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THAT WHICH MUST BE DONE

Bridging the Evidentiary Burdens of the Doctrine Of Substituted Judgment And Best Interest When Dealing with the Legally And Mentally Incompetent

LAW AND MORALITY
Advanced Writing Seminar
Professor Michael P. Ambrosio
Seton Hall University School of Law
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THAT WHICH MUST BE DONE

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I. INTRODUCTION

Under current American Jurisprudence, in order for an individual to undergo a non-life saving, medically unnecessary procedure there must be some form of informed consent. Most adults are assumed to have the capacity to consent, however in cases dealing with legally incompetent and mental incompetent individuals the doctrine of substituted judgment is applied. The doctrine, as established by Lord Eldon, allows the incompetents guardian to “step into” the incompetents shoes to gauge “that which would the incompetent would have done himself.” The doctrine demands that clear and convincing evidence of moral beliefs and values in order for the guardian to base their decision on. However, in many cases involving the incompetent there may be no history of moral beliefs or values to base these judgments on. In such cases the court often allows compelled medical procedures based on a tangible, non-medical benefit, often emotional and altruistic, that would be in the best interest of the incompetent donor, according to the incompetent’s guardian.

But how can we be certain, absent base line indicators of the incompetents moral beliefs and preferences, that the mental incompetent’s guardian is not in danger of asserting their will and beliefs onto the incompetent. In what manner could we ever verify the reasonableness or logic of the guardian’s choice? Sara Lind Nygren, author of Organ Donation by Incompetent Patients: A Hybrid Approach, warns that the court should remain mindful that the majority of cases dealing family members will have the best interests of the patient in mind, however, sometimes family members will rely on their own judgments or predilections rather than serving as conduits for expressing the patient's wishes.¹ Moreover, can any emotional or altruistic

benefit be so significant that it provides justification to breach a person’s personal autonomy sans their consent? The answer is no, according to David W. Meyers. In his article, The Human Body and the Law, Meyer’s surmises that the benefits are greatly exaggerated by the parental guardians due to an emotionally charged situation; one where parental love for a sick child might adversely affect the personal autonomy of the mental incompetent.²

Noted legal scholar Lynn E. Lebit, believes that in order to bridge this evidentiary gap that has caused much debate, there must be a new standard set out.³ One that engages in deep moral analytical thought. In his book, Natural Law and Rights, John Finnis’ outlines a novel approach, practical reasonableness, in the pursuit of the common good, which includes the good of flesh and blood individuals and the conditions necessary for the full flourishing of everyone in the community, which may provide a framework for moral analysis of the substituted judgment doctrine, and best interest, in general and in particular in order to decide the most fair and equitable solution in situations where the substituted judgment doctrine and the best interest standard may be appropriate.⁴

The First part of this paper explores the evolution of the law of lunacy when dealing with incompetents; the second part concentrates on Modern American Jurisprudence treatment of mental incompetent. The third part of this paper focuses on the application of the various doctrines pertaining to the mentally incompetent. Lastly, part four focuses on turning to a new standard in which to gage the wishes of the incompetent.

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⁴ See generally JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS (1ST ed. 1980).
II. ORIGINS OF THE SUBSTITUED JUDGMENT DOCTRINE IN THE LAW OF ENGLAND

A. Feudal Origins of the Substituted Judgment Doctrine

The origin of the doctrine of substituted judgment can be traced back to its feudal origins in the "law of lunacy, under feudal rule "the law of lunacy" dealt with mentally incompetent people, i.e. lunatics, in two very separate classifications and distinctive ways. The King designated mental incompetents as lunatics, those who were once sane, and idiots, those who were never sane. The King’s legal designation of a person as a lunatic, although signifying mentally incompetency, always held hope that the person might, one day, return to his right mind. As a result the lunatic’s property was held safely, with the King declining to disburse the lunatic’s assets while living, so that if he ever regained his mind, his property would be safe and preserved. Whereas the King’s designation that a mentally incompetent person was an “idiot” denoted the unspoken belief that the incompetent person would never regain competency, simply because they were incompetent from birth. As a result, when dealing with an idiot’s property, it was common for the King to assume possession while the idiot was alive in order to distribute it to the idiot’s relatives, both prior to, and upon their death. The only limit to the King’s authority to unilaterally seize control of an idiot’s property, assets, and income, was that any conveyance would seek to avoid “waste and destruction”. This allowed the King to extract

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5 1 W. Blackstone, Commentaries *302.
6 Id.
7 Prerogativa Regis, 1324, 17 Edw. 2, Ch. 10: Of Lands of Lunatics; L. Shelford, A Practical Treatise On The Law Concerning Lunatics, Idiots, And Persons Of Unsound Mind (1833).
8 Id.
9 Prerogativa Regis, 1324, 17 Edw. 2, Ch. 9: The Custody of Lands of idiots.
10 Id.
11 Prerogativa Regis, 1324, 17 Edw. 2, Ch. 9: The Custody of Lands of idiots. "[T]he King shall have the custody of the Lands of natural fools, taking the profits of them without waste or Destruction, and shall find them their necessaries, of whose Fee so ever the lands beholden; and
taxes and fees from the idiot’s estate and insured that the familial line of inheritance remained unbroken. Eventuall the King started to delegate his powers to lay claim to idiots or lunatic’s assets to his chancellor, who “administered” the King’s disbursements of property. The chancellor, in effect, exercised jurisdiction over the mental incompetents’ assets and equitably distributed them according to the King’s bidding. It was according to the Chancellor’s equitable jurisdiction over the mental incompetents’ property that the doctrine of substituted judgment found its origins in English courts.

B. The English Equity Court’s Expansion of the Substituted Judgment Doctrine

In 1816, the doctrine of substituted judgment evolved into something more akin to a legal construct. The doctrine was created by the English courts of equity as a way to expand its jurisdiction to allow for resolution of property matters in the law of lunacy. This was Lord Eldon legal reasoning in the seminal case, *Ex parte Whitbread*, which expanded the doctrine’s original purpose to allow for the court of equity to make a “gift” conveyance of property; from a living “lunatic” to his legally competent adult relatives, whom the “lunatic” had no legal or moral duty to pay. Lord Eldon surmised that the doctrine allowed the court “to do that which it is probable the lunatic himself would have done.” Despite the fact that the only evidence that the

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12 See 1 F. WHARTON & M. STILLE, WHARTON AND STILLE’S MEDICAL JURISPRUDENCE 483 (5th ed. 1905). The Prerogativa Regis reflected feudal tradition that expected all able body men to serve in the military. As a result it was accepted notion that the King could demand payment for the loss of services “owed” by all in his kingdom. It was understood that the idiots estate and money extracted by the king went to pay for this “maintenance” that the King provided to all his subjects.

13 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 608 (12th ed. 1877).

14 *Id.*


16 *Id.*
"lunatic" either desired or would have desired the conveyance was the testimony of his relatives, who were themselves seeking the property conveyance.\textsuperscript{17} This was a clear departure from the doctrines feudal origins where the King was prohibited from disbursing a "lunatics" assets or property to relatives while they were living.\textsuperscript{18} Up until this point, only an idiot's property, assets, and profits were subject to disbursement to relatives because it was assumed that mental competency would never occur and under the English property law to not use property was to waste it, and waste was to always be avoided.\textsuperscript{19}

C. Early American Cases on the Doctrine of Substituted Judgment

Much of Lord Eldon's legal basis for the expansion of the doctrine of substituted judgment was questioned and as a result the English law of lunacy was slow to be adopted in American jurisprudence. There was not a cite or mention of \textit{Ex parte Whitebread}, in any case until 1914. In \textit{In re Kernochan} which also involved a property matter between a wealthy incompetent relative and their poor relations.\textsuperscript{20} In \textit{Kernochan}, a nephew asked the court to give an allowance in the amount of $12,000.00 yearly on the premise that he was in dubious financial need, his aunt was incompetent, and that the court should exercise equitable jurisdiction over her assets in order to disburse the amount to him on a yearly basis.\textsuperscript{21} The nephew cited a number of


\textsuperscript{18} Prerogativa Regis, 1324, 17 Edw. 2, Ch. 10. While the King could take payment for taxes and inability to serve in the Kin's army, any profits or remaining property would remain in the lunatic's estate until they became competent. If death occurred only then would a disbursement of assets occur.

\textsuperscript{19} Id.

\textsuperscript{20} \textit{In re Knochman}, 146 N.Y.S. 1026 (1914).

\textsuperscript{21} Id. at 146 N.Y.S. at 1027, 1029. The request for financial need was dubious at best, rather than coming from an improvised background the nephew came from a life of luxury, wanted to
issues that were analogous with *Whitebread* including the fact the aunt was mentally incompetent, she had an extreme excess of income, the conveyance would not significantly affect her standard of living, and that he was "next of kin". However, the court declined to exercise jurisdiction for a multitude of reason. The most prominent one was that there was no evidentiary basis to assume that the aunt would have made the conveyance if she were, in fact, mentally competent due to the fact that the nephew was born *after* the aunt had been deemed mentally incompetent by the court. Simply put, if the incompetent never knew of, or contemplated, the petitioners' existence, how could the court, in good faith, do "that which the lunatic would have done himself or herself?" Although the nephew was unsuccessful in his attempts to obtain his aunt's property, the court was successful in expanding its authority by agreeing that they had the ability to make the conveyance, if it so chooses. The burden of proof would be (1) close family ties, (2) a pattern of history of the incompetent's generous nature, (3) evidence of any prior intent to convey assets to the relative who was petitioning the court, and (4) some evidence of a shared affection between the incompetent relative and the petitioner.

However, even with the evidentiary burdens set out by the court in *In re Kernochan*, at this point, the majority of American courts were hesitant to exercise this expansion of the court of equity's powers. The reasoning remained suspect, in relation to Lord Eldon's doctrine, namely under

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be a musician, and expected the incompetent aunt to support the lavish lifestyle that was previously bankrolled by the petitioners own mother.

22 *Id.* at 1029. Nephew and holding court cited *Ex parte Whitebread* and the doctrine of substituted judgment as both the basis of the nephew's petition and eventually persuasive case law in the courts holding.

23 *Id.*

24 *Id.* at 146 N.Y.S. at 1028-29; *Ex parte Whitebread*, 35 Eng. Rep at 879.

25 *Id.*

26 *Id.*

27 *Id.*
Blackstone’s property law, on what basis did any court have the right to unilaterally take a person’s property to give to another without their express consent?\(^{28}\) For a while, at least, it seemed as if the burdens of proof required to make such a weighty decision outweighed the pleas of the many needy relatives to obtain their wealthy incompetent relative’s assets.\(^ {29}\)

III. EXPANSION OF THE DOCTRINE IN MODERN AMERICAN JURISDICTION

Today, in modern American jurisprudence, courts have expanded the Lord Eldon’s doctrine to reach past the conveyance of a lunatic’s property and money to encompass the conveyance of an idiot’s actual body, via the law of informed consent, when dealing with legal incompetents and medical decision cases.\(^ {30}\)

A. Current Applicable Law

1. Legal Classification of Mentally Incompetent Persons

Currently, American Jurisprudence classifies the mentally incompetent in three manners: (1) the mentally competent, but legally incompetent, or minor child, (2) the now-incompetent, refers to a previously competent person who now lacks, for any number of reasons, the necessary mental capacity to give informed consent in their medical choices.\(^ {31}\) And (3) the never-competent; meaning that they were either (i) born without the capacity to consent and then

\(^{28}\) See *Lewis v. Moody*, 261 S.W.673 (1924) (Court held they had no jurisdiction to convey incompetents assets to his mother and female relatives); *see Kelly v. Scott* 137 A.2d 704, 708 (1958) (holding that there is no statutory basis to convey an incompetents property without their express consent due to their obligation to hold the property without adversely affecting it).

\(^{29}\) Id.


\(^{31}\) *In re Quinlan*, 355 A.2d 647, 670 (N.J. 1976)
became severely mentally disabled before the age of majority, or (ii) where born severely mentally disabled and never possessed the capacity to consent.\textsuperscript{32} If the informed consent in question involves a minor, now-incompetent or never-incompetent individual, the right to offer informed consent for a medical procedure on the incompetent’s patient’s behalf falls to the parent or legal guardian.\textsuperscript{33}

B. The Doctrine of Informed Consent

The topic of informed consent encompasses both legal and ethical issues. Legally speaking, a medical professional is beholden to regulations and statutes, in addition to having the benefit of court decisions that both sanction and define a medical professional’s basic duties.\textsuperscript{34} However, from a medical professional’s point of view, the issue of informed consent is largely ethical, simply because serious issues develop on a day to day basis that inspires regulation and sanctioning.\textsuperscript{35} Ethical questions must be answered quickly and prior to there being any legal insight or regulations to offer a clear path. Ethically and legally speaking, in order for consent to become informed there must exist three factors (1) the physician or medical professional must provide full disclosure, meaning the information offered is adequate for the patient to make an autonomous decision;\textsuperscript{36} (2) the patient must have to mental capacity to understand the benefits and the risk involved as explained in the full disclosure, in addition to being able to comprehend

\textsuperscript{32} See Curran, 566 NE.2d at 1325-26(court reasoning that the various factors used to apply the substituted judgment standard was inappropriate because the child’s desires were practically unknowable at 3 years old).

\textsuperscript{33} See generally Id.


\textsuperscript{35} Id.

\textsuperscript{36} Id.
the potential consequences of their decision to consent,\textsuperscript{37} and (3) the patient must then voluntarily give their implicit, preferably written, consent to participate in the medical procedure free of any duress, manipulation, or concealed information.\textsuperscript{38}

1. Medical Standard

In the 1970's the United States medical community moved from a "traditionally almost singular focus on the benefit of the patient as the governing ethical principle of medical care to a new and dramatic emphasis on a requirement of informed consent."\textsuperscript{39} This shift away from a paternalistic approach, where the primary focus only considered the patient's medical well-being, to one that resembles a partnership that encompasses a healthy respect for the patient's autonomy.\textsuperscript{40} In short, no longer does informed consent focus on what the physician chooses as best for the patient. Currently the medical profession chooses to focus on what the patient believes to be the best choice of action for himself.\textsuperscript{41}

Physicians are also "moral agents and, as such, retain areas of free choice—as in the freedom in some circumstances not to provide medical care that they deem either medically inappropriate or ethically objectionable. It is unethical to prescribe, provide, or seek compensation for therapies that are of no benefit to the patient."\textsuperscript{42} Interpretations of medical need

\textsuperscript{37} Id.
\textsuperscript{40} Levine RJ. Ethics and Regulation of Clinical Research. 2nd Ed. New Haven (CT): Yale University Press; 1988.
\textsuperscript{41} Id.
and usefulness in some circumstances also may lead a physician to refuse to perform surgery or prescribe medication. The freedom not to provide standard or potentially beneficial care to which one ethically objects is sometimes called a right to "conscientious refusal," although this right is limited. 43 Even in the context of justified conscientious refusal, physicians must provide the patient with accurate and unbiased information about her medical options and make appropriate referrals." 44

If the medical procedure in question is non-therapeutic, meaning the procedure offers no medical benefit and/or is not a medical emergency to the legally incompetent person, the medical professional must obtain the court’s permission to perform the medical procedure. 45 If consent is not obtained the medical professional exposes himself to charges of assault, trespass and malpractice; without regard to the success or benefit of the procedure. 46

2. At Common Law

At common law, it is assumed that all adults have the capacity to give informed consent. This capacity is tied to the constitutional right of bodily integrity and protected by substantive due process, the Fourth, Eighth, and the Fourteenth Amendments. 47 Indeed, American

jurisprudence has consistently found that the Fourteenth Amendment and substantive due
process to be closely associated with the right to personal autonomy.\textsuperscript{48} In fact, under common
law "[N]o right is held more sacred, or is more carefully guarded, by the common law than the
right of every individual in possession and control of his own person, free from all restraint or
interference of others, unless by clear and unquestionable authority of law."\textsuperscript{49} It follows that if a
medical professional breaches their ethical and legal duty to secure the patients informed consent
before performing a non-therapeutic medical procedure then he has entrenched on a patients’
rights under the Fourteenth amendment. The patient’s interest in self-determination (i.e. making
choices about treatment.); the patient’s interest in their own well-being (i.e. having personal
interest or achieving some desired personal gain by consenting to treatment); and (3) the patients
interest in maintaining their bodily integrity (i.e. the protection and freedom from bodily
invasion) has been violated. However, there are exceptions to this legal assumption.\textsuperscript{50}

Although the above factors play a role in determining whether consent was informed, for
courts, the issue of mental capacity to consent tends to hold the most weight in determining
whether informed consent in a medical procedure can, and has, been given.\textsuperscript{51} If mental capacity

\textsuperscript{48} B. Jessie Hill, The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two
Doctrines, 86 Tex. L. Rev. 277, 345 (2007)
\textsuperscript{49} See Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (common law jealously guards
every individuals rights “to the possession and control of his own person”).
\textsuperscript{50} Foody v Manchester Mem. Hosp., 482 A.2d 713, 718 (Conn. Super. Ct. 1984). See also
Professional Guardianships, Inc. v. Ruth E.J. (In re Guardianship Of Ruth E.J.), 540 NW.2d
213, 217 (Wis. Ct. App. 1995) (stating that denying lifesaving medical treatment to a person who
is in a class of citizens unable to express consent violates that person right to equal protection of
the laws).
\textsuperscript{51} Faden, Ruth R.; King, Nancy M.P. (1986). A history and theory of informed consent (Online
renders it impossible for a person to give informed consent the court will appoint a guardian, usually the parents to provide consent.

IV. JUDICIAL REVIEW OF VARIOUS LEGAL INCOMPETENCY STATUS AND THE ISSUE OF INFORMED CONSENT IN COMPELLED MEDICAL PROCEDURES.

A. Mentally Competent Legal Incompetent

The right of the parent guardian to make medical decisions that benefit their children’s health and safety is not absolute.52 When the legal incompetent status is due to the potential donor’s age as opposed to their mental ability to offer informed consent, courts have held that the minor child has both the ability and right to either consent or deny their family member an organ or refuse to accept medical treatment.53 In fact, if the parent’s surrogate decision threatens the minor’s physical health or safety, the child’s right to consent or refuse treatment overrides the parents right to make decisions on behalf of their minor offspring.54 This right applies prior to the child reaching the age of legal consent, before the minor reaches 18 years.55 While there is no “magic age” to determine what the court will allow, typically, the older the child, the more likely the court is to limit the parental right to control the child medical decisions.56

52 Id.
53 Roberta Gottesmand, the Child and the Law (1981) at 58. See also Wisconsin v. Yoder, 406 U.S. 205 (1972). The Supreme Court held that the parents will is secondary to the child’s constitutional right for privacy and autonomy of self. A parents invoking a free exercise defense did not subvert the child’s constitutional claim
54 In re EG, 549 NE2d 322 (Ill. 1989); In re Green, 307 A2d 279 (Pa. 1972); In re Sampson, 328 NYS2d 686 (NY 1970). All cases involve the court overriding parental authority to decide if their child would consent or refuse possibly lifesaving medical procedures on the grounds that the minor child was mentally able to provide informed consent
55 Id.
1. *Parens Patriae*

The power to override a parent’s authority to make medical decisions for a mentally competent, but legally incompetent, minor child is actually the state exercising its powers of *parens patriae* to support the minor’s wishes. This power to limit a parent’s authority to make decisions on behalf of their minor children is based on the state’s interest in protecting its citizens much like the King, and later the Chancellor, exercised *parens patriae* over the property of lunatics and idiots.\(^{57}\) An example of the state’s exercise of the power of *parens patriae* is the case of *Caldwell v. Bechtol*. In *Caldwell*, the court held that a 17 year old was free to consent to medical treatment against his parent’s religious views.\(^{58}\) The court applied the best interest standard, reasoning that medical treatment was in the best interest of the sick child because the state’s interest in protecting sick children fell under the state’s interest in the preservation of life, and therefore the state had a duty to invoke its power of *parens patriae*.\(^{59}\) However, even when the state declines to side with the minor child’s objections, a “best interest standard” was applied; with the court holding that, under the state’s power of *parens patriae*, the state’s interest in protecting sick children was in “best interest of child’s”,\(^{60}\) overriding the sick child’s own objections to medical treatment, even when the child’s objections are based on their constitutional right to bodily integrity and autonomy.\(^{61}\)

The law changes when the potential donor is unable to give legal consent, either because they are now-incompetent or were never-competent.\(^{62}\) In these sorts of cases, courts trust that

\(^{57}\) *Id.*

\(^{58}\) 724 SW.2d 739 (Tenn. 1987).

\(^{59}\) See also *In re Rena*, 705 NE 2d 1155(Mass. App. Ct. 1999).

\(^{60}\) See *In re McCauly*, 565 NE. 2d 411 (Mass. 1991).

\(^{61}\) *Application of Long Island Jewish Med. Ctr.*, 557 NYS2d 239 (Sup. Ct. 2008).

\(^{62}\) *Id.* at *supra* note 5.
the legal incompetent’s guardian, usually the parent, to act as a surrogate and make the best decision for the incompetent, using either the best interest standard, or substituted judgment doctrine.\textsuperscript{63}

B. B. Substituted Judgment for the Mentally Incompetent

A now-incompetent person refers to a previously competent person who now lacks, for any number of reasons, the necessary mental capacity to give informed consent in their medical choices.\textsuperscript{64} In these instances, courts tend to apply the doctrine of substituted judgment, when dealing with issues that require informed consent, most notably, medical issues.\textsuperscript{65} While each state has a slightly different version of the doctrine, courts tend to agree that the doctrine is a subjective standard allowing a surrogate to “step into” the place of the now-incompetent person and make the decision “he would have made had he been given the opportunity.”\textsuperscript{66} The court is essentially trying to figure out what exactly the now-incompetent person desires, based on the known morals, values, and moral beliefs that the incompetent person had while competent.\textsuperscript{67} Typically the surrogate makes every effort to ascertain, what, if anything the patient would do if competent.\textsuperscript{68} Courts will allow most any evidence that made the patient’s wishes or desires

\textsuperscript{63} \textit{Strunk}, 445 S.W. 2d at 147-148; D. Don Welch, Walking in their Shoes: Paying Respect to Incompetent Patients, 42 VAND.L.REV. 1617, 1629 (1989). Highlights the various standards and disparate court holdings within the same jurisdictions when dealing with mental incompetents and compelled medical procedures.

\textsuperscript{64} \textit{In re Quinlan}, 355 A.2d 647, 670 (N.J. 1976)

\textsuperscript{65} \textit{Id}. at 664.

\textsuperscript{66} \textit{In re A.C.}, 573 A2d at 1235, 1249 (DC App 1990) (citations omitted)(Although now-incompetent, there was behavior and actions exhibited while competent that leads the court to believe that the incompetent most likely would, given the opportunity, have given their informed consent)

\textsuperscript{67} \textit{Id}. at 1250.

\textsuperscript{68} \textit{Quinlan}, 355 A.2d at 670.
tangible, explicit, and clear. 69 Seemingly innocuous statements that were made out of context are usually not permitted due to credibility issues; i.e. no one can reasonably verify that (1) the statement was made and (2) the person was serious. 70 However, tangible sources such as medical decisions and records, living wills, letters, comments, activities, religious affiliation, are given the greatest weight. 71

Furthermore, the court even allows more ambiguous evidence to be considered; such as statements made in private to family members. 72 However, the more ambiguous a statement the less weight it is given. It is not uncommon for the court to supplement the now-incompetents known moral beliefs with the totality of the circumstances at hand. Courts look to see what effect, if any, the procedure will have on the family, the side effects and likelihood of success or failure. 73 Although the surrogate is charged with the task of gathering evidence to present to the court for review, ultimately it is the responsibility of the court to gauge the credibility of the evidence presented. 74 When the evidence presented is insufficient, courts may allow for a

69 See Id. (previously expressed wishes “includes prior statements, written or oral”); see Hurdle, 5VaCir. at 509 (donation permitted on the grounds that donor had conversations with her sister about kidney donation and seemed to possess the capacity to provide informed). 70 Sara Lind Nygren, Organ Donation by Incompetent Patients: A Hybrid Approach, 2006 U. Chi. Legal F. 471, 502 (2006) (quoting see In re A.C., 573 A2d at 1251 (“The court should consider the context in which prior declarations, treatment decisions, ad expressions of personal values were made, including whether statements were made casually or after contemplation.”); In re Conroy, 486 A2d at 1230 (explaining that “an offhand remark” does not “constitute clear proof” that the patient would actually want that result). 71 See generally Id. 72 See generally Id. 73 Rogers v. Commissioner of Dept. of Mental Health, 458 NE2d 308, 318-19 (1983). 74 Sara Lind Nygren, Organ Donation by Incompetent Patients: A Hybrid Approach, 2006 U. Chi. Legal F. 471, 502 (2006) (quoting In re A.C., 573 A2d at 1250 (“The court should be mindful, however, that while in the majority of cases family members will have the best interests of the patient in mind, sometimes family members will rely on their own judgments or predilections rather than serving as conduits for expressing the patient's wishes.”).
reasonable person standard to substitute for an incomplete substituted judgment analysis. The courts may compel the procedure be done. The substituted judgment doctrine aims to give an incompetent person the closest proximity to autonomy as legally possible. The implications of this is obvious, in that the decisions must only be in line with an incompetent person's personal morals, ethics, moral beliefs, and preferences. Legal precedents suggest, if a tangible benefit is identified, the courts may compel donation under the substituted judgment doctrine. However, to correctly apply the substituted judgment doctrine any benefit derived from a substituted judgment doctrine must be ancillary and not central to a court's analysis. Under the substituted judgment doctrine the surrogate is charged with determining what the incompetent individual would have decided had they been made competent and autonomous. It follows that the surrogate could choose a decision that was not in the incompetent’s best interest if there was

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75 *In re A.C.*, 573 A2d at 1251 (citations omitted) (the court should weigh this evidence only after considering the more tangible evidence at hand, i.e. medical records, decisions, religious moral beliefs, etc.).

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78 The term "substituted judgment" was credited to Lord Eldon's legal fiction in lunacy cases as noted by the American Law Reports. The A.L.R. notes:

"[T]he "doctrine of substituted judgment," which apparently found its first expression in the leading English case of Ex parte *Whitbread* (1816), 35 Eng. Reprint 878 (Ch.), supra § 3(a), was amplified in *Re Earl of Carysfort* (1840) Craig & Ph 76, 41 Eng. Reprint 418, where the principle was made to apply to one who was not next of kin of the lunatic but a servant of his who was obliged to retire from his service by reason of age and infirmity. The Lord Chancellor permitted the allowance of an annuity out of the income of the estate of the lunatic earl as a retiring pension to the latter's aged personal servant, although no supporting evidence could be found, the court being "satisfied that the Earl of Carysfort would have approved if he had been capable of acting himself."


79 *Id.*
some sort of tangible, finding evidence to support the will of the incompetent.\textsuperscript{80} Often when courts allow the emotional, altruistic, or best interest to be a factor in its substituted judgment analysis they focus on the "best interest" of society or the incompetents family in weighing the benefit of the procedure. \textsuperscript{81} The case law cited, below, starting with \textit{Shrunk v. Shrunk} and its progeny highlight this application of analysis. The doctrine of substituted judgment, at its core, is based on personal preference sans any duty to engage in activity that is in the incompetents, or anyone else's best interest.\textsuperscript{82}

C. Best Interest Standard

The best interest standard implemented, which most courts tend to base their holdings on, is a purely objective standard.\textsuperscript{83} When a petitioner cannot meet the burden of proof necessary to invoke the doctrine of substituted judgment, the court will impose a limited – objective test; which is a hybrid of the best interest standard and the doctrine of substituted judgment, supplementing with the "best interest" standard as evidentiary proof of the never-competent exhibited prior actions or moral beliefs that would evidence their implied consent.\textsuperscript{84} The court focuses solely on the medical procedures possible benefits and burdens with no regard for what the incompetent would have wanted.\textsuperscript{85}

\textsuperscript{81} \textit{Id.}
\textsuperscript{82} Louise Harman, \textit{Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment}, 100 YALE L.J. 1, 22 (1990).
\textsuperscript{83} See generally \textit{In re Conroy}, 486 A.2d 1209 (NJ 1985) (The best interest standard implemented by the courts has incarnations which are both discussed infra in detail is (1) the pure-objective standard, and (2) the limited – objective test standard; which is a hybrid, supplementing evidence that failed to pass the doctrine of substituted judgments burden of proof with borrowed law from the "best interest" standard).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at 1232
When applying the purely objective version of the best interest standard, the courts turn on legal precedent which dictates that an incompetent person, if made competent, would desire the same as most other competent people, regardless of any contradictory evidence of the patient’s personal subjective moral beliefs. 86 This test is often implemented in cases where the patient was never - competent, meaning that they were either (1) born without the capacity to consent and then became severely mentally disabled before the age of majority, or (2) where born severely mentally disabled and never possessed the capacity to consent. 87 Typically in these instances, it would be difficult to apply the doctrine of subjective judgment because there is no record of the incompetents’ wishes moral beliefs or desires. 88 The best interest standard is often applied in cases like these, since the court is assuming what will be in the best interest of the incompetent individual sans any evaluation of the individuals personals values, moral beliefs, or desires; regardless whether they exist or not.

V. WHEN THE COURT APPLIES THE SUBSTITUTED JUDGMENT DOCTRINE

In modern times, court precedents have extended substituted judgment doctrine well beyond property disputes and into the realm of compelled organ donation of incompetents as established in Shunk v. Shunk. 89 In Strunk, Jerry Strunk, who at 27 possessed the intelligence of a six-year-old child, was a legally incompetent person who lived in a mental institution. 90 In stark contrast, the appellant’s brother, and intended organ recipient, Tom Shunk, was twenty-

86 United States v. Charters, 829 F.2d 479, 498 (4th Cir. 1987).
87 See Curran, 566 NE.2d at 1325-26(court reasoning that the various factors used to apply the substituted judgment standard was inappropriate because the child’s desires were practically unknowable at 3 years old).
88 In re Conroy, 486 A.2d at 1232; see generally Curran, 566 NE.2d at 1325-26.
90 Id. at 146.
eight years old, married and a university student.\textsuperscript{91} The hospital demanded the parents petition the courts for permission to perform the transplant due to the unusual circumstances surrounding the case.\textsuperscript{92} It was Jerry’s parents petitioned the court to compel Jerry to donate a kidney in order to save his brother, Tom’s, life.\textsuperscript{93} Although Jerry could not as a matter of law, give consent legally or otherwise, the court held that the parents, under the substituted judgment doctrine, had the legal authority to remove their mentally incompetent child’s kidney for donation to the ailing sibling.\textsuperscript{94} The Kentucky court of appeals upheld the lower courts holding that the parents of Jerry Strunk be allowed to donate a kidney to save the life of his brother, Tom Shrunk, who suffered from a fatal kidney disease.\textsuperscript{95} In fact, this ruling was made despite Jerry Strunk’s guardian ad litem’s staunch opposition to compelling the procedure.\textsuperscript{96}

Connecticut, Virginia, and Texas soon adopted this standard as the basis to expand their jurisdiction to compel organ donation in cases of never-competent individuals.\textsuperscript{97} Some cases dealt with the transplantation of vital organs from one minor sibling to another. The \textit{Hart v. Brown} court went on record and referenced the doctrine of substituted judgment as its legal basis for allowing a nephrectomy on a seven-year-old girl for transplantation into her twin sister.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} at 147.
\item \textsuperscript{92} \textit{Strunk}, 445 S.W.2d at 147, 149.
\item \textsuperscript{93} \textit{Id.} at 146, 147.
\item \textsuperscript{94} \textit{Id.} at 147.
\item \textsuperscript{95} See \textit{Id.} at 145; \textit{Little v. Little}, 576 S.W.2d 493 (Tex.Civ.App.1979).
\item \textsuperscript{96} \textit{Strunk}, 445 S.W.2d at 146.
\item \textsuperscript{97} See \textit{Hurdle v. Currier}, 5 Va. Cir. 509, 513 (1977) (opining that under the circumstances parents possessed the legal authority to require minor daughter to surrender her kidney to her sibling); \textit{See Little}, 576 S.W.2d at 500 (Tex. Civ. App. 1979) (opining that the mother had the legal authority to substitute judgment for her fourteen-year-old daughter for purposes of consenting to a kidney “donation”); \textit{See Hart v. Brown}, 289 A.2d 386, 391 (Conn. Super. Ct. 1972) (holding that parents have the authority to require seven-year-old daughter to surrender her organ for donation to her twin sibling).
\end{itemize}
Moreover the court in Hart, referenced Strunk, as well as a few other Massachusetts court decisions that allowed compelled medical procedures involving organ transplants from the legally incompetent.\textsuperscript{99} The Hart court cited Bonner v. Moran, which found that parental consent for a skin graft from a 15-year-old boy was necessary.\textsuperscript{100} The Hart court also held, that based on Bonner, the court had legal basis to authorize non-therapeutic operations on legally incompetents based solely on parental or guardian consent as opposed to a medical emergency.\textsuperscript{101} The Hart court concluded that Strunk and its progeny had been decided, by an application of the substituted judgment doctrine, and authorized the surgery on the minor twin "using the doctrines of law as stated in the Strunk case, in the Bonner case, and in the Massachusetts cases."\textsuperscript{102} It seems as if Strunk had successfully expanded the domain of the court to not just exercise control over "the lunatic and all his properties" but had extended its jurisdiction to encompass "all issues pertaining to the mentally incompetent" idiot.\textsuperscript{103} Up until this point, the doctrine of substituted judgment had solely applied to property and financial matters.\textsuperscript{104} Critics have argued that the Strunk court effectively "borrowed" law that was in itself inapplicable to the current issue of breaching the personal autonomy of mentally incompetent individual's body.\textsuperscript{105} This is because they had not or could not show evidence of moral beliefs or values due to their incompetent status; which is a central factor in the doctrine of substituted judgment.\textsuperscript{106} Moreover, Lord

\textsuperscript{100} Bonner v. Moran, 126 F.2d 121, 123 (D.C. Cir. 1941).
\textsuperscript{101} Hart v. Brown, 289 A.2d at 390.
\textsuperscript{102} Id. 289 A.2d at 391.
\textsuperscript{103} Strunk, 445 S. W.2d at 145, 146, 147.
\textsuperscript{104} Supra note 1-3.
\textsuperscript{105} Quoting Lynn E. Lebit, Compelled Medical Procedures Involving Minors and Incompetents and Misapplication of the Substituted Judgments Doctrine, 7 J.L. & Health 107, 130 (1992).
\textsuperscript{106} Id. at note 99.
Eldon’s very basis for establishing the doctrine of substituted judgment was to “do that which the lunatic would have done himself.”\textsuperscript{107} Although Lord Eldon’s legal fiction proved to be a stretch, it pertained to a lunatic, someone once, but no longer, competent; under the laws of chancellor the court of equity had an obligation to assume control of the lunatic’s property and insure no harm came to it.\textsuperscript{108} Strunk, in comparison dealt solely with an idiot, his body, and the courts will to classify his body as property to be distributed without his consent, while he was still living.\textsuperscript{109} An about face from the principles of property law that Lord Eldon sought to preserve, that the court shall “do no harm to the property of an idiot.”\textsuperscript{110} Strunk and its progeny, also overlook the fact that when dealing with an idiot, the various factors used to apply the substituted judgment doctrine were inadequate because it is impossible to know “that which an idiot would do so himself” if the person in question was never able to establish or communicate their moral wishes in which to guide the court.\textsuperscript{111} The Strunk court, although touching on the issue on moral beliefs, used a pseudo best interest doctrine as a tangible factor in their substituted judgment analysis because actual tangible evidence was missing for fulfill the evidentiary burdens set out by Lord Eldon. Interestingly enough, in basing its reasoning and holding firmly behind the doctrine of substituted judgment, the court failed to note to make mention that it was actually application of the a pseudo best interest standard that allowed them to come to their decision.

Although the legal history shows very similar organ transplant authorizations, the various authorizing courts declined to use the substituted judgment doctrine as the basis for their

\textsuperscript{107} See generally \textit{Ex parte Whitebread}, 35 Eng. Rep 878 (1816).

\textsuperscript{108} Id.

\textsuperscript{109} Id at 148, 149.

\textsuperscript{110} See generally \textit{Ex parte Whitebread}, 35 Eng. Rep 878 (1816).

\textsuperscript{111} See generally \textit{Curran}, 566 NE.2d at 1325-26 (court reasoned that the substituted judgment doctrine was inapplicable because the mental incompetents wishes, a necessary factor in applying the doctrine, were practically unknowable).
decisions, when clear and convincing evidence of the incompetent’s moral beliefs was missing, and instead went with more conventional doctrines. Again, the Hart court assigned a dispositive value to emotional benefit, in lieu of clear and convincing evidence of moral beliefs, noting that the donor would be happy because her family would be happy to have her sister live.\textsuperscript{112} In that light, Strunk helped the Hart court to further expand the subjective judgment doctrine original intent to encompass children and the idea of immense benefit. \textsuperscript{113} In re Doe, authorized bone marrow removal from an incompetent man to his bother under the doctrine of the “best interest of the incompetent test.”\textsuperscript{114} Similarly, in Little v. Little, the court, used the best interest of the incompetent” as the legal basis to authorize a nephrectomy on a 14-year old girl whose mother had her declared mentally incompetent not even a week before; so that her mother could petition the court to compel the doctors to transplant into the girls younger brother despite the fact that there was no evidence of the incompetents moral beliefs as required by the doctrine of substituted judgment.\textsuperscript{115} Like Strunk, the court noted that compelled donation was warranted in order to maintain the emotional, physical, and familial closeness of the siblings in question.\textsuperscript{116} Although the Little court noted the substituted judgment standard, the court as a factor in its holding, also applied a pseudo benefit analysis standard, making it central, in lieu of a substituted judgment analysis.\textsuperscript{117} The Little court’s ruling effectively expanded the doctrine to encompass living minor donors as well where no evidence of moral beliefs could be found.\textsuperscript{118}

\textsuperscript{112} Id. at 387.
\textsuperscript{113} Id. at 387-389.
\textsuperscript{114} In re Doe, 104 A.D.2d 200 (1984).
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} See Id. (ruling Texas law did not exclude a court granting authority to a parent to compel her 14 year old daughter’s kidney to be removed to benefit her son).
By contrast, the *In re Richardson*, courts, although faced with similar circumstances, held that there was insufficient legal basis for a court of equity to authorize a forced organ donation, in this case a nephrectomy, on an incompetent individual, even if the parents petitioned the court themselves to save the incompetent’s sibling.\(^{119}\) The *Richardson* court noted that “[S]ince our laws afford this qualified protection against [giving away ones property] it is inconceivable to us that it affords less protection to a minor’s right to be free in his person from bodily intrusion to the extent of loss of an organ unless such loss be in the interest of the minor.”\(^{120}\) The Wisconsin supreme court, in *In re Pescinski*, flat out rejected the doctrine of substituted judgment, when there is no clear an convincing evidence of moral beliefs, in lieu of the best interest standard to determine that a 39 year old incompetent who lived in a mental facility should not be compelled to donate a kidney to his brother, especially when there was another competent sibling who declined to donate his organ.\(^{121}\) This is despite the fact that the *Pescinski* court’s dissent adamantly argued that the substituted judgment standard was, in fact, the proper standard and as such the transplant should have been allowed. The dissent based this opinion on its view that the incompetent brother was the “taker… never the giver” and would benefit by finally contributing to “humanity” if allowed to under the doctrine of substituted judgment.\(^{122}\) In fact, the dissent argued, the substituted judgment doctrine would help the court of equity “[e]ndow him with the finest traits of humanity, [assume] the goodness of his nature, instead of assuming the opposite.”\(^{123}\)

\(^{119}\) *In re Richardson*, 284 So. 2d 185, 187 (La. App. 1973).

\(^{120}\) Id.

\(^{121}\) *In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

\(^{122}\) Id. at 12, 226 N.W.2d at 184.

\(^{123}\) Id.
In contrast, *In re Doe*, under the substituted judgment doctrine went so far as to hold that an incompetent benefited substantially from the compelled donation of his organ that it outweighed the physical and psychological risks.\(^{124}\) In *Wentzel v Montgomery General Hospital, Inc.*, the court noted, “Use of the substituted judgment doctrine promotes the best interest of the individual, no matter how difficult the task may be.”\(^{125}\) The substituted judgment doctrine allows for a surrogate to “step into the shoes” of a once competent, now-incompetent individual so long as there is tangible evidence that the then competent individual would have held the same moral beliefs.\(^{126}\) The Supreme Court, *Cruzan v. Director, Missouri Dept. of Health*, articulated that this evidence is subject to a clear and convincing standard of review.\(^{127}\) The Supreme Court noted that, absent clear and convincing evidence, state courts were free to reject the guardian’s subjective judgment.\(^{128}\) In short, *Cruzan* stipulates there must be some prior evidence that the now-incompetent individual would want to take a particular course of action in order for a court to accept a guardian’s subjective judgment.\(^{129}\) If no evidence can be found then the court must reject the doctrine of substituted judgment and apply the best interest standard.\(^{130}\)

The *Curran* court also articulates this finding, which rejects the substituted judgment doctrine, and carefully evaluates the risks inherent in the surgery in a best interest analysis.\(^{131}\) The court noted “[W]hile the incidence of risk is not very high, the risk is medically significant.

\(^{124}\) *In re Doe*, 104 A.D.2d at 201.
\(^{125}\) *Wentzel v Montgomery General Hospital, Inc.*, 447 A.2d 1244 (1982).
\(^{126}\) *Supra* at note 47.
\(^{128}\) See generally *Curran*, 566 NE.2d at 1325-26.
\(^{129}\) Id., *supra* note 54.
\(^{130}\) Id.
\(^{131}\) See *Curran*, 566 NE.2d at 1325-26(court reasoning that the various factors used to apply the substituted judgment standard was inappropriate because the child’s desires were practically unknowable at 3 years old).
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.\textsuperscript{132}

It is important to note that while a handful of courts reject the Strunk court's application of the doctrine of substituted judgment, on the basis that the evidentiary burdens cannot be satisfied without clear and convincing evidence of the mental incompetents moral beliefs and values, or as Lord Eldon described, "that which the lunatic would have done himself", \textit{Strunk} remains the lead case in all compelled organ donation petitions for incompetent people.\textsuperscript{133}

VI. CRITICISM OF THE COURTS TREATMENT OF THE INCOMPETENT DONORS

In cases where the incompetents best interest are tangible, such as when the incompetent's primary caretaker's life is in danger, or the primary financial provider is in need of an organ donation, the court's basis for the decision to let a guardian substitute their judgment or determine the best interest, for another is simple and free of error because there would be, by definition, clear evidence of the persons moral beliefs, values, and wishes in which the guardian can base their substituted judgment within a reasonable degree of certainty.\textsuperscript{134} Many courts may


\textsuperscript{133} See generally \textit{Strunk}, 445 S.W.2d 145; 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. \textit{Id.} at 1263 (Davidson, J., dissenting).

\textsuperscript{134} \textit{Id.}; See generally \textit{Curran}, 566 NE.2d at 1325-26
find that the death of the caretaker relative in need of an organ donation would destroy the incompetent's ability to have a family unit, or meet their financial or basic survival needs. But what of the factual scenarios, like Strunk, where the line between need and benefit are not so clearly drawn?

The cases discussed above, although dissimilar in factual scenarios hold one common thread. When the various doctrines are applied courts have moved away from Lord Eldon's subjective brand of substituted judgment, which ask "What would this lunatic decide?" and have moved to a more objective standard of 'What would a reasonable person do?" It seems the courts have held, more often than not, that a reasonable person would choose to have his bodily integrity breached without his consent in order to help others and benefit himself. However, under the substituted judgment doctrine, benefit is not a motivating factor, although it may be an intended or unintended consequence of a decision. But critics are skeptical of the benefits conferred.

A. The Courts Underlying Assumptions When Dealing With Incompetents

1. Parents Are Acting the Child's Best Interest

Courts have based this reasoning on the premise that parents inherently know what their child's moral the family structure, are more likely to weigh the competing interest at play and reach an equitable solution, and are best able to honor the child's known values, morals beliefs, and wishes. However, David Meyers, author of The Human Body and Law, says this commonly held viewpoint seems to skirt the gamut of human emotion. On basic level parents may favor

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one child over the other, assigning a greater value to the competent child’s worth in the family and potential to lead, what they consider a full life.\textsuperscript{137} However, these considerations are supposed not a factor in the substituted judgment doctrine analysis.\textsuperscript{138} In fact, Meyers’ opines that the question is what the incompetent child would want; and it would be a fallacy to assume that the incompetent child, if competent, would not chose to place another person’s value higher than their own.\textsuperscript{139}

Additionally, although the parent guardian is supposed to look at all the factors on the table to “step into” their incompetent child’s shoes, the fact is, they are an autonomous individual assigning value to another’s life. Michele Goodwin, whose research sheds light on the issue of paternal projection, says it is unlikely that an incompetent individual would feel an intense paternal love for another sibling due to the fact that they have trouble even communicating the most basic of desires.\textsuperscript{140} Moreover, on the off chance that they would feel an overwhelming paternalistic love toward their sibling, how would they ever go about communicating that fact? It stands to reason that just because a parent is willing to put themselves into harm’s way and sacrifice everything for their ill child, does not guarantee that a sibling will fill obligated to help their sibling in the same manner.\textsuperscript{141} The issue is ascertaining within a reasonable degree of certainty what, exactly, the mental incompetent would desire. Without any tangible evidence

\textsuperscript{137} Id.
\textsuperscript{138} In re A.C., 573 A2d at 1235, 1249 (DC App 1990) (citations omitted)(the doctrine is a subjective standard allowing a surrogate to “step into” the place of the now-incompetent person and make the decision “he would have made had he been given the opportunity)
\textsuperscript{139} Meyers, supra note 80, at 93, 96. A parent’s love for their child does not signal that an incompetent holds the same feelings to warrant compelled medical procedures.
\textsuperscript{141} Id.
required by the substituted judgment doctrine a parent is making an uninformed guess. Again must ask ourselves, does that “guess” warrant the breach of another’s personal autonomy.

2. A Reasonable Person Would Consent To Organ Donation

Organ donation is common in American culture, however the overwhelming evidence is that there is a shortage of organ donors. In fact, most legally competent people have decided not to donate for a variety of reasons. Whether religious, ethical, moral, or just personal preferences, a healthy amount of people simply choose not to volunteer for procedures that could save another person’s life without, arguably, adding any significant risk to their own health. In fact, one could argue that absent any indication that the incompetent person at issue actually believed or supported organ donation, the statistics would force the guardian to adopt an objectively subjective standard, based on a reasonable person that would mandate no organ donation. If Lord Eldon’s doctrine were strictly applied, if the incompetent were made competent in theory, under an objective standard, based on the preferences of the general competent population, the courts would find a reasonable competent person would not consent to organ donation.

3. The Emotional Benefits of Compelled Organ Donation Are Tangible and Sufficient To Warrant Court Action

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142 *Id.* based on the most recent information available.
144 Id.
145 Id. based on the most recent information available.
In cases involving compelled medical procedures and the mentally incompetent, it is common for the courts to determine that the primary benefit to justify compelled organ donation is often emotional best interest or well-being.\(^{146}\) Meaning that the best interest is not peripheral, but central factor in the courts analysis of the never-competent hypothetical consent to organ donation where no clear and convincing evidence can be found of the incompetent’s moral values or beliefs.\(^{147}\) However noted researcher Grace Chang and Carol McGarigle surmise that studies have shown this is notion, that there is some sort of emotional benefit to the incompetent donor, may be patently untrue and without merit.\(^{148}\) In fact, studies have shown that the even for competent adults and children there, are severe negative emotional effects that may linger for an unspecified point of time.\(^{149}\)

\textit{a) Potential Psychological Impact on Incompetent Donors}

Although there appears to be limited research in the area, studies show that the “benefit” that courts often use to justify compelled donation may not actually exist.\(^{150}\) In fact, there is

\(^{147}\) \textit{Creating A Life To Save A Life: An Issue Inadequately Addressed By The Current Legal Framework Under Which Minors Are Permitted To Donate Tissue And Organs}, 17 S. Cal. Interdis. L.J. 337 (quoting Grace Chang, Carol McGarigle, Thomas R. Spitzer, Steven L. McAfee, Fred Harris, Kay Piercy, Margaret Ann Goetz & Joseph H. Antin, \textit{A Comparison of Related and Unrelated Marrow Donors}, 60 Psychosomatic Med. 163, 166 (1998) ("Related donors have more negative feelings after donation and do not feel as good about themselves for having donated when compared with unrelated donors."))
\(^{148}\) See generally \textit{Id.}.
\(^{149}\) \textit{Id.}
\(^{150}\) Mark Sheldon, Guest Editorial: \textit{Children as Organ Donors: A Persistent Ethical Issue}, 13 Cambridge Q. Healthcare Ethics 119, 120 (2004) (quoting Norman Frost, \textit{Children as Renal Donors}, 296 New Eng. J. Med. 363-67 (1977)). Many individuals argue that children who donate tissue and/or organs to their siblings will benefit psychologically from their altruistic act. Proponents of minor organ donation argue that child-donors will experience "increased self-esteem from performing an altruistic act ... continued companionship of the surviving sibling ... [and] avoidance of possible guilt on discovery later in life that one could have saved his sibling's life."
evidence to psychological effect of compelled organ donation may be overwhelmingly negative, depending on the circumstances, when the recipient and donor are related, ultimately having profound consequences on the relationship between the siblings, and ultimately, the family unit.\textsuperscript{151} The organ recipient may experience lingering feelings of guilt and indebtedness towards the sibling that "saved" their life leading to feelings of inadequacy and low self-esteem which can be corrosive to the family unit as a whole.\textsuperscript{152} In addition, there are a host of other psychological stressors that may occur during the organ transplant process. These psychological stressors manifest in eight key stages that occur throughout the entire span the organ transplant processes. They are:

\begin{quote}
(1) The decision to accept treatment (the "anticipation" stage),\textsuperscript{153}
(2) the initial admission evaluation and care planning (the "preparation" stage),\textsuperscript{154}
(3) immunosuppression and entry into isolation (the "point of no return" stage),\textsuperscript{155}
(4) the transplant,
\end{quote}

\textsuperscript{151} \textit{Id. supra} at 115; Goodwin, \textit{supra} note 109 at 28-30 (citing Laura A. Siminoff & Kata Chillag, The Fallacy of the "Gift of Life," 29 Hastings Ctr. Rep. 34 (1999) ("Education campaigns identifying organ donation as the gift of life were designed to make the public aware of the good that comes from transplantation and to encourage people to become donors.").

\textsuperscript{152} Sheldon, \textit{supra} note 150, see generally Grace Chang, Carol McGarigle, Thomas R. Spitzer, Steven L. McAfee, Fred Harris, Kay Piercy, Margaret Ann Goetz & Joseph H. Antin, A \textit{Comparison of Related and Unrelated Marrow Donors}, 60 Psychosomatic Med. 163, 166 (1998) ("Related donors have more negative feelings after donation and do not feel as good about themselves for having donated when compared with un-related donors."); \textit{Creating A Life To Save A Life: An Issue Inadequately Addressed By The Current Legal Framework Under Which Minors Are Permitted To Donate Tissue And Organs}, 17 S. Cal. Interdis. L.J. 337.


\textsuperscript{154} \textit{Id.} at 441

\textsuperscript{155} \textit{Id.} at 442
graft rejection or take (the "waiting" stage),\textsuperscript{156} (6) graft-versus-host
disease, (7) preparation for discharge from the hospital, and (8)
adaptation out of the hospital.\textsuperscript{157}

The anticipation stage commences when a consenting donor is handed a "frighteningly
explicit consent form that outlines the entire bone marrow transplantation process in detail
causing some patients to engage in methods of deflection to quell the their feelings of anxiety
and helplessness that the brains fight or flight reflex triggers."\textsuperscript{158} By the third stage organ donors
"consider themselves exposed and defenseless - not only immunologically but also
psychologically, and begin to ponder their own mortality and second guess their initial reasoning
for consenting to organ donation. Coupled with the immunosuppressive drugs and mandatory
isolation in a medically sterile room donors often feels like a “the point of no return."\textsuperscript{159}

Surprisingly, the actual transplant occurs with minimal psychological stressors for both
patient and donor.\textsuperscript{160} However, on average, both organ donees and organ recipients’ patients
enter the next stage where they find themselves flooded with fears and doubts.\textsuperscript{161}

Noted clinical researchers Herbert N. Brown & Martin J. Kelly have gone even further to
opining the negative emotional consequences could scar the incompetent or never-competent

\textsuperscript{156} \textit{Id.} at 443
\textsuperscript{157} \textit{Id.} at 444
\textsuperscript{158} \textit{Brown and Kelly, supra} note 138, at 440-441.
\textsuperscript{159} \textit{Id.} at 442.
\textsuperscript{160} See generally \textit{Id.}
\textsuperscript{161} \textit{Id.} at 443. “Organ doneness wonders if the operation successful, their health restored and the
nightmare of their decision is over. In contrast, the organ donor is often assuaged with both
dreams and nightmares about the procedure. If a patient enters into the sixth stage - graft-versus-host
disease - then the patient may be overcome with anger and depression. Also, it is important
to note that during this stage the donor may feel significant psychological pressure, particularly
due to the fact that many donors who find their recipient in this stage believe that it is their fault
that the "marrow is hurting or failing" the recipient.”
irreparably. It stands to reason that a person unable to legally or actually consent may not have the ability to process the information being presented or the emotional intelligence to convey the level of pain, fear, and isolation that affect even those who have consented and possess actual knowledge of what awaits them.\textsuperscript{162} Simply put the effects could be multiplied exactly because the individual is legally incompetent thereby negating the perceived benefits outline by the court.

VII. REASONABLENESS OF APPLYING THE DOCTRINE OF SUBSTUTITTED JUDGMENT IN COMPELLED ORGAN DONATION OF THE MENTALLY INCOMPETENT

Currently, although many courts cite the doctrine of substituted judgment as the basis for compelled medical procedures on the mentally incompetent they often make best interest central to their analysis where no evidence of the incompetents moral value or beliefs can be found. \textit{In re Mary Moe} highlights this misapplication noting that although the substituted doctrine was "the proper test to apply, this court, and the Wentzel court confused this doctrine with the best interest standard."\textsuperscript{163} In \textit{Wentzel} case, the Massachusetts Supreme Court noted that the trial court possessed jurisdiction to grant the parent guardians petition to force a compelled medical procedure if the parent guardians could show it was in the \textit{best interest} of the incompetent.\textsuperscript{164} However, it is important to note that the best interest standard forgoes any analysis of what the incompetent would have wanted and instead substitutes the courts judgment as to what would be best for the incompetent.\textsuperscript{165} Tellingly, \textit{Wentzel}'s holding echoed the substituted judgment evidentiary burdens when it instructed the trial court to authorize the sterilization if they found

\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{In Re Mary Moe}, 432 N.E.2d 712 (Mass.1982) (internal citations omitted) (quoting \textit{Wentzel}, 447 A.2d at 1251)).
\textsuperscript{164} \textit{Wentzel v Montgomery General Hospital, Inc.}, 447 A.2d 1244 (1982).
the incompetent "would so choose to do so if competent."¹⁶⁶ Unlike the Curran court, who applied Lord Eldon's version of the substituted judgment doctrine. The Curran court reviewed the inherent risk of the surgery, the marginal benefit to the mentally incompetent donor, coupled with the fact that a three and a half year old could not legally or practically assert known moral beliefs or preferences, rejected the doctrine of substituted judgment as the as a basis to compel organ donation.¹⁶⁷ This calls into the reasonableness of applying the substituted judgment doctrine, when it appears to incorporate the best interest in lieu of clear and convincing evidence, so that courts might expand their jurisdiction to allow for compelled organ donations because the never-competent has not expressed any values or moral beliefs in which the guardian or the courts could properly gauge "that which the incompetent would have done themselves. Regardless of the moral certitude of the case law, the Strunk courts application of the doctrine has taken hold even in medical communities." According to Paul Applebaum Alan Meisel and Charles Lidz:

"[A]ll surrogate decision makers are, in a general way, under the duty to act in the best interest of incompetent patients. The difficulty with the best interest 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 the patients instructions – written or oral, expressed or implied- is seeking to implement the patients best interest as the patient would have

¹⁶⁶ Wentzel, 447 A.2d at 1263 (Davidson, J. dissenting).
¹⁶⁷ Curran, 556 N.E.2d at 1333.
defined them. Thus, the substituted judgment approach is merely one way in which the best interest standard is given content.”

But criticisms to this argument are numerous. D. Don Welch levels criticism at Applebaums argument in his article “Walking in Their Shoes: Paying Respect to Incompetent Patients. Welch surmises:

“[T]his is exactly wrong. The substituted judgment doctrine is not a way of giving content to the best interest standard. Rather, best interest is not 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.”

The seminal case Strunk v. Strunk further illustrates the current debate over, and possible misapplication of the two doctrines. In Strunk, the majority affirms the circuit courts finding that compelled donation was in the incompetents donors best interest, holding that the compelled donation was so beneficial to the incompetent donor that it rose to the level of necessary because Jerry was “greatly dependent” on his brother to the point that “his very well being” both psychologically and emotionally “would be jeopardized more severely by the loss of his brother than by removal of a kidney.” The courts findings of “benefit” are predicated upon the

169 Id. and footnote 94, 95(internal citations and quotations omitted).
170 Strunk, 445 SW2d at 146-147.
recommendations of Jerry’s immediate family, who petitioned the court, and the department of mental health, who deemed Tom so “vital” to Jerry that without him Jerry will cease to have the “concerned, intimate communication so necessary to his [Jerry’s] stability and optimal functioning.” However in his dissent, Judge Steinfeld, joined by Nekirk and Palmore, questioned whether the majorities finding of benefit is significant enough to be considered “clear and convincing” under the doctrine of substituted judgment. Although acknowledging that the death of his only sibling would bring about some emotional harm, given that Jerry has the mentality of a six year old, the lasting harm outlined in the department of mental health’s report was “nebulous” at best. Additionally, the dissent calls the immediate families emotional objectivity in petitioning for compelled donation into question, reasoning that, while parents may willingly choose to martyr themselves for their children, it is nonsensical to allow them to “make martyrs of their children” with the child’s informed consent.

The courts differing of opinion, which resulted in a 4-3 split, and the ongoing scholarly debate begs to question whether the doctrine of substituted judgment can be correctly applied in cases where a court is petitioned to compel the very young or never-competent individual to submit to a medical procedure, that neither saves nor prolongs the individuals life, based solely on a perceived psychological and/or emotional benefit to the incompetent. Moreover, even if the court does find evidence of a psychological or emotional benefit, how can the court determine the benefit is substantial enough to meet the evidentiary burdens set out in

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171 Id. at 150.
172 Id. at 150-151.
173 Id.
174 Id.
the doctrine of substituted judgment? Lastly, is the benefit so substantial that it is clearly and convincingly in the best interest of the mentally incompetent to compel organ donation?

If we take the doctrine of substituted judgment at face value, according to the *Cruzan* court, application is warranted where there is some clear and convincing evidence that the mentally incompetent person has formed his or her own moral beliefs, ideals, or values.\(^{175}\) It follows that the doctrine of substituted judgment can never be applied to the never-competent since, by definition, they cannot form their own. Furthermore, as some scholars note, all surgery has inherent risk, coupled with the potential for psychological harm and physical pain, regardless of an individual’s mental competency.\(^{176}\) However, as the research suggest, if the person in question is very young or never-competent the extent of the harm and/or pain is more difficult to prevent, detect, mitigate or treat. The benefit of undergoing a medical procedure must be substantial enough to warrant the more-than-likely pain, confusion, and psychological harmed caused by the procedure. In modern American juror’s prudence, as with the *Strunk* case, the court usually defers to the family as the ultimate arbiter of benefit vs. harm to the mental incompetent.\(^{177}\) But as many scholars have pointed out, parents are not disinterested parties.\(^{178}\) Whether guided by notions or love or martyrdom, they often measure best interest subjectively, in terms of what is best for the family as a whole, as opposed to the objective standard necessary to apply the doctrine of substituted judgment.\(^{179}\) Moreover the standard, in cases dealing specifically with the very young or never competent, needs to account for the fact that there may

\(^{175}\) *See generally Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).*

\(^{176}\) *Supra, see generally* note 135, 136, 140.

\(^{177}\) *Id.*

\(^{178}\) *Id.*

\(^{179}\) *Id.*
be no assumptions to base the decision on, and the often overlooking the autonomy of the never-
competent.\textsuperscript{180}

Legal precedents suggest if a tangible benefit is identified the courts may compel
donation under the substituted judgment doctrine.\textsuperscript{181} However, to correctly apply the substituted
judgment doctrine any benefit derived the procedure must be ancillary and not central to a
court’s analysis. Under the substituted judgment doctrine the surrogate is charged with
determining what the incompetent individual would have decided had they been made competent
and autonomous.\textsuperscript{182} It follows that the surrogate could choose a decision that was not in the
incompetent’s best interest if there was some sort of tangible, finding evidence to support the
will of the incompetent.\textsuperscript{183} Often when courts allow the emotional, altruistic, or best interest to
be a factor in its substituted judgment analysis they focus on the “best interest “ of society or the
incompetents family in weighing the benefit of the procedure.\textsuperscript{184} The case law cited, above,
starting with \textit{Shrink v. Shrink} and its progeny highlight this application of analysis. The

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} The term "substituted judgment' was credited to Lord Eldon's legal fiction in lunacy cases as
noted by the American Law Reports. The A.L.R. notes:

"[T]he "doctrine of substituted judgment," which apparently found
its first expression in the leading English case of Exparte
Whitbread (1816), 35 Eng. Reprint 878 (Ch.), supra § 3(a), was
amplified in Re Earl of Carysfort (1840) Craig & Ph 76, 41 Eng.
Reprint 418, where the principle was made to apply to one who
was not next of kin of the lunatic but a servant of his who was
obliged to retire from his service by reason of age and infirmity.
The Lord Chancellor permitted the allowance of an annuity out of
the income of the estate of the lunatic earl as a retiring pension to
the latter's aged personal servant, although no supporting evidence
could be found, the court being "satisfied that the Earl of Carysfort
would have approved if he had been capable of acting himself."


\textsuperscript{182} \textit{Id.}


\textsuperscript{184} \textit{Id.}
doctrine of substituted judgment, at its core, is based on personal preference sans any duty to engage in activity that is in the incompetents, or anyone else's best interest.\textsuperscript{185}

A. A New Standard

How can we determine, absent any clear and convincing evidence of, what the mentally incompetent's morals, beliefs, and values are in order to grant or reject a petition for a compelled medical procedure? I purpose that, in lieu of the courts deference to the family or guardians opinion of the mentally incompetents moral preferences, which runs the risk of bias, the court allow practical reasonableness, as ascribed by John Finnis theory of natural law, to a dispositive factor in the doctrine of substituted judgment, in order for the courts to gauge a mental incompetent persons values and moral beliefs within a relative degree of certainty and objectiveness, where no clear and convincing evidence exist.\textsuperscript{186} Applying practical reasonableness would have a twofold effect of 1) minimizing the degree of harm, and 2) maximizing respect for the mentally incompetent's personal autonomy and freedom in cases involving compelled medical procedures regardless of the degree of mental incompetency. Moreover, the very nature of Finnis' analytical framework of practical reasonableness seeks to answer the very questions that are central to every case, from Whitebread to Strunk and Cruzan, involving the doctrine of substituted judgment and the best interest standard. That which the incompetent would do if made competent.

Although many scholars have argued that it would be impossible to determine an individual's moral beliefs, in his book Natural Laws and Rights, Finnis explores this premise, opining that "students of ethics and human cultures very commonly assume that cultures

\textsuperscript{186} See generally JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS (1\textsuperscript{ST} ed. 1980).
manifest preferences, motivations, and evaluations so wide and chaotic in their variety that no value to practical principles can be said to be self-evident to human beings, since no value or practical principle is recognized in all times and all places.”\textsuperscript{187} Although Finnis concedes that we cannot within a degree of certainty predict the infinite or potential \textit{manifestations} of any persons pursuit of their expectations, wants, and desires,\textsuperscript{188} he notes anthropologist have found that there are “striking similarities” in what any given individual would expect, want, or desire.\textsuperscript{189} Simply put, there are general \textit{values}, self-evident in their intrinsic worth, that \textit{all} men will move toward or pursue, albeit in different manners because these values are basic aspects central to any person’s well-being.\textsuperscript{190}

1. \textbf{The Common Goods}

Finnis refers to these basic human values as universal goods, or goals, to be pursued. These common goods are (1) life, (2) knowledge, desirable for its own sake, (3) play, enjoyed for its own sake, (4) aesthetic experience (beauty), (5) sociability (friendship), (6) practical reasonableness, and (7) religion.\textsuperscript{191} One has to accept that while they are called “goods” they hold no inherent moral value. They are simply goods to be pursued throughout life, with no inherent hierarchy or moral right vs. wrong reasoning.

\textsuperscript{187} See generally id. at 83–85.
\textsuperscript{188} See generally id. at 81-97 (“depth intensity, duration of commitment, in the extent to which the pursuit of a given value is given priority in the shaping of one’s life a character”).
\textsuperscript{189} See generally id. at 84. Finnis goes on to say that anthropologist have taken inventory of anthological literature and found “striking similarity” allowing for “rather confident assertions” on what basic goods and values a society, culture or \textit{individual} would expect, want, or desire, regardless of the way one would choose “all modalities of response to any value.”
\textsuperscript{190} See generally id. at 82.
\textsuperscript{191} See generally id. at 86–89 (Morality viewed for an impersonal stance).
However, the goods are the basis or substrata for making moral judgments.\textsuperscript{192} They are not about morality, rather, how we go about choosing or instantiating the goods through our actions, or practical reasonableness, is about morality.\textsuperscript{193} Moreover, one must be careful to understand that any choice of a particular good may requiring subordinating one or more of the other goods, or indirect harm, which is explained in the next section.\textsuperscript{194}

2. \textbf{Practical Reasonableness}

Practical reasonableness is philosopher John Finnis thoughts on the subject of objectively determining what any given individual would desire and applying a objective analytical framework in which to determine the moral appropriateness of any course of action in relation to the benefit of the individual and the community at large.

According to Finnis, the nine principles of practical reasonableness are not moral principles per se; rather, as Finnis puts it, they are the deep structure of moral thought.\textsuperscript{195} They are principles of practical reasons or wisdom and modes of responsibility. They are the anti-dote to relativism and consequentialism.\textsuperscript{196}

Finnish nine principles are: "(1) having “a coherent plan of life,” (2) not having an arbitrary preference amongst the basic goods, (3) not having an arbitrary preference amongst persons, (4) having a sense of detachment from all the specific and limited projects one undertakes, (5) not abandoning general commitments lightly, (6) acting to bring about good with efficiency, (7) respecting every basic value in every act by never directly choosing against a

\textsuperscript{192} \textit{See generally id.}
\textsuperscript{193} \textit{See generally id at} 126-127.
\textsuperscript{194} \textit{See generally id at} 118-125.
\textsuperscript{195} \textit{See generally id at} 100-127, 134.
\textsuperscript{196} \textit{Id.}
basic good, (8) favoring and fostering the common good of one’s communities, and (9) following one’s conscience.\textsuperscript{197}

The first principle recognizes the fact that the goods are merely opportunities of being; practical reasonableness offers the framework to fully engage in these states of being so that one can achieve his full potential in life.\textsuperscript{198} However, the second principle of the analytical framework requires that one must also have a coherent or rational plane to life; one where living from impulse-to-impulse or moment-to-moment is discouraged.\textsuperscript{199} The third and fourth principles mandate that this coherent plan must not allow for arbitrary preferences among values or persons.\textsuperscript{200} These tenements speak to the fact, that while you may identify certain goods as central and others as peripheral in a coherent life plan, it would be irrational to not acknowledge that all of the common goods have an equally intrinsic value, and must be treated as such. Similarly, as the fourth principle mandates, no arbitrary value among persons speaks to the fact that the basic goods apply to, and should be participated in by all human beings. The fourth and fifth principles speak to detachment and commitment to ones pursuit of the common goods.\textsuperscript{201} The fifth principle also instructs that one should look for new and varied ways to fulfill ones pursuit of the common goods, rather than confining oneself to familiar patterns and routines.

The sixth principle of practical reasonableness is efficiency within reason.\textsuperscript{202} Meaning ones efforts to foster the greater goods in one’s own life, the community, and the community at large should be accomplished in the most efficient manner possible, weighing purpose, utility,

\textsuperscript{197} See, e.g., Michael Bertram Crowe, The Changing Profile of the Natural Law at 6, 12, 17 (1977).
\textsuperscript{198} Finnis, NATURAL LAW & NATURAL RIGHTS, see generally id. at 100-103.
\textsuperscript{199} See generally id. at 103-105
\textsuperscript{200} See generally id. at 105-108.
\textsuperscript{201} See generally id. at 106-111.
\textsuperscript{202} See generally id. at 111-118.
effectiveness, and consequences, simply put, it is a cost benefit analysis. The first, second, third, seventh and eighth requirements demand that any cost-benefit analysis (6th) requirement be pursued sans any direct intent to harm any of the greater goods.\(^{203}\) This is also the seventh principle, and it mandates that we purposefully seek to affect the common goods.\(^{204}\) Although one can never justify a direct attack on a basic good, when the pursuit of a good indirectly causes harm, to another good is considered an acceptable side effect. In his book Finnis outlines a four-fold principle of double affect that would permit indirect harm.\(^{205}\) Indirect harm requires 1. One act with upright intention, 2. That the good affect must be simultaneous with the bad affect, 3. The contemplated act cannot be wrong in itself, and 4. The harm must be optional to the good to be achieved.\(^{206}\)

The eighth tenement of practical reasonableness requires that we favor cultivating and enriching the common goods in our own community.\(^{207}\) From this, our moral obligations and duties to others, and the collective whole, flow. The ninth tenement of practical reasonableness is one must also follow one’s own conscience.\(^{208}\) Meaning, whether or not ones ultimate decision leads to a “good” result is irrelevant. The goal is to resist the urge to follow ones selfish impulses or subjective feelings, rather a person should strive to take a step back and objectively weigh the goods at stake in choosing how to pursue them. The end result is morality via a deep analytical framework.\(^{209}\)

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\(^{203}\) See generally id. at 100-118.
\(^{204}\) See generally id. at 118-125.
\(^{205}\) See generally id. at 119-125.
\(^{206}\) See generally id. at 120-125.
\(^{207}\) See generally id. at 125.
\(^{208}\) See generally id. at 125-126.
\(^{209}\) See generally id. at 127- 134.
It is important to note that practical reasonableness, as an analytical framework is not linear in its application. Meaning that the principles are at once separate and intertwined, all equal in their weight and authority.

B. Applying Practical Reasonableness

Practical reasonableness need not be applied where the medical procedure in necessary to save or prolong the mental incompetents life. Similarly, the doctrine of substituted judgment and best interest standard is always appropriate where the mental incompetent was once competent and left some clear and convincing evidence allowing the court to establish, outside of the opinions of the parents or guardians, their personal moral beliefs and values. The purpose of adding practical reasonableness to the standard is to protect the personal autonomy of the mentally incompetent person and make their rights are respected as equal to competent individuals in a court of law. Applying Finnis’ theory of practical reasonableness to the legal frame work of compelled organ donation is the ideal way to balance the pursuit of the good to preserve life versus the good of protecting that good from unnecessary harm or intrusion.

Because practical reasonableness as an analytical framework is not linear in its application, meaning that the principles are at once separate and intertwined, the greater goods shall serve as the nexus of analysis. When applied to the Shrink case we see the potential for a deeper analysis via Finnis’ rationale where the doctrine of substituted judgment and the best interest standard are not appropriate due to a lack of clear and convincing evidence of the mental incompetent’s moral preferences and beliefs. The basic goods central to the Shrink court’s
holding play, friendship, and life or rather the potential the loss of play, friendship, and life that might follow the death of Jerry Shrunk's brother, Tom are easily identifiable.²¹⁰

1. Play

The third basic good, play enjoyed for its own sake, is central to the case.²¹¹ Here, the Strunks, the court, and expert witnesses all found in some capacity, that play was central to Tom's relationship with Jerry.²¹² The psychologist even went so far as to purport that Tom was Jerry's "only outlet and link to this world."²¹³ Although the Strunk dissent was skeptical that the level of Play experienced between Jerry and Tommy should weigh heavily in the majorities ruling, Finnis natural law theory allows for all forms of play as an equally valued good to be pursued, one that can enter into any task one engages in.²¹⁴ Here, it could be said that the court, on Jerry's behalf pursued play for plays sake. The issue here is whether the Strunk court abandoned Tommy's pursuit of goods lightly. For instance, the court found, based on the psychologist and the parents testimony that play was central to Jerry's well-being. Could this be

²¹⁰ See generally id. at 87-89. Moreover, aesthetic experience does not seem to be central to the issues at play. Although there might be aesthetic value in Tom returning to health; both on an aesthetic level and also being able to enjoy the beauty of the world around him. But there is no mention that either Jerry or Tom had any concerns with the aesthetic experience as defined by Finnis. Similarly, Religion does not seem to be at issue here because no mention of religious objection to the compelled donation was made.

The second basic good, Knowledge, does not seem to be at play in the Strunk case. Knowledge as it applies to Finnis basic goods, is valued in and of its self, not as a tool to pursue another basic good. Here, the Strunks did not pursue knowledge for the sake of knowledge alone. Rather, the knowledge sought out by the Strunks (the petition, the odds of the cadaver transplant being successful, and the knowledge of possible organ donors) was used as an instrument to further their pursuits of the basic values. Moreover, Jerry Strunk was incapable of pursuing knowledge, as defined by Finnis, because he was mentally incompetent.

²¹¹ See generally id. at 87.
²¹² Strunk, 445 SW2d at 146-147.
²¹³ Id.
²¹⁴ Finnis, see generally id. at 105-106
deemed a sensible and worthwhile project, subjecting Jerry to a non—life saving medical
treatment that has many risk and psychological consequences—because Tommy’s death would
signal a lack of play in Jerry’s life? Does that rise to the level of Jerry’s life lacking significant
meaning without the opportunity to pursue play that Tom could provide? However some would
argue that in Strunk v. Strunk the benefits to the incompetent are more than emotional. Not only
does the incompetent brother benefit from having continued friendship with his brother and
enhanced capacity for play because of the very special relationship with his, but the
incompetent’s life is improved, especially in terms of his mental health by the relationship he has
with his brother.

Practical reasonableness also demands that one, here the court acting on Jerry’s behalf,
should look for new and varied ways to fulfill Jerry’s pursuit of his common goals, rather than
confining him to familiar patterns and routines that the psychiatrist and parents were
suggesting. This is to say, because Tommy and Jerry both pursued play, can it be said that
Tommy was/is/and would continue to be Jerry’s only opportunity to pursue play, so much so that
the court was justified in placing another’s well-being over Jerry’s own? The goal of practical
reasonableness is to “[l]ive on the level of practical principle, not merely the level of
conventional rules of conduct.”

2. Friendship

Sociability and friendship are also central to the facts at play in the Strunk case. Finnis
places full on friendship as the strongest form of human community, with sociability on the other
side of the spectrum as the weakest tie to community. The Strunk court bases it’s holding on the

215 See generally id. at 105-111.
216 See generally id. at 110.
217 See generally id. at 88.
premise the friendship shared between the brothers is of great benefit to Jerry.\textsuperscript{218} The court gives great deference to the friendship shared by the two brothers in its decision to ultimately approve the organ donation.\textsuperscript{219} However, as the dissent point out, is friendship enough to breach one’s personal autonomy.\textsuperscript{220} Friendship, according to Finnis, involves “acting for the sake of one’s friend’s purposes and one’s friend’s well-being.”\textsuperscript{221} Finnis considered anything less than this level of sacrifice to be a “collaboration” of sorts where each person, while being social, was pursued their own self-interest. By applying sociability (friendship) according to Finnish puts Tom’s and Jerry’s friendship into context.\textsuperscript{222} Here, although Jerry’s organ donation is an enormous sacrifice, it is arguable whether Jerry is even acting as a friend, as defined by Finnis. For one, Jerry cannot comprehend the enormous sacrifice he is making for the sake of his brothers friendship due to his being mentally incompetent. Secondly, Jerry is not acting for the sake of his “friend” rather than being forced, at his parent’s behest, and ultimately the courts behest, to act for the sake of his brother’s well-being. Jerry’s donation may fall within the definition of a “collaboration” because the compelled procedure is merely instrumental in assuring that Tom, remains alive, central to his purpose of self-preservation and self-determination and thereby allowing Jerry to realizes the benefit of his brother’s continued friendship.\textsuperscript{223} However, we must ask ourselves, is a collaboration worthy of the breach of a person’s autonomy, the recovery process, and the confusion and pain Jerry will most likely

\textsuperscript{218} Strunk, 445 SW2d at 146-149.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 147-151.
\textsuperscript{221} Finnis, see generally id. at 141-144
\textsuperscript{222} See generally id. at 88, 100-125, 141-144.
\textsuperscript{223} Id.
experience when we wakes up from his surgeries alive to visit Jerry? It seems as if Tom is benefiting the most here.

3. Life

Practical reasonableness demands we treat others equal to ourselves. This includes honoring another’s pursuit of the common goods equal in value to our own. Here, Tom Strunk faces certain death from kidney failure. On Jerry’s behalf, the court refuses to settle on a cadaver transplant, and actively pursues the best match possible, thereby increasing Jerry’s brothers odds of recovery and survival; i.e. self-preservation. Here the court is also pursuing the basic good of life, in terms of vitality for Tom, in hopes that the organ transplant from Jerry, will leave Tom in a better position for self-determination. It can also be said that the court is sticking to Jerry’s cohesion plan to life, by taking steps to ensure his friend and playmate Tom has the organ he needs to survive. They are also furthering a sense of community since family, according to Finnis is a form of community in itself with shared goals, hopes, and beliefs. By petition the court to remove his Brother Jerry’s kidney he is engaging in a form of self-determination for another, which according to Finnis is an equally important to one’s own pursuit of life and self-determination. The court does not abandon this pursuit lightly, as is evidenced in their holding, which was sharply criticized by the descent and opposed by Jerry’s guardian ad lithem. Here, one could say can that the court is acting reasonably in its choosing to pursue the good of life as it pertains to Tom’s continued presence in Jerry’s.

This call into question the Strunk courts treatment of Jerry’s pursuit of life or rather their analysis of how pursuing the good of life as it pertains to Tommy v Jerry. Under the rubric of practical reasonableness the courts first concern, primarily, should be Jerry’s wellbeing since
they are making a decision on his behalf. But this notion does not lie in mere selfishness or prefer one’s own good over another, rather one’s own well-being is central and fundamental because it is only through “one’s own self-determination and self-realization and participation in the basic goods that we can do what is reasonably requested and required in order to achieve the first principles of practical reasonableness.” More importantly, as Finnis notes, “is not one’s own well-being reasonably the first claim on my interest, concern, and effort?” In other words, self-preservation of one’s own life is a requirement in order to pursue the basic human goods. Here, once the Strunk court made a general commitment to hear the petition they made a commitment to pursue the common goods as Jerry would have himself. This would mean that there would have to be a good overwhelming reason to override Jerry’s own coherent plan to life that requires him to put his own well-being before another’s.

In contrast, Jerry’s organ donation does not seem to pursue vitality, self-preservation or self-determination for himself. For one, although the court does its best to down play the risk, an organ transplant is a major medically invasive procedure which is not medically necessary to preserve or prolong Jerry’s life. Recovery times and complications threaten loss of vitality, both short term and permanently. In addition, there is a chance that Jerry’s remaining may kidney fail later in life, due to a potential family history of kidney problems, which would render the courts compelled donation of an organ starkly inapposite of Jerry’s self-preservation. The fact that it is a compelled decision also robs Jerry of his self-determination. Jerry cannot institute a process by which he “control his life” if another autonomous person, here his parents and brother, are able to hold dominion over his body. In fact, the court, acting on behalf of Jerry, seems to show

\[224 \textit{See generally id. at 134-135.} \]
\[225 \textit{See generally id. at125-139.} \]
improper favor to Tommy’s life at the expense of Jerry, whose well-being should be preferred, first to all others, for the rational reason of without his own life, self-preservation and determination, it is impossible to do “what reasonableness expects or requires in realizing the forms of human good.”

This also calls the courts detachment and commitment to Jerry’s pursuit of the goods the fifth principle of practical reasonableness. Here, whether or not the Strunk’s courts ultimate decision leads to a “good” outcome (here, Tom living) is not the point. In authorizing the transplant, the court can be said to further Jerry’s life plan, only if, the transplant is successful. Secondly, “there should be no arbitrary preference among the basic goods.” Here, Jerry’s guardians make a choice that his play and friendship with his brother weigh more heavily than his pursuit of life, or pursuit of knowledge in trying to get informed consent from the court, bypassing Jerry personal autonomy. The parents’ decision and court testimonies were charged with passion. This seems to oppose Finnis’ principle “to have a sense of detachment from all specific and limited projects we take.” We must ask, was the decision to force Jerry to consider organ donation “acting to bring out the good with efficiency.” One could argue yes, if the greater good pursued is solely his competent brother’s life. But Finnis would contend the greater good is Jerry’s own life. Perhaps his compelled donation would foster a sense of community by helping his brother live so that Tom may contribute as a college professor, a husband, perhaps a family man. However, to speak of future benefit to justify current choices boarders on


See generally id. at 106-111.
consequentialism and is to be avoided under practical reasonableness. Lastly, we must follow one's own conscious.\textsuperscript{228} Jerry's parents, as his guardian, undoubtedly believe petitioning the court was the right decision. But Jerry being compelled to engage in activities that could potentially result in his loss of life leaves the risk that no good can be done. One could argue that given the facts his parents, with the courts approval, are then pursuing one son's greater good(s), to the detriment of the other son's life by petitioning for compelled donation.\textsuperscript{229}

Although the \textit{Strunk} case reasons that the incompetent brother, Jerry, benefits from having continued friendship with his brother, Tom, and enhanced capacity for play because of the very special relationship thereby improving Jerry's life, especially in terms of his mental health by the relationship he has with his brother; the court fails to set out any dispositive evidence that there was any tangible benefit and "Opinions concerning psychological trauma are at best most nebulous."\textsuperscript{230} The perceived benefits outlined in the psychologist report failed to mention that how frequent the visits are. Jerry's perceived sadness and guilt is never balanced with the courts monumental decision to claim possession of a living person's body, disregarding constitutional protections against breach of bodily integrity. Further, the dissents reasoning, that "It is common knowledge beyond dispute that the loss of a close relative or a friend to a six-year-old child is not of major impact" has particular resonance in light of the question at hand.\textsuperscript{231}

These conflicting pursuits of greater goods can only be justified if they are indirect harm, meaning the court does not seek to attack one good in the pursuit of another, i.e. violate the

\textsuperscript{228} See generally id. at 125-126.
\textsuperscript{229} See generally \textit{Buck v. Bell}, 274 U.S. 200, 201, 207 (1927) (Court extended jurisdiction to force immunization to encompass forced sterilization).
\textsuperscript{230} \textit{Strunk}, 445 S.W.2d at 150.
\textsuperscript{231} \textit{Id.}

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seventh principle of practical reasonableness. Here, the court can be said to be acting with upright intention. They seek to further Jerry’s pursuits of play and friendship at the very least. It comes, perhaps at the pursuit of Jerry’s coherent pursuit of life. The good effect is simultaneous with the bad effect, i.e. if Tom’s life is preserved there is a chance that Jerry’s life will falter, the contemplated act, saving his brother’s life, is not necessarily wrong in itself, as it is also serving the community good and Jerry’s own pursuits of good. Finnis himself viewed the family as a “community” and finally the harm is optional to the good to be achieved. We have no way of knowing the future effects of the compelled procedure, however we know for a fact that the goods of play and friendship are being pursued in compelling the procedure. This analysis is not a simple one and a multitude of questions can spring forth from any one answer. But in the end, personal, moral and ethical opinions are of no matter. Just like in any legal analysis the court shall be the final arbiter. The goal is to resist the urge to follows ones impulses or subjective feelings, rather the court, on Jerry’s behalf, should strive to take a step back and objectively weigh the goods at stake in choosing how to pursue them, in order to engage in a deep moral analysis to establish moral beliefs and values where no evidence can be found. That is the ultimate hope of applying practical reasonableness as a factor in the analytical framework where the doctrine of substituted judgment and best interest are applied.

VIII. CONCLUSION

The court, as a dedicated member of the common good should always be look for new and novel ways of attaining the common good232 J.L. Mackie, noted ethics theorist, surmises that an ethical query cannot be reduced to mere substituted judgment and the belief that the

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232 Finnis, Natural Law at 231, 232. “[a]n intelligent member will find new and better ways and not just one but many possible and reasonable ways.”
inherent fairness of best interest, applied to any given action is solely determined by the consequences of your actions, i.e. the more good consequences determined, the better or more moral the act.\textsuperscript{233} Moreover, “[a]ll judgments seem to those who make them to be objective but really succeed in saying nothing more about the world than that the speaker has certain desires.”\textsuperscript{234} The decision to assume another’s will in order to compel a medical procedure must not be solely based on emotional, altruistic, or best interest, merely setting one basic good against another depending on which has the more desired outcome.

Rather, practical reasonableness, is a framework to ensure that any decision made has considered the common goods all men desire are respected in every decision made; allowing a person to “full-being” or fully actualized life. This sentiment, is at the heart of a person’s right to personal autonomy, and if respected and incorporated as a factor in the doctrine of substituted judgment would allow the court to apply the doctrine of substituted judgment to all mentally incompetent persons regardless of the degree on incompetency.

After all, no man knows what consequence his actions may bring. As humans, our actions are born of intent, entered into with purpose, and fulfilled with hope for a desired good. But we cannot determine what God will set forth before us. The measure of our actions cannot be our expectations, hopes, or intent. However, we can gauge the good and righteousness of our actions by adhering to the pursuit of the Divine’s greater goods through the application of practical reasonableness to ensure no good is pursued to the detriment of another. – Wisdom of Solomon

\textsuperscript{233} See generally, e.g., J.L. Mackie, Ethics: Inventing Right and Wrong (Harmondsworth: 1977) Ch1. (people operate under assumed delusion that their own practical principles are intrinsically objective and rational).

\textsuperscript{234} Id.