. For an extensive annotation on physical invasion of a person's body for the purpose of obtaining evidence for a criminal prosecution, see Annot., 25 A.L.R.2d (1952), and the cases compiled in the Later Case Service under that annotation.

194. See text accompanying note 33 *supra*.

195. Judge Flaherty recognized that McFall's request required state action. He phrased his opinion in terms of the "Chancellor" being asked to do something, and the "law" being asked to compel the donation. No. 78-17711 at 2. He viewed the requested intervention of the state, however, as being in aid of the plaintiff's exercise of *his* rights when, in fact, McFall was asking the court to vindicate the *state's* interests. See text accompanying notes 149-51 *supra*.

196. Pennsylvania had imposed no statutory duty to rescue, and Judge Flaherty was properly hesitant about creating a common-law duty without guidance from the legislature.

197. See text accompanying note 39 *supra*. Judge Flaherty's language in the opinion demonstrates his overly protective concern for the defendant, in spite of the fact that he found Shimp's conduct to be morally unacceptable. His concern was unnecessary in view of the Court's pronouncements concerning the right asserted.

198. The law is an important means by which society ensures that implementation of technological advances takes place only after careful consideration of the consequences. The recent court decisions in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) ("right to die") and *Superintendent of Belchertown State School v. Sackewicz*, 370 N.E.2d 417 (Mass. 1977) (right to refuse medical treatment) are clear examples; more may be expected as biomedical technology develops.