COMMENT

"BLOOD AND JUDGMENT"[*]: INCONSISTENCIES BETWEEN CRIMINAL AND CIVIL COURTS WHEN VICTIMS REFUSE BLOOD TRANSFUSIONS

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I. INTRODUCTION

Three years ago, Thomas Branco and his mother were driving home when a faulty transmission caused their car to stall.[1] As Mr. Branco pushed the stalled car off the road, an out-of-control drunk driver collided into the car, crushing Mr. Branco into the trunk.[2] He sustained severe injuries, but amazingly was still alert while en route to the hospital in an ambulance.[3] Upon arrival, he informed the doctor that he would not agree to a blood transfusion because of his religious beliefs.[4] A short time later, after surgery

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[*] William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act III, Scene 2, l. 33.

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I would like to dedicate this Comment to my family: to my mom for thinking it was fantastic before a word was even written, to my brother for challenging me to create, and especially to my dad, for reading it more than anyone else ever will, except for me. I am also grateful to the *Stetson Law Review* editors and associates, especially Lyndy Jennings and Karen Mulcahy for being perfectly critical and Carrie Ann Wozniak for her diligent editing.

1. *Klinger v. State*, 816 So. 2d 697, 698 (Fla. 2d Dist. App. 2002), *rev. denied*, 837 So. 2d 410 (Fla. 2003).

2. *Id*.

3. *Id*.

4. *Id*. Thomas Branco, a Jehovah's Witness, refused a blood transfusion, and instead opted for nonblood management, because of the admonition at Acts 15:28–29 to "keep abstaining from . . . blood." *Id*.; *Acts* 15:28–29 (New World Translation). Nonblood management involves a variety of procedures, surgical tools, and techniques including, but not limited to, closed-circuit blood salvaging machines, biological hemostats (glues, sealants, and pads applied to wounds or punctures to stop bleeding), and laproscopic or other mini-

to amputate both of his legs, Mr. Branco died.[5] A Florida trial court convicted the drunk driver of driving under the influence (DUI) manslaughter.[6] On appeal, the defendant argued that Mr. Branco's refusal of a blood transfusion was an intervening cause of death.[7] The appellate court rejected this argument, reasoning that the defendant "caused life-threatening injuries" and the refusal of a blood transfusion did not "absolve [the defendant] from criminal liability."[8]

If members of the Branco family had chosen to sue the defendant, they would also have had a civil cause of action, wrongful death.[9] Prior caselaw suggests that if the family filed and brought this hypothetical civil suit, the judge would likely instruct the jury to consider whether Mr. Branco could have avoided death by accepting a blood transfusion.[10] The doctrine of avoidable consequences (also known as the duty to mitigate) could bar the Branco family from receiving wrongful-death damages.[11] Consequently, the defendant could be guilty in criminal court but not liable in civil court. This result is, if nothing else, a reason to give pause. After all, the burden of proof is lower in civil court.[12] It seems that surviving the beyond-a-reasonable-doubt burden in criminal court would mean clearing the preponderance-of-the-evidence standard in civil court with relative ease.[13] Are the issues and objectives in

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mally invasive instruments. *The Growing Demand for Bloodless Medicine and Surgery*, 81 Awake! 8, 8–9 (Jan. 8, 2000) [hereinafter *Bloodless Medicine and Surgery*].

5. *Klinger*, 816 So. 2d at 698; *Blood Transfusion Issue Doesn't Stop Conviction*, St. Petersburg Times 7B (Sept. 15, 2000) [hereinafter *St. Petersburg Times*].

6. *Klinger*, 816 So. 2d at 698.

7. *Id*.

8. *Id*. at 699.

9. Fla. Stat. § 768.19 (2003).

10. *See Munn v. S. Health Plan, Inc.*, 719 F. Supp. 525, 526, 530–532 (N.D. Miss. 1989), *modified*, *Munn v. Algee*, 730 F. Supp. 21 (N.D. Miss. 1990), *aff'd*, 924 F.2d 568 (5th Cir. 1991) (barring a husband from receiving wrongful-death damages when his wife refused a blood transfusion after a car accident in which the defendant, trying to pass a tractor-trailer rig, collided head-on with the victim and her husband) [hereinafter *Munn I*].

11. *Id*. at 527.

12. Even the general population of nonlawyers is familiar with this concept, partially due to the O.J. Simpson case, in which the evidence against Mr. Simpson did not convince a jury that he was criminally guilty beyond a reasonable doubt. However, the evidence did meet the much lower burden in civil court. *See* CNN, *Simpson Civil Trial Explainer: A Primer on the Case*, http://www.cnn.com/US/9609/16/simpson.case/ (accessed Oct. 26, 2003) (discussing the difference between the O.J. Simpson criminal and civil trials resulting from the 1994 murders of Nicole Brown Simpson and Ron Goldman).

13. *See id*. (explaining that the burden of proof in a civil case is lower than that of a criminal case).

civil court so different that a defendant can be criminally guilty but not civilly responsible, despite the different burdens? Or are blood-transfusion civil cases an aberration in the law?

Refusing to "accept [a] blood [transfusion] raise[s] some of the most difficult legal issues" facing judges today.[14] Although particularly relevant to Jehovah's Witnesses,[15] the issues involve anyone who opts not to accept certain medical treatment for religious, moral, or other reasons.[16] As medical technology advances, there are an increasing number of controversial treatments that raise serious moral dilemmas for many people; current examples include blood transfusions, organ transplants, abortions, and embryonic-stem-cell treatment; the future may raise issues with cloned human body parts.[17]

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14. *Rozewicz v. N.Y.C. Health & Hosp. Corp.*, 656 N.Y.S.2d 593, 594 (N.Y. Sup. 1997). Theoretically, refusal of any kind of medical treatment invites the same kind of inquiry involved in blood transfusion cases. *See e.g. T.J. Morris Co. v. Dykes,* 398 S.E.2d 403, 407 (Ga. App. 1990) (deciding that a patient's failure to seek surgery until one year after an accident, for no apparent reason, was not a failure to mitigate); *Hall v. Dumitru*, 620 N.E.2d 668, 671–673 (Ill. App. 5th Dist. 1993) (deciding that a patient's refusal of surgery because of fear was not an unreasonable failure to mitigate); *Labit v. Setiff*, 489 So. 2d 942, 947 (La. App. 5th Cir. 1986) (deciding that a patient's failure to undergo treatment that promised little possibility of success was not a failure to mitigate).

15. *E.g. Klinger*, 816 So. 2d at 698.

16. *See id*. (patient refused treatment based on religious beliefs); *Hall*, 620 N.E.2d at 671 (patient refused treatment because of fear of surgery); *Labit*, 489 So. 2d at 947 (patient refused treatment that promised little possibility of success).

17. *See The President's Council on Bioethics*, http://www.bioethics.gov/transcripts/apr02/apr25session3.html (accessed Apr. 3, 2004) (discussing the "ethical questions in stem cell research"). In the future, the issue of personal ethics and choice of treatment will likely remain a controversial subject. *Id*. Embryonic-stem-cell treatment is one area of research and treatment raising numerous ethical issues. *Id*. Recently a "neurobiologist . . . implanted embryonic stem cells into a paralyzed rat . . . . [V]ideo footage . . . showed the treated rat walking on all four feet around a child's plastic swimming pool." Peter Hackett, *Technology, Society, and Policy: Trends and Innovation: The Library of Parliament Seminar on Innovation, Science Policy, and the Role of Parliament*, http://www.nrc-cnrc.gc.ca/newsroom/speeches/techpolicy02_e.html (May 3, 2002). Although this research and treatment offers genuine hope to thousands of victims of paralysis due to auto collisions, many may decline such treatment because of personal ethics or morality, because embryos discarded from fertility clinics are a major source of stem cells. *See* Gloria Borger, *You Can't Spin the Pope*, 131 U.S. News & World Rpt. 22 (Aug. 6, 2001) (available in LEXIS, NEWS library database, MAGS file) (stating that the Pope, the leader of the Roman Catholic Church, is against embryonic-stem-cell research and treatment); Assoc. Press, *Pope Condemns Stem Cell Research*, USA Today (Nov. 10, 2003) (available at http://www.usatoday.com/tech/news/2003-11-10-pope-stem-cell_x.htm) (stating, "Pope John Paul II . . . denounced as 'morally contradictory' any medical treatment based on stem cells taken from embryo tissue"). The issue of cloned body parts raises the debate of "fundamental ethical boundaries of human research." *Duke University; Bioethicists Take Differing Views on Cloning Breakthrough*, Biotech Wk. 161 (Mar. 10, 2004) (available at 2004 WL

One type of case in which courts consider the legal effects of refusing a blood transfusion is when the refusal occurs in the course of treatment for an injury from a criminal or tortious act.[18] Criminal and civil defendants typically contest causation, claiming that refusing a blood transfusion caused the victim's death.[19] Criminal courts consistently reject this argument, holding that the refusal of a blood transfusion does not absolve the defendant from criminal liability.[20] On the other hand, civil courts accept the argument.[21] Civil courts typically allow for little or no recovery because they apply the doctrine of avoidable consequences.[22]

Using the facts of *Klinger v. State*,[23] discussed earlier, to highlight the practical effects of different criminal and civil approaches, this Comment will explore how courts treat victims who refuse blood transfusions because of a sincerely held religious belief.[24] Part II of this Comment will explore the history of blood

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18. *See Munn v. S. Health Plan, Inc.*, 924 F.2d 568, 570–571 (5th Cir. 1991) (discussing the refusal of a blood transfusion in the civil context) [hereinafter *Munn II*]; *Klinger*, 816 So. 2d at 698 (discussing the refusal of a blood transfusion in the criminal context).

19. *See* Pt. III & IV (discussing criminal and civil approaches when a patient refuses medical treatment from an injury sustained by the criminal or tortious act of another, and the defendant contests causation).

20. *Infra* nn. 59–84 and accompanying text (discussing the criminal approach to defendant's liability when the victim refuses medical treatment following the defendant's harmful conduct).

21. *Infra* nn. 85–103 and accompanying text (discussing the civil approach to defendant's liability when the victim refuses medical treatment following the defendant's tortious conduct).

22. *Infra* nn. 133–222 and accompanying text (outlining the avoidable-consequences doctrine, which describes the defendant's ability to avoid liability if the victim does not act reasonably to limit or mitigate his or her losses).

23. 816 So. 2d 697.

24. *E.g. id*. at 698. There are other religious groups that refuse different medical procedures for religious reasons. For instance, Christian Scientists typically reject all Western medicine in favor of "healing . . . through scientific prayer, or spiritual communion with God." Missions for the Lord, *Background on Christian Science*, http://mftl.net/resources/beliefs/christian_science.htm. But Jehovah's Witnesses' refusal of blood transfusions is unique in the area of religion-based refusal of medical treatment for two reasons. First, Jehovah's Witnesses are eager to accept alternative medical treatment, such as fluids that maintain blood volume, genetically engineered proteins that stimulate red blood cell production, blood salvaging machines, and types of surgeries that do not require blood transfusions. *Bloodless Medicine and Surgery*, *supra* n. 4, at 8–9; Am. Med. Assn., *Jehovah's Witnesses: The Surgical/Ethical Challenge*, 246 J. of Am. Med. Assn., 2471, 2472 (1981) (reprinted at http://www.watchtower.org/library/hb/article_06.htm) (stating, "Jehovah's Witnesses accept medical and surgical treatment. In fact, scores of them are physicians, even surgeons. But Witnesses are deeply religious people who believe that blood transfusion is forbidden for them by Biblical passages."). Second, a blood transfusion cannot be characterized as "life-saving" across the board. Many who receive blood transfu-

transfusions and the right to refuse them, the backdrop against which today's courts make their decisions. Parts III and IV will focus on the different approaches in criminal and civil courts and how courts justify holding criminal defendants responsible but releasing them from civil liability. Part V will discuss the need for a uniform approach. Finally, Part VI will call for nondiscriminatory treatment of the victims through the second-injury rule in tort law.[25] Under the second-injury rule, a victim refusing a blood transfusion is his own, faultless second injurer.[26] Applying this rule eliminates the dilemma of criminal guilt without civil liability.[27] It also absolves the jury from having to decide the reasonableness of a religious belief.[28] Finally, it avoids constitutional issues by allowing the free exercise of religion and the right to refuse medical treatment without violating the Establishment Clause of the First Amendment to the United States Constitution.[29]

II. BLOOD TRANSFUSIONS—A HISTORICAL PERSPECTIVE

Blood transfusions have been part of standard medical practice since World War II and have become big business in the United States, bringing in billions of dollars every year.[30] They

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sions still die because of the extent of the original injuries or adverse reactions to blood transfusions. *See Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125, 128 (N.D. Ill. 1972) (discussing a case in which a patient, forced to receive a blood transfusion, still died); *infra* n. 48 and accompanying text (stating the benefits of avoiding blood transfusions).

25. *See* Pt. V (concluding that the second-injury rule creates a consistent standard between civil and criminal approaches).

26. *See* Pt. IV(E) (discussing the second-injury rule).

27. *Id*.

28. *See* Pt. V (stating that a uniform approach would relieve juries of the confusion that usually results when deciding whether the victim's refusal of a blood transfusion was reasonable).

29. *See* Pt. V (discussing how a uniform approach circumvents the possibility of penalizing a victim for exercising his or her constitutional right to refuse to consent to medical treatment).

30. "Blood [c]ollection [is] 'a business . . . .' What few American blood donors know is that buying and selling the blood they freely give are part of a huge international trade. The plasma products market alone is about $6 billion worldwide." Christine Stapleton & Elliot Jaspin, *Sept. 11 Donors a Windfall for Blood Trade*, Palm Beach Post 1A (Sept. 8, 2002); *see* Susan Adams & Robert Langreth, *Mighty Mice*, Forbes 34 (Jan. 8, 2001) (referring to blood services as a "multi-billion-dollar blood transfusion business"); Eric Alan Barton, *Blood Trade: Two Companies Wage a Never-Sanguine War for Your Bodily Fluid*, New Times (Nov. 28, 2002) (available at http://www.newtimesbpb.com/issues/2002-11-28/feature.html/1/index.html) (quoting a blood bank Chief Executive Officer as saying, "Show me the blood, and I'll show you the money"); Laurence Darmiento, *Local Firm Sues*

are widely accepted among the public and in the medical field.[31] However, blood transfusions have not always been popular.[32] Jean-Baptiste Denis, French scientist and physician to Louis XIV, performed the first recorded human transfusion in 1667, using calf blood.[33] Denis experimented on Antoine Mauroy, a middle-aged man prone to mad rages, believing that a blood transfusion would cause Mauroy to assume the calf's docile nature.[34] Before the blood transfusion, Mauroy experienced "[frenzies] during which he would batter his wife, strip off his clothes, and run through the streets, setting house fires along the way."[35] After the blood transfusion, Mauroy was noticeably calmer as he vomited, bled from the nose, and urinated black fluid.[36] One year and another blood transfusion later, Mauroy began beating his wife again and she, in turn, began poisoning him with arsenic.[37] When Mauroy died during a visit with Denis, the French courts tried Denis for murder.[38] Although the courts acquitted Denis,

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Red Cross over Its Business Practices, 23 L.A. Bus. J. 5 (Jan. 15, 2001) (suggesting that the Red Cross charges hospitals an unfair markup of $400–$600 per pint of blood platelets); Ann Oakley, *Blood Donation-Altruism or Profit?* 312 British Med. J. 1114 (May 4, 1996) (stating that "Reports of blood products being sold abroad with a fourfold mark up . . . will have [fueled] some people's belief that the British system will shortly be indistinguishable from that in the United States, where for many years the dominant profit motive has led to problems in ensuring a safe supply of blood"); Beth Piskora, Jessica Sommar & Erica Copulsky, *Bull's Eye*, N.Y. Post 41 (Oct. 21, 2001) (stating, "You give [blood] away [for] free, but the hospital pays up to $500 for your pint of blood"); Douglas A. Starr, *Blood: An Epic History of Medicine and Commerce* 250 (Alfred A. Knopf, Inc. 1998) (discussing the "cutthroat" competition among nonprofit blood banks and revealing, "blood represent[s] a resource worth hundreds of millions of dollars—money that traveled from patients or their insurance companies to hospitals and to the blood banks, regardless of their 'nonprofit' designation"); Michael Unger, *The Blood Wars/Li-Based Vitex Goes Head-to-Head with California Company in Race to Commercialize Technology to Safeguard World's Blood Supplies*, Newsday C8 (Aug. 24, 1998) (stating that "[i]ndustry analysts and executives say that the business of cleansing blood products in itself is potentially worth billions in a nation that has [forty-five] million blood transfusions a year").

31. *See* Am. Assn. of Blood Banks, *Facts about Blood and Blood Banking*, http://www.aabb.org/All_About_Blood/FAQs/aabb_faqs.htm#1 (accessed Mar. 10, 2003) (stating that "on any given day, an average of 38,000 units of red blood cells are needed" and "In 1999, 26.5 million units of blood components were transfused") [hereinafter *Am. Assn. of Blood Banks*].

32. Judith Reitman, *Bad Blood: Crisis in the American Red Cross* 23 (Kensington Books 1996).

33. *Id*.; Starr, *supra* n. 30, at 3.

34. Starr, *supra* n. 30, at 3.

35. *Id*.

36. *Id*. at 6.

37. *Id*. at 14–15.

38. Reitman, *supra* n. 32, at 23.

the French and English Parliaments banned all human blood transfusions.[39] In Rome, the Pope followed suit, banning blood transfusions after two men died from them, and doctors abandoned blood transfusions for another one hundred and fifty years.[40]

As medical technology regarding blood advanced, blood transfusions resurfaced.[41] By the nineteenth and twentieth centuries, scientists had discovered effective anticoagulants, improved refrigeration techniques and plasma, and were able to identify blood types.[42] Beginning in 1941, the United States military used blood transfusions to treat wounded soldiers.[43] Shortly after this military use began, civilian requests for blood transfusions increased significantly.[44] Doctors introduced blood transfusions into clinical medicine again, at a time when governmental agencies, like the United States Food and Drug Administration, did not strictly evaluate effectiveness "and side effects of drugs" and biogenic products.[45]

Nonetheless, today blood transfusions are a routine part of medical practice.[46] Because of the advent of Acquired Immuno Deficiency Syndrome (AIDS) and ongoing public concern about other transmissible diseases, like Hepatitis C and the West Nile virus,[47] both the general public and the medical profession have begun to explore alternatives to blood transfusions.[48]

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39. Starr, *supra* n. 30, at 15.
40. *Id*.
41. Reitman, *supra* n. 32, at 23–24.
42. *Id*.
43. *Id*. at 24.
44. *Id*. at 25.
45. Donat R. Spahn, *Benefits of Red Blood Cell Transfusion: Where Is the Evidence?* http://www. nata-edu.org/Art2.htm (accessed Mar. 8, 2003).
46. *Am. Assn. of Blood Banks*, *supra* n. 31.
47. Dolores Kong, *Hepatitis Cases Prompt Review of Transplants*, Boston Globe Metro/Region 1 (available in LEXIS, NEWS library, MAJPAP file); Stephen Nohlgren, *Tainted Donor Blood Infects Two with HIV*, St. Petersburg Times 1A (July 19, 2002); David Wahlberg, *Healthy Living: Blood Options; As Fears about Supplies Linger, Patients Seek Alternatives to Transfusions*, Atlanta J. & Const. 1E (Feb. 11, 2003) (available in LEXIS, NEWS library database, MAJPAP file).
48. *See* The N.J. Inst. for the Advancement of Bloodless Med. & Surgery, *Physicians at the N.J. Institute*, http://www.bloodlessmed.com/Pages1/meetMDs1.html (accessed Nov. 11, 2003) (encouraging the exploration of nonblood surgery). This organization states,

> Knowing that blood can cause viral and bacterial infection, be mismatched and suppress immunological response should give us enough negative reasons to avoid transfusion, if at all possible. But it is not until we make the extra effort to perform

Nonetheless, most people view taking a blood transfusion as completely reasonable, and blood transfusions are still the standard treatment for loss of blood.[49]

Because blood transfusions are so widely accepted, choosing alternative treatment has been an uphill battle for Jehovah's Witnesses.[50] Until recently, when a person wanted to choose alternative treatment, doctors often sought and won court orders forcing the patient to receive blood.[51] One study suggested that some doctors have dealt with patients who refused blood transfusions by using coercion or deception, even going so far as to transfuse a patient with blood without the patient's knowledge.[52]

Currently, the state and federal constitutional right to refuse medical treatment protects adult patients who refuse a blood transfusion on the basis of a sincerely held religious belief.[53] This

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> difficult surgery without blood that we really begin to see the positive benefits. Patients respond and heal faster.

Id.; Banner Health, *Blood Conservation Medicine*, http://www.bannerhealth.com/channels/patients+and+visitors/facilities/arizona/good+samaritan/programs+and+services/specialty+services/blood+conservation.asp (accessed Apr. 6, 2004) (encouraging transfusion avoidance). This Web site states,

> Despite all the precautions and safety measure[s] taken to ensure a safe blood supply, the risk of transmitting viruses through blood transfusions cannot be completely eliminated. Transfusion-avoidance reduces the risks of patients developing postoperative infections and eliminates the risk of allergic reactions.

Id.

49. *Supra* n. 30 (discussing the common practice of blood transfusions in the United States).

50. *E.g. Klinger*, 816 So. 2d at 698.

51. *See Holmes*, 340 F. Supp. at 128 (appointing a conservator to authorize an unwanted blood transfusion). *Holmes* involved a twenty-year-old man who refused a blood transfusion for religious reasons. *Id.* After he lost consciousness, his doctors petitioned the court, had the man declared incompetent, and had a conservator appointed to authorize a blood transfusion against the wishes of the patient and his family. *Id.*; *see also* Assoc. Press, *Patient Wins a Court Ruling Barring Forced Transfusions*, N.Y. Times B5 (Apr. 9, 1996) (citing the case of Nelly Vega, in which hospital officials, in the middle of the night, got an emergency order from a judge to force a blood transfusion even though Vega previously signed a form refusing it on religious grounds). Although courts have largely resolved the legal issue of refusing blood for most adults, in practice, Jehovah's Witnesses have had to seek out doctors who will respect their wishes and have formed hospital liaison committees to facilitate communication between doctors and Witness patients. Watchtower, *Jehovah's Witnesses and the Medical Profession Cooperate*, http://www.watchtower.org/library/g/1993/11/22/article_01.htm (Nov. 22, 1993). The debate about forced blood transfusions continues in cases involving minors, an issue not addressed in this Comment. *Id*.

52. I. Kerridge et al., *Clinical and Ethical Issues in the Treatment of a Jehovah's Witness with Acute Myeloblastic Leukemia*, http://www.med.unipi.it/patchir/bloodl/bmr/cases/case4.htm (Aug. 11, 1997).

53. *See McConnell* v. *Beverly Enter.-Conn., Inc.,* 553 A.2d 596, 601 (Conn. 1989) (stat-

right of self-determination also protects patients who refuse medical treatment for other reasons, including fear, risk, apathy, and prior bad experiences.[54] Many patients regularly refuse certain prescribed drugs and medical procedures, like surgery, chemotherapy, and resuscitation, likely with little realization that they are exercising a constitutional right.[55] However, unlike refusing surgery, chemotherapy, or resuscitation, refusing a blood transfusion for religious reasons is not a popular, nor a widely understood decision.[56] So, despite widespread recognition of a pa-

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ing, "The right to refuse medical treatment is a right rooted in this [N]ation's fundamental legal tradition of self-determination"); *Superintendent of Belchertown St. Sch. v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977) (stating that "a person has a strong interest in being free from nonconsensual invasion of his bodily integrity," and citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *e.g. In re Osbourne*, 294 A.2d 372, 375 (D.C. 1972); *Stamford Hosp. v. Vega*, 674 A.2d 821, 831 (Conn. 1996); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *Pub. Health Trust of Dade County v. Wons*, 541 So. 2d 96, 98 (Fla. 1989); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1021 (Mass. 1991); *Fosmire v. Nicoleau*, 551 N.Y.S.2d 876, 879–880 (N.Y. 1990).

54. *See Saikewicz*, 370 N.E.2d at 432 (recognizing that a minor patient's right to self-determination and privacy outweighed the state's interest in preserving life, and considering the risks of chemotherapy, including the probable side effects of treatment, the low chance of producing remission, and the certainty that treatment will cause immediate suffering); J. Lowell Dixon, *Blood: Whose Choice and Whose Conscience?* 88 N.Y. St. J. of Med. 463, 463–464 (1988) (reprinted at http://www.watchtower.org/library/hb/article_07.htm). This article states that "one must not forget that patients other than Jehovah's Witnesses often choose not to follow their doctor's recommendations. . . . [Nineteen percent] of patients at teaching hospitals refused at least one treatment or procedure, even though [fifteen percent] of such refusals 'were potentially life endangering.'" *Id*. Patients with "do not resuscitate" orders refuse life-saving resuscitation, thereby often guaranteeing death in the face of the medical possibility of saving their lives. *See* U. of Wash. Sch. of Med., http://eduserv.hscer.washington.edu/bioethics/topics/dnr.html (last modified Feb. 22, 1999).

55. For instance, a doctor in a New York hospital prescribed the Author's rather ornery grandfather the wrong medication. Consequently, he suffered kidney shutdown and has since decided that he does not like doctors and would rather lie at home in his own bed than go to the hospital.

56. In fact, the only religious group that consistently holds this belief is Jehovah's Witnesses, making up a population of a little over six million people in the world. Authorized Site of the Office of Public Information of Jehovah's Witnesses, *Membership and Publishing Statistics*, http://www.jw-media.org/people/statistics.htm (accessed Mar. 16, 2003). One possible cause of this attitude is the phrasing of the constitutional right to refuse medical treatment. The doctrine is not widely known as the "right to select alternative treatment" or the "right to choose medical treatment." It is instead called the right to *refuse* medical treatment—implying that the person exercising this right is refusing medical treatment across the board. This distinction between choosing and refusing may seem like a needless exercise in semantics. However, the label of exercising one's "right to refuse medical treatment" fosters the already largely held misconception that refusing a blood transfusion is the choice of someone who is antimedical. Jehovah's Witnesses eagerly seek alternative medical treatments to blood transfusions and are not illogically refusing all medical treatment. Also, when someone refuses a blood transfusion and dies, there are

tient's right to make his or her own medical decisions, the debate over refusing blood transfusions continues in certain situations, for instance when the refusal of a blood transfusion occurs in the course of being treated for injuries resulting from a crime or tort.[57] In these cases, courts often suggest that the victim's exercise of his or her right to refuse medical treatment interferes with the defendant's rights.[58]

III. THE CRIMINAL APPROACH

Criminal courts consistently find defendants guilty regardless of later actions of their victims.[59] When victims cut themselves, swallow poison, have breathing tubes removed, or refuse subsequent medical procedures, their injurers are still held criminally liable.[60] For example, in *People v. Velez*,[61] the victim of a gunshot wound removed his feeding tubes and refused all nourishment.[62] The court called the victim's actions evidence of suicide, but still found the defendant guilty of murder.[63] The court reasoned that

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claims that the person died because of his or her refusal of blood. *Klinger*, 618 So. 2d at 698 (stating that "Mr. Branco did not receive a blood transfusion and died due to loss of blood"). This statement, like many others, is an oversimplification of the medical cause of death. The *Klinger* court should have stated that Mr. Branco was the victim of a horrific collision and died shortly after surgery to amputate both of his legs. This wording supports the legitimacy of the right to choose medical treatment.

57. *Williams v. Bright*, 658 N.Y.S.2d 910, 913 (N.Y. App. Div. 1st Dept. 1997) [hereinafter *Williams II*]. This case states, "No one suggests that the State, or, for that matter, anyone else, has the right to interfere with that religious belief. But the real issue here is whether the consequences of that belief must be fully paid for here on earth by someone other than the injured believer." *Id*.

58. *Id*.

59. *Infra* n. 60 and accompanying text (discussing cases in which the victim refused medical treatment following the defendant's criminal act).

60. *E.g. U.S. v. Hamilton*, 182 F. Supp. 548, 550 (D.D.C. 1960) (assault victim removed breathing tubes); *People v. Lewis*, 57 P. 470, 471 (Cal. 1899) (gunshot victim cut his own throat); *Klinger*, 816 So. 2d at 698 (DUI manslaughter victim refused blood transfusion); *Ford v. State*, 521 N.E.2d 1309, 1310 (Ind. 1988) (gunshot victim refused blood transfusion); *Stephenson v. State*, 179 N.E. 633, 635 (Ind. 1932) (rape and assault victim poisoned self while held captive); *People v. Webb*, 415 N.W.2d 9 (Mich. App. 1987) (bar-room-brawl victim initially refused help from paramedics); *People v. Velez*, 602 N.Y.S.2d 758, 759 (N.Y. Sup. 1993) (gunshot victim had a nurse remove a feeding tube and refused nourishment); *People v. Vaughn*, 579 N.Y.S.2d 839, 841 (N.Y. Sup. 1991) (stab-wound victim removed life support); *State v. Pelham*, 746 A.2d 557, 559 (N.J. Super. L. Div. 1998) (non-brain-dead victim had life support removed according to family wishes and his living will); *State v. Welch*, 521 S.E.2d 266, 267 (N.C. App. 1999) (stab victim refused blood transfusion).

61. 602 N.Y.S.2d 758.

62. *Id*. at 759.

63. *Id*. at 760, 762.

the gunshot wound "set in motion a chain of events," eventually resulting in death.[64] *Velez* is typical of criminal caselaw.[65] Even a victim's refusal of a blood transfusion has no effect on a defendant's criminal liability.[66] This consistency is the result of a bright-line rule about causation in criminal murder and manslaughter cases.[67]

In proving defendants guilty of various degrees of murder and manslaughter, prosecutors must establish the elements of the crime, including causation.[68] Prosecutors can establish causation three different ways: 1) if the injury is "the sole proximate cause of death"; 2) if "the injury directly and materially contributed to the cause of death"; or 3) if "the injury materially accelerated the death."[69] In analyzing criminal causation, courts sometimes use the term "intervening cause" to describe a second event that is so extraordinary that it is unfair to hold the accused responsible.[70] To qualify as an intervening cause, death must be directly due to an independent event in which the defendant did not participate and which the defendant could not foresee.[71] Refusing a blood transfusion has never qualified as an intervening cause in criminal courts.[72] The courts reason that it is foreseeable that a defendant's wrongful actions put the victim in the situation of having to seek medical attention, an event entirely dependent on being injured by the criminal activity.[73] Therefore, criminal courts do

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64. *Id*. at 762.

65. *Infra* n. 72 (providing examples of cases in which the victim's refusal of medical treatment did not absolve the defendant of liability).

66. *E.g. Klinger*, 816 So. 2d at 698, 699; *Ford*, 521 N.E.2d at 1310; *Welch*, 521 S.E.2d at 268.

67. *Infra* nn. 68–75 and accompanying text (discussing the causation element in criminal murder and manslaughter cases).

68. *Maynard v. State*, 660 So. 2d 293, 296 (Fla. 2d Dist. App. 1995) (discussing criminal causation as a question for the jury after hearing expert medical testimony).

69. *E.g*. *Walker v. State*, 553 S.E.2d 634, 636 (Ga. App. 2001).

70. *Gibbs v. Hernandez*, 810 So. 2d 1034, 1037 (Fla. 4th Dist. App. 2002).

71. *Id*.

72. *E.g. Klinger*, 816 So. 2d at 698 (finding a drunk driver guilty when his victim refused a blood transfusion, and noting that criminal defendants have been found guilty in every case involving the victim's refusal of a blood transfusion); *Ford*, 521 N.E.2d at 1310 (finding the defendant guilty when his victim, wounded by a gunshot, refused blood transfusion); *Welch*, 521 S.E.2d at 266 (finding defendant guilty when his victim, wounded by a knife, refused blood transfusion).

73. *See Klinger*, 816 So. 2d at 698 (adopting the Florida Supreme Court rule that when a wound is life threatening, the form of treatment the victim chooses will not allow the defendant to escape liability).

not release defendants from criminal liability simply because of their victims' subsequent medical or personal decisions.[74] This approach is consistent and simple to apply.[75]

The primary goals of criminal courts are to punish and deter.[76] Criminal courts punish people who commit both crimes and attempted crimes, focusing not only on the defendants' actions, but also on their intent.[77] Therefore, criminal courts refuse to break the chain of causation primarily because of the focus on the criminal defendant's actions.[78] For example, in *Ford v. State*,[79] the defendant was an armed lookout in a robbery, and therefore an accomplice to felony murder.[80] The victim, who was shot in the abdomen, refused a blood transfusion because of religious beliefs and later died in the hospital from "complications resulting from [his] gunshot wound."[81] The defendant had the requisite intent to participate in an armed robbery, regardless of the victim's refusal or acceptance of a blood transfusion.[82] Because the defendant's intent would be the same regardless of the victim's subsequent action, the defendant would be guilty in both situations.[83] The *Klinger* case echoes this approach.[84] Without such an interpreta-

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74. *Id*.

75. *See id.* (representing that all criminal cases in which the victim has refused a blood transfusion have the same result—the criminal defendant is found guilty).

76. Janet C. MacDonald, *Legislative Note: Ohio Revised Code Section 3113.31 and the Constitution: Ohio's Statutory Response to Domestic Violence and Its Double Jeopardy Infirmity*, 19 Dayton L. Rev. 317, 334 (1993).

77. David A.J. Richards, *The Moral Foundations of the Criminal Law*, 13 Ga. L. Rev. 1395, 1414–1420 (1979).

> While both the criminal and civil law rest on the moral foundations of the moral principles of obligation and duty, the grounds of enforcement differ in both cases: the criminal law rests on the punitive upholding of basic standards of moral decency, the civil law on moral principles of compensation.

Id. at 1416.

78. Criminal cases, usually titled *People v. Defendant* or *State v. Defendant*, involve the public interest in bringing the defendant to justice. Richard J. Bonnie et al., *Criminal Law* 6–10 (Found. Press 1997).

79. 521 N.E.2d 1309.

80. *Id*. at 1310.

81. *Id*.

82. *Id*. at 1311.

83. For this reason, it would be unnecessary to create a duty of mitigation in criminal law as suggested by Marc R. Michaud, Student Author, *Guilty but Not Responsible: The Need for a Criminal Duty to Mitigate Injuries*, 34 Suffolk U. L. Rev. 629 (2001).

84. *See Klinger*, 816 So. 2d at 698–699 (finding the defendant guilty even though the victim refused medical treatment).

tion, defendants fully intending to murder their victims would go free simply because of their victims' choice of medical treatment.

IV. THE CIVIL APPROACH

Tort law's approach in cases involving refused blood transfusions is not nearly as simple as that of criminal law, but is instead overly complex and riddled with constitutional issues.[85] As explained above, criminal law supplies a bright-line rule that defendants are guilty regardless of the medical treatment their victims choose.[86] In its application, this rule applies to all victims.[87] In contrast, tort law uses a subjective test, leaving it to the judge or jury to decide whether the victim's medical choices were reasonable.[88] The practical effect of this is to discriminate only against religion-based medical decisions.[89] Tort-law doctrines in cases involving religion-based refusals of medical procedures also raise questions regarding the Establishment Clause and the Free Exercise Clause.[90] This Section will discuss the various tort-law doctrines and the constitutional issues, as applied to Mrs. Branco's hypothetical civil suit.[91]

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85. *See generally* Jeremy Pomeroy, Student Author, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. Rev. 1111 (1992) (discussing the complex issues involved with religious freedom and a duty to mitigate).

86. *Infra* nn. 59–84 and accompanying text (describing the way criminal courts handle cases in which the victims' later actions worsen their injuries).

87. *See* nn. 59–60 and accompanying text (listing various examples of cases in which courts found defendants guilty regardless of victims' subsequent actions).

88. *See* Part IV(D) (explaining the doctrine of avoidable consequences, under which courts allow jurors to decide if the victim acted reasonably).

89. *Infra* nn. 133–222 and accompanying text (explaining the doctrine of avoidable consequences and its effects).

90. *See generally* Pomeroy, *supra* n. 85, at 1113 (discussing faith, the duty to mitigate, and the Establishment and Free Exercise Clauses).

91. The facts of the *Klinger* case give rise to one type of civil suit, a tortfeasor liability case, in which the petitioner seeks wrongful-death damages when the victim refuses a blood transfusion. *See Munn II*, 924 F.2d at 571 (survivors brought a wrongful-death suit when a victim of a car accident refused a blood transfusion). A plaintiff can also sue for damages after refusing a blood transfusion. *See Williams v. Bright*, 632 N.Y.S.2d 760, 762–763 (N.Y. Sup. 1995), *rev'd*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1st Dept. 1997) (referencing a case in which a car accident victim who refused a blood transfusion sued for damages) [hereinafter *Williams I*]. There are also other kinds of civil cases in which refusing a blood transfusion becomes the subject of litigation, such as employee benefit cases, in which the petitioner seeks government benefits denied because of religion-based refusal of medical treatment. *See Montgomery v. Bd. of Retirement*, 109 Cal. Rptr. 181, 185–186 (Cal. App. 5th Dist. 1973) (reversing a trial court's decision that denied employee benefits to a claimant who had refused to have nonthreatening surgery to remove a tumor); *Indus. Commn. v. Vigil*, 373 P.2d 308, 311 (Colo. 1962) (not allowing a patient's refusal for surgery to in-

Mrs. Branco's hypothetical civil suit may include both a survival claim and a wrongful death claim.[92] As the petitioner, Mrs. Branco would bear the burden of proving the standard elements of negligence: duty, breach, causation, and damages.[93] She would likely succeed in establishing duty, breach, and causation-in-fact.[94] The driver who collided with Mr. Branco breached his duty of reasonable care by driving under the influence of alcohol.[95] But for the driver's actions, Mr. Branco would not have been in the position of refusing a blood transfusion because he would not have suffered any injuries.[96] Mr. Branco's family would also likely succeed in establishing causation-in-fact under the substantial-factor

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crease the benefits the patient's employer owed); *Walter Nashert & Sons v. McCann*, 460 P.2d 941, 943 (Okla. 1969) (citing to the Court's previous ruling that a patient who would have been cured, had he submitted to treatment, should not receive an increase in disability for the failure to use such care). There are also medical malpractice cases, in which a petitioner alleging negligence at the hands of a doctor seeks wrongful death damages when a patient refuses a blood transfusion. *See Corlett v. Caserta*, 562 N.E.2d 257, 259 (Ill. App. 1st Dist. 1990) (arising from the death of a patient after refusal of a blood transfusion); *Rozewicz*, 656 N.Y.S.2d 593, 595 (N.Y. Sup. 1997) (holding that it is a question for the jury whether a patient who refused a blood transfusion understood the risks of the transfusion and voluntarily assumed them). Employee benefit cases do not examine civil responsibility (whether the injury was caused by negligence of the employer or the employee); however, courts still impose a duty to mitigate on the employee. *Nashert*, 460 P.2d at 943. In medical malpractice cases, the refusal of a blood transfusion is usually brought up in the issue of causation. *Corlett*, 562 N.E.2d at 259. Doctors argue, first, that they were not negligent in providing medical treatment, and second, that if the patient had allowed a blood transfusion, the doctor could have fixed the problem. *Id*. at 260. In these types of cases, the principle of the second-injury rule discussed in Part IV(E) would still apply. This would mean not imposing the undue burden of a duty to mitigate on a patient who seeks medical alternatives to blood transfusions, but does not want to compromise religious principles. *Id*.

92. *See* Fla. Stat. § 768.16–768.21 (2003) (Florida's wrongful death statutes). For example, under the Florida wrongful death and survivor statutes, close relatives sue for claims the decedent would have had and for losses due to death. *Id*. at § 768.19–768.21.

93. Fla. Stat. § 768.18 (defining survivors as the decedent's spouse, children, parents, and other dependent blood relatives); *Jenkins v. Roberts, Inc.*, 851 So. 2d 781, 783 (Fla. 1st Dist. App. 2003). The petitioner alleges that death resulted from the tortious conduct of the defendant. *Id*. at § 768.19. Monetary damages may include loss of future support and services, loss of companionship, mental pain and suffering, and medical and funeral expenses. *Id*. at § 768.21. Plaintiffs suing for wrongful death need to prove the elements of the tort, in addition to elements unique to wrongful death—that they qualify as close relatives and a fairly certain calculation of losses suffered due to the death. *Id*.; *Jenkins*, 851 So. 2d at 783.

94. Usually the plaintiff proves causation-in-fact by showing that but for the defendant's actions, the plaintiff would not have been injured. John L. Diamond, *Cases and Materials on Torts* ch. 6, § E, 198 (West 2001).

95. *Klinger,* 816 So. 2d at 698.

96. *Id*. at 698–699.

test because the defendant's actions crushed Mr. Branco into the back of his car, necessitating amputation of both of his legs.[97]

The complexity arises in the issues of proximate cause, damages, and affirmative defenses. Civil courts have an arsenal of different rules they could apply:[98] the thin skull doctrine,[99] contributory or comparative negligence,[100] assumption of the risk,[101] avoidable consequences (duty to mitigate),[102] and the second-injury rule.[103]

A. The Thin Skull Doctrine

The thin skull doctrine does not apply to Mrs. Branco's hypothetical civil suit because religious beliefs do not qualify as either physical or psychological conditions.[104] Thin skull, also known as the eggshell skull doctrine, prescribes that the defendant is still liable even if the victim is not a "normal" person, but is instead more vulnerable to injury.[105] All conditions included in the thin skull doctrine make the victim of a tort more frail or vulnerable.[106] For instance, someone with a bad back might be more prone to sustain permanent injury in a car accident. A "thin skull" condition, like the bad back, would not preclude a victim from recovering.[107] However, when determining damages, courts would consider the condition's effect on life expectancy or quality.[108] There-

97. *St. Petersburg Times*, *supra* n. 5, at 7B. *See Stahl v. Metro. Dade County*, 438 So. 2d 14, 18–19 (Fla. 3d Dist. App. 1983) (defining the substantial-factor test).

98. *See* Gary Knapp, *Refusal of Medical Treatment on Religious Grounds as Affecting Right to Recover for Personal Injury or Death*, 3 A.L.R.5th 721 (1993) (discussing contributory negligence, avoidable consequences, and other tort theories in light of the right to recover for personal injury).

99. *See infra* nn. 104–117 and accompanying text (treating the thin skull doctrine as a proximate-cause issue).

100. *See infra* nn. 118–124 and accompanying text (treating contributory or comparative negligence as an affirmative defense).

101. *See infra* nn. 125–132 and accompanying text (treating assumption of the risk as an affirmative defense).

102. *See infra* nn. 133–222 and accompanying text (treating avoidable consequences as a damages issue).

103. *See infra* nn. 223–228 and accompanying text (treating the second-injury rule as a proximate cause issue).

104. *Munn II*, 924 F.2d at 576, 576 n. 14.

105. *Clark v. Assoc. Retail Credit*, 105 F.2d 62, 66 (D.C. Cir. 1939); *Lee v. Regan*, 267 S.E.2d 909, 912 (N.C. App. 1980).

106. *Maurer v. U.S.*, 668 F.2d 98, 99–100 (2d Cir. 1981).

107. *Id*.

108. *Brackett v. Peters*, 11 F.3d 78, 82 (7th Cir. 1993) (citing *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 822 (7th Cir. 1985); *Steinhauser v. Hertz Corp.,* 421 F.2d 1169,

fore, someone with a thin skull may win on proximate causation but lose on damages.[109]

Religious beliefs are not included under the protected conditions of the thin skull doctrine for two reasons.[110] First, religious beliefs are based on voluntary and conscious reasoning, unlike physical conditions.[111] Second, there may be some dispute as to whether the religious belief is preexisting.[112] Although the victim holds the belief before the injury causing event (in the facts of the *Klinger* case—the auto collision), the actual choice to refuse blood is made afterward.[113]

Some courts apply the thin skull doctrine to cases involving a preexisting *psychological* sensitivity.[114] However, a religious-based decision would not qualify as a psychological weakness either.[115] A person's personal preferences, religious beliefs, and moral choices do not make him or her physically or psychologically more vulnerable to injury.[116] So, the thin skull doctrine, rightly so, does not include religious beliefs.[117]

1173–1174 (2d Cir. 1970)). "A victim's eggshell skull may require a refined adjustment in damages to reflect the likelihood that the victim would because of his vulnerability have been injured sooner or later nontortiously." *Id*.

109. *Id*. at 82.

110. *Munn II*, 924 F.2d at 576 n. 18.

111. *Id*. (denouncing the application of the thin skull doctrine because the doctrine applies only to preexisting physical injuries aggravated by a tortfeasor's action).

112. *Id*.

113. *See Klinger*, 816 So. 2d at 698 (demonstrating that the victim refused blood after the accident because he was a Jehovah's Witness).

114. *See e.g. Steinhauser*, 421 F.2d at 1172 (deciding that a girl predisposed to schizophrenia could recover from a defendant after a car accident aggravated her predisposition).

115. *Munn II*, 924 F.2d at 576 n. 18.

116. *Id*.

117. *Id*. Interestingly, some courts seem to lean toward applying the thin skull doctrine to religious beliefs. *E.g. Williams I*, 632 N.Y.S.2d at 769. The *Williams I* trial court alluded to the thin skull doctrine by reasoning, "if a person has a special condition or predisposition which results in greater than normal damages, [including religious belief,] the defendant remains legally responsible." *Id*. (citing *King v. St.*, 396 N.Y.S.2d 919, 920 (N.Y. App. Div. 3d Dept. 1977)). The prosecutor in *Klinger* also alluded to a criminal thin skull by saying, "The question is who put [Branco] on the road to death. . . . The defendant wants to argue, 'I'm not guilty because I hit the wrong victim. I wanted to hit someone who would live.'" Bill Heery, *DUI Transfusion Defense Fails*, Tampa Trib. Florida/Metro 1 (Sept. 15, 2000) (available in LEXIS, NEWS library database, MAJPAP file).

B. Contributory or Comparative Negligence

Contributory or comparative negligence[118] are more rules that do not apply to Mrs. Branco's hypothetical civil suit for two reasons. First, the refusal occurred *after* the injury-causing event, and cannot qualify as "contributory."[119] Second, it is not negligent to exercise a constitutional right.

Under contributory or comparative negligence doctrines, the plaintiff must first succeed in establishing the classic tort elements of duty and breach.[120] But under contributory or comparative negligence, the defendant asserts that the plaintiff should be barred from recovery because of the plaintiff's own negligent actions *contributing* to the accident.[121] For example, arguments that a plaintiff contributed to a car accident might include evidence of the plaintiff driving at night without headlights, failing to keep a proper lookout, failing to turn in order to avoid the collision, or failing to brake.[122] In the Branco hypothetical civil suit, the victim's refusal of a blood transfusion occurred *after* the collision, not before.[123] So, Mr. Branco's medical decisions did not contribute to the injury-causing incident.[124] Additionally, although there seems to be no support or argument as to the issue, it seems obvious that exercising the constitutional right to refuse medical treatment cannot qualify as "negligent conduct."

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118. Comparative negligence means that "a plaintiff's negligence which concurs with that of the defendant in causing the plaintiff's injury, should not relieve the defendant entirely from liability, but should merely diminish the damages the plaintiff can recover." 57B Am. Jur. 2d *Negligence* § 954 (2004). Contributory negligence is the degree of reasonable care a plaintiff fails to use when confronting a risk. *Id*. at § 797. This failure combines with the defendant's negligence to cause the plaintiff's harm. *Id*.

119. *See infra* nn. 120–122 and accompanying text (explaining how a plaintiff may be barred from recovery if the plaintiff's own actions contributed to his or her injuries).

120. *See supra* n. 95 and accompanying text (describing how the defendant breached his duty by driving under the influence of alcohol).

121. Common law "contributory negligence acts as a complete bar to a plaintiff's cause of action." *Parker v. Montgomery*, 529 So. 2d 1145, 1147 (Fla. 1st Dist. App. 1988). Comparative negligence, adopted in Florida, allows courts to weigh a victim's negligence and "reduce . . . damages in proportion to . . . fault." *Id*. This Section primarily addresses plaintiff's actions "occur[ring] either *before* or *at the time* of the wrongful act or omission of the defendant." *Id*. (emphasis in original). Part IV(D) addresses a plaintiff's actions occurring *after* the injury causing event—usually addressed under the doctrine of avoidable consequences.

122. *Clayton v. Burston*, 493 F.2d 429, 430 n. 1 (5th Cir. 1974).

123. *Munn I*, 719 F. Supp. at 527 (stating that contributory negligence can occur before or during the defendant's wrongful act or omission).

124. *Id*.

C. Assumption of the Risk

The assumption-of-the-risk defense historically acted as a complete bar to a plaintiff's recovery.[125] Many states have since abolished this defense, eliminated it in certain actions, or subsumed it into comparative negligence as only a partial bar to recovery.[126] In states where it applies as either a complete or partial bar, the defendant has the burden of proving that the victim 1) knew of the risk, 2) appreciated the danger, and 3) voluntarily assumed the risk.[127]

Victims who refuse blood transfusions after being injured by another do not voluntarily assume the risk of death. In the context of blood transfusions, the plaintiff does not assume the risk of death when the defendant put the victim in the situation of having to choose between definite violation of religious beliefs and possible death.[128] Thomas Branco likely had actual knowledge of the risk of refusing a blood transfusion and appreciated any risks of refusal.[129] However, the critical third element of voluntariness is missing. To establish that the victim voluntarily exposed himself to a danger, he must have made a deliberate decision to incur the risk, acting as a result of an intelligent choice.[130] There is no voluntary assumption of risk when the defendant forces the vic-

125. *Restatement (Second) of Torts* § 496A (1965).

126. 57A Am. Jur. 2d *Negligence* § 806 (2002). Florida, where Mrs. Branco would file her hypothetical civil suit, subsumed the affirmative defense of implied assumption of the risk into comparative negligence. *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977). For a discussion about why refusing a blood transfusion is not contributory or comparative negligence, see *supra* notes 118–124 and accompanying text (discussing whether refusing a blood transfusion is negligence).

127. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, 486–487 (5th ed. 1984) (describing the elements of the assumption of risk defense); 57A Am. Jur. 2d *Negligence* § 820 (2002).

128. Keeton et al., *supra* n. 127, at 490–491.

129. Most Jehovah's Witnesses carry a card with them in case they are in an accident and need medical attention. The card is made by the Watchtower Bible & Tract Society and is called a "no blood card." It is signed in the presence of two witnesses and carried by Jehovah's Witnesses. The card states, "I also know that there are various dangers associated with blood transfusions. So I have decided to avoid such dangers and, instead, to accept whatever risks may seem to be involved in my choice of alternative nonblood management. I release physicians, anesthesiologists, and hospitals and their personnel from liability for any damages that might be caused by my refusal of blood, despite their otherwise competent care." Watchtower Bible & Tract Society, *Advance Medical Directive/Release* "No Blood Cards."

130. Keeton, et al., *supra* n. 127, at 487 (discussing that, in order for a victim to voluntarily expose himself or herself to danger, he or she must know the facts of the danger and appreciate the nature of it).

tim to choose the lesser of two evils, accepting treatment that would compromise his or her conscience or opting for alternative treatment and reduced compensation.[131] In addition, any risk Mr. Branco assumed in opting for nonblood management relieved only involved medical personnel from liability for not giving a blood transfusion. Mr. Branco's refusal of a blood transfusion did not relieve the defendant of any kind of duty because the defendant never had any duty toward Mr. Branco regarding his medical care.[132]

D. Avoidable Consequences

The doctrine of avoidable consequences is fraught with problems and raises constitutional dilemmas.[133] The common law doctrine of avoidable consequences, also known as the duty to mitigate,[134] is currently applied in federal court cases in which victims refuse blood transfusions.[135] Although most of the difficulties arise

131. *See Marshall v. Ranne*, 511 S.W.2d 255, 260 (Tex. 1974) (deciding that a plaintiff faced with the two evils of remaining in his house or risking a conflict with a wild boar did not voluntarily assume the risk of being gored while running to his car). This is not to suggest that victims actually would compromise their beliefs for higher verdict amounts. Keeton stated, "Even where the plaintiff does not protest, the risk is not assumed where the conduct of the defendant has left [her] no reasonable alternative. Where the defendant puts [her] to a choice of evils, there is a species of duress, which destroys the idea of freedom of election." Keeton et al., *supra* n. 127, at 490–491. This raises the issue of whether the alternative chosen by the victim was reasonable, a standard explored by the avoidable-consequences doctrine, discussed in Part IV(D).

132. *Munn I*, 719 F. Supp. at 528. *Munn I* states, "In the instant case, by assuming the risk that she would die if she did not agree to a blood transfusion, Mrs. Munn did not relieve the defendant of any duty because the defendant had no duty in relation to the transfusion." *Id*. In contrast, if a Jehovah's Witness sought medical treatment for a health condition and not because of an injury caused by a tortfeasor, this might be a true assumption of the risk. This assumption would be identical to the situation of other patients accepting the risks of *receiving* a blood transfusion or accepting any medical procedure with some known risks. *Id*.; *see Munn I*, 719 F. Supp. at 527–528 (explaining that under the assumption-of-the-risk doctrine, a victim absolves the defendant of liability for accepting a known risk that arises from the defendant's actions). In that kind of scenario, a Jehovah's Witness would assume the risk of refusing blood when there is otherwise competent care. *Id*. This assumption of the risk would protect health care personnel from the possibility of a lawsuit for failure to give a blood transfusion. *Id*.

133. *Munn II*, 924 F.2d at 573–575 (discussing the First Amendment implications of the avoidable-consequences doctrine).

134. *Id*. at 573–574 n. 9 (recognizing that courts often interchange the terms "avoidance of consequences" and "mitigation of damages").

135. *Id*. at 573–575.

from juries' and judges' discriminatory application of this rule, it also has inherent problems.[136]

In tort actions, "avoidable consequences" describes a defense that reduces the defendant's liability if the injured victim does not act reasonably to limit or mitigate his or her losses.[137] Victims will not receive damages for an injury that they could have "reasonably" avoided.[138] Because choosing medical treatment is a very personal decision, courts generally give victims broad discretion when determining the reasonableness of their choice of medical treatment.[139] This broad discretion, however, has limits; courts apply the doctrine of avoidable consequences to protect the defendant from an abuse of the reasonableness standard afforded victims.[140] Avoidable consequences may partially or even completely reduce damages for losses that were "avoidable."[141]

Applied to Mrs. Branco's hypothetical civil suit, the defendant would claim that he is not liable for wrongful death damages because Thomas Branco could have accepted a blood transfusion and avoided death. This essentially means arguing that the refusal of a blood transfusion, and not the defendant's actions, caused death. There are three approaches to applying the doctrine of avoidable consequences that a court could use in Mrs. Branco's hypothetical case.[142]

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136. Pomeroy, *supra* n. 85, at 1143–1145 (highlighting the "constitutional defects" of the current application of the doctrine of avoidable consequences, and the additional problems that the application of mainstream religious values raises).

137. *Munn II*, 924 F.2d at 572 n. 4; 22 Am. Jur. 2d *Damages* §§ 340, 344 (2003).

138. 22 Am. Jur. 2d *Damages* §§ 340, 344.

139. *Ellerman Lines, Ltd. v. The Pres. Harding*, 288 F.2d 288, 290 (2d Cir. 1961) (reasoning that the victim is confronted with a "choice of evils"); *see e.g. T.J. Morris Co.*, 398 S.E.2d at 407 (deciding that a patient's failure to seek surgery until one year after an accident for no apparent reason, was not a failure to mitigate); *Hall*, 620 N.E.2d at 673 (deciding that a patient's refusal of surgery because of fear was not an unreasonable failure to mitigate when substantial risk is involved); *Labit*, 489 So. 2d at 947 (deciding that a patient's failure to undergo treatment that promised little possibility of success was not a failure to mitigate).

140. *E.g. Munn II*, 924 F.2d at 576–577 n. 16 (finding that the purposes of the avoidable-consequences doctrine are the fair treatment of defendants, along with encouraging plaintiffs to lower the societal costs of their injuries).

141. *Id*. The *Munn II* court totally barred recovery for injuries the jury deemed avoidable. *Id*.

142. Pomeroy, *supra* n. 85, at 1140–1141.

1. Three Approaches to Avoidable Consequences

One method of applying the avoidable-consequences doctrine is to allow the jury to weigh religion as one factor in determining reasonableness, also called the "case-by-case approach."[143] A second approach is to treat all religion-based refusals of treatment as unreasonable as a matter of law, also called the "strictly-objective approach."[144] The third approach is to accept that the victim's sincere religion-based refusal is reasonable as a matter of law, also called the "reasonable-believer standard."[145] This Section will examine each approach and the constitutional issues that each raises.

a. Jury Determination: A Case-by-Case Approach

The case-by-case approach produces inconsistent results and impedes the free exercise of religion.[146] This approach allows the jury to use religion as one factor in determining whether the victim's actions in obtaining medical treatment were reasonable.[147] Under the case-by-case approach, the court instructs the jury that the belief is "a factor to be considered with all the other evidence,"[148] but the "overriding test is whether the [victim] acted as a reasonably prudent person." [149] As applied to Mrs. Branco's hypothetical civil suit, the court would allow Mrs. Branco to present evidence that her son was a "believer in the Jehovah's Witness faith, and that as an adherent of that faith, [he could not] accept any medical treatment which requires a blood transfusion."[150] The

143. *E.g. Christiansen v. Hollings*, 112 P.2d 723, 730 (Cal. App. 1st Dist. 1941); *Lange v. Hoyt*, 159 A. 575, 577–578 (Conn. 1932); *Williams II*, 658 N.Y.S.2d at 915–916; Pomeroy, *supra* n. 85, at 1144–1145.

144. *Munn II*, 924 F.2d at 578; Pomeroy, *supra* n. 85, at 1143 (finding religious motivations to be irrelevant to the avoidable-consequences doctrine when jury instructions remove them from consideration and thus consider them per se unreasonable).

145. *E.g. Williams II*, 658 N.Y.S.2d at 916; Pomeroy, *supra* n. 85, at 1145–1146.

146. Pomeroy, *supra* n. 85, at 1144 (stating that minority religions are disproportionately burdened when jury sympathies play a part in evaluating the merits of a religious belief).

147. *Christiansen*, 112 P.2d at 730 (citing *Lange*, 159 A. at 575); *Williams II*, 658 N.Y.S.2d at 915–916.

148. *Christiansen*, 112 P.2d at 730.

149. *Williams II*, 658 N.Y.S.2d at 916.

150. *Id*. at 915.

jury or judge would then take that evidence into account along with all other evidence presented.[151]

The case-by-case approach has a number of problems.[152] First, it produces inconsistent results.[153] Although inconsistent results are the inevitable by-product of a jury system, these inconsistencies are discriminatory in this context.[154] Jurors, in objectively deciding what constitutes a reasonable medical choice, give undue weight to their own religious affiliations and personal opinions.[155] Furthermore, jurors are subjected to millions of dollars of advertising by the blood industry that "blood saves lives," which likely weighs in their personal opinions about blood transfusions.[156] Thus, minority religious beliefs are severely disadvantaged—when victims refuse blood for religious reasons, juries can deem death to be avoidable, even if the original injury was life threatening.[157] Caselaw shows that the obligation to mitigate does not require victims to undergo surgery,[158] obtain cheaper medical care,[159] get immediate medical attention,[160] undergo high-risk procedures,[161] or undergo treatment that promises little chance of success.[162] The only exception to this broad array of acceptable rea-

151. *Id*. at 915–916.

152. Pomeroy, *supra* n. 85, at 1144–1145.

153. *Id*.

154. *Id*.

155. *Id*. at 1136. Pomeroy states that "case-by-case jury charges, while purporting to accommodate religious beliefs, leave considerable room for conscious or unconscious biases to influence jurors' determination of reasonableness . . . a juror's tendency will likely be to give precedence to his own, community-based perspective." *Id*.

156. America's Blood Centers, *Financial Impact of Blood Technologies*, http://www.americasblood.org/index.cfm?fuseaction=Display.showPage&pageid=61 (accessed Apr. 5, 2003) (stating that millions of dollars are spent on paid advertising every year to encourage people to give blood). In turn, lawyers for the plaintiff have the time span of a few hours or days to present evidence that blood does not always save lives, to combat this lifetime of blood industry advertising.

157. *Munn II*, 924 F. 2d at 576–577 n. 16; *Munn I*, 719 F. Supp. at 532.

158. *Hall*, 620 N.E.2d at 672–673 (stating that the duty to mitigate does not require surgery).

159. *James v. Midkiff*, 888 P.2d 5, 6 (Okla. Civ. App. 1994) (stating that the duty to mitigate does not require patient to take advantage of free access to Indian health care).

160. *T.J. Morris Co.*, 398 S.E.2d at 407 (duty to mitigate does not require plaintiff to seek immediate medical attention and did not prevent recovery when plaintiff put off seeking surgery for a year).

161. *Cannon v. N.J. Bell Tel.*, 530 A.2d 345, 351 (N.J. Super. App. Div. 1987) (duty to mitigate does not require high-risk procedure that might result in psychological or psychogenic impotence).

162. *Labit*, 489 So. 2d at 947 (stating that the duty to mitigate does not require undergoing treatment that promises little success).

sons to refuse medical procedures seems to be refusal of blood transfusion on religious grounds.[163] Allowing juries to determine avoidable consequences on a case-by-case basis singles out religious reasons as illegitimate.[164] A case-by-case standard essentially establishes the religious value of the majority.[165]

This subtle invitation to allow majority religious views and community standards to outweigh minority religious beliefs may also violate the Free Exercise Clause, imposing a heavy burden on minority religions.[166] In *Sherbert v. Verner*,[167] the state denied unemployment benefits to a woman who refused a job offer that required working on the Sabbath in violation of her religious beliefs.[168] The United States Supreme Court held that this burdened the woman's right to free exercise of religion.[169] The Court also believed there was no compelling state interest to justify this burden, when in fact the only interest was the slight possibility of fraudulent filing of claims.[170] This landmark case showed that even indirect burdens on members of minority religious groups violated their right to free exercise.[171]

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163. *Munn II*, 924 F.2d at 576; *supra* nn. 158–162 and accompanying text (discussing that the obligation to mitigate does not require a victim to take great strides to avoid further injury).

164. The Author wonders how a judge or jury would decide a case dealing with a nonreligion based refusal of a blood transfusion. The plaintiff/victim would have to present evidence about the basis for his or her reason for refusing a blood transfusion, like the risks of infection or disease transmission. The jury would then have to consider whether the refusal was reasonable. *See supra* nn. 152–163 and accompanying text (discussing the factors that influence a victim's decision-making and the caselaw that illustrates society's acceptance of some causes not to mitigate, but not religious beliefs).

165. *See contra Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 Yale L.J. 1466, 1482–1484 (1978) (arguing that the case-by-case approach violates the Establishment Clause by inviting the jury to consider religion, thereby violating the Establishment Clause prohibition against excessive entanglement).

166. This Comment only highlights Free Exercise concerns as just one problematic issue raised by the case-by-case approach. For a greater discussion of Free Exercise problems, please consider the following articles: Pomeroy, *supra* n. 85, at 1133–1135 (discussing in detail the Free Exercise problems that arose subsequent to *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Smith*, 494 U.S. 872) and Ben Ritterspach, Student Author, *Refusal of Medical Treatment on the Basis of Religion and an Analysis of the Duty to Mitigate Damages under Free Exercise Jurisprudence*, 25 Ohio N.U. L. Rev. 381 (1999).

167. 374 U.S. 398.

168. *Id*. at 399–401.

169. *Id*. at 403.

170. *Id*. at 406–407.

171. *Id*. at 409–410.

Some suggest that the *Sherbert* ruling was called into question by *Employment Division v. Smith*.[172] In the *Smith* case, the United States Supreme Court refused to find a burden on the free exercise of religion when criminal prohibition of drugs kept members of a Native American church from using peyote, even for sacramental purposes.[173] The Court held that under the Free Exercise Clause, a compelling governmental interest was not needed to justify a neutral law or a law of general applicability.[174] However, the Court distinguished *Smith* in the opinion, saying that the *Sherbert* test was developed in the highly individualized context of unemployment program employees examining each individual's reasons for unemployment.[175]

Judicial consideration of what constitutes reasonable mitigation of damages is a similarly individualized context, so the *Sherbert* test should apply. The chance of abuse, that victims will refuse medical treatment so their families can sue employers, tortfeasors, and doctors, is even less than the chance of abuse mentioned in *Sherbert*. Also, unlike the *Smith* plaintiffs, victims who refuse medical treatment are not trying to get an exception to practice otherwise illegal conduct.

b. Unreasonable as a Matter of Law: The Strictly-Objective Approach

The strictly-objective approach is covertly discriminatory against religion and raises similar constitutional dilemmas.[176] In *Munn v. Algee* (*Munn II*),[177] the appellate court encouraged courts to use the strictly-objective approach, stating that "religion may not justify an otherwise unreasonable failure to mitigate."[178] Un-

172. 494 U.S. 872.

173. *Id*. at 885–889. Peyote is "a small cactus indigenous to Mexico and the Southwestern United States and [is] used in Native American tribal ceremonies, where it produces a trance and hallucinations; [the] principal active component of peyote is mescaline." *eMedicine/Stedman Medical Dictionary Lookup!* http://www.emedicine.com/asp/dictionary.asp?keyword=peyote (accessed Apr. 19, 2004).

174. *Smith*, 494 U.S. at 890.

175. *Id*. at 882–885.

176. Pomeroy, *supra* n. 85, at 1144–1145 (stating that, although the reasonableness of a religious belief is a question the jury must answer in the case-by-case approach, the same question is just as prevalent when left implicitly to the jury in the strictly-objective approach).

177. 924 F.2d 568.

178. *Id*. at 574, 575 n. 12.

der this approach, there would be no way for victims or families of victims to recover after refusing a blood transfusion—refusing blood for religious reasons would be categorically unreasonable.[179] Furthermore, victims would have to violate their sincerely held religious beliefs to get monetary compensation.[180] Evidence of religious belief would be inadmissible, and petitioners could only present evidence regarding secular reasons to avoid medical treatment—like risks, costs, or fears.[181]

Allowing the state to brand religious belief as unreasonable is contrary to First Amendment principles.[182] In using the strictly-objective approach, the *Munn II* court was attempting to avoid constitutional dilemmas by not allowing religious inquiry in the courtroom.[183] However, by forbidding victims or their families to explain their subsequent actions, the court essentially encouraged a directed verdict against all victims who refuse medical treatment on religious grounds, thereby discriminating against religion.[184] James Madison, principal author of the Religion Clauses,[185] called it "arrogant pretension" to treat "the [c]ivil [m]agistrate [as] a competent [j]udge of [r]eligious truth."[186] The *Munn II* court, with its ruling, judged the refusal of blood transfusions for religious reasons as unreasonable, thereby also inhibiting the free exercise of religion.[187]

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179. *Id*. at 576–577 n. 16 (explaining the total bar from recovery for avoidable consequences).

180. *See Sherbert*, 374 U.S. at 404 (commenting on the pressure that a choice between adhering to religious beliefs and being eligible for benefits put on the appellant).

181. Pomeroy, *supra* n. 85, at 1144 (believing it to be a foregone conclusion that, with the presentation of secular standards without religious qualifications, juries would return unfavorable verdicts for Jehovah's Witnesses).

182. *Id*. at 1144 (arguing that, despite *Smith*, the strictly-objective approach still impermissibly burdens the free exercise of religion).

183. *Munn II*, 924 F.2d at 574.

184. Pomeroy, *supra* n. 85, at 1144 (finding it a foregone conclusion that, without the explanation of religious beliefs, a Jehovah's Witness' rejection of a blood transfusion would lead to an unfavorable verdict).

185. The Religion Clauses refer to the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution; together they separate church and state in the United States. Catherine Maxson, *"Their Preservation Is Our Sacred Trust"—Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances under Empl. Div. v. Smith*, 45 B.C. L. Rev. 205, 215 (2003).

186. Pomeroy, *supra* n. 85, at 1141 (quoting Ltr. from James Madison to Va. Gen. Assembly, *Memorial and Remonstrance against Religious Assessments* (1785) (reprinted as an appendix in *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 63–72 (1947))).

187. *See supra* nn. 177–186 and accompanying text (discussing *Munn II*'s implications on victims who refuse blood transfusions for religious reasons).

c. Reasonable as a Matter of Law: A "Reasonable-Believer Standard"

In 1992, Jeremy Pomeroy advocated for, in a comprehensive article on avoidable consequences that he wrote as a student, a reasonable-believer standard in which courts would define a reasonable person as "a reasonable, sincere adherent of the [victim's] religio[n]."[188] Pomeroy argued that the other approaches invited "covert[ ] consideration of the reasonableness of a religious belief and "impermissible projection of jury sympathies" with majority religious views, while the reasonable-believer standard actually steered clear of "constitutional defects."[189] Under this standard, the jurors would engage in a three-part inquiry: "(1) what religious tenets avowedly motivated the victim's failure to mitigate damages; (2) did the victim sincerely believe in these tenets; and (3) would a reasonable adherent of such sincerely held tenets have acted as the [victim] did?"[190]

In her civil suit, Mrs. Branco would present evidence that her son's refusal of a blood transfusion was based on the commandment in Acts 15:29 to "abstain from . . . blood" and the belief of Jehovah's Witnesses that accepting a blood transfusion violates this admonition.[191] She would then present evidence that her son was indeed a Jehovah's Witness and that this belief is a universally accepted belief of Jehovah's Witnesses. Using that evidence, and without considering the reasonableness of the belief itself, the jury would answer the third question.[192]

After Pomeroy published his article, the trial court in *Williams v. Bright* (*Williams I*)[193] adopted this standard, instructing the jury to consider whether the victim acted as a reasonable Jehovah's Witness, and thereby finding religion-based refusal of medical procedures to be reasonable as a matter of law.[194] In *Williams I*, the victim refused surgery that would necessitate a blood

188. Pomeroy, *supra* n. 85, at 1114.
189. *Id*. at 1144–1145.
190. *Id*. at 1145–1146.
191. *Supra* n. 4 (providing online access to Jehovah's Witness information about the reason members of this religion refuse blood transfusions).
192. Pomeroy, *supra* n. 85, at 1145.
193. 632 N.Y.S.2d 760.
194. *Williams II*, 658 N.Y.S.2d at 912 (calling the standard applied in *Williams I* the "reasonable Jehovah's Witness Standard").

transfusion, and instead opted for a more painful and protracted treatment.[195] The victim spent a year in a wheelchair and used a walker and crutches for six months.[196] She could not leave home for a period of two years.[197] In her personal injury suit for damages, including pain and suffering damages, the defendant raised the doctrine of avoidable consequences.[198] The defendant argued that, by accepting a blood transfusion, the victim could have avoided the more painful and longer period of treatment, and that refusing a blood transfusion was an unreasonable failure to mitigate.[199] The court rejected this and instead instructed the jury to assess whether the victim "acted reasonably as a Jehovah's Witness in refusing surgery which would involve blood transfusions."[200] The court did not impermissibly allow the jury to question whether refusing a blood transfusion was objectively reasonable.[201] The *Williams I* court reasoned that requiring the victim to mitigate by violating her religious beliefs would unduly burden her constitutional right to free exercise of religion.[202]

The appellate court in *Williams* (*Williams II*)[203] reversed the trial court's use of the reasonable-believer standard in favor of the case-by-case approach.[204] The appellate court reasoned that the instruction used in *Williams I* was a "sham" because there was no evidence as to the basis for the victim's decision.[205] There was no "rationale of her religious convictions . . . [or] how universally accepted they may have been by members of her faith."[206] Therefore, the appellate court characterized the trial court's instruction as

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195. *Williams I*, 632 N.Y.S.2d at 762–763.
196. *Id*. at 763.
197. *Id*.
198. *Id*. at 764.
199. *Id*.
200. The court instruction went on to read as follows: "Was it reasonable for her, not what you would do—or your friends or family—was it reasonable for her, given her beliefs, without questioning the validity or the propriety of her beliefs." *Id*.
201. *Id*. at 770.
202. *Id*. For further discussion of Free Exercise issues, see *supra* nn. 167–175 and accompanying text (discussing *Sherbert*, 374 U.S. 398, and *Smith*, 494 U.S. 872, and their use of Free Exercise in their reasoning).
203. 658 N.Y.S.2d 910.
204. *Id*. at 915–916. For a further discussion of the case-by-case approach and its implication on minority religions, see *supra* notes 146–175 and accompanying text.
205. *Williams II*, 658 N.Y.S.2d at 914.
206. *Id*. at 913.

"effectively direct[ing] a verdict on the issue."[207] *Williams II* asserted that using the reasonable-believer approach *without* evidence as to the sincerity of the belief, was an improper endorsement of religion.[208] *Williams II* also foreclosed the possibility of using the reasonable-believer standard *with* evidence, reasoning that hearing such evidence may lead the court to evaluate the reasonableness of the belief itself, thereby entering into the "forbidden domain" of excessive entanglement with religion.[209] Finally, *Williams II* remanded in favor of the case-by-case approach.[210]

In theory, using the reasonable-believer standard and characterizing refusal of blood transfusions as being reasonable as a matter of law solves the problem of inconsistency amongst juries because it forces juries to give sincere religion-based beliefs the same weight as other reasons not to mitigate. Additionally, because other strong personal reasons for declining medical treatment are respected, recognizing religion-based refusal would not mean granting a special exemption. According to Pomeroy, the reasonable-believer standard would not violate the Establishment Clause.[211] Under *Lemon v. Kurtzman*,[212] there is a three-prong test to determine whether a statute or policy violates the Establishment Clause: (1) its purpose must be secular; (2) the "primary effect [of the statute] must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive governmental entanglement with religion.'"[213] The purpose of a reasonable-believer standard would be to prevent discrimination against religion and to consistently and evenly accommodate all types of religion-based refusal to mitigate damages.[214] The effect would neither advance nor inhibit religion—giving religion-based refusal of medical treatment an equal standing with other reasons to refuse medical treatment would instead prevent the inhi-

207. *Id*. at 914.

208. *Id*. (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993)).

209. *Id*. at 915 (citing *U.S. v. Ballard*, 322 U.S. 78, 87 (1944)).

210. *Id*. at 916. For a further discussion of the case-by-case approach including its use in *Sherbert*, 374 U.S. 398, see *supra* notes 146–175 and accompanying text.

211. Pomeroy, *infra* n. 85, at 1154.

212. 403 U.S. 602 (1971).

213. *Id*. at 612 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); quoting *Walz v. Tax Commn.*, 397 U.S. 664, 674 (1970)).

214. Pomeroy, *supra* n. 85, at 1155.

bition of religion. Additionally, there is no excessive entanglement with religion when jurors are merely considering the nature and sincerity of the belief, and not the reasonableness of the belief itself. The reasonable-believer standard would not establish or even symbolically endorse the religion of Jehovah's Witnesses, or coerce others to refuse blood transfusions any more than a criminal court's treatment of victims that refuse blood transfusions would do so.

2. Inherent Problems with Avoidable Consequences

Of the three approaches, the least discriminatory and least offensive to constitutional issues appears to be Pomeroy's reasonable-believer standard, which is used in *Williams I*.[215] In practice, however, courts may be wary of inviting a Jehovah's Witness standard into their courtrooms.[216] Courts may not want to risk the chance of a conflict developing and presenting a "triable issue as to whether the [religious] conviction was heretical or orthodox."[217] They may also fear that they are in fact granting a special exception.[218] In addition, the reasonable-believer standard still leaves the determination of "reasonableness" in the jury's hands. Even after instructing jurors to put themselves in the shoes of a reasonable believer, in practice it will probably be difficult for them to separate their personal beliefs from the task at hand.[219] Jurors may decide to ignore evidence of religious beliefs if they feel that even a reasonable believer may disregard religious doctrine in some circumstances.[220] For instance, jurors may consider that many people do not follow the decrees of their religion anyway, or

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215. *Id*.
216. *Williams II*, 658 N.Y.S.2d at 912.
217. *Id*. at 914.
218. *Id*.
219. *See id*. at 915 (citing *Lundman v. McKown*, 530 N.W.2d 807, 828 (Minn. App., 1995) (holding that the proper standard was that of the "reasonable Christian Scientist," but then holding as a matter of law, that a reasonable Christian Scientist would have sought medical treatment when the life of a child was at stake). Rulings such as *Lundman* contradict the Christian Science faith and instead assume that reasonable believers will go against their religious beliefs. *Id*.
220. Some American Catholics, while revering the Pope and proclaiming themselves to be Catholics, decide for themselves on issues such as birth control, the death penalty, and war. Laurie Goodstein, *Threats and Responses: Catholics; Conservative Catholics' Wrenching Debate over Whether to Back President or Pope* N.Y. Times 14A (March 6, 2003). Jurors may take the liberty of assuming that other religious groups are similar.

jurors may wrongly conclude that a reasonable Jehovah's Witnesses would accept blood transfusions when death is on the line.

There are also other practical and inherent problems with applying any avoidable-consequences approach. Imposing a duty to mitigate by obtaining reasonable medical treatment is too heavy a burden for the victim. Victims already "mitigate" to further their own personal desire to live. The courts, with the doctrine of avoidable consequences, impose an additional duty to mitigate to the satisfaction of the jury and defendant. In other areas of the law, where courts impose a duty of mitigation, it is to prevent the victim from taking advantage of the defendant.[221] A victim who opts not to obtain any medical treatment or to refuse a blood transfusion is not trying to take advantage of the defendant, so there is no underlying policy reason that justifies applying a duty to mitigate.[222] Additionally, the avoidable-consequences doctrine falsely assumes that the rejected treatment was a medical certainty, basically that Thomas Branco, although in surgery for amputation of both legs, would have survived with a blood transfusion. The jury is left to weigh the testimony of opposing experts and, undoubtedly, preexisting biases are part of the decision. In contrast to all of these problematic tort rules, the final rule considered by this Comment offers a uniform, nondiscriminatory approach to victims who refuse medical treatment on the basis of sincerely held religious beliefs.

E. Second-Injury Rule

The final tort doctrine that could apply to a case in which a victim refused medical treatment based on a sincerely held religious belief is the second-injury rule. Under this rule, the tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment, because the tortfeasor's negligence placed the victim in the hospital, forcing him to undergo medical treatment.[223] As applied to Mrs. Branco's hypothetical civil suit, Thomas Branco would be his own

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221. *See Pierce* v. *Cornell*, 102 N.Y.S. 102, 106 (N.Y. App. Div. 1st Dept. 1907) (stating that, in an action on a building contract, when the defendant refused to proceed, it was the plaintiff's duty to procure the work to be done as quickly as possible to limit the damages).

222. Pomeroy, *supra* n. 85, at 1138.

223. *Anaya v. Superior Court*, 93 Cal. Rptr. 2d 228, 229 (Cal. Super. App. 2d Dist. 2000).

faultless second injurer.[224] The refusal of a blood transfusion occurs in the course of medical treatment, beyond the defendant's control, but it is still the result of his tortious conduct.[225] Just like cases in which ambulances and helicopters crash on the way to the hospital, or doctors are negligent in providing medical treatment, the original tortfeasor is still liable.[226] The second-injury rule applies only to injuries or death occurring in the course of medical treatment, so this solution would not open the floodgates of tort law by allowing people to recover in spite of stubbornly refused medical treatment for no reason.

The second-injury rule should apply to all cases in which victims seek medical treatment after sustaining injury from a tort.[227] This rule recognizes that victims have made an effort to survive without penalizing them for exercising their constitutional right to choose medical treatment.[228]

V. A UNIFORM APPROACH

Although the goal of criminal law is to deter and punish, and the goal of civil law is to compensate the victim, the standards for considering victims who refuse blood transfusions should be the same.[229] Neither the victim of a crime nor the victim of a tort should be penalized for exercising his or her constitutional right to choose medical treatment. Both the criminal defendant and the civil defendant put his or her victims in the situation of having to make the choice of whether to accept blood transfusions. A uniform approach does not ask courts to treat criminal defendants

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224. *See id*. at 231 (describing the helicopter pilots as the second injurers but holding the original tortfeasor liable).

225. *Id*. In applying this rule to medical malpractice cases, if a doctor was found to have acted incompetently, the refusal of a blood transfusion would not relieve the tortfeasor-doctor from negligence.

226. *Id*.

227. Therefore, it would not raise any constitutional dilemmas regarding the Establishment Clause. *Supra* nn. 193–210 and accompanying text (discussing the *Williams I* and *II* cases, which used the reasonable-believer standard and the case-by-case approach, respectively).

228. By refusing to compensate the families of these victims, courts are essentially penalizing victims for choosing alternative medical treatment for religious reasons. The legal effect of this is to inhibit the constitutional right to self-determination. In practice, Jehovah's Witnesses and other people making religion-based medical decisions would not compromise their faith, regardless of the legal consequences.

229. In fact, courts in the past have analogized criminal and tort law in areas like causation. *E.g. Brackett,* 11 F.3d at 82.

and tortfeasors identically. Courts would continue to punish criminal defendants with prison sentences and impose monetary judgments on tortfeasors.

The *Klinger* case, a DUI manslaughter case, is a criminal case.[230] However, it is similar to civil negligence cases because it does not examine the defendant's intent.[231] In Florida, DUI manslaughter is proven by showing two elements: (1) "[the] defendant was under the influence or had an unlawful blood alcohol level while operating a vehicle"; and (2) "by reason of such operation, [the defendant] caused the death of another human being."[232] The first element parallels the negligence element of duty and breach—the duty of reasonable care when driving breached by being under the influence of alcohol. The second element parallels the negligence element of causation. Because there is no requirement of intent, DUI manslaughter is analogous to negligence and perhaps a step toward holding civil defendants liable when their victims refuse blood transfusions.[233]

VI. CONCLUSION

The second-injury rule creates harmony between tort law and criminal law. It avoids penalizing a victim for exercising his or her constitutional right to choose alternative medical treatment. Additionally, it abandons the reasonable-person standard that in practice allows jurors to replace the standard of reasonableness with their own values. The second-injury rule also creates consistency in tort law, rather than the arbitrary or discriminatory results that stem from applying the doctrine of avoidable consequences. Juries are not left to haphazardly decide whether or not refusing a blood transfusion was reasonable. Ultimately, it grants due compensation to families of victims.

230. *Klinger,* 816 So. 2d at 698.
231. *Id*.
232. *Id*.
233. *Id*. (citing Fla. Stat. § 316.193(3)(c)(13) (1999)).