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MY SISTER'S KEEPER?: LAW, CHILDREN, AND COMPELLED DONATION

MICHELE GOODWIN*

INTRODUCTION

*Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.*¹

In thinking about this Symposium, *The Politics of Health Law*, I wanted to consider the politics of organ donation, particularly from the perspective of children. Compelled organ and tissue donation from children is a passively accepted norm. As such, a debate as to whether and under what circumstances children may serve as medical donors is largely nonexistent. With the exception of noted scholars such as Jennifer L. Rosato,² John J. Paris,³ and Michelle Oberman,⁴ and more recently the intersectional scholar-

* Wicklander Chair and Director of the Health Law Institute, DePaul University College of Law. I would like to thank Barbara Noah and the editors of the *Western New England Law Review* for inviting me to participate in this symposium edition. Barbara Noah is an outstanding colleague in the health law field and this symposium provides a special opportunity to collaborate—thank you, Barbara. I am also grateful to Professor Martha Fineman for inviting me to participate in the conference on Genetic Manipulation and Enhancement Technologies at Emory Law School where I shared some of my thoughts expressed in this Essay. Many thanks to Jane Cohen, Ani Satz, and Marie Fox for their thoughtful comments at the conference. I would also like to thank Erin Crow, my research assistant, for her dedicated service. This Essay draws upon my prior scholarship and borrows from the argument presented in *Altruism's Limits: Law, Capacity, and Organ Commodification*. See Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305 (2004).

1. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

2. See Jennifer L. Rosato, *Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 57 (2000).

3. John J. Paris et al., *Has the Emphasis on Autonomy Gone Too Far? Insights from Dostoevsky on Parental Decisionmaking in the NICU*, 15 CAMBRIDGE Q. HEALTH-CARE ETHICS 147 (2006).

4. Michelle Oberman & Joel Frader, *Dying Children and Medical Research: Access to Clinical Trials as Benefit and Burden*, 29 AM. J.L. & MED. 301 (2003).

ship of Kimberly M. Mutcherson,⁵ which blends public policy law with family law, too few legal scholars scrutinize the impact of these questions. The lack of scholarship in this domain might indicate that the whims of parents in organ retrieval from children are too complicated and morally bound to easily unravel. Further, compelled tissue and organ donation is an area largely overlooked in state and federal regulation. Thus, at a glance, the case law involving the use of children in organ and tissue transplants indicate judicial deference and social ambivalence to parents at the risk of devaluing the autonomy, privacy, and integrity of children.

This Essay, quite simply, is about the contemporary reach of the Good Samaritan Rule, commonly known as the “duty to rescue.” The Essay scrutinizes whether and under what circumstances parents’ rationalization for compelling organ and tissue donation from their children is ever proper or legitimate. In other words, when and under what circumstances can parents impose that duty—to rescue—on their children to save the life of another. It critiques what I refer to as “reproductive altruism,” meaning creating a child as a life-saving resource for a dying child. Reproductive altruism happens to conflict with the most noble principles of altruism, which theoretically, if not actually, govern federal and state guidelines for organ and tissue donation. This term too might be inadequate, but the aim is to speak more precisely to what is happening, which is not direct altruism, but rather imposed, manufactured, or compelled altruism. Sophisticated reproductive technologies afford parents the means to create organ and tissue donors, but legislation and jurisprudence have yet to address these modern scenarios. Drawing from popular culture—specifically the recent best-selling novel, *My Sister’s Keeper*, by Jodi Picoult,⁶ and Kazuo Ishiguro’s *Never Let Me Go*⁷—I explore how judicial considerations might be framed and what values are most essential to preserve in establishing a framework for compelled living donations, particularly from children.

Ishiguro’s novel is an insightful journey into a world imagined, but unstudied, as of yet, by academics. With his languid prose, a very sad dystopia awaits us. The irony, of course, is that his fictionalized future represents more of a contemporary legal realism,

5. Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL’Y 251 (2005).

6. JODI PICOULT, *MY SISTER’S KEEPER* (2004).

7. KAZUO ISHIGURO, *NEVER LET ME GO* (2005).

where children are produced or created specifically to serve as “donors” and to provide “gifts” to others. Ishiguro questions the broader usage of preimplantation genetic diagnosis and in vitro fertilization through innuendo; the children here are “clones” created in test tubes. He plays with the knowledge that “they know, but don’t know,” meaning that the children simply adapt to the life given them.⁸

In the novel, these children are born to either enhance medical understanding or serve as “donors” and “carers” until they die. The haunting tale teases the reader along because the children—apart from their macabre purpose—are quite normal; they are the children born through advancements in biotechnology. That they are born specifically to serve as “altruistic” organ donors minimizes the full value of their lives—it tells only one aspect of the story—although this is Ishiguro’s point. Bound people adapt and children are resilient. The children know and understand Ishiguro’s world, where their sacrifice is socially, legally, and psychologically normalized. Yet, his prose pushes us into a type of complicity with the concept of compelled donation from children because that reality is normalized in his novel. No longer is it a question as to whether creating individuals to save the lives of others is ever justifiable; in Ishiguro’s novel our satisfaction with, if not absolute reliance on, the cures that come from biotechnological advancements has made donors and carers necessities, and a responsibility that the state willingly assumes (as the clones are effectively wards of the state).

Much as an adopted child ponders over her connection to a biological parent, so do these children secretly seek out their “possibles” (the individuals who provided their DNA and genetic material). They look for their possibles among the faces of people in pornographic magazines, figuring only individuals among the skid row would be desperate and destitute enough to participate in a cloning program. Thus, Ishiguro insinuates that one possible (and dramatically horrific) outcome associated with incentives for organs might be that only the poor and socially disconnected will participate, and such programs will necessarily violate general moral and ethical principles.

Ishiguro’s novel provides a provocative backdrop for a legal study of compelled donation; his veiled references to slavery touch

8. *Id.* at 266-68.

upon Richard Titmuss's⁹ plea against incentives for blood and organ donation. Yet, as the author alludes, an organ shortage coupled with overwhelming demand will necessarily lead to complicated and often undesirable options. The proper question will be: what options pose the least harm, risk, coercion, and fraud, and also provide the best benefits. As Neil Komesar notes, all choices—when law and resources are strained—are necessarily burdened.¹⁰ The problem, however, is that societies become wedded to systems and legislatures to laws—even bad ones—and change is regarded as an insurmountable obstacle.

The use of children as organ suppliers is but one of the problematic results of an organ procurement system that relies *exclusively* on altruism. Federal regulations prohibit any method of compensating adults for their expenses and wages connected with organ donation, yet ironically ignores the forced use of children as organ and tissue donors. Not only can an adult be fined for reimbursing another for wages missed due to organ recovery, the National Organ Transplantation Act (NOTA) imposes mandatory incarceration.¹¹ Further, based on reported cases and other data, I contend that the present altruistic organ procurement process in the United States is likely to exacerbate expectations that children are appropriate organ producing resources. Those worried about the potential negative effects of introducing incentives into organ procurement should consider that children are far more commodified in the present procurement system than any adult would be, whose compensation for providing an organ might be reimbursement for travel expenses, living expenses, and wages.

Thus, one by-product of a federal prohibition on organ sales, and its enforcement of an altruistic procurement model, happens to be the use of children and the creation of children to support and sustain the living. In the United States, legislators have drowsily acquiesced to Titmuss's altruistic based organ procurement model,

9. See, e.g., RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 242-46 (1971) (drawing the line between social good and economic value in blood donations; ultimately arguing for altruism to dominate "gift relationships" between donors and recipients in order to avoid devaluation of the individual).

10. See, e.g., NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 3-4 (2001).

11. See, e.g., 42 U.S.C. § 274(e) (2000). This section of the National Organ Transplantation Act (NOTA) gives rise to criminal penalties, including imprisonment, and fines for the purchase or sale of human organs, including livers, hearts, and kidneys for use in transplantation.

ignoring its more serious problems; efforts to introduce alternative plans before the President's Council on Bioethics are thoughtfully tolerated,¹² but ultimately dismissed. Altruistic organ procurement has benefited many over the years, but disserves thousands each year, because too few organs are available and thousands of people die annually because organs are not available.¹³ Ishiguro paints a world about choice; as he informs the reader, desperate people will turn to children if organs are not available.

I was moved to consider Jodi Picoult's work because it has captured the public's attention, and more importantly, the author details in fine precision the medical and legal complications experienced by the daughters caught in an internecine divide, giving fiction the most compelling "real life" narrative. Picoult's novel caught my attention for another reason: my Torts students were reading it. Thus, the novel provided a unique opportunity for academic dialogue about legal concepts which my students were eager to wrestle with and pick apart.

Moreover, Picoult's novel had great relevance for my own research. For example, how should courts respond to compelled living donations from children and to reproductive altruism? How do we balance the desire to preserve life versus the desire to protect life from unnecessary harm and interference or intrusion? This Essay takes up the scrutiny of these issues, using a law-and-status framework.

In early 2006, over 95,000 Americans waited anxiously for organs.¹⁴ However, between January and November 2006 fewer than

12. The President's Council on Bioethics met five times during 2006, inviting comments from a number of scholars. The President's Council on Bioethics, Meetings, <http://www.bioethics.gov/meetings> (last visited Feb. 14, 2007). Among those presenting testimony to the Council were Dr. Benjamin Hippen and Richard Epstein. Benjamin E. Hippen, Transplant Nephrologist, Metrolina Nephrology Assocs., Charlotte, N.C., Testimony before the President's Council on Bioethics, Session 4: Organ Transplantation and Procurement—Policy Proposals (June 22, 2006) (transcript available at <http://www.bioethics.gov/transcripts/june06/session4.html>); Richard Epstein, Dir. of the Law & Econ. Program, Univ. of Chi. Law Sch., Testimony before the President's Council on Bioethics, Session 2: Organ Transplantation and Procurement—Policy Proposals (Apr. 20, 2006) (transcript available at <http://www.bioethics.gov/transcripts/april06/session2.html>).

13. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ANNUAL REPORT OF THE U.S. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK AND THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS: TRANSPLANT DATA 1995-2004, at I-1 (2005).

14. United Network for Organ Sharing, U.S. Transplantation Data, <http://www.unos.org/data/default.asp?displayType=usData> (data as of 3:41 p.m. on February 16,

14,000 donors supplied organs.¹⁵ Thousands will die annually before an organ becomes available, and more patients will be shed from the waiting list as the United Network for Organ Sharing (UNOS) deems them unsuitable because of age, the severity of illness, or too many years on dialysis. By 2010, according to Dr. Benjamin Hippen, a leading nephrologist and researcher on organ procurement options, the average waiting time for an organ will be approximately nine to ten years.¹⁶ To be sure, when forced to endure such waits the likelihood of survival is dramatically reduced. The considerable demands for organs and bone marrow are evidenced by our national transplant waiting lists. Yet, federal policy makers are slow to respond to the ever-growing demand for organs and the woefully inadequate supply to meet those needs. In the absence of an adequate legislative response to fuel a greater supply, individuals are creating their own supply systems, either by participating in organ tourism (obtaining organs abroad from poor people in third world countries) or by using their children to supply organs and bone marrow. From the perspectives of dying patients in need of organs, the options are limited and the choices are constrained by restrictive legislation that limits all procurement to the altruistic acquisition of organs.

Nevertheless, the question remains whether children, and even those created for the purpose of donating, are the best solution to our organ and tissue transplantation problems. In this Essay, I take the position that children and the mentally ill are not viable replacements for an incompetent, ineffective organ procurement system. Their involvement is symptomatic of the deeply embedded procurement strains on altruism as articulated in earlier works.¹⁷ Specifically, third-party-imposed obligations to rescue defy the American common law tradition, but in contravention of that established doctrine can be found numerous cases involving children supplying blood, bone marrow, skin, and organs for family members. The choices to be made are surely difficult; instinctually, most

2007). However, this sum of total patients awaiting transplant is less than the total number waiting for specific organs. *Id.*

15. *Id.* This is the most recent data available.

16. Hippen, Testimony before the President's Council on Bioethics, *supra* note 12.

17. MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006); Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling & Distributive Justice*, 6 VA. J.L. & TECH 2 (2001), reprinted as *Rethinking Legislative Consent Law*, in 5 DEPAUL J. HEALTH CARE L. 257 (2002).

parents desire to protect their children at all costs and in many contexts, the law imposes this duty on them.

In their provocative books, Ishiguro and Picoult revive rescue doctrine questions. That the books are novels, rather than treatises on reproductive technology or family law, does not detract from their value as compelling and disturbing studies for lawyers, judges, policy-makers, and physicians. Picoult packs the book with an emotional force too often divorced from the deeply edited and arguably sanitized cases students study, and contextualizes her examination of compelled donation without indulging in sentimentality or straying from the pertinent legal questions of substituted judgment, best interest standards, and conflicts of interests. The foci of her book—the Fitzgerald family and the parents' legal battle with their thirteen-year-old daughter, whom they created to save an older sibling—deeply scrutinizes these legal questions. Interestingly, the legal question is not whether the Fitzgeralds may use their daughter as a donor, but whether and how the daughter can legally extricate her medical decision-making from them. Picoult's conclusion is complicated; the donor child, Anna, is granted medical emancipation, but nevertheless becomes the organ donor for her seventeen-year-old sibling, Kate, after a fatal car accident.

Picoult, like other authors writing about organ donation, frames organ and tissue transactions as a "gifting," as if the donor child is consenting to the tissue and organ harvesting. Ishiguro treats this in a different manner, using "donor" as a life status—almost as a rite of passage—a noble stage. This language pervades the donor-donee relationship. However, the "gift of life" is a fallacy according to Laura Siminoff and Kata Chillag, and perhaps they are right.¹⁸ Organ gifting, according to the authors' study on donor perceptions, is more like creating fettered "creditor-debtor" relationships with the inability of donors or recipients, particularly children, to ever fully come to closure with the transactions.¹⁹ Their study confirms prior research, which reveals that transplant recipients may later feel unworthy or guilty about receiving the organs.²⁰

18. See Laura A. Siminoff & Kata Chillag, *The Fallacy of the "Gift of Life,"* 29 HASTINGS CTR. REP. 34 (1999) ("Education campaigns identifying organ donation as the gift of life were designed to make the public aware of the good that comes from transplantation and to encourage people to become donors.").

19. *Id.* at 36 (quoting RENÉE C. FOX & JUDITH P. SWAZEY, SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY 40 (1992)).

20. Philip Cohen, *Donors' Dread: Why Do Children Who Help a Sick Sibling End Up Depressed?*, NEW SCIENTIST, Aug. 23, 1997, at 20; Deane L. Wolcott et al., *Psycho-*

The donors too, according to a research study conducted by psychologists at the University of California San Francisco and the Pacific Graduate School of Psychology, experience significant angst. Wendy Packman and Mary Crittenden, the lead authors of that study, assert that siblings “who make up three-quarters of the donors in pediatric bone marrow transplant cases often suffer anxiety and seem to feel worse about themselves than non-donor siblings.”²¹ Given such compelling research findings, is it ever permissible to subject incompetent persons to bone marrow or organ harvesting?

Picoult eloquently illuminates these conundrums, but leaves readers to untangle the issues on their own. There are shortcomings to this approach. If her strength is raising the legal questions, Picoult’s weakness is the failure to challenge her audience with answers, including a failure to truly engage the reader with the jurisprudence. The author, however, succeeds intelligently in other areas, including constructing a nuanced battle of ethics between the donor and her parents. Yet, at the book’s conclusion, Picoult’s opinion as to whether parents are the best decision makers in these instances and whether courts should grant parents exclusive authority to make compelled-donation decisions remain a mystery. Her failure to shed light on these questions is frustrating in light of her research.²² The author, it seems, has difficulty answering the very question she doggedly pursues: Is harming one child to save the life of another ever a legitimate choice? The strength of her work, as well as Ishiguro’s, then, is that they provide a framework from which to launch lengthy thought experiments into a true legal case study, which this Essay provides.

This Essay disentangles the jurisprudence of compelled donation to evaluate the legitimacy of the rescue doctrine as applied to children. It analyzes the questions left unanswered by Picoult and provides context for the disturbing jurisprudence which ultimately

logical Adjustment of Adult Bone Marrow Transplant Donors Whose Recipient Survives, 41 *TRANSPLANTATION* 484, 484 (1986) [hereinafter *BMT Donors*].

21. See Corinna Kaarlela, Press Release, Univ. of Cal. San Francisco, After Child Donates Bone Marrow to a Sibling, Self-Esteem Often Fares Worse than that of Non-Donor Brothers and Sisters, Aug. 8, 1997, available at <http://www.ucsf.edu/~adcom/listserv/ucsfnews/0142.html>.

22. Interestingly, Picoult dedicates the book to the Currans; it is unknown by this author whether the Currans to whom she refers are those who were locked in a legal battle in Illinois in 1990 with their father regarding the use of their bone marrow to save the life of their older sibling. PICOULT, *supra* note 6; see *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990).

grants parental authority to compel organ and tissue donations from children. This Essay argues against that jurisprudence, suggesting that it is symptomatic of biotechnology outpacing the law; children rightfully lack the legal capacity to make informed decisions about organ donation and their participation in transplant regimes should be limited to the narrowest set of circumstances.

This Essay begins with a discussion of preimplantation genetic diagnosis and a slightly technical overview of bone marrow transplantation, thereby examining both the means and mode of rescuing siblings. It frames the discussion in two distinct ways, laying out the legal theory for rescue doctrine and arguing that the theory behind the No Duty Rule had great relevance in our nascent biotechnology era, and even more importance now. Part I briefly describes the medical justifications for using siblings as subjects in non-therapeutic medical cases. It then turns from the medical framework to explore the forceful justifications of the “no-duty-to-rescue” doctrine. Part II considers the murkier issue of language. It argues that the “gift of life” concept is a fallacy and that compelled altruism contradicts the “no-duty” common law tradition. Part III unpacks the legacy of eugenics and its nefarious connection to contemporary jurisprudence on affirmative rescue duties. I argue that the forced use of mentally incompetent persons’ body parts greased the slippery slope of compelled organ donation, thereby creating a legal precedent which we now struggle against. This Essay concludes by articulating an alternative vision for organ procurement that might reduce parental willingness to harvest from their children.

I. BODY PART SEARCH AND SEIZURE

Picoult and Ishiguro cleverly demonstrate that what fits neatly within a medical paradigm as necessary or essential treatment may not always translate as the appropriate, moral, or legally justifiable course of action for children. Recent national debates about the denial of federal government funding for stem cell research, and whether stem cells should be used in medical research and therapies, capture part of the social tension. The more contemporary debates about the use of uninformed, non-consenting, or marginally consenting participants in non-therapeutic medical treatments remain entrapped in a moral shroud, rarely treated as a constitutional law thought experiment, and seldom tested against legal theories in tort law. Yet, the forced use of children in bone marrow and organ

transplants presents a compelling case from which to explore the moral and legal limits of biotechnology. Section A provides an overview of Picoult's book to situate the context for this Essay. Section B briefly identifies the ways in which contemporary biotechnologies have assisted parents in saving the lives of their dying children, and describes the medical justifications for using siblings as subjects in non-therapeutic medical cases. Section C turns from the medical framework to explore the forceful justifications of the no duty to rescue doctrine.

A. *The Problem*

Jodi Picoult introduces us to a middle class family struggling with three very different children; a disillusioned teenage son who is consumed with anger and bitterness because his parents have spent the last thirteen years ignoring him—or paying far more attention to his ailing younger sister, Kate. Anna, the donor child, is at the center of the family's crisis; she is the youngest. Conceived specifically for the purpose of being a donor, and having served in that capacity her entire life, Anna is ready to stop. However, withdrawing her consent to donate blood, bone marrow, and other tissues is not so easy. Nor is it a clear case whether providing or withdrawing consent is Anna's decision to make.

The story unravels as Anna seeks help from a local lawyer consumed by his own physical and psychological issues. The novel is highly descriptive, predictable and somewhat pedestrian, but serves well as a provocative thought experiment. Picoult takes great care to sensitize readers about Anna's life. Anna's parents are reluctant to let her join summer camps, lest she be unreachable for an emergency transfusion that Kate might require. Anna misses days at school as often as her ailing sister because she too becomes a patient. Anna is essentially Kate's pharmacy.

Picoult convinces the readers that Anna's social life and the ability to develop friendships and relationships outside of her family have significantly suffered. More importantly, Picoult hints at what a donor child's relationship with her parents might resemble. The mother is oblivious, portrayed as one whose mission is saving Kate to the detriment of a meaningful relationship with her other children. The mother's ambition is to keep Kate alive at all costs. If creating a child through in vitro fertilization and specially selecting embryos through preimplantation genetic diagnosis specifically

to harvest body parts is extreme, then all actions subsequent to those departures are far less morally complicated.

Anna is symbolic—an actual and figurative tool. In this way, Anna is also a distraction from the inevitability of Kate's death. The parents can forestall Kate's death and avoid the pain of mourning a child's loss by demanding resources from Anna. Perhaps requiring so much of Anna is an easier pain to cope with than the death of a child they loved and knew before Anna's birth. But for Anna's body parts, Kate would be dead. The complications of this story, both moral and legal, have less to do with Picoult crafting a novel tale. Rather, the power in this case study has more to do with what the author does not express, but that with which we are all familiar. The unspoken relationships and responsibilities of parents to their children and notions of unconditional love pervade the compelled donation dynamic. Inherently, we believe that parents should not love one child more than another or place one child at great risk to benefit another. But that is exactly the dynamic at work in compelled donation cases.

B. *The Cure?*

In the absence of federal protocols, regulations, or monitoring, and with the aid of physicians, parents can create embryos in laboratories specifically for the purpose of harvesting organs and bone marrow. Users of in vitro fertilization (IVF) and preimplantation genetic diagnosis (PGD) can deselect embryos carrying genetic "deficits" or select the "fittest" or most suitable for later harvesting. Some critics decry such reproductive technological advancements, referring to them as a new form of eugenics and special race breeding. Yet even the PGD critics avoid the ethical and legal questions posed by the use of children to address body part supply and demand, which are questions far more worthy of scrutiny, in my opinion, than concerns about aesthetic preferences.

Indeed, those wanting for children can, without the use of PGD, express aesthetic and financial preferences through the partners with whom they choose to procreate. The concerns about invading a child's privacy and committing tortious types of injuries to fulfill a parent's desire seem a different category of circumstances altogether. Indeed, only the legally subordinate status of children renders their decision-making subject to the whims of others. Stated differently and perhaps more accurately, because minor children lack the legal capacity to make binding legal decisions, they

are at the mercy of adults, particularly their parents (and doctors), to serve as responsible proxies.

Federal oversight is virtually nonexistent in the realm of reproductive technologies. Thus, parents are able to pick and choose “the right” embryos for implantation and later harvesting. It should come as no surprise, then, that some of the more stinging critiques of PGD include criticisms that the resultant embryos are functionally more like clones; that PGD commoditizes children; that the technology is a eugenics tool and may exacerbate racial divides in the broader society; that PGD is social reengineering; and that the resulting infants are scientific guinea pigs. These criticisms are harsh in light of the fact that most parents who use biotechnology for reproduction purposes are infertile and simply want to have babies. To conflate their efforts with those described by the novels discussed in this Essay would be a mistake. The darker side, however, exposes the weaknesses in PGD and artificial reproductive technology (ART) regulation when biotechnology and the demand for body parts combine.

When is it reasonable to ask a child to donate her kidney or lung to save a sibling? Is it ever reasonable to impose a rescue duty on a child? Fifty years ago, these questions had only philosophical relevance, with few practical consequences. Children and relatives simply died from terminal illnesses that could be treated by organ replacements; children were not needed as spare parts. Nor was technology available to facilitate the broad scale use of children as organ and tissue donors. As a society, we prepared for death, not organ transplant waitlists, bone marrow registries, or in vitro fertilization, specifically for the purpose of creating a donor child.

Tort rules governing third-party-imposed rescue obligations on children were simply moot, highly theoretical suppositions. First, transplantation itself was risky, expensive, and ineffective; the odds of survival were dramatically low in the absence of immunological rejection medications. Second, reproductive technology was a nascent technology, yet to fully develop into a vibrant, meaningful tool to unlock alternative procreative processes for designing life. Thus, beyond the value of a provocative thought experiment, children were shielded from any serious or meaningful consideration as rescuers of dying siblings or relatives.

However, biotechnology now affords cures for terminal illnesses heretofore only imagined. For example, leukemia causes

more deaths in children than any other disease.²³ It is also the most commonly treated disease with bone marrow transplants (BMTs).²⁴ In severe cases of leukemia, not only will the autoimmune system of the child deteriorate, but an organ transplant might also be recommended. Doctors and parents traditionally seek the involvement of siblings to aid their dying brothers or sisters. Such decision-making may be medically sound, but morally and legally complicated by concerns for the individual autonomy, privacy, and bodily integrity of the "well" child. Twenty years ago, approximately 450 BMTs were performed on children annually.²⁵ By 1997, the number had more than quadrupled to over 2,000 BMTs per year.²⁶ The steep increase can be attributed to greater access to the technology and more insurance companies providing coverage for BMT. Moreover, researchers discovered that BMT could treat more illnesses than previously considered. There are over fifty genetically inherited blood disorders that may lead to deficiency in the blood, immune, or metabolic systems in a child. For these diseases, and especially leukemia, bone marrow transplantation is the best known curative available to the patients. Yet, despite its relative efficacy, the technology is not without significant complications and drawbacks for the donor and the recipient. Frequently, these drawbacks are described from the perspective of the patient needing the transplant, thereby overlooking the common burdens equally experienced by the child who surrenders her bone marrow.

Significantly high dosages of chemotherapy and radiotherapy remain the preferred treatment to suppress the child's immune system in order to prevent bone marrow rejection. The graft will fail if the injected bone marrow cells are rejected by the recipient.²⁷ In the alternative, the graft might attempt to destroy the donee's im-

23. Richard Klausner, Dir., Nat'l Cancer Inst., NIH, Leukemia, Lymphoma, and Multiple Myeloma: Toward a New Understanding, Statement Before the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies (June 21, 2001) (transcript available at <http://www3.cancer.gov/legis/testimony/llm.html>).

24. Nat'l Kidney Found., 25 Facts about Organ Donation and Transplantation, <http://www.kidney.org/news/newsroom/fsitem.cfm?id=30> (last visited Feb. 14, 2007); see Nat'l Cancer Inst., Bone Marrow Transplantation and Peripheral Blood Stem Cell Transplantation: Questions and Answers, <http://www.cancer.gov/cancertopics/factsheet/Therapy/bone-marrow-transplant> (last visited Feb. 14, 2007).

25. *BMT Donors*, *supra* note 20, at 484.

26. Kaarlela, *supra* note 21.

27. *Protein Level Predicts Who Will Develop Deadly Complication After Bone Marrow Transplant*, LAB BUS. WK., Mar. 19, 2006, at 294 (discussing the results of a study done by the University of Michigan Comprehensive Cancer Center).

mune system, causing a severe medical emergency known as graft versus host disease (GVHD).²⁸ Approximately 50 percent of all patients who receive bone marrow transplants will develop GVHD.²⁹ If it occurs within the first one hundred days after the transplant, dermatitis, enteritis, and hepatitis are well known side effects. Conditions associated with GVHD occurring more than one hundred days after the transplant can result in an autoimmune syndrome that destroys organs. Chemotherapy can reduce the likelihood of such occurrences, or treat these conditions as they arise. Yet, chemotherapy and radiotherapy can be problematic, as these treatments are known to cause organ damage both in the short and long term. Infections are common side effects of BMT procedures. The infections may be difficult to treat given the preexisting vulnerable health care status of the patient.

To reduce the likelihood of complications, doctors emphasize the importance of close donor matches.³⁰ Some critics assert that this is an over-reliance in light of alternative medical therapies. In reality, close donor matches, particularly from siblings, are convenient; sibling donations reduce costs and other burdens for the donee, parents, and physicians. Siblings are easily accessible, available, and need not be tracked down. Their reluctance to donate is easily overcome and likely given less meaningful consideration when balanced against the prospect of a sibling dying from a potentially treatable illness. Thus, the power dynamic is also different; there is no negotiation process for the child who surrenders her bone marrow or organ.

Consider a recent case reported in a Midwestern newspaper in March 2006, involving an Oklahoma family who intended to use their five-year-old daughter to supply bone marrow for a sibling to be born later that year.³¹ In this particular case, the Freemans knew that with each child they bear, the possibility of the fetus inheriting a terminal genetic disease is likely. Yet, this knowledge has not dissuaded the Freemans from procreating because the parents have a built-in donor supply system. According to the reporter,

28. *Id.*

29. *Id.*

30. Note, however, that some physicians and researchers reject the notion that exact matching should be the only prescribed course of research to address BMT related treatment protocols. See *Use Of Alternative Donor Transplants In Children With Early Ph+ ALL Encouraged*, LAB BUS. WK., Mar. 12, 2006, at 63 (discussing a study done by the Children's Hospital of Wisconsin).

31. Kristina Dudley, *Family Ready to Battle Immunodeficiency Again*, TULSA WORLD (Okla.), Mar. 8, 2006, at 3, available at 2006 WLNR 11016009 (Westlaw).

“[t]he Freemans [were] hoping for a smoother medical ride with their fourth child. . . . However, the chances of his immune system growing stronger and faster appeared better because of his . . . big sister, Brittany.”³² Brittany’s parents were preemptive, and their soon-to-be-born son’s physicians were not only zealous in their effort to promote his health, but also complicit in the compelled donation plan. Most enlightening about the article is Mrs. Freeman’s observation about Brittany’s reluctance to be a bone marrow donor. Mr. Freeman expressed relief that his daughter, Brittany, was a match, “‘but at the same time, she’s only 5 years old. I definitely wish there was another way. It’s a bittersweet situation.’”³³ Most telling, however, is that when Brittany “‘asked if she could wait a few years before she had to take part in a transplant,’” the Freemans refused.³⁴ Mrs. Freeman recalls, “‘We said that’s not possible. Now she’s glad she can help.’”³⁵

Avoiding transplant waitlists lessens the stress and psychological burdens for all parties involved, except the compelled donor children. Donor siblings as described by Picoult are readily available for probing, testing, and supplying supplemental doses of blood, lymphocytes, granulocytes, and bone marrow.³⁶ Yet donor children experience a host of potential setbacks as well. The operations require general anesthesia, which although routinely used in serious medical surgeries, nonetheless carries significant risks, including death. According to the National Marrow Donor Program, more common problems include fatigue, faintness, headaches, soreness, inability to properly walk, difficulty climbing stairs, pain at the intravenous spot, sore throat, pain sitting, pain at the collection site, nausea, and vomiting.³⁷ Donor children’s health statuses as the non-diseased or non-ill children may work against them in unique ways. They live in the shadows of siblings with serious, life-threatening medical conditions.³⁸ Donors are far less sympathetic patients when compared to their dying siblings. In fact, they are commonly overlooked as patients, never fully making the social and

32. *Id.*

33. *Id.* (quoting Jeremy Freeman).

34. *Id.* (quoting Emily Freeman).

35. *Id.* (quoting Emily Freeman).

36. PICOULT, *supra* note 6, at 295, 333-35.

37. See Nat’l Marrow Donor Program, Donor Information, Marrow Donation advanced, http://www.marrow.org/DONOR/marrow_donation_advanced.html (last visited Feb. 14, 2007).

38. PICOULT, *supra* note 6, at 269.

psychological transition from healthy children to non-therapeutic patients.³⁹

C. *Rescue Doctrine's Readability and Applicability in Contemporary Contexts*

In applying rescue doctrine, a rule found in tort law, to my reading of Picoult's book, I attempt to unearth concepts central to American jurisprudence. The No Duty Rule, also referred to as the Duty to Rescue Rule, derives specifically from negligence theory and "fault" principles. American jurisprudence imposes no duty or obligation on an individual to rescue another in the absence of having created the peril. One might interpret this as a negative rule—do no harm and there is no liability, but should you cause harm, the law will obligate you to render assistance. There are forceful rationales for the rule.

The traditional rationale against imposing liability on the innocent bystander for failure to act in response to another's negligence was that it violated our notion of fairness. In other words, holding Sunbather responsible for failing to rescue Swimmer when she did not create the peril imposes an unfair legal duty and unreasonable economic sanction.⁴⁰ The rationale here is that if one does not *cause* the accident, she should not be at *fault* for failing to prevent the subsequent injury. Combined with early contributory fault principles, which precluded recovery if the plaintiff contributed to her accident, the No Duty Rule fit squarely within that jurisprudence. Another problem is that imposing an affirmative duty on Sunbather might create a disincentive for Swimmer to exercise care and caution. From a practical standpoint, it is difficult to know whether, if the hypothetical Sunbather rendered aid, she and Swimmer would survive. It is possible that she might harm Swimmer in the process of rendering aid or that they both could die.

Nonetheless, ethicists are generally uneasy with the No Duty Rule. Failing to save the life of another when the expertise is readily available seems cold, callous, and uncivilized, exposing the fault lines in our collective humanity. A more utilitarian ethic might offer that life-saving resources belong to the broader community. Such ethics are grounded in Rousseau's social contract philosophy—an ethic that responds to notions of an individualized social

39. *Id.* at 301-05.

40. See *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (refusing to impose liability on defendant for failure to render aid in a drowning death).

contract, whereby, even in our private dealings, we can expect, anticipate, or demand service from others.⁴¹ Yet, such noble principles also conflict with individual autonomy, and as Rousseau predicted could be abused by governments.⁴² Perhaps for this reason a duty to rescue is not reinforced through negligence jurisprudence in the United States.⁴³

Consider the case of *Yania v. Bigan*, a well-trodden torts case reinforcing the No Duty Rule.⁴⁴ Here, the defendant was engaged in a coal strip-mining operation whereby trenches were dug in order to remove coal deposits. One trench contained several feet of water, and the defendant placed a pump in the trench to remove the water. According to the record, the defendant taunted the plaintiff, Yania, urging him to jump into the water, upon which he did and drowned. The subsequent lawsuit initiated by the widow claimed that the defendant, Bigan, caused the accident by virtue of the incessant taunting, failing to warn, and failing to rescue. The court rejected the plaintiff's claim, emphasizing that the complaint did not allege that Yania had been pushed, slipped, or otherwise received a "physical" impact from Bigan. The choice, according to the Court, clearly rested with Yania, an adult, to decide whether he would jump into the water.⁴⁵

Critics of the *Yania* decision argue that it divorces the law from morality, thereby creating a tenuous, slippery slope. On the other hand, imposing an affirmative duty on active or passive bystanders might discourage otherwise socially healthy and normative behaviors associated with common activities, or give license to zealots to interfere in delicate situations where experienced professionals are better suited for rescues, and where amateur rescuers pose more harm than good. Parents might avoid playgrounds lest they become

41. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* (1762), reprinted in *ON THE SOCIAL CONTRACT* 46-54 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978).

42. *Id.* at 78-81.

43. *Id.* at 47.

44. *Yania*, 155 A.2d 343.

45. *Id.* at 346. One aspect of the *Yania* case for which modern courts might be more sympathetic resides in the cajolery and taunting by the defendant, challenging Yania to jump into the water. The *Yania* court alludes to a potentially different outcome were the plaintiff a child or person of compromised mental capacity. *Id.* at 345. I think that instinct is correct. In any case, one can begin to see the range of fault and liability in the "no duty" cases. At one end of the spectrum are perhaps the "bad samaritan" cases where one stands idly by while a crime occurs. Clearly, then, at the other end of the spectrum are the cases where sibling children have no duty to surrender body parts to save or enhance the life of a sick relative.

liable for failing to prevent another child's accident; sunbathing and beach sports might be avoided lest individuals be sued for failing to predict and intervene in swimming accidents. Equally problematic are the issues involving privacy where the lines to rescue may be obscured at least enough to exonerate inappropriate rescue behavior. In such contexts, it is not hard to imagine scenarios that hide abuse such as a male security guard's claim: "I heard a scream in the girl's restroom; I knew that I should render aid"; and vigilante groups policing subways, borders, buses, and neighborhoods. Indeed, problem chasing could evolve; imagine situations where individuals demand to rescue or refuse to yield to more qualified specialists.⁴⁶

Finally, bystander duties are difficult to police. If a group of women passively attended to their children on the playground at a time when one child became injured, should all the women be legally responsible for the accident, or only the woman who possessed the keenest mother-wit and predicted the injured child's fall from the monkey bars? Or are the mothers (or an individual) liable only to the extent that they fail to respond effectively after the acci-

46. Vigilantism in various forms is on the rise in the United States. *See, e.g.*, Kenneth van Wyk, *The Rise of Patch Vigilantism* (Oct. 2, 2006), <http://www.esecurityplanet.com/views/article.php/3635431>; Posting of Kaimi Wenger to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2005/06/internet_vigila.html (June 30, 2006, 6:30 p.m.). Particularly as related to immigration and the policing of state borders, vigilantism is a growing concern. Lynn Franey, *Coalition Answers Immigration Foes: Group Members Say Movements Such as the Minuteman Corps Are Rooted in Racism*, KAN. CITY STAR, Jan. 31, 2007, at B4, available at 2007 WLNR 1850063 (Westlaw); Editorial, *Taking Away Border Group Rights Wrong*, THE SUN (Yuma, Ariz.), Jan. 24, 2007, available at 2007 WLNR 1388218 (Westlaw); Megan Feldman, *The Hunted*, DALLAS OBSERVER, Dec. 14, 2006, available at 2006 WLNR 22105678 (Westlaw); Carolyn Szczepanski, *To the Rescue*, KAN. CITY PITCH WKLY., Nov. 16, 2006, available at 2006 WLNR 20309619 (Westlaw); James Heggen, *Web Site Makes it Possible for Citizens to Guard Border from Home*, UNIV. WIRE (Ames, Iowa), Nov. 10, 2006, available at 11/10/06 UNIWIRE 22:39:32 (Westlaw). Proponents of this type of self-help view the efforts of individuals to "protect" the U.S. border from illegal immigration as a noble and charitable act. Some of this has strong community approval; other aspects show how incredibly dangerous allowing individuals to take justice into their own hands can become. *See, e.g.*, John Coté, *Murder Case Has Grim Twist*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 28, 2006, at 1A, available at 2006 WLNR 7341299 (Westlaw) (reporting the murder of a young man by the victim of a robbery); Dianne Williamson, *A "Savior" Beyond Sanity?: Law, Lunacy Take Stand with Druce*, SUNDAY TELEGRAM (Worcester, Mass.), Jan. 15, 2006, at B1, available at LEXIS (describing the murder of a pedophile priest by a man who now claims insanity). In another bizarre twist, companies now advertise for dangerous encounters, including "storm chasing adventures." *See* Storm Chasing Tours, <http://www.violentskies.com> (last visited Mar. 12, 2007); Storm Chasing and Southwestern Tours, <http://www.westernwindstours.com> (last visited Mar. 12, 2007).

dent has occurred? My point here is that policing these lines might be more difficult than we assume. If we know that our communities are particularly litigious, how do we counter spurious lawsuits? As Professor James Henderson concludes, "Courts have refused to impose a general duty to rescue largely because it would be unmanageable as a guide to either primary or adjudicative behavior."⁴⁷

Nonetheless, some critics contend that the no duty to rescue rule promotes ambivalence, nonfeasance, passivity, and justifies anti-cooperative, morally unjustifiable behavior, which, in one way or another, harms society. Deciding not to rescue, some commentators contend, can be a calculated error (i.e., closer to misfeasance) that reveals the worst in our society and American jurisprudence. These arguments are persuasive entreaties against the normative influence of individualism, which pervades American society in general and our jurisprudence in particular. However, as a utilitarian social policy, these no-duty rules are not absolute; we pay taxes to subsidize healthcare, welfare, and education—programs among many for which there is broad social agreement and benefit.

Yet, no matter how we might wrestle with these concepts, our jurisprudence is intentional and not blind to the moral appeal of rescue.⁴⁸ In a famous opinion, Justice Smith explains:

For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts.⁴⁹

The jurisprudential calculations, if anything, were insightful, setting a limit to the law's long arm reach into individuals' lives. According to Justice Smith, only the "omission or negligent discharge of legal duties" should "come within the sphere of judicial cognizance."⁵⁰ In sum, absent a statutory duty to aid or one's own negligence, our jurisprudence exempts individuals from liability should they fail to render aid. In addition, as in the case presented

47. James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 943 (1982).

48. See *Union Pac. Ry. Co. v. Cappier*, 72 P. 281, 282-83 (Kan. 1903).

49. *Id.*

50. *Id.* at 282.

by Picoult, the No Duty Rule protects individuals against being forced to rescue or endanger themselves to aid another.

To extend the Good Samaritan concept to medicine, and especially the harvesting of body parts, is antithetical to an American way of thinking for a few reasons. Requiring healthy individuals to undergo non-therapeutic medical surgeries is a disincentive for remaining healthy. If staying healthy means a reduced expectation of privacy and autonomy, fewer people would be motivated to stay healthy. In addition, forcing healthy individuals to share their kidneys, lobes of livers, and other body parts ostensibly imposes a penalty on healthiness. After all, if given a choice, patients will choose body parts from healthy people. Individuals who smoke, drink, and consume illicit drugs would have no incentive to curb those behaviors. Indeed, drinkers, smokers, and drug users would be exempt from a social policy that primarily burdens healthy people to rescue the sick. The imposition of rescue rules in medicine is also problematic because the very resources that one surrenders might be what an individual needs to sustain her life later.

Finally, to some extent, biotechnology drives the demand for healthcare services with a great imbalance between attention to life and quality of life concerns. For example, cosmetic surgeries are incredibly popular and some of the treatments actually derive from human body parts obtained by tissue banks. The quality of life for these individuals may be greatly enhanced in the short term, but with limited attention as to the long-term consequences of some of the more daring cosmetic treatments or the addictive nature of cosmetic enhancements.⁵¹ Likewise, quality-of-life concerns are commonly sacrificed in the quest for research knowledge. Neonatology units within hospitals are increasingly the most profitable among medical wards; babies born anencephalic (with only a brain stem), hydrocephalic (a congenital condition in which an abnormal accumulation of fluid in the cerebral ventricles causes enlargement of the skull and compression of the brain), and with other life-threatening conditions are increasingly offered significant research-type therapies with no proven efficacy beyond extending life a matter of hours, days, or weeks at most. The costs, emotional, psychological, and financial, are rarely calculated together and parents are caught within a complex matrix of moral and legal obligations that are dif-

51. *Larry King Live: Is Plastic Surgery America's New Addiction?* (CNN television broadcast Jan. 28, 2006) (transcript available in two parts at 2006 WLNR 1577669 and 2006 WLNR 1577670 (Westlaw)).

difficult to evaluate. Here, the interests of doctors are not always squarely in line with those of patients; research interests may conflict with the best interest of a terminally ill patient.

Medicine cannot be divorced from the laws that regulate it, nor the social policies that should govern its reach, particularly as related to vulnerable subjects. Past medical abuses, including controversial international clinical trials that abuse the consent process, and the U.S. government sponsored clinical trials involving several hundred illiterate black men from rural Alabama, known as the Tuskegee Experiment, demonstrate this principle all too clearly.⁵² Likewise, biotechnology and its beneficial relationship to children must be explored within the broader dimensions and contexts of the law and society. To discuss rescue doctrine in the absence of its social contexts with children illumines only a narrow aspect of it, leaving the foreground empty and wanting. Children are uniquely situated within families, where the power relationships are vertical and their status resides at the bottom.

II. THE GIFT OF LIFE FALLACY: LANGUAGE & THE LAW

"We loved you even more," my mother made sure to say, "because we knew exactly what we were getting."⁵³

Let us turn to the murkier issue of language and its social constructions. As Picoult explains, there is the presumption, at least adopted by some courts, that characterizes living donations from children to their siblings as providing a "psychological benefit" for the child donor. Such rationalizations, in addition to ascribing the term "benefit" to a process that requires non-therapeutic medical intervention, seem consistent with a preexisting, problematic paradigm. The presumption here is that all gift-giving is good, and that altruism as a concept in organ donation is pure and unspoiled by secondary or spurious motivations. This reasoning, as discussed below, is seriously flawed.

Far worse, however, is the problem of vernacular in organ transplantation that extends beyond terminology. Language is powerful and to the extent that children are involved in organ donation, the language of the "gift" may obscure manipulation, coercion, and downright abuse. Compelled organ donation from living children is but one additional problematic byproduct of the "gift"

52. GOODWIN, *supra* note 17, at 28-30.

53. PICOULT, *supra* note 6, at 8.

or “altruism” model, and a collateral component of assisted reproductive technology and preimplantation genetic disorders. These cases are primarily an issue in “living donation” rather than cadaveric donations, where non-therapeutic surgeries are not an issue. Section A addresses these concerns along with a look at individualism and its importance to a critique of altruism and status. Section B analyzes living donation, first by considering the transplantation data and then turning to the case law.

A. *The Cloak and Construction of Altruism*

Despite the degree to which this metaphor pervades transplantation practice, our studies have demonstrated that “gift-giving” or altruism is not necessarily the primary motivation when families decide to donate. Families often donate for nonaltruistic reasons, for example a desire to see their loved one live on in the recipient.⁵⁴

In January 2006, at the American Association of Law Schools annual meeting, in his keynote address, the Honorable Guido Calabresi encouraged an audience of law professors to scrutinize the concept of altruism.⁵⁵ In his opinion, legal scholars have given a pass to the concept, suggesting that it is always morally defensible, possessing higher-order values and no corruption. According to Calabresi, legal scholars fail to scrutinize the limits and nuances of altruism. To some, altruism, just as the “gift concept” in transplantation, is the unfettered good.

Yet, on inspection, horrible abuses are facilitated in the name of altruism; slavery was one construction of altruism, forcing Blacks into free labor; children serving in armies is another, whereby youth are coerced into “volunteering” for the sake of “saving” their tribes, governments, or communities; and such sacrifices for the common good can demand an enormous social price. The moral value of those types of sacrifices does not pale in the face of individualism. In my opinion, there are some sacrifices that should not come with applause, lest we encourage unsound behaviors for which the costs may be socially and legally incalculable or morally

54. Siminoff & Chillag, *supra* note 18, at 40.

55. Guido Calabresi, U.S. Cir. Judge, U.S. Court of Appeals for the Second Cir., Keynote Speaker at the Association of American Law Schools Annual Meeting: The Lawyer as Institutional Empiricist: The Case of Law and Economics (Jan. 5, 2006) (audio recording of the speech available at <http://www3.cali.org/aals06/mp3/AALS2006CalabresiLuncheon.mp3>).

unjustifiable. Rather, we must be guided by critical thinking as it relates to altruism. Clinical trials in developing countries are another complex form of altruism; pharmaceutical companies donate medicines to sick populations, but the medicines may not have any proven efficacy for those populations. Dozens if not hundreds of people will die from this type of altruism. The patients in these experiments are altruistic; their sacrifices inure great benefit to those in the West who will consume the refined pharmaceutical products.

John Rawls would likely argue against this type of cynicism. Individualism, according to Rawls's social contract model, should be supplanted for the betterment of the whole community.⁵⁶ Social security is a model of altruism within a social contract framework, as are the municipal benefits resulting from the taxes we pay.⁵⁷ George P. Fletcher, a professor of jurisprudence, emphasizes a normative view of social solidarity, communal concern, and a sense of togetherness, all of which can be satisfied only in a moral community that is premised on the value of mutual responsibility.⁵⁸ In this way, decision-making for the benefit of society inures benefit to the individual.⁵⁹ Professor Dorothy Brown, a critical race theory scholar and tax professor, however, challenges the operation of this type of altruism, noting that it is not impervious to the social criteria otherwise used to exclude or punish those considered more marginalized, less desirable, less trustworthy, or of less value to society.⁶⁰

The social contract assumes equal bargaining and acquisition power, and in our present *altruistic* organ and tissue donation systems we perhaps presume the same.⁶¹ However, this view of altru-

56. JOHN RAWLS, *A THEORY OF JUSTICE* 28-33 (photo. reprint 2005) (1971).

57. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 335-37 (1997).

58. See, e.g., GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993).

59. See CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 130-31 (1979).

60. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997) (arguing that African American families are more likely to pay a marriage penalty than white families because black women tend to contribute a larger portion of their households' income than white women, which results in a more significant "penalty" for black families); see also Patricia Hill Collins, *African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825 (1997).

61. See THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 3, 19, 82, 88, 100, 144 (1970); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous*

ism in the transplantation and broader body parts industry does not ask whether all individuals are situated similarly, even within families, particularly children and the mentally ill.⁶² Theories of altruism, including Rawls's theory of social justice and fairness, are intended for democratic societies that adhere to non-discriminatory principles. But such altruistic theories, even if appealing, do not consider law and status as we know it in our society. So they tend to overlook preexisting imbalances in society and the compromised status of those traditionally marginalized or discriminated against, such as children whose authority is subordinate to that of their parents.⁶³ Understanding the nuances of status and language is critical to the study of organ transplantation, particularly donation, and shows why, as Siminoff and Chillag assert, the "gift" concept does not work.⁶⁴ These nuances are indicated in the law's treatment of these issues as described and analyzed herein.⁶⁵

The power of altruism resides in the performance of selfless, voluntary acts, which deprive us of some value or object that inevitably has some worth associated with it, in order to achieve a social good.⁶⁶ These deprivations are usually tangible and may be financial, such as salary, labor, and stocks, or those instruments that are more personal, such as a home, car, clothes, shoes, or time. At times, these deprivations are temporary, owing to the fact that we might inherit or be the eventual beneficiaries of our own "selfless"

Promises, 1997 WIS. L. REV. 567, 585 (stating that "altruistic gifts make the beneficiary better off, because the beneficiary prefers the gift to nothing; and they make the donor better off because the donor derives utility from the donee's increase in utility"). See generally FLETCHER, *supra* note 58.

62. See, e.g., Martha E. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 19 (2003) (declaring that sperm donor anonymity "is crucial because family law often links biology to parental rights and responsibilities").

63. See, e.g., Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling & Distributive Justice*, 6 VA. J.L. & TECH. 2 (2001) (critiquing the moral and legal legitimacy of presumed consent statutes that allow for the nonconsensual removal of tissues from cadavers and their disparate impact on communities of color).

64. See Siminoff & Chillag, *supra* note 18.

65. Posner, *supra* note 61, at 567 (postulating that gift-giving's social value is derived from "its role in nonlegal relationships, and therefore efforts to regulate it with the law would reduce its value").

66. Cf. Marie-Andrée Jacob, *On Silencing and Slicing: Presumed Consent to Post-Mortem Organ "Donation" in Diversified Societies*, 11 TULSA J. COMP. & INT'L L. 239, 242 (2003) (articulating a communitarian perspective on organ giving, suggesting that when individuals die, their legacy is best served by organ donations).

good deeds.⁶⁷ Perhaps the jewelry we buy our grandmothers will one day be worn by our daughters or the paintings we donate to a museum will be viewed and enjoyed by all in our community.⁶⁸ In some instances, perhaps we are motivated by other benefits, such as tax credits.⁶⁹ Those motivations, however, indicate the nebulous nature of altruism; acts otherwise perceived as selfless may have underlying motivations. Through our taxes we support educating children, hoping they are better prepared to administer our government and cities when we become older and vulnerable, thereby investing in a future type of social safety.⁷⁰ In these instances, the gifting is not entirely altruistic, but strategic planning.

In the realm of organ donation, such deeds are often referred to as “gifts” and “miracles.”⁷¹ Indeed, therein exists the power to love and the will to be generous absent our own desires. The enormity of such emotions can never be underestimated as it is part of a host of dynamics located within organ and tissue donation; it can be an incredible motivator to perform acts of kindness.⁷² Yet, living donation cases, particularly those involving children, are deeply nuanced and may be influenced by a host of factors too difficult to

67. See ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* 125-27 (Cecil Baines trans., International Universities Press 1966) (1936) (challenging broad assumptions about selflessness and altruism).

68. Cf. Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 175 (2000). Mahoney writes about the chains of altruism and bargaining. Although individuals are strongly presumed to be altruistic in their dispensation of body parts, those involved in the asking may be motivated by other impulses, including commercialism and greed.

69. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1940 (1987) (relating the favorable tax consequences of nonprofit donations and other investments that are thought to be desirable for society and are thus encouraged by the tax code); Frederick R. Parker, Jr. et al., *Organ Procurement and Tax Policy*, 2002 HOUS. J. HEALTH L. & POL'Y 173, 175-76 (speaking to how financial incentives might encourage greater “altruism” in organ donation).

70. See Cynthia E. Garabedian, Note, *Tax Breaks for Higher Education: Tax Policy or Tax Pandering?*, 18 VA. TAX REV. 217, 218 (1998) (analyzing tax schemes and their impact on education financing).

71. See PICOULT, *supra* note 6, at 100; *Organ Donation: Miracles Come From Tragedy*, WICHITA FALLS MED. MAG., <http://www.medmag.org/miracle.html> (last visited Feb. 14, 2007) (providing testimonials about Gloria Key Harrison, whose death and subsequent organ donations benefited fifty people).

72. Although, there are other motivating factors contributing to organ donation. For example, some scholars have suggested that payments could be capped or in the form of tax incentives. See Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 IOWA J. CORP. L. 69, 85-86 (1994) (arguing that compensation could be a motivator for organ donation); see also PICOULT, *supra* note 6, at 389-92.

monitor and predict, including guilt, coercion, and shame.⁷³ These transactions involving child-donors certainly are not altruistic. Picoult persuasively argues that compelled donation from children is the most basic form of objectification: "I am afraid of what might happen to Kate while her sister is gone. If Kate survives this latest relapse, who knows how long it will be before another crisis happens? And when it does, we will need Anna—her blood, her stem cells, her tissue—right here."⁷⁴ But our limited vernacular for describing the processes born out of rapidly expanding biotechnology leaves us at a loss. Even courts reinforce the limited vernacular of the transplantation industry.⁷⁵ In *Georgia Lions Eye Bank*, for example, the Supreme Court of Georgia dismissed parents' claims where their deceased son's corneas were removed without consent, claiming that the state statute that authorized such harvesting was legitimate because it benefited others.⁷⁶ The language of "benefit" and "gifting" to others pervades such cases.

Picoult suggests that courts are not the best bodies to deal with compelled organ surrender, nor do legislative alternatives appear on the horizon. Congress has not spoken on the issue; there are no federal regulations or guidelines about appropriateness of age for child or incompetent donation. Courts are left to resolve the legal and moral tensions, with parents forcing children to donate to siblings, mostly in cases where hospitals or physicians have sought declaratory judgments (to avoid liability should mistakes occur during tissue or organ harvesting). The jurisprudence in this area must become more nuanced in light of the potential for coercion, confusion, manipulation, and conflicts of interest not only among physicians, but also parents. Indeed, each case of compelled organ donation involves competing interests among parents, physicians, courts, and children.

73. PICOULT, *supra* note 6, at 270-74.

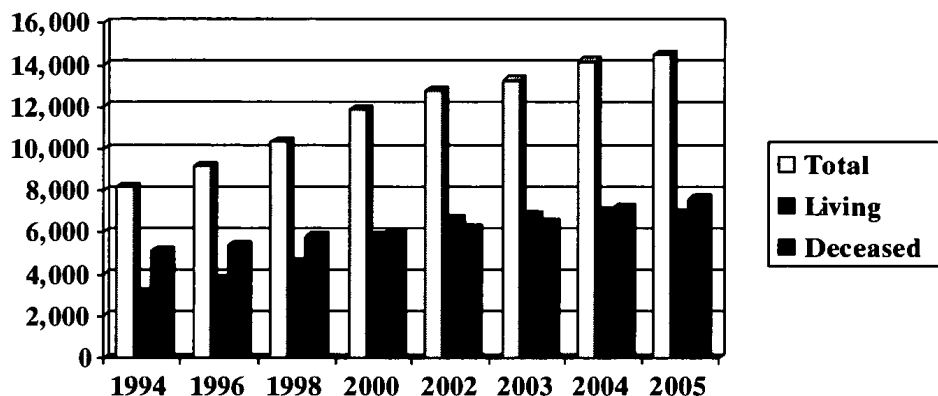
74. *Id.* at 269.

75. *See Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 129 (Ga. 1985) ("Certainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.").

76. *Id.* at 128-29.

B. Living Donations

U.S. ORGAN DONORS BY ORGAN DONOR TYPE 1994-2005⁷⁷



The most dramatic increase in the altruistic pool, as charted above, are living donations, which have steadily increased, while the increase in deceased donations has tapered. In 2003, living donations outpaced deceased donations.⁷⁸ For example, in 1994, deceased donors represented 5,099 organ contributions, while living individuals donated 3,102 organs.⁷⁹ By 2003, deceased donations had risen to 6,455, while living donations reached 6,820.⁸⁰ Most living donors who contribute to the organ pool are relatives providing direct donations to sick family members. Siblings comprise the largest donor pool.⁸¹

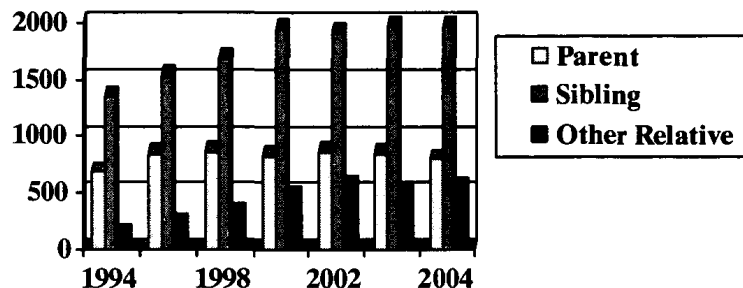
77. Graph derived from data in ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, ANN. REP. 1-1 tbl.1.1 (2005) [hereinafter 2005 ANN. REP.], available at <http://www.optn.org/AR2005/default.htm> (click link for "Download 2005 Annual Report"); ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, ANN. REP. 1-1 tbl.1.1 (2004) [hereinafter 2004 ANN. REP.], available at <http://www.optn.org/AR2004/default.htm> (click link for "Download 2004 Annual Report").

78. 2004 ANN. REP., *supra* note 77, at 1-1 tbl.1.1; ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, ANN. REP. 1-1 tbl.1.1 (2003) [hereinafter 2003 ANN. REP.], available at <http://www.optn.org/AR2005/default.htm> (click link for "Download 2003 Annual Report").

79. Interview with Jack Lynch, Dir. of Cmty. Affairs, Gift of Hope Organ and Tissue Donor Network (Jan. 5, 2007).

80. 2003 ANN. REP., *supra* note 78, at 1-1 tbl.1.1; 2004 ANN. REP., *supra* note 77, at 1-1 tbl.1.1.

81. 2003 ANN. REP., *supra* note 78, at 2-30 tbl.2.8; 2004 ANN. REP., *supra* note 77, at 2-30 tbl.2.8.

LIVING DONOR CHARACTERISTICS BY RELATIVE 1994-2004⁸²

To what can we attribute this trend, and is it significant? Does it indicate anything about American law, ethics, and social values? We could read the outpacing phenomenon as Americans' reluctance to participate in blind, anonymous, and altruistic processes where they help others whom they do not know.⁸³ This may be less true outside the transplantation context. According to one court, "our 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."⁸⁴ Thus, purely altruistic transfers involving deceased donations are perhaps truly outside of American norms.⁸⁵ Such generosity may be inconsistent with the general framework of our daily lives; there is no duty to rescue someone in harm's way even when doing so would pose minimal risks and be cost effective.⁸⁶

The rise in living donors could also indicate that the psychological bonds of family relationships carry over or may be intensified during illnesses, thereby stimulating a sibling's willingness to un-

82. Graph derived from data in 2004 ANN. REP., *supra* note 77, at 2-30 tbl.2.8.

83. Peter M. Agulnik & Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 *TOURO INT'L L. REV.* 93, 96-97 (1998) (arguing that "[d]eeply ingrained in the American psyche is the individual's desire to live free from governmental interference. American law has long respected the autonomy of the individual and has been reluctant to punish for failure to rescue.").

84. *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978).

85. Adam J. Kolber, *A Matter of Priority: Transplanting Organs Preferentially to Registered Donors*, 55 *RUTGERS L. REV.* 671, 697 (2003) (arguing that "[t]he altruistic motivation to donate has proven itself woefully insufficient, and while many preach that it should be sufficient, people on organ waiting lists are dying at an average rate of sixteen per day in the United States").

86. Robert J. Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 *UCLA L. REV.* 252, 253-54 (1983) (positing that "[t]here is no general legal duty to rescue in most Anglo-American jurisdictions"). There are special relationships in which the law requires a duty to rescue. For example, a carrier has a legal duty to take reasonable steps to rescue a passenger, *Middleton v. Whitridge*, 108 N.E. 192 (N.Y. 1915), and an innkeeper must aid a guest in case of fire, *West v. Spratling*, 86 So. 32 (Ala. 1920).

dergo invasive, potentially dangerous surgeries.⁸⁷ Perhaps also the spiritual and psychological benefits that inure may be long lasting and indescribable.⁸⁸ Courts have suggested that this “psychological benefit is grounded firmly in the fact that the donor and recipient are known to each other as family.”⁸⁹ Beyond the psychological benefits experienced by donors, might there be other factors motivating living donations?

Within the living donor context, wherein more donations are harvested than through the purely blind process, time and emotions are pivotal issues; the imminence of death is part of that reality.⁹⁰ Indeed, coercion, pressure, and feelings of entitlement may arise in these time-sensitive, life-threatening situations from both family members and doctors.⁹¹ For the donee, the tyranny of the gift may be the oppression of the debt itself, an inability to ever repay.⁹² Consider the predicament of cousins in *McFall v. Shimp*,⁹³ a noteworthy case because it addresses emotions, expectations, and legal dilemmas involved with the “living donor” subset of altruism.

87. *But see* Howard S. Schwartz, *Bioethical and Legal Considerations in Increasing the Supply of Transplantable Organs: From UAGA to “Baby Fae”*, 10 AM. J.L. & MED. 397, 423-24 (1985) (commenting on intra-family reluctance to participate in organ donation, finding “[n]ot infrequently, related potential donors ask the physician to inform the family that he or she is not a ‘good match’ in order to relieve these pressures”). *See also* Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. 1979).

88. *See* Michael T. Morley, Note, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215, 1222-23 (2002) (quoting Ingela Fehrman-Ekholm et al., *Kidney Donors Don’t Regret*, 69 TRANSPLANTATION 2067, 2069 (2000)) (pointing out that “in a study of 451 living kidney donors with a 92% response rate, ‘almost all of them felt that the donation affected their lives in a positive way Of particular interest was that only three (0.8%) of the donors regretted the donation, two were undecided (0.5%), and thus almost 99% reported that they did not regret their decision.’”).

89. Curran v. Bosze, 566 N.E.2d 1319, 1343 (Ill. 1990).

90. *See* Schwartz, *supra* note 87, at 429 (quoting Jean Hamburger & Jean Crosnier, *Moral and Ethical Problems in Transplantation*, in HUMAN TRANSPLANTATION 37-38 (F.T. Rappaport & J. Dausset eds., 1968)) (“While it is conceivable that a mother, father, or sibling may have sound psychological reasons to become volunteer donors, experience indicates that individuals who write to a transplant center in order to donate a kidney to a prospective recipient to whom they are not connected by any kind of emotional tie are frequently pathologic by psychiatric criteria.”).

91. Joel D. Kallich & Jon F. Merz, *The Transplant Imperative: Protecting Living Donors from the Pressure to Donate*, 20 IOWA J. CORP. L. 139, 143-44 (1994).

92. Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 267 (1995). Anderson argues that “[w]e should not subject the families of potential cadaveric organ donors to this kind of emotional upheaval against their will. Instead, we should protect the emotional health of those who survive and not focus completely on the desires of those who no longer have emotions to experience.” *Id.*

93. *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978).

1. *McFall v. Shimp*

In *McFall v. Shimp* the plaintiff, Robert McFall, suffered from a rare bone marrow disease, aplastic anemia, and death was imminent absent a bone marrow transplant from a suitable donor.⁹⁴ After an arduous search, including locating and testing six siblings split apart through his parents' divorce, it was determined that only the defendant, the plaintiff's cousin Robert Shimp was a suitable donor.⁹⁵ Shimp agreed to be tested, which involved minimally invasive blood analysis.⁹⁶ However, Shimp later refused to provide bone marrow even though he was the only perfect match.⁹⁷ This was surely a grave and difficult time for both men and their families.⁹⁸ The most important legal question was whether the law had a role at all in their personal controversy. The cousins were very good friends, and McFall recalled, "I used to buy gifts for his children when they were little. We [were] good friends."⁹⁹ Even Shimp's children volunteered as donors, but none of the four were matches.¹⁰⁰

This case provides a provocative backdrop for the study of compelled body-part donation. It tested whether a person can be forced to be altruistic, which of course does not mean that he is altruistic, but that he has been forced to be a bone marrow donor. The case was not unique, in that it was not the first to address the question of compelled donation, but all earlier cases involved persons who were legally incompetent.¹⁰¹ In effect, those earlier cases involved incompetent minors and the mentally incompetent, a marked difference from *McFall*, which involved the consent of a competent adult.

Judge Flaherty, the lone justice hearing the case, required Shimp to submit a brief to the court documenting why he should not be compelled to save his cousin's life. Shortly thereafter, the court denied McFall's injunction. In a noteworthy dictum, however,

94. *Id.*

95. Dennis Williams, *Bad Samaritan*, NEWSWEEK, Aug. 7, 1978, at 35.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See *Curran v. Bosze*, 566 N.E.2d 1319, 1343 (Ill. 1990); see also *Estate of Longeway v. Cmty. Convalescent Ctr.*, 549 N.E.2d 292 (Ill. 1990); *Estate of Greenspan v. Gelman*, 558 N.E.2d 1194 (Ill. 1990).

Judge Flaherty took the liberty to characterize Robert Shimp's decision as "morally indefensible."¹⁰²

What are we to understand from each of the parties' actions—Shimp, McFall, and the court? The *McFall* dilemma is significant not only for the study of transplant jurisprudence, but also because it marks the conflicts between individualism and altruism. Judge Flaherty's opinion is unambiguous; a dying person does not possess a special right to invade his cousin's body even if to save his own life. *McFall v. Shimp* remains, however, an interesting test case, particularly because it involved bone marrow donation and not organ donation. Bone marrow transplantation is considered far less invasive than the surgery required to harvest an organ.¹⁰³ Thus, although the court took notice of the potential for harm to result, its main emphasis was not so much the process of donation, but rather Judge Flaherty focused on "respect for the individual."¹⁰⁴ The court made clear that altruism cannot be compelled, and indeed, donation cannot really be a gift if it is mandated.

The government, through its judiciary, is not in the position to "change every concept and principle upon which our society is founded."¹⁰⁵ And while cases like *Brown v. Board of Education*¹⁰⁶ challenge that notion (i.e., the role of the judiciary to bring about social change), ultimately to compel an individual to submit to a non-therapeutic surgery, which in the process violates her privacy, is an incredibly dangerous legal construct.¹⁰⁷ Where would such legal rules end? Could a domestic partner have a legal right to her partner's reproductive material? Could a husband have a legal right to demand sex from his wife? The media characterized Shimp a "Bad Samaritan," but Judge Flaherty's denial of the injunction was not an egregious error.¹⁰⁸ Rather, it demonstrated American jurisprudence in action. After all, we abjure rescue doctrine; the law does not require a duty to aid or rescue when a victim is in danger. In preserving such "no duty" rules, we are bound to cause harms, but they too must be weighed against other values in a just

102. *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978).

103. See, e.g., Nat'l Marrow Donor Program, ABCs of Marrow or Blood Cell Donation, <http://www.marrow.org/DONOR/ABCs/index.html> (last visited Feb. 14, 2007) ("Most donors are back to their usual routine in a few days.").

104. *McFall*, 10 Pa. D. & C.3d at 91.

105. *Id.*

106. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

107. This concept would resemble slavery far more than would cadaveric organ incentives.

108. Williams, *supra* note 95.

society, which in this case was protecting Shimp from the tyranny of McFall. Reconciling the case with international precedent, however, is a different matter.

McFall, having found no U.S. judicial authority to support his case, relied on a seven hundred year old statute, hoping the court would find that in order to preserve or save the life of another, a society has the right to impose upon an individual's right to "bodily security."¹⁰⁹ According to Judge Flaherty,

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. A great deal has been written regarding this rule which, on the surface, appears to be revolting in a moral sense. Introspection, however, will demonstrate that the rule is founded upon the very essence of our free society.¹¹⁰

Indeed, McFall's theory of compelled donation does not reflect the development of American jurisprudence, which contrary to others cited by McFall, "has as its first principle, the respect for the individual."¹¹¹ Great moral conflicts will result from strict interpretations of individual rights.¹¹² As biotechnology progresses, conflicts will often attend that progress. Within weeks after Judge Flaherty's seminal decision, nearly to the day, Robert McFall died.¹¹³

2. *Curran v. Bosze*

In a later decision, *Curran v. Bosze*,¹¹⁴ the Illinois Supreme Court followed the same line of jurisprudence extolled in *McFall*, opining that an individual's altruism cannot be legally compelled by a relative.¹¹⁵ The *Curran* case is significant for three reasons. First, it introduced and responded to a conceptual nuance not at issue in *McFall*, specifically, compelled donations from minors not only for their siblings, but presumably also for other relatives. Second, it introduced a framework, involving a three-prong test, for deciding whether a parent's decision to compel his children to donate against

109. *McFall*, 10 Pa. D. & C.3d at 90-91 (indicating that the plaintiff had cited 81 Westminster 2, 13 Ed. I. c. 24 in his brief).

110. *Id.* at 91.

111. *Id.*

112. *Id.*

113. *Died*, NEWSWEEK, Aug. 21, 1978, at 79.

114. *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990).

115. *Id.* at 1345.

the wishes of the other parent will be legally enforced. Third, it speaks to the emotional and psychological issues involving blended families, presaging future dynamics in tissue transplantation.

The question before the court in *Curran* was whether a non-custodial parent, Mr. Tamas Bosze, could compel the production of his three-year-old twins for blood testing and possible bone marrow harvesting in order to save the life of their twelve-year-old half-brother, Jean Pierre, who would surely die without the transplant.¹¹⁶ Their mother, Ms. Nancy Curran, the twins' legal guardian, refused to provide consent for the procedure, leaving the court to decide, not only a case of first impression, but one which would shape future jurisprudence on altruistic donations from minors.¹¹⁷ Two decisions were issued; first a pronouncement from the court in September 1990, and later a written ruling.

Just days before Christmas, on December 20, 1990, judges of the Illinois Supreme Court delivered their written opinion announcing why they refused to grant Mr. Bosze's request for an injunction to compel Ms. Curran to produce the twins for blood testing and bone-marrow harvesting. The court refused to invoke a more than century-old legal tenet to substitute its judgment for that of the children, instead upholding a lower court decision that the blood test and possible transplant would be an invasion of the twins' privacy.¹¹⁸ Traditionally, a court may substitute judgment in cases where individuals lack capacity to make sound decisions for themselves, either due to youth, illness, or psychological or mental inability.¹¹⁹ Had the court substituted its judgment for that of the twins, doing so, according to their guardian ad litem, would have established a dangerous precedent.¹²⁰

However, that precedent was previously established by the Illinois Supreme Court in both the *Longeway*¹²¹ and *Greenspan*¹²² decisions, involving substituted judgment for incompetent adults. In both cases, the court permitted the substituted judgments of incompetent patients for the purpose of removing artificial nutrition and

116. *Id.* at 1321.

117. *Id.*

118. *Id.* at 1339.

119. *Id.* at 1331.

120. See Andrew Fegelman, *Guardian Allowed to Talk To Twins*, CHI. TRIB., Aug. 24, 1990, at C4, available at 1990 WLNR 3716429 (Westlaw).

121. *Estate of Longeway v. Cmty. Convalescent Ctr.*, 549 N.E.2d 292 (Ill. 1990).

122. *Estate of Greenspan v. Gelman*, 558 N.E.2d 1194 (Ill. 1990).

hydration, which would most certainly result in death.¹²³ The court declined to adopt the best interest standard in both cases, opining instead that the record in both cases demonstrated the relevancy of substituted judgment theory.¹²⁴ Ultimately, the court avoided addressing the more troubling ethical issues presented by the best interest standard; namely, is the death that results from the discontinuance of hydration and nutrition in the best interest of a patient? Is it ever in the best interest of a patient, particularly one who is incompetent, to have hydration and nutrition withdrawn? In the case of a child donor, is the removal of healthy bone marrow or a vital organ ever in her best interest?

By the time the written opinion was issued, Jean Pierre had died.¹²⁵ *Curran v. Bosze* is not an uncomplicated case nor is it free from moral doubt; it is emotionally compelling because a child would surely die, and saving his life might require so little from his siblings.¹²⁶ But there are risks. During the procedure, the donor is anesthetized and harvesting can be painful. Subsequent pain can be treated through postoperative medication.¹²⁷

However, Jean Pierre had no relationship with his half brother and sister; they were, in the eyes of the court, practically strangers.¹²⁸ We are left to ponder whether social relationships should trump biological relationships as the court sets out. Families today are a blend of biological, legal, and social connections. Biological lines alone, according to the court, may be insufficiently narrow and other factors more relevant. But is the court right? Where is the pragmatic line to be drawn in familial altruism? Ironically, in order to confirm paternity for child support, Ms. Curran previously had the twins appear for blood testing, only a year before.¹²⁹ Whose

123. *Estate of Longeway*, 549 N.E.2d at 297-98; *Estate of Greenspan*, 558 N.E.2d at 1195.

124. *Curran*, 566 N.E.2d at 1326.

125. See *Boy at Center of Suit for a Marrow Donor Is Dead of Leukemia*, N.Y. TIMES, Nov. 20, 1990, at B9, available at 1990 WLNR 3051099 (Westlaw).

126. See Janet B. Korins, *Curran v. Bosze: Toward a Clear Standard for Authorizing Kidney and Bone Marrow Transplants Between Minor Siblings*, 16 VT. L. REV. 499, 502 (1992).

127. *Id.*

128. Bryan Shartle, Comment, *Proposed Legislation for Safely Regulating the Increasing Number of Living Organ and Tissue Donations by Minors*, 61 LA. L. REV. 433, 458 (2001).

129. *Curran* and *Bosze* were paramours in a conflicted relationship, at once engaged, and later feuding over paternity, which ironically was settled through the twins being subjected to a blood test when they were one year old at the behest of Curran. See *Curran*, 566 N.E.2d at 1320.

best interest was the Illinois Supreme Court to consider: the twins, Jean Pierre, or the parents? The difficulty here is determining how a court should balance the withholding of life-saving transplantation from one child and the infliction of an invasive procedure on a healthy child. The court's three-prong analysis attempts to answer these questions.

The *Curran* court held that a parent or guardian may consent on behalf of minor children to donate bone marrow to a sibling only when to do so would have been in the minors' best interest.¹³⁰ The court addressed three critical factors necessary for a determination of that kind. First, the consenting parent must have been informed of the risks and the benefits of the procedure.¹³¹ Second, there must have been emotional support available to the donor child from his or her caretakers.¹³² Third, there must have been an existing, close relationship between the donor and recipient.¹³³

Here, there was no existing, close relationship between the half-siblings who shared the same biological father, but different mothers.¹³⁴ At the mother's request, the children were never informed that Jean Pierre was their brother.¹³⁵ Consequently, the court indicated, the limited time the siblings shared was insufficient to prove a close relationship.¹³⁶ As for altruism, the test seems to address the altruism of the parents more than that of the children.¹³⁷ Does the best interest of the twins shift according to their age, custodial parent's consent, quality of the relationship to the donor? Had the twins been seven years old, instead of three, would

130. *Id.* at 1343-44.

131. *Id.* at 1343.

132. *Id.*

133. *Id.*

134. See *Boy at Center of Suit for a Marrow Donor Is Dead of Leukemia*, *supra* note 125.

135. *Curran*, 566 N.E.2d at 1344.

136. *Id.* at 1344-45.

137. See Barbara Redman, *Rethinking the Progressive Estate and Gift Tax*, 15 AKRON TAX J. 35, 48-49 (2000). Redman argues that altruistic concerns for children's wellbeing spring from an extension of a "household production model." *Id.* In that model, parental utility encompassed the utility of children. She writes:

This model's predictions include bequests to children by such "altruistic" parents, even if the children behave selfishly. In fact, the "rotten kid" of this theorem finds it in his/her own self-interest to help the altruistic parent maximize family income, though only if the parent retains the last word (that is, the ability to make bequests). Soon, however, researchers presented an alternative explanation for bequests to children, that of exchange for services rendered.

Id.

that have made a difference in their ability to consent, thereby bypassing their mother's objection? According to the court, the answer would be "no" if the mother could not or refused to provide the psychological support necessary under the "caretaker" prong.¹³⁸ Commentators have since suggested that *Curran* may have been legally right, but morally wrong.

The *Curran* holding demonstrates the nascent qualities of this fluid jurisprudence. As discussed later, the law is incoherent with regard to compelled living donations, and the underlying dynamics of each transaction may be ambiguous and troubling. Also, it seems apparent in the broader jurisprudence involving tough medical decisions that technology outpaces both legislative responses and judicial decision-making, creating gaps in the rule of law.¹³⁹ Ergo, we have at least four byproducts of this jurisprudence that together seem inconsistent and open for interpretation.

The first is the court's unequivocal position that it does not recognize and will not enforce a social, altruistic duty for potential donors to assist relatives, even siblings, by undergoing minimally invasive, non-therapeutic procedures when the prospective donor cannot formulate consent.¹⁴⁰ In fact, the court relies upon testimony from psychologists and pediatric surgeons urging the court to protect potential donors from invasive procedures, even where the risk is minimal, if a psychological benefit cannot be attained.¹⁴¹

Second, the court does not and will not assume that a psychological benefit naturally arises from bone marrow donation and arguably more invasive transplantations, seemingly dismissing any possible claims to the contrary, which can be inferred from federally supported public service announcements and state sponsored advertisement campaigns encouraging organ donation.¹⁴² Clear and convincing evidence must be presented that a potential donor

138. *Curran*, 566 N.E.2d at 1344-45.

139. See Rebecca C. Morgan, *How to Decide: Decisions on Life-Prolonging Procedures*, 20 STETSON L. REV. 77, 102 (1990) (arguing that "statutes cannot anticipate every situation or factual pattern, and medical technology advances faster than law").

140. See Robert W. Griner, *Live Organ Donations Between Siblings and the Best Interest Standard: Time for Stricter Judicial Intervention*, 10 GA. ST. U. L. REV. 589, 599 (1994).

141. *Id.* at 589; see also Shartle, *supra* note 128, at 467 (arguing for the use of expert testimony, oral or otherwise, to determine the consent of minors to organ and tissue donation).

142. See Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 90 (1995).

will psychologically benefit from providing tissue, bone marrow, or an organ.¹⁴³ This can perhaps be accomplished through a showing of an “existing, close relationship” between the potential donor and recipient.¹⁴⁴ It seems possible, based on the ruling that as long as there is an existing, close relationship that will likely continue, the donor child will be psychologically benefited, thereby satisfying the third prong.

Third, the court makes subtle distinctions about the nature of the family relationship between potential donors and recipients but fails to erect boundaries or give guidance. What weight should be given to biological status in familial relationships? In *Curran*, half-sibling, rather than full-blood status, was emphasized, but what does it mean when considering “family”? Because the court recognized the biological status, but not the “family status” of the children, the twins were barred from donating their bone marrow.¹⁴⁵ Thus, biological status would seem rather irrelevant, whether the potential donor was a half brother, full sister, or a step-sister.¹⁴⁶ What will matter to the court is the “existing, close relationship,” one of the prongs in its three-part analysis, which in the future may prove just as problematic.¹⁴⁷ After all, foster children can develop close relationships with each other or their host families, and because some placements are semi-permanent it may be possible to continue the relationship.¹⁴⁸ The court leaves open the possibility of clever adults applying the rule in cases where there are no bio-

143. See Maria N. Morelli, Note, *Organ Trafficking: Legislative Proposals to Protect Minors*, 10 AM. U. J. INT'L L. & POL'Y 917, 942 (1995) (“Courts undergo [a] balancing process in order to ascertain whether the donation serves the [donor’s] best interests”); Cara Cheyette, Note, *Organ Harvests from the Legally Incompetent: An Argument Against Compelled Altruism*, 41 B.C. L. REV. 465, 493-94 (2000) (arguing that “[s]ome courts seek to balance the relative harms to which donors and recipients will be subjected, or alternatively, the relative benefits donors and recipients will realize”).

144. *Curran v. Bosze*, 566 N.E.2d 1319, 1343 (Ill. 1990); see Sheila R. Kirschenbaum, *Banking on Discord: Property Conflicts in the Transplantation of Umbilical Cord Stem Cells*, 39 ARIZ. L. REV. 1391, 1411-12 (1997) (finding that “[t]he similarities between kidney or bone marrow transplants and umbilical cord blood transplants are multiple and obvious”).

145. *Curran*, 566 N.E.2d at 1344.

146. See *id.* at 1343-44; see also Jennifer K. Robbennolt et al., *Advancing the Rights of Children and Adolescents to be Altruistic; Bone Marrow Donation by Minors*, 9 J.L. & HEALTH 213, 231 (1994).

147. See Banks, *supra* note 142, at 89.

148. See Shannon H. Smith, *Ignorance is Not Bliss: Why a Ban on Human Cloning is Unacceptable*, 9 HEALTH MATRIX 311, 327 (1999) (critiquing the *Curran* court’s use of “‘existing close relationship’ with the ‘substantial benefit’ to the donor notion in determining what is in the donor’s best interests”). Smith asserts that “[i]n order to find an existing close relationship, however there must necessarily be an existing donor, who

logical relationships, but long-standing intimate social relationships, as is the case with children in foster care.

The *Curran* court declined the opportunity to address potential, but likely, parent or guardian conflicts of interest in such cases.¹⁴⁹ Based on the court's analysis, it is sufficient that the parent be aware of the risks, consent on behalf of the child, and give emotional support.¹⁵⁰ With such limited guidance, adopting the best interest standard might have less significance and meaning for children's interests in light of the test established.¹⁵¹

Finally, perhaps neither the substituted judgment theory nor the best interest standard, as enforced by the court, are appropriate for organ donation involving children.¹⁵² This is not to suggest that the ultimate decision would be different were a more nuanced theory applied. Rather, the jurisprudence might stretch and develop in ways that specifically address this new frontier of problems, rather than relying upon doctrines which did not anticipate our foray into transplantation regimes. Indeed, it would always seem against the best interest of a child to submit to non-therapeutic surgeries.¹⁵³ Such invasive procedures pose health risks, including the potential for complications with anesthesia, difficulties during the operation, the need for possible post-operative blood transfusions, and other problems unique to the particular type of harvesting.¹⁵⁴ Yet, the moral questions are not insignificant.

Substituting judgment may also pose difficulties as it requires assessing prior manifestations of intent.¹⁵⁵ How does a three year

has had the opportunity (and time) to form a close bond with the recipient." *Id.* at 327-28.

149. *Curran*, 566 N.E.2d at 1337.

150. See Shartle, *supra* note 128, at 458-59.

151. See Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 660-01 (2000).

152. See Deborah K. McKnight & Maureen Bellis, *Foregoing Life-Sustaining Treatment for Adult, Developmentally Disabled, Public Wards: A Proposed Statute*, 18 AM. J.L. & MED. 203, 223 (1992) (arguing against the substituted judgment standard because it lacks objective content).

153. See Dwight Newman, *An Examination of Saskatchewan Law on the Sterilization of Persons with Mental Disabilities*, 62 SASK. L. REV. 329, 332 (1999) (suggesting that non-therapeutic surgeries can never be in the best interest of the patient, even when parents and guardians are involved).

154. See Rosato, *supra* note 2, at 57 (stating that organ donation is always, by definition, non-therapeutic, and therefore, even with parental consent, such operations must be strictly scrutinized by courts).

155. See Thomas J. Brindisi, Note, *Right to Die—Court Requires Clear and Convincing Evidence of Persistent Vegetative Patient's Intent to Terminate Life Sustaining*

old manifest her intent to donate bone marrow or a kidney?¹⁵⁶ As for evidence of intent, what should a guardian ad litem look for?¹⁵⁷ What gestures or actions indicate an intent to donate prior to the manifestation of your sibling's illness? What type of inquiry should be made to uncover evidence of intent? Can intent be influenced by parents, thereby undermining the court's scientific inquiry?

To conclude, neither *McFall* nor *Curran* represents exclusively the jurisprudence on living donations. Rather, they represent one aspect of the coin. The other, equally nuanced aspect of this jurisprudence is alluded to in *Curran*. Within it are the judicial struggles involving conflicts of interest and mental incompetence. Within the gaps of legislative guidance and nascent jurisprudence, further nuances are born.

III. EUGENICS, SOCIAL VALUING, AND THE MENTALLY INCOMPETENT SAMARITAN

Let us now turn to where I believe the "right to use" another's body part derived from. Indeed, it is a double standard in the law. *Curran* is the outlier; the court rejected the notion that twins who barely knew that they had another sibling should surrender blood and possibly bone marrow.¹⁵⁸ However, *Curran* is inconsistent with a robust body of case law and medical precedent documented in the media. Consider the births of Adam Nash and Marissa Ayala who were created expressly to supply body parts for their siblings. The Nashes are thought to be America's first couple to screen their embryos before implanting them in the mother's womb for the purpose of harvesting bone marrow.¹⁵⁹ In that case, the parents were

Procedures; Health Care Decisions Act of 1993 Casts New Light on Outcome, 23 U. BALT. L. REV. 619, 623 (1994).

156. Or, how does a mentally incompetent manifest intent? See *In re Moe*, 432 N.E.2d 712, 720 (Mass. 1982) (acknowledging the potential slippery slope in pursuing substituted judgment).

157. See Anne Marie Gaudin, Note, *Cruzan v. Director, Missouri Department of Health: To Die or Not to Die: That is the Question—But Who Decides?*, 51 LA. L. REV. 1307, 1322 (1991) (suggesting that if clear and convincing evidence is lacking, the court might look to a conversation between the patient and another); *Cruzan ex rel. v. Mo. Dep't of Health*, 497 U.S. 261, 285 (1990). *Cruzan* is perhaps one of the seminal cases involving evidence of consent from a third party. In the case, the Court considered testimony of a conversation between Nancy Cruzan and her roommate. *Id.* at 268. In the conversation, Nancy is said to have communicated her desires as to treatment options were she to become vegetative. *Id.*

158. *Curran v. Bosze*, 566 N.E.2d 1390 (Ill. 1990).

159. See Jeffrey P. Kahn, *Making Lives to Save Lives*, CNN.COM, Oct. 16, 2000, <http://www.cnn.com/2000/HEALTH/10/16/ethics.matters/index.html> (asserting that

able to successfully use Adam's cord blood, but were seemingly prepared for a more invasive donation were it necessary to save their daughter's life. However, twelve years before, Abe Ayala surgically reversed his vasectomy, hoping that his wife would become pregnant with a child who could save their eldest daughter's life.¹⁶⁰

The couples were very different; one Hispanic and the other white, hailing from different regions in the United States. The Nash family lived in Colorado and the Ayalas in California. The couples, however, were motivated by similar desires. Both were unwilling to accept the inevitable deaths of their daughters. The Nash family followed the development of preimplantation genetic diagnosis, a process involving the removal of a single cell from embryos created through standard in vitro fertilization techniques and developed in a laboratory petri dish.¹⁶¹ Before implantation in the uterus, the embryos were tested for Fanconi Anemia, the genetic blood disease from which their daughter suffered, and those exhibiting no signs of the disease were implanted.¹⁶²

The births of Adam and Marissa raise serious doubts about the confluence of the rule of law, biotechnology, ethics, and parenting. Although an effort to ban "transplantation" parenting in England was recently overturned, U.S. legislators and courts have yet to address the issue of reproductive altruism, the practice of having children to save the lives of other children.¹⁶³ Neither federal nor state law establishes limits on who can parent, nor on how many children couples may produce, or when or under what circumstances they may reproduce. Save for child sexual abuse resulting in

screening embryos to choose a bone marrow donor "crossed an important line"); *Birth of a U.S. Boy as Donor Raises Ethical Question*, CNN.COM, Oct. 3, 2000, <http://www.cnn.com/2000/HEALTH/10/03/genetics.ethics.reut> (noting that "if the [stem cell transplant] did not work [the alternative would be] to harvest bone marrow from the boy, a potentially risky procedure").

160. See Mary B. Mahowald, *Genes, Clones, and Gender Equality*, 3 DEPAUL J. HEALTH CARE L. 495, 513 (2000) (discussing the story of the Ayala family).

161. See Donrich W. Jordaan, *Preimplantation Genetic Screening and Selection: An Ethical Analysis*, 22 BIOTECHNOLOGY L. REP. 586, 586 (2003).

162. *Id.*

163. In April 2003, a three judge panel, composed of senior justices of the United Kingdom's Court of Appeal overturned a ban proscribing parents from reproducing to aid a dying child. "Designer Baby" Ban Quashed: A Ban on a Couple Creating a Baby to Help Save Their Child Has Been Overturned by the Court of Appeal, BBC NEWS, Apr. 8, 2003, available at <http://news.bbc.co.uk/1/hi/health/2928655.stm>.

pregnancies and preterm illegal drug use, the right to parent is closely guarded and protected.¹⁶⁴

Here, I briefly consider what I believe is the genesis of judicially enforced duties to rescue others. In my opinion, were the plaintiff in the first reported case of this kind a competent person, rather than a mentally incompetent adult, our case law would look very different. Our endorsement of eugenics contributed to the precedent that courts follow. Eugenics evolved rapidly from a race-based hegemonic ideal to one that enveloped class, mental acuity, and a host of social behaviors.¹⁶⁵ Its all-consuming philosophy, however, legitimized practices that we quickly abandoned post World War II, to distinguish ourselves from the enemy abroad.¹⁶⁶ Respected jurists, members of Congress, and presidents were eugenicists.¹⁶⁷ To be sure, eugenics was not simply a philosophy, but a way in which twentieth-century pragmatists believed they could better organize the world, their country, communities, and families.

In 1969, the Kentucky Court of Appeals became the first court in the United States to address, in a reported decision, whether a parent could authorize removal of one child's kidney—to surrender it to another.¹⁶⁸ Ava Strunk petitioned the court for the removal of one of her son Jerry Strunk's kidneys for implantation in his brother, Tommy.¹⁶⁹ Jerry Strunk, a twenty-seven-year-old mentally incompetent person, with the capacity of a six-year-old, was confined to Frankfort State Hospital as a ward of the state.¹⁷⁰ His brother, Tommy, twenty-eight-years-old, suffered from chronic glo-

164. *Planned Parenthood v. Danforth*, 428 U.S. 52, 60 (1976); see also Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 603-04 (2002) (arguing that the right to parent has been recognized as a fundamental right by Supreme Court).

165. Paul A. Lombardo, "The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund, 65 ALB. L. REV. 743, 754-55 (2002).

166. *Id.*

167. *Id.* at 749-55; see EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE (2003).

168. *Strunk v. Strunk*, 445 S.W.2d 145, 146 (Ky. App. 1969). Three unreported Massachusetts decisions addressed whether parental authority to consent to similar medical procedures involving twins was permissible. These cases, however, were not reported and thus were not readily accessible to judges and law clerks in other jurisdictions. See *Foster v. Harrison*, No. 68674 (Cutter, Single Justice, Eq. Supr. Jud. Ct. (Mass.) Nov. 20, 1957); *Huskey v. Harrison*, No. 68666 (Whittemore, Single Justice, Eq. Supr. Jud. Ct. (Mass.) Aug. 30, 1957); *Masden v. Harrison*, No. 68651 (Counihan, Single Justice, Eq. Supr. Jud. Ct. (Mass.) June 12, 1957).

169. *Strunk*, 445 S.W.2d at 146.

170. *Id.* at 147.

merulus nephritis, a kidney disease, which would have caused his death without the transplant.¹⁷¹

Owing its authority to the doctrine of substituted judgment,¹⁷² the court opined that principles laid out over the centuries in the United States as well as abroad, were broad enough “not only to cover property but also to cover all matters touching on the well-being of [Strunk].”¹⁷³ With that authority, the court, in a split four-to-three decision, found it to be in the best interest of Jerry Strunk to provide a kidney to his older brother, Tom.¹⁷⁴ The court reasoned that Tom’s life was more valuable to Jerry than his kidney, suggesting that “emotionally and psychologically[. . .] his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney.”¹⁷⁵ The majority found Jerry’s happiness to be linked to Tom’s survival.¹⁷⁶ And, although Jerry’s guardian ad litem strongly urged against the operation, the court was not persuaded.¹⁷⁷

Strunk is a unique case to launch this jurisprudence because it involves a distinct set of circumstances, at an interesting time in American history. That Jerry was mentally incompetent, with an I.Q. of thirty-five, may have been more revealing and probative for the court than the close bond between the brothers that the justices allude to, but fail to substantiate with any clear evidence—after all Jerry had been locked away in an asylum in another city. That Jerry would be sad if his brother died is instinctual, a feeling that even non-siblings would share, but it is not a persuasive claim for justifying disregarding a constitutional right to privacy and bodily integrity.

Paul Lombardo forcefully describes how the eugenics movement gained popularity.¹⁷⁸ He argues that state legislation, court opinions, and social movements that followed must be placed in context. The first to feel the brunt of the effort to build a fitter race were incompetent persons. One of the most notorious rulings in-

171. *Id.* at 145.

172. Substituted judgment arises from English case law, which permitted courts of equity to intercede on behalf of employers suffering from “lunacy” to provide a pension for retiring servants. See *Ex parte Whitebread*, (1816) 35 Eng. Rep. 878 (Ch.); *In re Earl of Carysfort*, (1840) 41 Eng. Rep. 418 (Ch.).

173. *Strunk*, 445 S.W.2d at 148.

174. *Id.* at 149.

175. *Id.* at 146.

176. *Id.*

177. *Id.* at 147.

178. See Lombardo, *supra* note 165.

volving incompetent persons was *Buck v. Bell*, wherein Justice Holmes opined “three generations of imbeciles is enough” to give the state authority over their reproductive privacy, particularly the fallopian tubes of women alleged to be mentally incompetent.¹⁷⁹ His notorious eugenics cry heralded an era in which tens of thousands of men and women were sterilized in the United States based on the notion that they harbored bad genes.¹⁸⁰

According to Justice Holmes and others jurists for some time to come, the mentally disabled usurped significant State resources; they were burdens to society that never reciprocated social or economic altruism. His reasoning in *Buck v. Bell* illuminates this point:

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, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.¹⁸¹

What we learn in *Strunk*, beyond the seminal precedent set by the court, is that the mentally ill were compromised citizens and perhaps more easily at the disposal of courts for less sensitive treatment.¹⁸² During this period, the Constitution and common law had what Pierre Schlag might call “plastic” value; legal protection corresponded to social status.¹⁸³ Consider, for example, that Jerry is referred to as “defective” throughout the amicus brief submitted by the Kentucky Department of Mental Health, which supported the removal of his kidney. Tom had a social value recognized not only by the court but also by society; the two brothers, however, were not social or legal equals. Building toward its holding, the court

179. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”).

180. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Lombardo, *supra* note 165 (documenting the early economic, political, and social ties to eugenics in the United States).

181. *Buck*, 274 U.S. at 201.

182. Shortly after *Strunk*, two cases with similar facts were brought in sister jurisdictions, one in Wisconsin and the other, Louisiana. Those courts departed from *Strunk*, holding that it would not be in the best interest of mentally disabled siblings to have parents or courts substitute their consent for non-therapeutic surgeries to procure their organs for the benefit of a sibling. See *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975); *In re Richardson*, 284 So. 2d 185 (La. Ct. App. 1973).

183. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 848-49 (1991).

pointedly observed that Tom was married, working, and going to college, and that undoubtedly he would benefit society.¹⁸⁴

My point, however, is that the ruling in *Strunk* was a slippery slope; the case was not limited to “mentally deficient persons,” but rather to persons who were incompetent to make those complicated transplant decisions independently, especially minors. Viewed in this way, the ruling expanded judicial authority to impose its judgment in transplant cases; that judgment happened to consistently coincide with and affirm parental appeals. In failing to predict the robust technological developments that would facilitate better diagnosis of diseases and make organ transplantation more accessible, the court was somewhat shortsighted.¹⁸⁵ Within a few years of *Strunk*, jurisdictions in Virginia,¹⁸⁶ Texas,¹⁸⁷ and Connecticut¹⁸⁸ adopted its expanding jurisprudence. The *Little v. Little*¹⁸⁹ case permitted a mother (one week after declaring her daughter incompetent) to order her daughter’s kidney removed so that the organ could be provided to the girl’s brother. The court concluded that the fourteen-year-old, although declared incompetent, could nevertheless benefit psychologically from surrendering her organ to a sibling.¹⁹⁰

Subsequent jurisprudence expanded the *Strunk* ruling to include living donors who are minors.¹⁹¹ In *Hart v. Brown*,¹⁹² Connecticut parents of seven-year-old twins sought a declaratory judgment to permit the removal of one daughter’s kidney for im-

184. *Strunk v. Strunk*, 445 S.W.2d 145, 145 (Ky. App. 1969).

185. See Emily Denham Morris, Note, *The Organ Trail: Express Versus Presumed Consent as Paths to Blaze in Solving a Critical Shortage*, 90 KY. L.J. 1125, 1149 (2001) (asserting that “[o]ne problem with most of the regulations passed and common law rules set out by courts regarding organ and tissue donation has been short-sightedness when dealing with future technological advances. Courts do not have crystal balls that can predict the future” of technological advancements.).

186. See *Hurdle v. Currier*, 5 Va. Cir. 509, 513 (1977) (opining that under the circumstances parents possessed the legal authority to require minor daughter to surrender her kidney to her sibling).

187. See *Little v. Little*, 576 S.W.2d 493, 500 (Tex. Civ. App. 1979) (opining that the mother had the legal authority to substitute judgment for her fourteen-year-old daughter for purposes of consenting to a kidney “donation”).

188. See *Hart v. Brown*, 289 A.2d 386, 391 (Conn. Super. Ct. 1972) (holding that parents have the authority to require seven-year-old daughter to surrender her organ for donation to her twin sibling).

189. *Little*, 576 S.W.2d 493.

190. *Id.* at 500.

191. See *id.* (holding that nothing in Texas law forbade the court granting authority to a mother to have her daughter’s kidney removed to aid her brother).

192. *Hart*, 289 A.2d 386.

plantation in her sister. The donee's physician refused to perform the operations and the hospital was unwilling to permit the use of its facilities unless the court declared the parents able to consent on behalf of Kathleen Hart, their daughter, to organ removal for procurement to her sister.¹⁹³ For the physicians, clear ethical problems existed; to whom would they owe a duty of loyalty? As for liability, could Kathleen later sue under battery theory, having been subjected to an unwanted medical procedure without her consent, or conversion for the extraction of the organ and its use by a third party?¹⁹⁴

The Connecticut Superior Court found that Kathleen's participation in the organ donation process would be "most beneficial" to her.¹⁹⁵ The court reasoned that Kathleen would be happy if her family were happy.¹⁹⁶ *Strunk's* instructive posture proved helpful for the *Hart* court as it too reached beyond the original intent of substituted judgment theory by expanding its scope to children.¹⁹⁷ Is "immense benefit" the appropriate standard of review? The longevity of happiness in a child or a family is difficult to predict. Families separate, divorce, and may be later reconstituted with different people. Placing responsibility on a child to promote that type of happiness through uninformed, nonconsensual, and invasive surgeries stretches the boundaries of pragmatic decision-making. It may be the case that circumstances present an opportunity for family members, particularly children, to help in extraordinary ways, but the courts' analyses in these cases have yet to establish the pragmatic limitations and reconcile those with moral principles and pre-existing legal rules.¹⁹⁸

After *Strunk* and its progeny, a few conclusions can be drawn. Notwithstanding *Curran*, the first and most obvious conclusion is that children do not possess the "right to refuse" an organ or tissue harvest. Second, even if children had a recognized *interest* to refuse organ harvesting or surrendering, that interest is subordinate to the *right* of parents to substitute their judgment. Third, whether evoking the rhetoric of best interest or relying on substituted judgment,

193. *Id.* at 387.

194. *Cf. Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941) (opining that a doctor must obtain consent before performing surgery on a minor in a case where minor's skin was removed on two occasions for grafting onto his cousin).

195. *Hart*, 289 A.2d at 389.

196. *Id.*

197. *Id.* at 387-88.

198. *See Morley, supra* note 88, at 1240-43 (arguing that guilt often influences organ donation decisions).

courts are reluctant to interfere with parental authority and decision-making, thereby effectively reducing, or altogether eliminating, the function of the courts in grappling with these complex issues. The outcomes in these instances will be obvious and the proceedings pro forma; unless there is conflict between the parents, they will always win. Fourth, the *Strunk* progeny demonstrates the plasticity of the law as related to minors (and incompetent persons). Courts have ostensibly created an exception to the rescue doctrine for children. The legislative and judicial failure to recognize the contradictions is manifold.

CONCLUSION

My Sister's Keeper is a daring book, illuminating the very real struggle within families when one child is sick and biotechnology offers a solution at a very steep price. Picoult provides an illuminating case study; my effort here was to explain what that case study means in the context of American jurisprudence. Biotechnology transports us to types of medical research unforeseeable and uncharted thirty years ago. The human genome was yet to be mapped, and bio-prospecting had relevance only for plants and wildlife, not human beings as we see now. Technology was less sophisticated and its robust economic potential was yet to be fully appreciated. From this perspective, *Curran*, *Strunk*, *Little*, and *Hart* were possibly short-term solutions to problems on a much grander scale. With parental immunity challenges on the horizon in some jurisdictions, the possibility of warding off subsequent privacy and tort lawsuits from children harmed psychologically or physically by nonconsensual organ, tissue, or cell removal may be less guaranteed. Picoult offers one way out for her protagonist: sue for medical emancipation. Yet, Picoult is a tragic realist; hours after winning her medical freedom, Anna is killed in an automobile accident. In the end, she was her sister's keeper.

When altruism is the exclusive legal forum for organ and tissue procurement, demand creates pressure within the limited pool, causing tissue and organ solicitation to spread into black markets and seep into less desirable altruistic subsystems.¹⁹⁹ Parents, patients, relatives, and friends confront burdened choices. The legal alternatives are limited when altruism is the only legally permissible

199. See John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 645 (1994) (suggesting that the most controversial alternatives in organ transplantation would be to create markets wherein living donations are solicited).

form of organ and tissue procurement. The jurisprudence involving compelled donations from siblings of children²⁰⁰ dying from terminal illnesses presages future dynamics where the biological lines of family may be less determinative, and therefore more fluid.²⁰¹ The “existing, close relationship” standard adopted in *Curran* informs us less about biology and more about personality, compatibility, and friendship. The biology of family may be replaced by “family relationship,” which would seem logical given the sometimes legally and socially arbitrary or ambiguous nature and definition of family.²⁰² Blended households, step-siblings, adopted siblings, siblings born of ova or sperm transactions, surrogate siblings, negotiated siblings (children of same sex parents, born with the aid of an involved friend), and foster siblings all represent adaptations on the traditional nuclear family “child” model.²⁰³

Indeed, the social contract functions only when mutual bargaining power and beneficial reciprocity exist. The benefits need not be equal, but should be of some tangible value to both parties. It also seems important that individuals be allowed to express their generosity and humanity in ways that at times may burden their liberties, including bodily integrity and privacy in the aid of another. Therefore, it would be unwise to prophylactically proscribe individuals from participating in living donation, even some children. There must, however, be a balance beyond the tests previously established.

First, it must be clearly understood that compelled living donations from children and incompetent persons are the least desired forms of donation. Donations from persons legally incompetent cannot easily fit under the umbrella of altruism; the heightened probability for compromising their humanity and dignity makes it so. We must consider alternatives for desperate parents and sib-

200. See Cheyette, *supra* note 143, at 469 (cautioning the use of incompetent persons as organ donors, declaring “[o]rgan harvests from children and mentally disabled adults should be categorically prohibited. . . . [U]sing the most vulnerable members of society to shield us from the pain of a loved one’s illness or imminent death is unfair.”).

201. *Id.* at 505-06.

202. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) (offering a different legal view of what family means in the United States, calling it a rapidly changing “anachronism”).

203. See Larry V. Starcher, *Supreme Court Page: The Family of 2003*, W. VA. LAW., Nov. 2003, at 8 (“[W]e have now moved into the twenty-first century, and the percentage of American children living in ‘traditional’ married nuclear families is well below a majority. . . . Single parents are raising 30% of our nation’s children. In some urban areas, 30 to 60% of children are being raised by neither biological parent.”).

lings beyond the reach of the most vulnerable members of their families. Currently, federally mandated altruism procurement constrains their ability to seek alternative, viable sources domestically. Again, the weaker, less desirable options become the exclusive options, quite unnecessarily. Conversely, those suspicious of the American transplantation system lack the confidence and motivation to participate in the current altruistic regime as donors, but it is possible other systems might prove more attractive to them. Let us remember children and the mentally ill are not viable replacements for an incompetent, ineffective organ procurement system. Their participation should be limited to the narrowest possibilities.

Second, minors younger than thirteen years old should be proscribed from participating in living donation procedures. An age barrier would be no different than those imposed in labor or employment systems. Children under thirteen lack the capacity to substantially appreciate the nuances of these transactions, including potential future health risks. This may also be true for teenagers; however, it is more likely that teenagers will be more literate, knowledgeable, educable, and aware than seven-year-olds. Their understanding of the transplantation process will be more substantive than symbolic, resulting in meaningful dialogues about risks and benefits of tissue and organ harvesting. Age should not be the only criteria, lest it become an arbitrary element.

Third, a guardian ad litem should always be appointed. Fourth, family and independent counseling must be required to ensure that parents understand the dynamics and depth of their actions and long term consequences. Fifth, an independent physician must be appointed for the prospective donor to avoid conflicts of interest. Finally, a statement should be issued to the court from the donor as to why she desires to participate as an organ or tissue donor. Limiting the participation of children will reduce the pool of viable organs, and other solutions must be sought. However, limiting the pool of child donors will necessitate and hopefully force a reconsideration of the altruistically based procurement regime.