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Compelled Medical Procedures Involving Minors and Incompetents and Misapplication of the Substituted Judgment Doctrine

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COMPELLED MEDICAL PROCEDURES INVOLVING MINORS AND INCOMPETENTS AND MISAPPLICATION OF THE SUBSTITUTED JUDGMENT DOCTRINE

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I. INTRODUCTION

In recent years, courts have used, or attempted to use, the doctrine of substituted judgment to compel certain medical procedures upon incompetents or minors of tender years. The substituted judgment standard, as first articulated in the case of *Ex Parte Whitbread in re Hinde, a Lunatic*, holds that "the court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would have acted if of sound mind."¹ This case involved a petition for funds to be drawn from the surplus estate of a lunatic to support his near relatives.

Over the years, courts have extended this doctrine to encompass medical procedures where a person, incapable of consent, can donate organs or tissues to a family member in need, or refuse medical treatment under the rubric of a "substituted judgment."² Courts have also applied this standard to cases where a parent or guardian wishes to sterilize a retarded minor or adult.³

¹35 Eng. Rep. 878, (Ch. 1816).

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

³*Stump v. Sparkman*, 435 U.S. 349 (1978). Petition to sterilize a somewhat retarded fifteen year old approved without a hearing, without notice and without a guardian ad litem using mother's substituted judgment. *Id.* See also *Wentzel v. Montgomery General Hospital, Inc.*, 447 A.2d 1244 (Md. 1982), *cert. denied*, 459 U.S. 1147 (1983). Court applies substituted judgment doctrine to authorize sterilization of an incompetent thirteen year old. *Id.*

In 1990, an Illinois man attempted to have this doctrine applied to a situation involving young children and a relatively new medical procedure. In the case of *Curran v. Bosze*,⁴ a father wished to compel his illegitimate three and one half year old twins to submit to blood testing to determine bone-marrow compatibility with their half-brother. If compatible, the father wished to compel the twins to submit to a bone marrow harvesting procedure so the cells could be transplanted into his son who was dying of leukemia. The father argued that under the doctrine of substituted judgment, the children would agree to submit to the procedure if they were old enough to make an informed, rational decision. The Illinois Supreme Court rejected this premise, holding that the future intentions of three and one half year olds could not be ascertained by a court of law or anybody else, and therefore a substituted judgment standard was inappropriate. While the court did not permit this procedure in this instance, the case raises interesting questions about the application of the substituted judgment doctrine as it relates to increasing advances in medical technology.

In many cases, courts have incorrectly applied the doctrine of "substituted judgment" to violate the bodily integrity of a minor (who is usually physically or mentally disabled), or an adult incompetent, to bring about a result which on its face seems beneficial to all involved. What courts have failed to do, however, is protect the best interests of these incompetent persons and to recognize their right to be protected, especially when they cannot consent, from non-therapeutic bodily invasions. In this context, "best interests" are determined by weighing the risks, needs and benefits to the affected person.⁵ The type of "non-therapeutic" procedures to which courts typically apply substituted judgment are those which are of no physical benefit to the incompetent person, but which may benefit another person or the guardians of the incompetent individual.

The doctrine of substituted judgment was originally applied in terms of property issues, while the best interests standard was typically applied to situations involving health interests of minors and incompetents. Over time, however, courts have come to confuse the best interests standard with the substituted judgment doctrine in certain situations and apply the substituted judgment doctrine to cases in which it is not appropriate. This misinterpretation and confusion often endangers the life and health of minors and incompetents, and places them in positions where courts and families may take advantage of their legal disability. This article will discuss the doctrine of substituted judgment in reference to these issues and examine (1) the theory of the substituted judgment doctrine; (2) the doctrine of informed consent; (3) the misapplication of the doctrine of substituted judgment to medical decisions involving minors and incompetents; (4) the confusion between the best

4566 N.E.2d 1319 (Ill. 1990).

⁵In *re Jobes*, 529 A.2d 434, 457 (N.J. 1987) (quoting, Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 973 (1985)).

interests standard and the doctrine of substituted judgment; and (5) propose a possible new standard to be used in cases involving minors or incompetents facing compelled medical procedures.

II. THE THEORY OF SUBSTITUTED JUDGMENT

In 1816, Lord Eldon created the doctrine of substituted judgment to permit an incompetent person, Hinde, to grant an allowance to his near relative from the surplus of his estate.⁶ It has been argued that the creation of this doctrine was, in itself, a legal fiction and that Lord Eldon established it to allow the preservation of the law of property while achieving his desire to grant money to the lunatic's niece.⁷

Ironically, while Lord Eldon's doctrine of substituted judgment purports to "act as the lunatic would have acted if of sound mind,"⁸ Lord Eldon "seemed to have made no effort to discover what had once been in Mr. Hinde's mind. The *Whitbread* decision does not mention any evidence of Mr. Hinde's prior spending practices or his propensity for making gifts."⁹ Instead Lord Eldon looked to an objective point of view and found a "generic, reasonable lunatic - a generic reasonable lunatic prone to giving his money away."¹⁰

While already on shaky ground in the 19th century, the doctrine found its way into American law and eventually into the area of informed consent in medical cases. It is here that the "fiction" of substituted judgment has reached its most dangerous incarnation.

[M]any equity courts assumed the authority to remove vital tissue, to withhold or withdraw life-support systems, to sterilize the incompetent, and to force psychotropic drugs on mental patients over their vocal dissent. Arguably some of these courses of medical treatment directly harmed the incompetent and directly or indirectly benefitted others."¹¹

In theory, the doctrine of substituted judgment looks to the individual to determine what she would do in a particular situation if she were competent. This doctrine works well in situations where a person, once competent, is rendered incompetent to consent to medical procedures through injury or disease. The once competent person has developed a system of morals and beliefs, and patterns of behavior which the court can examine when evaluating

⁶*Whitbread*, 35 Eng. Rep. at 878.

⁷Louise Harmon, *Falling Off The Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 22 (1990).

⁸*Whitbread*, 35 Eng. Rep. at 878.

⁹Harmon, *supra* note 7, at 23.

¹⁰*Id.* at 23 (quoting John A. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 61 n. 73 (1976)).

¹¹*Id.* at 60.

what she would do in a particular situation.¹² The Supreme Court most recently articulated and accepted this standard in *Cruzan v. Director, Missouri Department of Health*.¹³ The Court, however, went on to hold that in cases involving a petition to terminate artificial hydration and nutrition of a patient, the states did not have to accept the substituted judgment of a family member absent clear and convincing evidence of the patient's wishes.¹⁴

It is interesting to note, that in a case where the doctrine of substituted judgment can be applied appropriately, the Supreme Court permits the requirement of clear and convincing evidence to assure that the wishes articulated are that of the patient and not of the family, no matter how well-motivated the family's decision may be. The *Cruzan* decision illustrates the Supreme Court's acceptance of a stringent interpretation of this standard even in a situation where there is some evidence of a patient's desires. It is ironic, therefore, that several courts of equity have permitted the application of the substituted judgment doctrine in situations where a patient has never expressed any evidence of her desires. In theory, the substituted judgment doctrine should only be applied in cases like *Cruzan* where a person, once competent, has made some statements as to her beliefs regarding a particular situation and has developed a life which can be used as a frame of reference to determine her wishes.

In *In re A.C.*, the District of Columbia Court of Appeals recognized that:

Most people do not foresee what calamities may befall them, much less do they consider, or even think about, treatment alternatives in varying situations. The court in a substituted judgment case, therefore, should pay special attention to the known values and goals of the incapacitated patient and should strive, if possible, to extrapolate from those values and goals what the patient's decision would be.¹⁵

This definition should set the outer limits of the substituted judgment doctrine: Looking to an individual's known value system to determine her decision in a particular situation. Instead, courts have tragically misapplied the doctrine of substituted judgment to achieve what judges believe to be "beneficial" decisions in cases where consent cannot be obtained. It is here that the doctrine of substituted judgment and the standard of best interests become confused. Substituted judgment is a subjective standard, and therefore can only apply to persons who have been competent at one time. The best interests standard,

¹²See generally *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

¹³*Id.*

¹⁴*Id.* at 269.

¹⁵*In re A.C.*, 573 A.2d 1235, 1250 (D.C. App. 1990). Hospital sought authority to perform caesarean delivery of terminally ill patient's baby. Tragically, substituted judgment may have been incorrectly used in this case because patient may, in fact, have been competent to decide. *Id.* at 1253.

however, is to be applied to the minor or incompetent who has never been competent and is, therefore, entitled to more protection under the law.¹⁶

III. THE DOCTRINE OF INFORMED CONSENT

American common law holds that any individual has the right "to make an informed choice, if competent to do so, to accept or forgo medical treatment."¹⁷ Doctors must inform patients of the nature of the proposed treatment, possible alternative treatment procedures, and the nature and degree of the risk and benefits involved in accepting or rejecting treatment. Additionally, courts hold that a surgeon who performs an operation without consent, independent of its result, may be guilty of a battery, or if a surgeon obtains an insufficiently informed consent, he may be guilty of negligence.¹⁸

The right to accept or refuse treatment has been recognized under the common law right of self-determination and informed consent.¹⁹ Further, the state cannot compel an individual to submit to invasion of bodily integrity for the benefit of another person's health:²⁰

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or take action to save another human being or to rescue . . . For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.²¹ (emphasis added.)

As our law openly recognizes the individual's right of autonomy over her body, the frequent and often ill-justified use of the substituted judgment standard in cases involving those who have never been competent is particularly disturbing. Courts have frequently used the doctrine of substituted judgment to permit procedures which would not be permitted or consented to by a competent individual. In doing so, courts have violated the constitutional

¹⁶See generally *Mills v. Rogers*, 457 U.S. 291 (1982). Mental patients who were institutionalized were forced to accept unwanted treatment with anti-psychotic drugs. Court recognized a Massachusetts case which states that liberty interests of person adjudicated as incompetent are broader than those protected directly by the Constitution of the United States. *Id.* at 303.

¹⁷*In re A.C.*, 573 A.2d at 1243.

¹⁸*Id.*

¹⁹See generally *In re Conroy*, 486 A.2d 1209 (N.J. 1985).

²⁰*Bonner v. Moran*, 126 F.2d 121 (D.C. App. 1941) (parental consent is required for a skin graft from a fifteen year old boy to be used to benefit his cousin who had been severely burned.)

²¹573 A.2d at 1244 (quoting *McFall v. Shimp*, 10 Pa. D. & C. 90, 91 (Allegheny County Ct. 1978)).

rights of incompetent patients in denying them the right to informed consent, guaranteed, except in an emergency, in all jurisdictions in the United States.²²

IV. MISAPPLICATION OF THE SUBSTITUTED JUDGMENT DOCTRINE

A. Compelled Organ and Tissue Donation

The doctrine of substituted judgment has been misinterpreted and misapplied in several situations. Courts have misused this doctrine in cases of compelled organ and tissue donation by minors and incompetents, compulsory sterilization of minors and incompetents, and removal and denial of life-sustaining treatment to minors and incompetents.

The case which established precedent for applying the substituted judgment doctrine to situations involving incompetents and organ donation was the Kentucky decision in *Strunk v. Strunk*.²³ This Kentucky court asked the question:

Does a court of equity have the power to permit a kidney to be removed from an incompetent ward of the state upon petition of his committee, who is also his mother, for the purpose of being transplanted into the body of his brother, who is dying of a fatal kidney disease?²⁴

Tommy Strunk was twenty-eight years old and dying of kidney disease.²⁵ His brother Jerry was twenty-seven years old and was committed to a state hospital and school for the incompetent.²⁶ His mental age was approximately six

²² See, e.g., *Canterbury v. Spence*, 464 F.2d 772, cert. denied 409 U.S. 1064 (1972). Doctor failed to disclose a risk of serious disability inherent in laminectomy operation. Patient became paralyzed and sued doctor for negligent failure to disclose. *Id.* at 779. "[D]ue care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve. The context in which the duty of risk-disclosure arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken." *Id.* 464 F.2d at 781.

There are two exceptions to the rule of a doctor's duty to disclose. "The first comes into play when the patient is unconscious or otherwise incapable of consenting and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment." *Id.* at 788. The second occurs in situations where disclosure may cause a patient to become so ill or distraught that she cannot make a rational decision. *Id.* at 789. "The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself." *Id.*

²³ 445 S.W.2d 145 (Ky. 1969).

²⁴ *Id.* at 145.

²⁵ *Id.* at 146.

²⁶ *Id.*

years.²⁷ Tommy's entire family was tested for possible tissue compatibility for a transplant, but only Jerry's tissue was found to be acceptable.²⁸

This Kentucky court permitted the transplant in this situation and held that in the

peculiar circumstances of this case it would not only be beneficial to Tommy but also beneficial to Jerry because Jerry was greatly dependent upon Tommy, emotionally as well as psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by removal of a kidney."²⁹

The court in this case based its decision on two key factors. The first was the "benefit" that would be bestowed upon Jerry by giving his kidney,³⁰ and the second was what the court perceived to be the "minimal" degree of risk associated with the procedure.³¹ The court applied the substituted judgment doctrine based on these factors and held that, "[t]he right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."³²

This risk/benefit type of analysis has been criticized for being a utilitarian manipulation of the substituted judgment doctrine. In situations similar to *Strunk*, the benefit incurred by the incompetent can be vaguely and loosely construed, and there are no criteria or standards for determining what constitutes a benefit or how much benefit must be shown in each particular case.³³ Additionally, the substituted judgment doctrine mandates that the court do what the incompetent would do if he were competent to make a decision. In *Strunk*, the court based the substituted judgment clearly on its view of a benefit flowing to the incompetent. "Yet the presence of benefit does not justify nonconsensual intrusions on competent persons. Rather the determinative factor appears to be consent or choice—persons may choose or consent to actions which bring them little or negative benefit."³⁴ The benefits standard articulated in *Strunk* assumes three things. First, that an individual will always do what is "beneficial" to her and second, that a possible psychological "benefit" may be enough to allow a medical procedure to be performed under the doctrine of substituted judgment. Finally, it assumes that any "benefit" is

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹445 S.W.2d at 148.

³²*Id.*

³³ See John A. Robertson, *Organ Donations By Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 56 (1976).

³⁴*Id.*

enough to permit a court to allow a guardian to substitute her judgment for that of an incompetent who has never been competent under the law to make a decision. If the incompetent's life under the substituted judgment doctrine is to be protected and respected, and the standard is to be correctly applied, the precedent articulated in *Strunk* is improper.

The Wisconsin Supreme Court recognized some of these inherent problems in *In re Guardianship of Pescinski*.³⁵ While the court recognized the benefits test set forward in *Strunk*, it refused to adopt the doctrine of substituted judgment as articulated in *Strunk*.³⁶ This court held:

[a]n incompetent particularly should have his own interests protected. Certainly no advantage should be taken of him. In the absence of real consent on his part, and in a situation where no benefit to him has been established, we fail to find any authority for the county court, or this court, to approve this operation.³⁷

Here, the court recognized the principle of substituted judgment the same way the *Strunk* court did. By limiting the scope of *Strunk's* benefit rule the court was able to reject its application in these circumstances.

The dissent in the decision recognized that one reason for the court's judgment may have been its concern with eugenic arguments reminiscent of Nazi Germany.³⁸ Further, the dissent articulated another misinterpretation of the substituted judgment doctrine. It first makes a proper analysis of the doctrine stating: "the court in effect does for the incompetent what it is sure he would do himself if he had the power to act."³⁹ Then, however, the dissent makes an improper analysis of the goal of the substituted judgment doctrine. The dissent writes, "[t]his approach gives the incompetent the benefit of the doubt, endows him with the finest qualities of his humanity, assumes the goodness of his nature instead of assuming the opposite."⁴⁰ The assumptions by the dissent in *Pescinski* make the doctrine of substituted judgment an objective one bestowing the best qualities upon all incompetent persons instead of recognizing substituted judgment as a subjective doctrine, unique to each individual and his own beliefs and ideals.

The Court of Appeals of Louisiana, Fourth Circuit, faced a similar situation in *In re Richardson*.⁴¹ In this case, however, the possible donor was a minor, Roy, who was mentally retarded. The father in this case wished to compel the mother to consent to the operation. Since the possible donor was a child, the

³⁵ 226 N.W.2d 180 (Wis. 1975).

³⁶ *Id.* at 181.

³⁷ *Id.* at 182.

³⁸ *Id.* at 183.

³⁹ 226 N.W.2d at 184.

⁴⁰ *Id.*

⁴¹ 284 So. 2d 185 (La. 1973).

court rejected the substituted judgment doctrine articulated in *Strunk*, and stated that under Louisiana law the goal of this decision was to "promote the ultimate best interest of a minor."⁴² Counsel for the plaintiff in this case argued that the transplant could be in Roy's best interest because the donee could take care of Roy after the death of his parents. The *Richardson* Court held: "[s]uch an event is not only highly speculative, but in view of all the facts, highly unlikely. We find that surgical intrusion and loss of a kidney clearly would be against Roy's best interest."⁴³

Here, a court refused to accept the substituted judgment doctrine as proper in cases involving a retarded minor, and instead chose to apply the best interests standard. Unlike the *Strunk* court, the *Richardson* court refused to allow a potential care relationship to constitute a "benefit" that would be in the incompetent's best interest. The *Richardson* court recognized that the removal of a kidney could rarely be in an incompetent patient's best interest.⁴⁴ This court correctly interpreted the difference between the substituted judgment doctrine and the best interests standard. The *Richardson* court recognized that best interests is a standard based on "benefit" while substituted judgment is based on personal preference. This court correctly refused to apply the substituted judgment doctrine, and also decided that this operation was not in Roy's best interest and could not be performed under a best interests standard. In doing so, this court recognized that benefit is not a proper element to be considered in making a substituted judgment.

The concurrence in this case refused to even apply a best interests standard in this particular situation. Judge Gulotta wrote:

I am of the opinion that before the court might exercise its *awesome* authority in such an instance and before it considers the question of the best interests of the child, certain requirements must be met. I am of the opinion that it must be clearly established that the surgical intrusion is urgent, that there are no reasonable alternatives, and that the contingencies are minimal.⁴⁵

Here, a judge refused to apply the doctrine of substituted judgment or a best interests standard and held the decision to a high level review. Judge Gulotta recognized the compelling need to protect mentally retarded minors from bodily intrusions that may be detrimental to their health.

A Connecticut court faced with a unique situation in the case of *Hart v. Brown*,⁴⁶ chose to apply the substituted judgment doctrine articulated in *Strunk*. Here, parents of identical twins who were seven years and ten months

⁴²*Id.* at 187.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵*Id.* at 188.

⁴⁶289 A.2d 386 (Conn. 1972).

old petitioned the court to allow a kidney transplant from one twin to the other. This case was particularly unusual because it involved an isograft donation, which is a "perfect match" and does not carry the risk of rejection involved in other kidney transplantation.⁴⁷ The *Hart v. Brown* court wrote that "the surgical risk is no more than the risk of the anesthesia . . ." and that "[t]he only real risk would be trauma to the one remaining kidney, but testimony indicated that such trauma is extremely rare in civilian life."⁴⁸ The *Hart* court then applied the benefits analysis set forth in *Strunk* and stated that there would be "immense benefit to the donor in that the donor would be better off in a family that was happy than in a family that was distressed and in that it would be a very great loss to the donor if the donee were to die from her illness."⁴⁹

While the court applied the benefits analysis in this case, it also recognized that the situation before it was highly unique. First, it recognized the uniqueness of an isograft transplant. Second, the court recognized that the donor was a minor who did not suffer from impaired mental capabilities.⁵⁰ Based on these facts, the court held that the natural parents of the children would be able to substitute their consent for that of their minor children after a close investigation of their motives.⁵¹

Here, it appears likely that the court approved the application of the substituted judgment doctrine as the parents' motives were likely to be pure since neither child was suffering from mental impairment.⁵² The analysis in this case was a risk/benefit one which weighed in favor of allowing the donation based on unique circumstances. The court recognized that the twins were extremely close and that the family life of the surviving twin would be greatly damaged by the death of her sister. Overall, the court applied a benefits analysis as it related to the healthy twin and how the operation would affect the balance of her life and development. It can be argued, therefore, that this should have been called a best interests analysis and that after weighing the alternatives surgery was, in fact, in the healthy child's best interests, even if it may not be what she would have decided if competent. It is interesting to note that the court acknowledged that "[t]he donor has been informed of the operation and insofar as she may be capable of understanding she desires to donate her kidney so that her sister may return to her."⁵³

Here, a court applied a new version of the doctrine of substituted judgment. It allowed a parent's judgment to be substituted for a minor child's in the case

⁴⁷*Id.* at 388 (a one egg twin carries identical genetic material which eliminates all risk of rejection).

⁴⁸*Id.* at 389.

⁴⁹*Id.*

⁵⁰289 A.2d at 391.

⁵¹*Id.* at 390.

⁵²*Id.* at 391.

⁵³*Id.* at 389.

of a compelled organ donation. This child had not yet developed the capacity to consent; yet understood that she did not want her sister to die. This decision was based on what the court and the parents believed the child would do if she were mature enough to fully understand the nature of the procedure. In essence, this is not a substituted judgment, but a combination of substituted judgment and best interests. A court allowed parents to substitute their judgment for that of their child, who could not consent, based on what they believed was in the child's best interests, and what they believed the child would decide if competent. Since the child had never been legally competent, however, this is *not* technically a substituted judgment.

This case most closely parallels the situation in *Curran v. Bosze* introduced at the beginning of this article.⁵⁴ The primary differences are that the potential donors in *Curran* were substantially younger than the potential donor in *Hart*, and the potential success of the procedure was substantially lower in *Curran* than in *Hart*. *Curran* rejected the substituted judgment doctrine stating that there could be no clear and convincing evidence of the twins' intent at such a young age (three and one half years).⁵⁵ The *Hart* court, however, accepted the doctrine as permissible. It should also be recognized that the family unit was intact in the *Hart* case and both parents consented, while the parents were never married in *Curran* and the custodial parent disapproved of the procedure.⁵⁶ While one of these cases accepted the substituted judgment doctrine in a situation involving a minor and the other rejected it, these cases can be reconciled based on facts alone.

Possibly the best way to put the *Hart* decision in context is to recognize it as a unique application of the substituted judgment doctrine in a unique situation. What actually occurred is a "substituted consent" based on the child's limited understanding of the procedure she would have to go through to save her sister, combined with what the court believed the child would want, and what the court believed was in the child's best interests. Overall, this is not a traditional application nor a theoretically correct application of the substituted judgment doctrine. Instead of viewing this case as precedent, therefore, it should be viewed as an unusual application of the substituted judgment doctrine to an isolated set of facts and circumstances. While the results may seem "fair" and beneficial to all, this case cannot stand for the proposition that parents can always substitute their judgment for the judgment of minor children in the case

⁵⁴See *supra* note 4 and accompanying text.

⁵⁵566 N.E.2d at 1325. The court based its decision on the fact that, "It is not possible to discover the child's 'likely treatment/nontreatment preferences' by examining the child's 'philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes towards sickness, medical procedures, suffering and death.'" *Id.* at 1326 (quoting *In re Estate of Longeway*, 549 N.E.2d 292, 299 (Ill. 1989), (quoting *In re Jobes*, 529 A.2d 434, 445 (N.J. 1987) (citations omitted)).

⁵⁶566 N.E.2d at 1321.

of compelled organ or tissue donation. *Curran v. Bosze* recognizes this and rejects this standard in a similar situation.

There are several problems with the application of the substituted judgment doctrine in cases of compelled organ donation. Ordinarily, "when the mental or social condition of the patient or subject precludes legally effective consent to a personal intrusion. . . respect for persons usually entails prohibiting the intrusive activity."⁵⁷ Because children and the mentally impaired have never developed the capacity to consent under the law, courts have frequently used a convoluted version of the substituted judgment doctrine involving a "benefits" analysis. The problem with this standard, as illustrated in *Strunk*, is that a "benefit" can be construed as any psychological benefit to the incompetent, no matter how slight. It is almost bizzare to recognize that in cases such as *Strunk*, a court has held that the possible "psychological benefit" to an institutionalized individual of not losing a relative justifies a surgical invasion of the incompetent's body and removal of his organ. Even more disturbing is that often the parents of an incompetent, who are attempting to save a life of their "normal" child, are the individuals entrusted with making the substituted judgment for their incompetent child. While courts also appoint a guardian ad litem to aid in these decisions, it is the judgment of the parent or legal guardian that courts hold in the highest regard.

In analyzing the "benefit" construed upon an incompetent, courts frequently disregard the risks involved in organ donation:

If the risk were trivial, a question of principle would still exist, but the chances and consequences of abuse would be lowered. To make a substituted judgment concerning an organ transplant, it is essential to be clear about the effect of the transplant on the donor, since a competent person similarly situated is likely to consider the consequences to himself. To an incompetent, who may be less able to understand the transplant procedures or to adapt to the unfamiliar surroundings of a hospital, the risks of an organ transplant may be even greater.⁵⁸

⁵⁷ Robertson, *supra* note 33, at 50. Robertson also writes that "the use of children and the institutionalized mentally impaired in experimentation cannot be rationalized in terms of consent precisely because they are incapable of consent." *Id.*

While organ transplantation is not "experimental," the theory is the same. Surgery performed on persons incapable of consent cannot be rationalized in terms of consent.

⁵⁸*Id.* at 69 (footnotes omitted). The *Curran* court, which rejects the substituted judgment doctrine, carefully evaluates the risks inherent in the surgery:

[w]hile the incidence of risk is not very high, the risk is medically significant. When a 3 1/2-year-old child undergoes a bone marrow harvesting procedure, the child is put under general anesthesia. Special needles are put through the skin into the hip bones at the back on both sides of the child and at the front on both sides. Dr. Johnson testified that in order to obtain the amount of bone marrow which would be necessary for a transplant to Jean Pierre, the bone would have to be punctured 100 separate times.

Curran v. Bosze, 566 N.E.2d at 1333.

While several courts have analyzed organ transplant cases based on the "minimal risks" involved in organ donation,⁵⁹ few courts have recognized that these risks may be magnified for the mentally incompetent.

Authors have even argued that, "[u]se of an institutionalized incompetent might inspire his attendants to devote special care and attention to him out of a sense of obligation or otherwise. Or, as a condition or natural result of the organ donation, it might be decided to assure the incompetent the best of medical care"⁶⁰ These types of arguments are at best speculative and attempt to justify what can only be viewed as invasions of the bodily integrity of incompetents to benefit others considered more valuable by our society.

B. Compulsory Sterilization

Just as the doctrine of substituted judgment has been tragically misapplied in cases of compelled organ donation, it has also been misused in cases involving compulsory sterilization of incompetents. The best example of this misuse is found in the 1978 case of *Stump v. Sparkman*.⁶¹ In this case, a circuit court judge permitted the sterilization of a fifteen year old girl upon petition of her mother. The mother stated that her somewhat retarded daughter had been associating with older men and that it would be in her best interests to undergo tubal ligation "to prevent 'unfortunate circumstances' . . ." in the future.⁶² The judge permitted the procedure and the daughter was told that she was to have her appendix removed. Two years later, she was married and found out the true nature of her procedure when she attempted to become pregnant.⁶³ Although the key issue the Supreme Court examined in this case was whether the judge acted within his jurisdiction and was therefore immune from liability,⁶⁴ it is important to note that a judge accepted a mother's "substituted judgment" regarding sterilization, which was clearly without her daughter's consent. Deception was even used to lure the daughter into the medical procedure. This case is a clear demonstration that the judgment of a parent or guardian may not always be the judgment of an incompetent and that the substituted judgment of a parent may not always be in a child's best interest when the child is mentally retarded.

In *Wentzel v. Montgomery General Hospital, Inc.*,⁶⁵ the Court of Appeals of Maryland wavered between application of the substituted judgment doctrine

⁵⁹ *Strunk supra* note 2, 445 S.W.2d at 149.

⁶⁰ Robertson, *supra* note 33, at 70.

⁶¹ 435 U.S. 349 (1978).

⁶² *Id.* at 351.

⁶³ *Id.* at 353.

⁶⁴ *Id.* at 364. While the Court held Judge Stump immune from damages, it recognized that the judge's approval of the petition was in error. *Id.*

⁶⁵ 447 A.2d 1244 (Md. 1982), *cert. denied*, 459 U.S. 1147 (1983).

and a best interests standard. In this case the mother and grandmother of a 13 year old mentally incompetent female petitioned the court to permit sterilization because of her inability to understand and handle her own bodily functions.⁶⁶ Ultimately, the court applied a best interests standard in this situation as the incompetent was a minor. The court cited *Strunk* as precedent and also cited *In re Mary Moe*⁶⁷ which held that a trial court should apply the substituted judgment doctrine to cases where it must determine whether to authorize sterilization.⁶⁸ The *Wentzel* court, which ultimately permitted the sterilization, seems uncertain as to which standard it actually applied. The dissent in this case, however, makes it clear that substituted judgment is the proper standard in this situation:

Thus, under the doctrine of substituted judgment, in determining whether to authorize sterilization, the trial court must not be concerned solely with objective criteria of what is in the best interests of the incompetent minor, but rather must place primary emphasis upon the decision that would be made by the incompetent minor if he or she were competent. Only by so doing can the incompetent minor's personal fundamental rights be fully protected and, therefore, the incompetent minor's best interests be fully preserved.⁶⁹

This dissenting judge also assumes that the substituted judgment doctrine and the best interests standard can be equated with each other and that best interests are the ultimate result of substituted judgment.

Two courts, however, have recognized the abuse of the substituted judgment doctrine in cases of compulsory sterilization. In *In re A.W.*,⁷⁰ the Supreme Court of Colorado, sitting En Banc, refused to allow the sterilization of a 12 year old mentally incompetent girl based on her parents' substituted judgment. This court held that:

⁶⁶*Id.* 447 A.2d at 1246.

⁶⁷432 N.E.2d 712 (Mass. 1982).

⁶⁸*Wentzel*, 447 A.2d at 1251 (citing *In re Mary Moe*, 432 N.E.2d 712 (Mass. 1982)). While the court decided that the substituted judgment doctrine was the proper test to apply, this court, and the *Wentzel* court confused this doctrine with the best interests standard:

The Supreme Judicial Court of Massachusetts concluded that the trial court—a court of general equity jurisdiction—possessed inherent equitable power to grant a petition for sterilization, shown to be in the best interest of the mentally incompetent ward. In so holding, the court said "that the [trial] court is to determine whether to authorize sterilization when requested by the parents or guardian by finding the incompetent would so choose if competent.

Id.

⁶⁹*Id.* at 1263 (Davidson, J., dissenting).

⁷⁰637 P.2d 366 (Colo. 1981); *but see* *Buck v. Bell*, 274 U.S. 200 (1927), upholding a Virginia sterilization statute and making the infamous statement that "[t]hree generations of imbeciles are enough." 274 U.S. at 207.

Simply allowing the parents or guardians of the mentally retarded person to substitute their decision and consent to sterilization for that of the incompetent person is not an adequate solution to the problem. Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children.⁷¹

This court recognized that the inconveniences and difficulties associated with caring for an incompetent child may cause parents to make decisions which infringe upon their offspring's procreational rights.⁷²

This conflict of interest is also recognized in the case of *Conservatorship of Valerie N.*⁷³ The California Court of Appeals held that there is "[a]n increasing awareness of conflicts which may exist between incompetent persons and those who are charged with their care."⁷⁴ This California court went on to state:

[B]ecause many unknown and variable considerations are thus involved in a decision whether or not to undergo or impose sterilization, it is perceptibly necessary that the procedure be limited to persons who are able to give informed consent. The limitation

⁷¹637 P.2d at 370 (footnotes omitted).

⁷²*Id.* These fears include sexual promiscuity and exploitation. This court recognizes procreational rights as fundamental and also recognizes that sterilization has been greatly abused by guardians in the past.

⁷³199 Cal. Rptr. 478 (Cal. Ct. App. 1984), *aff'd* 707 P.2d 760 (Cal. 1985). The appellate court affirmed the decision of the trial court in holding that conservators were not entitled to have conservatee sterilized. The Supreme Court of California affirmed, holding that the California statute prohibiting sterilization of those under conservatorship "[d]eprives developmentally disabled persons of privacy and liberty interests" *Id.* at 771-72. The court explicitly ruled, however, that its judgment was without prejudice to a renewed petition to establish that sterilization was necessary to the conservatee's habilitation. *Id.* at 762.

In assuming that those who are incompetent have a right to procreative choice the court may have made a drastic mistake in reasoning. As observed in Chief Justice Bird's dissent:

Today's holding will permit the state, through the legal fiction of substituted consent, to deprive many women permanently of the right to conceive and bear children. The majority run roughshod over this fundamental constitutional right in a misguided attempt to guarantee a right of procreative choice for one they assume has never been capable of choice and never will be. Yet precisely because choice and consent are meaningless concepts when applied to such a person, the majority's invocation of the theory of procreative choice and the fiction of substituted consent cannot withstand constitutional scrutiny. *Id.* at 781-82 (Bird, C.J., dissenting).

⁷⁴199 Cal. Rptr. at 486 (citing *Stump v. Sparkman*, 435 U.S. 349, 351 (1978)).

protects the fundamental right of an incompetent person to bear children.⁷⁵

While several courts have recognized the varying motivations of parents and guardians in situations involving compulsory sterilization, few courts have recognized this problem in cases of organ donation. This distinction can easily be traced to a benefits analysis. In cases of organ donation, the person to be benefitted may receive life and health. Without the surgery, the donee may die or be subjected to a painful and difficult lifestyle. It is also argued that the donor may benefit psychologically. In situations involving sterilization, however, it is the guardians who are benefitted both physically, as they do not have to deal with the problems of menstruation and conception, and psychologically, as they do not have to worry about promiscuity. The detriment to the incompetent female, however, may arguably be too great as she loses her fundamental right to bear children. In situations where the benefit involves the life and health of a competent individual, such as cases of organ donation, as opposed to a guardian's peace of mind, as in sterilization cases, courts are more willing to apply the doctrine of substituted judgment and infringe upon the rights of an incompetent person.

C. Refusal and Withdrawal of Life-Sustaining Treatment

The medical situation best designed for application of the substituted judgment doctrine is the decision to refuse or discontinue life-sustaining treatment. This is only true, however, in situations where a patient was once competent. Frequently, this situation involves a person who has become incompetent through disease or accident but who has already developed a system of ideals and beliefs which can be applied in making a substituted judgment. Paradoxically, this has been the situation in which courts are most reluctant to apply the substituted judgment doctrine. The only Supreme Court decision involving the substituted judgment doctrine in this situation is *Cruzan v. Missouri Department of Health*.⁷⁶ In *Cruzan*, the Supreme Court held that due process did not require a state to accept the substituted judgment of close family members without substantial proof that their views reflect those of the patient.⁷⁷ Even though Nancy Cruzan had made general statements about her desire to discontinue her life if she were in a vegetative state,⁷⁸ the Supreme Court did not find this to be sufficient evidence of her intent. The tenor of the Supreme Court's opinion also recognized that Nancy Cruzan's parents were

⁷⁵*Id.* Procreation has been recognized as a fundamental right for our fifty years. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁷⁶497 U.S. 261 (1990).

⁷⁷*Id.* at 285-86.

⁷⁸*Id.* at 285. Nancy "[e]xpressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally" *Id.* at 268.

people with the best possible motives and concerns.⁷⁹ Additionally the Court wrote that "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent."⁸⁰

In the case of an incompetent sixty-seven year old male with an I.Q. of ten, however, the Supreme Judicial Court of Massachusetts came to a drastically different decision. In *Superintendent of Belchertown State School v. Saikewicz*,⁸¹ a Superintendent of a state institution petitioned the court to make a decision regarding administration of chemotherapy treatments for a man suffering with acute myeloblastic monocytic leukemia. Ultimately, the court let this decision turn on a general right in all persons to refuse medical treatment and extended this right to include those who are incompetent.⁸² This court applied the substituted judgment doctrine, and distinguished this case from other right to die cases in stating:

To make a worthwhile comparison, one would have to ask whether a majority of people would choose chemotherapy if they were told merely that something outside of their previous experience was going to be done to them, that this something would cause them pain and discomfort, that they would be removed to strange surroundings and possibly restrained for extended periods of time, and that the advantages of this course of action were measured by concepts of time and mortality beyond their ability to comprehend.⁸³

While this court found that most people in a similar situation to Mr. Saikewicz elect to undergo chemotherapy,⁸⁴ this court still held that the decision to

⁷⁹*Id.*

No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the state were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading.

Id. at 286.

⁸⁰*Cruzan*, 497 U.S. at 286.

⁸¹370 N.E.2d 417 (Mass. 1977).

⁸²*Id.* at 427. "To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." *Id.* at 428.

Here again, a court is applying a theory of choice to a person who is not capable of such a "choice" under the law.

⁸³*Id.* at 430.

⁸⁴*Id.* at 431.

withhold treatment from Mr. Saikewicz "was based on a regard for his actual interests and preferences"⁸⁵ This decision was based primarily on Mr. Saikewicz's inability to understand the treatment that he would have to undergo.⁸⁶ While this court may actually have been making a decision which was in Mr. Saikewicz's best interests, the court's reasoning is twisted in such a manner as to allow this decision to be a substituted judgment. Technically, this court based its decision on what Mr. Saikewicz would have decided if competent. Theoretically, however, Mr. Saikewicz can never have made such a decision and therefore cannot have the doctrine of substituted judgment applied. While this case may arguably have been correctly decided, it could not have been decided applying the doctrine of substituted judgment.

Mr. Saikewicz, who had never been able to express any sort of opinion regarding chemotherapy treatments, was permitted to have his guardian's judgment substituted for his in this situation. Ms. Cruzan, who had expressed some opinions regarding her situation, was not permitted to have her parents' judgment substituted for hers. While *Cruzan* was decided after *Saikewicz*, the key distinguishing factor is that Mr. Saikewicz had never been competent while Ms. Cruzan had been. Additionally, Missouri required a standard of clear and convincing evidence while Massachusetts did not. In a case where substituted judgment could not in theory be applied, a court chose to apply the doctrine. In a case where substituted judgment could reasonably have been applied, however, the Supreme Court refused to do so.

Prior to the *Cruzan* decision, several courts permitted the use of substituted judgment for removal of life-sustaining medical treatment from persons in an irreversible vegetative state.⁸⁷ *Cruzan*, however, is not viewed as controlling precedent in all situations involving removal of life-sustaining treatment. The Supreme court did not mandate that courts apply the standard of clear and

⁸⁵*Id.* at 432.

⁸⁶*Id.*

The two factors considered by the probate judge to weigh in favor of administering chemotherapy were: (1) the fact that most people elect chemotherapy and (2) the chance of a longer life. Both are appropriate indicators of what Saikewicz himself would have wanted, provided that due allowance is taken for this individual's present and future incompetency. We have already discussed the perspective this brings to the fact that most people choose to undergo chemotherapy. With regard to the second factor, the chance of a longer life carries the same weight for Saikewicz as for any other person, the value of life under the law having no relation to intelligence or social position.

Id. at 431. It is ironic, therefore, that this court chose to permit this procedure after recognizing that the life of an incompetent has the same value as the life of a competent individual.

⁸⁷See generally *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989) (recognizing that the guardian of a terminally ill patient in an irreversible coma may exercise the right to refuse artificial nutrition and hydration); *In re Jobes*, 529 A.2d 434 (N.J. 1987) (noting that the right of patient in an irreversible vegetative state to determine whether to refuse life sustaining treatment can be exercised by a patient's family or close friend).

convincing evidence required in the state of Missouri.⁸⁸ Rather, *Cruzan* permitted the states to apply such a standard.

Additionally, *Cruzan* does not serve as precedent in cases such as *Saikewicz*. The *Cruzan* decision applies to persons once competent who, through accident or illness remain in a persistent vegetative state. *Saikewicz*, however, stands for the proposition that the court may apply the doctrine of substituted judgment to situations where a person who has never been competent under the law must decide whether to accept or reject life prolonging treatment. While the *Saikewicz* court presents its decision under the rubric of "the right to refuse medical treatment," this application is particularly dangerous in cases involving the mentally deficient. As medical costs increase and medical technology improves, the doctrine of substituted judgment may be applied in a utilitarian manner to deprive incompetents of medical care they may be entitled to. Although it has been argued that, "the substituted judgment doctrine is explicitly non-utilitarian, and makes no claim that the rights of incompetents may be overridden to advance the interests of others, where the rights of competents may not be similarly overridden,"⁸⁹ this is specifically what has been done in cases such as *Strunk* and *Saikewicz*. When the life of an incompetent becomes devalued to aid another or refuse a human being medical treatment, the substituted judgment doctrine has reached its most ominous application. It creates generic, reasonable idiots who may be prone to giving their organs or their lives away.⁹⁰

V. CONFUSION BETWEEN BEST INTERESTS AND SUBSTITUTED JUDGMENT

The basic problem courts have with the application of the substituted judgment doctrine in cases involving minors and the mentally incompetent is that it is frequently confused with the best interests standard. The best interests standard allows decisions to be made which promote a patient's best interests. This standard is usually applied in terms of beneficence and looks to consequences which will benefit a minor or incompetent.⁹¹ Alternatively, "[s]ubstituted judgment is an effort to make the decision the person would have made if competent. As we have seen time and time again, subjects and patients do not always make the decisions that others feel are in their best interests."⁹²

Even leading authorities on medical ethics, however, have blurred the distinction between the two standards. According to Paul Applebaum, Charles Lidz and Alan Meisel;

⁸⁸*Cruzan*, 497 U.S. at 282, 284.

⁸⁹See Robertson, *supra* note 33, at 76.

⁹⁰Harmon, *supra* note 7, at 41.

⁹¹D. Don Welch, *Walking in their Shoes: Paying Respect to Incompetent Patients*, 42 VAND. L. REV. 1617, 1629 (1989).

⁹²*Id.* at 1629.

All surrogate decisions makers are, in a general way, under a duty to act in the best interest of incompetent patients. The difficulty with the best interests standard is not in the statement of it but in giving content to it. The substituted judgment approach is, in fact, one way of doing so. That is, a surrogate who makes a decision for an incompetent patient on the basis of that patient's instructions—written or oral, express or implied—is seeking to implement the patient's best interests *as the patient would have defined them*. Thus, the substituted judgment approach is merely one way in which the best interests standard is given content.⁹³

D. Don Welch criticizes this argument in his article "Walking in Their Shoes: Paying Respect to Incompetent Patients." He writes:

This statement is exactly wrong. Substituted judgment is not a way of giving content to the best interests standard. Rather, best interests is one item that should be taken into account when making a substituted judgment. The inverted relationship in which these authors place the two concepts reflects their failure to acknowledge the priority that autonomy should have over beneficence in their development of a theory of informed consent.⁹⁴

Even the *Strunk* court reveals a confusion between the best interests standard and the substituted judgment doctrine when it places an emphasis on benefit.⁹⁵ Theoretically, benefit should not be the key issue in a substituted judgment, but rather is a key issue in a best interests standard.

Other judges have made the same mistake when evaluating the substituted judgment doctrine in relation to the best interests standard. In *Wentzel v. Montgomery General Hospital, Inc.*, Judge Smith wrote, "Each approach has its own difficulties, but use of the doctrine of substituted judgment promotes best the interests of the individual, no matter how difficult the task involved may be."⁹⁶ This is precisely what a substituted judgment is *not* designed to do. Rather, substituted judgment allows a patient to make decisions that may be contrary to her best interests, based on her personal preferences.⁹⁷

⁹³*Id.* at 1629 (citing P. APPLEBAUM, C. LIDZ & A. MEISEL, INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 99 (1987)) (emphasis in original) (footnote omitted).

⁹⁴*Id.* at 1630.

⁹⁵*Strunk*, 445 S.W.2d at 148. Justice Day, dissenting in *In re Guardianship of Pesciski*, 226 N.W.2d 180, 182 (Wis. 1975) wrote:

The court in that case [*Strunk*] did find, based on the testimony of a psychiatrist, that while the incompetent had the mental age of six, it would be of benefit to him to keep his brother alive so that his brother could visit him on occasion; I would regard this as pretty thin soup on which to base a decision as to whether or not the donee is to be permitted to live.

⁹⁶447 A.2d at 1259.

⁹⁷*In re Guardianship of Roe*, 421 N.E.2d 40, 59-60 n.20 (Mass. 1981).

A benefits test is frequently applied when equating best interests with substituted judgment. It is argued that respect for incompetents is preserved when making decisions in this manner because:

A competent person will ordinarily satisfy his wants and preferences. To the extent that the benefits rule advances the incompetent's previously expressed preferences, or procures him more of the primary goods if his preferences are unknown, there is a firm basis for ascribing to him choices which yield a net benefit.⁹⁸

Here again, a presumption of best interests is intermingled with the doctrine of substituted judgment though this is theoretically incorrect.

Perhaps the reasons for this confusion are the differing situations to which courts have applied substituted judgment. In cases involving removal of life-sustaining treatment from those who were competent but are presently in a vegetative state, courts have easily looked to a subjective standard which is based on the patient's actual, expressed beliefs and wants. In cases involving organ transplantation, sterilization, or refusal of life-sustaining treatment to minors or those who have never been competent, courts are confused as to what standard to apply. This may be because minors and incompetents are traditionally accorded the best interests standard in cases involving issues of informed consent.⁹⁹ In an effort to allow procedures to be performed which courts view as beneficial to "society" rather than to the incompetent individual, judges have become uncomfortable with the best interests standard which is paternalistic in nature and benefits the incompetent. Therefore, courts have looked for another doctrine to apply and have found substituted judgment. The problem in applying this standard to those who have never been competent, however, is that the substituted judgment doctrine is not theoretically based on benefit, yet benefit cannot be overlooked in cases involving incompetents. Therefore, courts have incorrectly applied the substituted judgment doctrine to cases involving minors and incompetents by combining this doctrine with a best interests beneficence analysis. This is wrong in theory and in practice, and allows procedures to be performed on those typically accorded more protection under the law, which may never have been permitted had they been capable of consent. The result is to give the incompetent less protection than the competent thereby rendering nugatory the true purpose of the doctrine.

VI. DEVELOPMENT OF A NEW STANDARD

In order to alleviate the confusion surrounding the application of the substituted judgment doctrine to cases involving minors and incompetents, a new standard must be developed to apply to these particular circumstances.

⁹⁸Robertson, *supra* note 33, at 64 (footnote omitted). "Primary goods are 'things that every rational man is assumed to want.'" *Id.* at 64 n. 94.

⁹⁹Welch, *supra* note 91, at 1617.

This new standard would be applied in cases involving compelled medical procedures to be performed on minors and incompetents which are not life saving or life prolonging. This standard will cover situations similar to *Curran*, *Strunk* and *Wentzel*, but will not apply to cases such as *Saikewicz*, where the medical procedure is, in fact, life saving or life prolonging and perhaps a basic best interests standard should be applied. Nor will this standard apply to cases such as *Cruzan* where a person who was once competent has expressed beliefs and wishes and a substituted judgement may be ideal. This standard will not be applicable to cases involving fetal organ and tissue donation or anencephalic babies. These issues are best left to another discussion as they involve the rights of the unborn and complicated issues of brain development and survival which are not addressed in this discussion. Rather, this standard would be implemented to protect the young and the incompetent from abuse, and to keep parents and courts from placing less value on the life of an incompetent.

This new standard begins with the proposition that substituted judgment can never be used in cases involving minors and the mentally deficient. In theory and by definition, substituted judgment can only be applied in situations where persons have developed a system of judgment in addition to beliefs and ideals. This can never be true in cases of very young or permanently incompetent persons.

The second element of this proposed standard involves a presumption that no compelled medical procedure is in a minor's or incompetent's best interests.¹⁰⁰ Although several cases merely brush over this fact, all surgery has inherent risks, and these risks may be magnified where a person is too young or unable to understand the procedure. Second, pain may be more difficult to detect and handle in cases of the young or mentally deficient as they may not be able to express and identify how and where they hurt.

Since this standard will be based on a presumption that no compelled procedure is in best interests, one can only rebut this presumption by clear and convincing evidence. In essence, this makes the standard a "higher scrutiny

¹⁰⁰Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, ISSUES IN LAW AND MEDICINE VOL. 1 NUMBER 2 131 (1985). Weber makes a similar proposal which he labels the "presumptions approach" which basically states that the incompetent individual is presumed to desire life. *Id.* at 154 n. 129. Weber argues:

The incompetent patient, maintained by certain therapies, is presumed to desire life. To the extent that physicians and caretakers nevertheless proceed to 'unplug' incompetents, this standard will act only to prevent the official devaluation of the lives of incompetents and the sanctioned pressure on the caretakers of incompetents to dispose of their wards . . . Thus, the presumptions approach may reduce the efficient allocation of resources. While this public policy goal may suffer, the social goal of upholding life gains. The presumptions approach would manifest the state's special solicitude for its weaker members and effectively proclaim the great respect held for all human life. *Id.* at 155. The standard proposed in this article, however, protects not only the sanctity of life of the incompetent, but her right to bodily integrity and her right to procreational autonomy.

best interests standard." The proof required will be much more than an amorphous psychological benefit which may inure upon the minor or incompetent who may undergo the medical procedure. While psychological benefit may be real, there are different levels of "psychological benefit" and specific facts must be considered in each case. This may allow for certain cases of sterilization where it can be proven by several sources that it is in the incompetent's best interests, or other possible procedures not contemplated by this article which may even pass muster of a higher scrutiny best interests test.

Although family may seem like the ultimate decision maker in cases such as the ones mentioned in this article, cases like *Strunk* have shown that parents may not always be disinterested parties. Parents sometimes look out for their own interests or the interests of others when determining the fate of their incompetent child or adult. Therefore, there must be more sources than just the family to turn to in cases such as these. Although courts already appoint guardians ad litem, deference is usually paid to parents or guardians in situations involving substituted judgment. Since it is clear that substituted judgment should not be applied in these cases, it follows that parent's or guardian's decisions should not be given greater weight than the decision of the guardian ad litem. Additionally, medical doctors and psychologists should have a great deal of input into these decisions, as should medical ethicists. The combination of the family, the legal community, the medical community and the philosophical community with a higher scrutiny level should best protect the interests of minors or incompetents in these situations. The strong presumption approach is still necessary in combination with several decision makers as these decisions must be made based on benefit to the individual and not to "society" as a whole. The presumption approach eliminates room for abuse in these situations.

Decisions involving organ and tissue donation frequently must be made quickly. Nevertheless, courts should not disregard the safeguards built into this proposed standard but must exercise them expeditiously. Priority should be given to these types of cases, and our medical and legal systems should cooperate in procuring the proper experts. Sometimes this may fail, but this failure should be viewed in the same way we view our criminal justice system. The margin of error should be on the side of the incompetent, just as it is on the side of the criminal defendant. With these safeguards in place, incompetents will not be treated as tissue and organ banks used to benefit those considered more valuable to society.

VII. CONCLUSION

Medicine and technology have advanced to a point where procedures that were never before possible are now routine and common. With further advancement, procedures we have not even contemplated may become commonplace. Cases such as *Curran v. Bosze* recognize the difficulty in applying present legal standards to situations and procedures that have been developed and are being developed. The doctrine of substituted judgment, developed in the 19th Century, is clearly not applicable in many of these new situations where minors and incompetents are involved. The law needs a new standard which allows certain procedures to be performed when truly equitable and necessary, but which prevents the abuse of those who cannot protect

themselves. The standards which presently exist are not sufficient and permit the utilitarian use of minors and incompetents to benefit those who are competent. If this abuse is to be prevented, courts must recognize the fiction of the substituted judgment standard as it is now applied and adopt a new standard which protects the rights of incompetents and treats them as persons with value and dignity under the law.

LYNN E. LEBIT