HARVESTING ORGANS FROM MINORS AND INCOMPETENT ADULTS TO SUPPLY THE NATION'S ORGAN DROUGHT: A CRITICAL REVIEW OF THE SUBSTITUTED JUDGMENT DOCTRINE AND THE BEST INTEREST STANDARD

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TABLE OF CONTENTS

I. INTRODUCTION 320
II. The History of Organ Donation 322
III. THE CONSTITUTIONAL RIGHTS OF MINORS AND INCOMPETENT ADULTS REGARDING MEDICAL DECISIONS 323
IV. THE CONSTITUTIONAL CONFLICT BETWEEN PARENTAL RIGHTS AND THE PARENS PATRIAE POWER OF THE STATE 324
V. AN INTRODUCTION TO TWO STANDARDS: THE SUBSTITUTED JUDGMENT DOCTRINE AND THE BEST INTEREST APPROACH 327
   A. *The Substituted Judgment Doctrine* 327
      1. *The Early Years of the Substituted Judgment Doctrine* 328
      2. *Modern Application of the Substituted Judgment Doctrine* 330
      3. *Endorsements, Evaluations, and Criticisms of the Substituted Judgment Doctrine* 332
   B. *The Best Interest Standard* 336
      1. *The Best Interest Standard and the Use of Psychological Benefits* 337
      2. *Application of the Best Interest Standard and the Use of Psychological Benefits* 338
      3. *Endorsements, Evaluations, and Criticism of the Best Interest Standard* 342
VI. POLICY CONCERNS RELATED TO HARVESTING ORGANS AND TISSUE FROM MINORS AND INCOMPETENT ADULTS 344
   A. *No Duty to Rescue Tort Law Principles* 344
   B. *The Right to Bodily Integrity* 346
   C. *Using the Fetus as an Organ Farm* 348
VII. PROPOSED SOLUTION: AN END TO DUAL STANDARDS 350
   A. *Procedural Requirements* 351
      1. *Courts Should Scrutinize Any Decision Coming From a Parent or Guardian* 351

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2. *The Adversarial Process Should be Used in All Cases* 352
3. *Courts Should Review Petitions Only if No Reasonable Medical Alternative Exists* 353
B. *The Standard for Formerly Competent Adults* 353
C. *The Standard for Minors and Never-Before-Competent Incompetent Adults* 355
1. *The Donor's Expressed Preference* 355
2. *Physical Benefit and Harm Associated with the Harvest* ... 356
3. *Psychological Benefit and Harm Associated with the Harvest* 356
4. *The Recipient is Likely to Benefit From the Transplant* 358
5. *The Potential Donor and Potential Recipient Have an Existing Relationship* 358
VIII. CONCLUSION 359

I. INTRODUCTION

In 1990, a California couple, desperate to find a bone marrow donor for their seventeen-year-old daughter, conceived another child in hopes of producing a suitable donor.[1] When the infant was only thirteen months, a bone marrow transplant was performed.[2] Due to the difference in physical size between the infant and the seventeen-year-old daughter, the infant had to undergo multiple harvesting procedures.[3] A greater amount of bone marrow had to be harvested due to the disproportionate sizes of the siblings.[4] The physical risks associated with harvesting bone marrow from an infant, as well as the psychological harm the conceived child may experience later in life, are just a few reasons why many critics believe parents should not be permitted to consent to their child's medical treatment, specifically when the parents are acting as decision-makers for both the donor child and the child recipient. A similar argument is made when the guardian of an incompetent adult acts as a decision-maker but is in the same way faced with conflicting interests.

While it has long been accepted that competent adults have the right to exercise control over their bodies and choose whether to donate an organ, the situation is not the same for children and incompetent adults. Prior to the nineteenth century, children in the United States were regarded as the chattel of their fathers and wards of the state.[5] As such, children did not possess rights

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[1] Abigail Trafford, *Brave New Reasons for Mothering; Having a Baby to Produce a Potential Organ Donor*, WASH. POST, Feb. 27, 1990, at Z6; *see* Sally Ann Stewart, *Toddler May Be Sister's Lifesaver*, USA TODAY, June 4, 1991, at 3A.

[2] Trafford, *supra* note 2; *see* Stewart, *supra* note 2.

[3] Trafford, *supra* note 2; *see* Stewart, *supra* note 2.

[4] Trafford, *supra* note 2; *see* Stewart, *supra* note 2.

[5] Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Rela-*

independent of their parents, but rather, the law focused on the rights of adults with respect to their children.[6] During this time, courts refrained from interfering with the familial relationship because parental control and custody were considered a sacred right.[7] Subsequently, social reformers initiated a movement to protect children, believing that children needed to be rescued from the "effects of the industrial revolution."[8] Since this time, however, children's rights have developed gradually with the state's recognition of parens patriae power.[9]

Although courts no longer view children as their parent's chattel, children, as well as incompetent adults, do not maintain the full panoply of constitutional rights that are extended to adults.[10] This does not mean, however, that children and incompetent adults do not possess any rights under the United States Constitution. For example, the Supreme Court has held that, like adults, the Constitution generally protects children against governmental deprivations.[11] Furthermore, the Supreme Court has extended the right of privacy in decision-making contexts to include minors.[12] In *Bellotti v. Baird*, however, the Supreme Court stated three reasons to justify its conclusion that children do not possess constitutional rights identical to those of an adult: (1) "the peculiar vulnerability of children;" (2) "their inability to make critical decisions in an informed, mature manner;" and (3) "the importance of the parental role in child rearing."[13] The Court's reasoning has been similarly used to justify why incompetent adults, like children, do not possess rights identical to competent adults.[14] While not completely devoid of all constitutional rights, it is clear that minors and incompetent adults are not able to exercise certain rights without the assistance of a parent, guardian, or the court.[15]

This Note discusses the many legal, ethical, and moral dilemmas presented by the practice of compelled live organ donation as used with minors

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tionship, 26 LOY. U. CHI. L.J. 259, 261 (1995).

[6] *Id.*

[7] *See* Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of* Curran v. Bosze, 24 CONN. L. REV. 211, 213-14 (1991).

[8] Ventrell, *supra* note 6.

[9] *Id.* For further discussion of the state's parens patriae power, see *infra* Parts III, IV.

[10] Bryan Shartle, Comment, *Proposed Legislation for Safely Regulating the Increasing Number of Living Organ and Tissue Donations by Minors*, 61 LA. L. REV. 433, 439 (2001).

[11] *See* Goss v. Lopez, 419 U.S. 565 (1975) (holding that the Fourteenth Amendment protected students suspended without a prior hearing from such "arbitrary deprivations of liberty" as unilateral suspensions of up to ten days without notice and hearing).

[12] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (holding that the state could not impose a blanket requirement for doctors to obtain consent to abortion for minors during the first trimester).

[13] Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[14] *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977); Godwin v. State, 593 So. 2d 211, 261 (Fla. 1992).

[15] *See* Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) ("Generally speaking, the rule has been considered to be that a surgeon has no legal right to operate upon a child without the consent of his parents or guardian."); *In re* Conroy, 486 A.2d 1209, 1230 (N.J. 1985); Dufault, *supra* note 8, at 216.

and mentally incompetent individuals.[16] It reviews and rejects both the substituted judgment doctrine and the best interest standard and proposes a new approach to assist judges, parents and guardians, and medical professionals in determining when it is appropriate for minors and incompetent adults to serve as organ and tissue donors. Part II of this Note addresses the history of organ donation and the development of live organ and tissue donation within the last fifty years. Part III discusses the evolution of minors' and incompetent adults' constitutional rights pertaining to medical treatment. Part IV examines the conflict between the state's parens patriae power and the constitutional right to family autonomy. Although Supreme Court decisions have long recognized deference to parental control, this Note suggests that the right to family autonomy must be balanced against the state's interest in protecting individuals who are unable to protect themselves. Part V focuses on the two standards a court uses to determine whether to permit an organ or tissue harvest from a minor or incompetent adult. In analyzing the substituted judgment doctrine and the best interest approach, this Note addresses the modern application of the standards as well as the praise and criticism both approaches receive. Part VI of this Note illustrates the policy and social concerns raised with harvesting organs from minor and incompetent adults. Finally, Part VII of this Note proposes a solution that will resolve the debate regarding which standard is more appropriate. This Note recommends that the court take different approaches when individuals have been competent once before and when individuals have never before been competent. Furthermore, the court may take into account psychological factors, such as the need to avoid psychological distress associated with the death of a sibling. Not only does this new standard protect the interests of the donor, but also, it preserves and respects the donor's personal autonomy.

II. THE HISTORY OF ORGAN DONATION

Each year, thousands of individuals voluntarily donate organs and tissue for the pure altruistic benefit of saving another's life.[17] Despite this selfless act, the supply from donors simply cannot keep pace with the demand, and unfortunately, thousands die while waiting on a recipient list.[18] Given the overwhelm-

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[16] This Note does not discuss issues regarding persons in a persistent vegetative state. For an interesting article discussing organ harvests from individuals in a persistent vegetative state, see John B. Oldershaw et al., *Persistent Vegetative State: Medical, Ethical, Religious, Economic and Legal Perspectives,* 1 DEPAUL J. HEALTH CARE L. 495 (1997).

[17] ORGAN PROCUREMENT & TRANSPLANTATION NETWORK & THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS, ANNUAL REPORT III-1 (2004) [hereinafter "ORGAN PROCUREMENT & TRANSPLANT NETWORK 2004"]. The data and analyses reported in the 2004 Annual Report of the U.S. Organ Procurement and Transplantation Network and the Scientific Registry of Transplant Recipients have been supplied by UNOS and Arbor Research under contract with HHS. *Id.* The authors alone are responsible for reporting and interpreting these data. *Id.*

[18] ORGAN PROCUREMENT & TRANSPLANTATION NETWORK & THE SCIENTIFIC REGISTRY OF

ing demand for organs and tissue, doctors and researchers began to seek alternative sources for donors.[19]

With the first successful kidney transplant involving a live donor occurring in 1954, live donors, as opposed to cadaver donors, have become an invaluable resource.[20] In fact, in 2000, the number of living donors exceeded the number of cadaver donors.[21] The trend continued from 2001 to 2003.[22] In 2004, however, the number of living donors fell below the number of deceased donors.[23] Despite this annual decline, live donors continue to be a critical source of transplantable organs, helping to relieve the nation's shortage of organs and tissue.[24]

Though demand for organs and tissue is alarming, many commentators believe that using minors and incompetent individuals as a means to increase the supply is simply not justified. Every year, organs are harvested from minors and mentally incompetent adults who neither voluntarily donate their organs nor consent to the surgical procedure.

III. THE CONSTITUTIONAL RIGHTS OF MINORS AND INCOMPETENT ADULTS REGARDING MEDICAL DECISIONS

Since medical decisions are so important and because procedures are so often permanent, decisions regarding the type of medical treatment received by minors and incompetent adults are typically determined by parents, guardians, and courts.[25] Whereas minors have been extended some authority to consent to medical treatment, the right to consent to nontherapeutic medical procedures, such as live organ and tissue donations, does not fall within their authority.[26] Minors and incompetent adults cannot consent to nontherapeutic procedures,

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TRANSPLANT RECIPIENTS, ANNUAL REPORT I-1 (2005) [hereinafter "ORGAN PROCUREMENT & TRANSPLANT NETWORK 2005"]. In 2004, just over 7,300 patients died while waiting for a transplant. *Id.* While this number increased from 2003, the number of recipients on the waiting list also increased from 2003. *Id.* Thus, the overall death rate did decline slightly. *Id.*

[19] Shartle, *supra* note 11, at 433.

[20] Organ Procurement & Transplantation Network, Facts About Living Donation, http://www.optn.org/about/donation/livingDonation.asp (last visited Mar. 27, 2007).

[21] ORGAN PROCUREMENT & TRANSPLANT NETWORK 2005, *supra* note 19.

[22] *Id.*

[23] *Id.* Of the 14,154 organs donated in the United States in 2004, 7,152 were from deceased donors compared to only 7,002 from living organ donors. *Id.* Even though the actual number of living donors increased three percent from 2003, this increase was a smaller annual rate than in recent years. *Id.* Furthermore, fourteen percent of deceased donors in 2004 were under the age of seventeen. *Id.* at IV-3.

[24] Shartle, *supra* note 11, at 434.

[25] Lawrence P. Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors*, 1975 ARIZ. ST. L.J. 31, 31 (1975).

[26] *See* Hart v. Brown, 289 A.2d 386, 391 (Conn. Super. Ct. 1972) (stating that *Bonner v. Moran,* 126 F.2d 121 (D.C. Cir. 1941), is the legal authority for permitting non-therapeutic procedures to be performed on minors as long as the parents or guardians consent); Shartle, *supra* note 11, at 443.

such as organ donation, due to the presumption that a minor or an incompetent adult is too inexperienced, cannot adequately assess the situation, and arguably lacks the ability to comprehend fully the consequences of his or her decision.[27]

In his writings on the concept of individual liberty, John Stuart Mill discussed his belief that children should not possess the ultimate value of personal choice due to their inability to act for the betterment of society.[28] It was Mill's belief that "the need to maximize overall goodness in society dictate[d] that children, unlike adults, should not be permitted the right to interpret their own good, for fear they [would] not act in accordance with the public good."[29] In such a case, a surrogate decision-maker makes these medical decisions for the minor or incompetent adult. The law requires that the surrogate decision-maker ensure that liberty interests of the minor or incompetent adult are both protected and respected.[30]

The appropriateness of parental or guardian consent is less clear when the medical treatment for the minor or incompetent adult is unnecessary.[31] When the person benefiting from the treatment is not the minor or incompetent adult but is instead a third party, the surrogate decision-maker may no longer be acting solely with the minor's or incompetent adult's interests in mind.[32] In order to expose any conflict of interest that a parent or guardian may have, courts must be used as the avenue for transplants.[33] Accordingly, with respect to organ donation, courts scrutinize consent for a transplant coming from a parent or guardian.[34]

IV. THE CONSTITUTIONAL CONFLICT BETWEEN PARENTAL RIGHTS AND THE PARENS PATRIAE POWER OF THE STATE

Given its intimate nature and the great weight society places on privacy and family integrity, family autonomy has long been recognized by United States courts. Throughout the twentieth century, the Supreme Court has held

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[27] *Bonner,* 126 F.2d at 122; *see* Shartle, *supra* note 11, at 439-40.

[28] Victor L. Worsfold, *A Philosophical Justification for Children's Rights, in* THE RIGHTS OF CHILDREN 29, 32 (Harvard Educational Review 1974) (discussing JOHN STUART MILL, ON LIBERTY (1963)).

[29] *Id.* at 33.

[30] *See In re* A.C., 573 A.2d 1235, 1249 (D.C. 1990); *In re* Nancy Ellen Jobes, 529 A.2d 434, 436-37 (N.J. 1987) ("[T]he goal of a surrogate decision-maker for an incompetent patient must be to determine and effectuate what that patient, if competent, would want."); Shartle, *supra* note 11, at 441.

[31] *See Hart,* 289 A.2d 386; Cara Cheyette, *Organ Harvests from the Legally Incompetent: An Argument Against Compelled Altruism,* 41 B.C. L. REV. 465, 466 (2000).

[32] This situation may arise, for example, when a parent or guardian wishes to harvest an organ from a minor or an incompetent adult in order to save the life of a sibling.

[33] Janet B. Korins, Curran v. Bosze*: Toward a Clear Standard for Authorizing Kidney and Bone Marrow Transplants between Minor Siblings,* 16 VT. L. REV. 499, 505 (1992).

[34] *Id.* at 503.

that the Fourteenth Amendment grants parents the constitutional right to control the education, rearing, and upbringing of their children.[35] Not only is deference to parental control "deeply rooted in our Nation's history and tradition,"[36] but also, there are continuing interests advanced in providing deference to this notion. The state has an ongoing interest in providing and protecting family autonomy because it "prepar[es] children to become productive members of society, develop[s] religious and cultural diversity among citizens, and fulfill[s] support obligations that would otherwise fall to the state."[37] Furthermore, the law's concept of "family" sustains the idea that parents and guardians possess the skills, life experiences, and capabilities to take on life's more demanding decisions – all characteristics that a child or incompetent adult lacks.[38] Finally, and perhaps most controversial, is the presumption that "natural bonds of affection" will prevent parents or guardians from acting contrary to the "best interests of their children."[39]

Due to the tremendous regard family autonomy retains, state intervention is justifiable only when "a powerful countervailing interest" has been demonstrated.[40] Similarly derived from the Fourteenth Amendment and included in this "freedom of personal choice in matters of family life,"[41] is a parent or guardian's right to make important decisions regarding medical treatment.[42] As a general rule, parents and guardians hold awesome authority to establish medical care for their ward "even when the decision might impinge on a liberty interest. . . ."[43]

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[35] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("[Liberty d]enotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

[36] Bellotti v. Baird, 443 U.S. 622, 638 (1978).

[37] Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 289 (1991).

[38] Parham v. J.R., 442 U.S. 584, 602 (1979).

[39] *Id.*

[40] Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[41] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[42] *In re* Baby K., 832 F. Supp. 1022, 1030 (E.D. Va. 1993); *see* Susan D. Hawkins, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2081-82 (1996).

[43] *Baby K.*, 832 F. Supp. at 1030. The parents disagreed over whether to continue medical treatment for their anecephalic daughter who was on a ventilator. *Id.* After discussing the significant United States Supreme Court cases that protect a parent's Fourteenth Amendment right to bring up a child, the court held that "[t]hese constitutional principles extend to the right of parents to make medical treatment decisions for their minor children . . . . even when the decision might impinge on a liberty interest of the child." *Id.* For cases discussing a parent's

Although it appears limitless, this right to familial privacy and parental control is not absolute. The right to family autonomy must be balanced against the state's parens patriae power. The doctrine of parens patriae power, originating in England, illustrates the relationship between the states and its citizens.[44] The Crown applied this principle to protect those individuals who could not protect themselves.[45] Courts in the United States similarly invoke this power in order to protect persons who are unable to protect themselves.[46] Thus, state intervention in private relationships is permitted in order to promote the best interests of persons in need of such protection.[47] However, just as the right to familial privacy and parental control is not absolute, the state's power faces similar restraints. The state's parens patriae power is limited to the extent that the state is required to act solely for the best interests of the child.[48]

While it is clear that the state's power and parental control are frequently at odds,[49] it is less apparent how the power struggle should be resolved. On more than one occasion, the Supreme Court has expressed its reluctance to interfere with matters concerning familial decisions.[50] At the same time, the Court has not shied away from placing limits on parental authority. For example, in *Prince v. Massachusetts*, the Court acknowledged that "the custody, care and nurture of the child reside first in the parents."[51] The Court reaffirmed, "the state can neither supply nor hinder" this freedom.[52] The Court, however, subsequently limited this parental authority when it declared, "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in

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constitutionally protected right to raise a child free from governmental intrusion, see *Parham*, 442 U.S. at 604; Wisconsin v. Yoder, 406 U.S. 205, 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 390 (1923)

44. United States v. Cohen, 733 F.2d 128, 152 n.21 (D.C. Cir. 1984); *see* Griffith, *supra* note 37, at 287. Parens patriae translates to "father of his country." *Cohen*, 733 F.2d at 152 n.21.

45. *Cohen*, 733 F.2d at 152 n.21; *see* Griffith, *supra* note 38, at 297.

46. In *Addington v. Texas*, the Supreme Court stated that the "[S]tate has a legitimate interest under its *parens patriae* [sic] powers in providing care to its citizens who are unable because of emotional disorders to care for themselves." Addington v. Texas, 441 U.S. 418, 426 (1979); *see also* Heller v. Doe, 509 U.S. 312, 332 (1993) (quoting *Addington*, 441 U.S. at 426) ("[T]he state also has . . . authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); *In re* E.G., 549 N.E.2d 322, 327 (Ill. 1989).

47. Hawkins, *supra* note 43, at 2084. An individual whose physical or mental well-being is at risk is an example of a person in need of such protection.

48. *See Pierce*, 268 U.S. at 510; Griffith, *supra* note 38, at 290.

49. For examples of the state's parens patriae power at odds with parental rights, see Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); *Pierce*, 268 U.S. at 534-35; Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

50. *See Yoder*, 406 U.S. 205; *Prince*, 321 U.S. 158; *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

51. *Prince*, 321 U.S. at 166 (citing *Pierce*, 268 U.S. at 510).

52. *Id.*

identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[53] Thus, the state's power to limit parental or guardian control regarding actions affecting the welfare of a child or incompetent adult is justified by society's interest in protecting the well-being of the child or incompetent adult. It is this power struggle between family autonomy and the state's parens patriae power that causes commentators to debate whether parental consent is sufficient for a child or incompetent adult to donate an organ or tissue for the benefit of a third party.[54]

V. AN INTRODUCTION TO TWO STANDARDS: THE SUBSTITUTED JUDGMENT DOCTRINE AND THE BEST INTEREST APPROACH

When faced with a petition from parents or guardians requesting authorization for organ and tissue donations from minors or incompetent adults, the United States uses a common law approach.[55] Accordingly, the power to adjudicate the petition for the compelled donation lies in the hands of the judiciary.[56] Courts have applied one of two judicial standards when presented with such cases: (1) the substituted judgment doctrine and (2) the best interest standard. Although both standards may result in the same outcome, "the distinction between the two approaches is not merely semantic."[57] Some courts use the substituted judgment approach because it is more flexible and deferential to individual autonomy.[58] On the other hand, many other courts choose to apply the best interest standard due to its paternalistic approach.[59] Regardless of the standard applied, each approach raises fascinating concerns, faces immense criticism, and offers compelling support for why it is superior to the alternative.

A. The Substituted Judgment Doctrine

Beginning it its earliest form, the substituted judgment doctrine was used as a way of allocating the estate of an incompetent individual.[60] Today, courts

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[53] *Id.* at 170; *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) ("[Children] are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae.").

[54] Jennifer K. Robbennolt et al., *Advancing the Rights of Children and Adolescents to be Altruistic: Bone Marrow Donation by Minors,* 9 J.L. & HEALTH 213, 218 (1994-1995).

[55] Shartle, *supra* note 11, at 447. Although the Uniform Anatomical Gift Act, which governs cadaver donations, has been enacted in every state, no state has yet to enact legislation that regulates petitions for live organ donations. *Id.*

[56] *Id.* at 448.

[57] Dufault, *supra* note 8, at 212.

[58] *See* Paul J. Liacos, *Is "Substituted Judgment" a Valid Legal Concept?*, 5 ISSUES L. & MED. 215, 220 (1989).

[59] Dufault, *supra* note 8, at 212.

[60] *See* Ex parte Whitbread, 35 Eng. Rep. 878 (1816); *In re* Boyd, 403 A.2d 744, 749

continue to rely on the substituted judgment doctrine as a means of determining what the minor or incompetent adult would do if he or she was in fact competent.[61] Over the years, proponents and critics of the doctrine have debated its appropriateness in medical contexts. Yet despite these praises and critiques, the substituted judgment doctrine has been transformed into a revolutionary standard applied in a wide variety of contexts.

1. The Early Years of the Substituted Judgment Doctrine

The substituted judgment doctrine was originally enacted by English courts during the nineteenth century.[62] It was first applied in the area of estate administration of mentally incompetent persons.[63] In 1844, the substituted judgment doctrine found its way into the United States, when a court of equity handled the property of a mentally incompetent person as it believed the person would have acted if competent.[64] Evidence of previous gift giving and statements regarding an incompetent adult's intentions were admissible so as to better assist the court in determining what the incompetent person would do if competent.[65] In its original form, this subjective test was a means of making allowances from the income of a person who was once competent (but now mentally incompetent) by looking at the person's prior conduct and intent.[66] Eventually, courts began to apply this doctrine to medical decision-making cases. The substituted judgment doctrine has rapidly evolved from its early years to become a comprehensive standard utilized in cases involving organ donations,[67] "right to die" cases,[68] and religious-based objections to medical treatment cases.[69]

(D.C. 1979); Strunk v. Strunk, 445 S.W.2d 145, 147-48 (Ky. 1969); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977).

[61] *See* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 271 (1990); *see* Little v. Little, 576 S.W.2d 493, 497 (Tex. App. 1979); *Saikewicz*, 370 N.E.2d at 431; *Strunk*, 445 S.W.2d at 148.

[62] *See Whitbread*, 35 Eng. Rep. 878; *Boyd*, 403 A.2d at 749; *Saikewicz*, 370 N.E.2d at 431; *Strunk*, 445 S.W.2d at 148.

[63] *See Whitbread*, 35 Eng. Rep. 878; *Boyd*, 403 A.2d at 749; *Saikewicz*, 370 N.E.2d at 431; *Strunk*, 445 S.W.2d at 148.

[64] *In re* Willoughby, 11 Paige Ch. 257, 259 (N.Y. Ch. 1844) ("[A court of equity could act] for the lunatic, and in reference to his estate, as it supposes the lunatic himself would have acted if he had been of sound mind."); *see* Louise Harmon, *Falling Off the Legal Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 26 (1990).

[65] *See Willoughby*, 11 Paige Ch. at 259; Harmon, *supra* note 65, at 24-29.

[66] Robert W. Griner, *Live Organ Donations between Siblings and the Best Interest Standard: Time for Stricter Judicial Intervention*, 10 GA. ST. U. L. REV. 589, 591 (1994).

[67] *See, e.g.*, Hart v. Brown, 289 A.2d 386, 386 (Conn. Super. Ct. 1972); *Strunk*, 445 S.W.2d 145; Little v. Little, 576 S.W.2d 493, 493 (Tex. App. 1979).

[68] *See, e.g.*, Gray v. Romeo, 697 F. Supp. 580, 584 (D.R.I. 1988); *In re* Nancy Ellen Jobes, 529 A.2d 434, 434 (N.J. 1987).

[69] *See, e.g.*, *In re* Boyd, 403 A.2d 744 (D.C. 1979); Giles R. Scofield, *Getting Down to Cases*, 7 ISSUES L. & MED. 213, 213 (1991).

Under the doctrine of substituted judgment, the fact finder makes a subjective determination of what a minor or an incompetent person would want when faced with the same decision.[70] "The doctrine is based on the principle that a court will not refuse to act if it is probable that the incompetent would have taken the same action had he been normal."[71] Courts purport to "determine and effectuate, insofar as possible, the decision that the patient would have made if competent. Ideally, both aspects of the patient's right to bodily integrity – the right to consent to medical intervention and the right to refuse it – should be respected."[72] Additionally, the court makes every effort to "don the mental mantle of the incompetent."[73] Courts attempt to make this determination based on the behavior and statements made during a competent period of that person's life and the value system of the patient and the patient's family.[74] Some courts also look at what the majority of persons would do in similar circumstances[75] and substitute its judgment for that of an incompetent adult based on a person's previous desire to minimize estate taxes, motives of charity, or for purely selfish reasons.[76]

The justification for applying the substituted judgment doctrine is that it provides minors and incompetent individuals "the same panoply of rights and choices [the state] recognizes in competent persons."[77] This doctrine is further justified on the basis that the incompetent person will likely ratify the decision in the chance that he or she recovers.[78]

Moreover, courts will not rely upon whether a benefit to the child or incompetent adult exists.[79] In fact, assuming that the decision is based on the minor's or incompetent person's personal preferences, the substituted judgment doctrine permits the court to make decisions that may be contrary to the minor

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[70] *Little*, 576 S.W.2d at 497.

[71] *Id.*

[72] *In re* Conroy, 486 A.2d 1209, 1229 (N.J. 1985).

[73] Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977) (quoting *In re* Carson, 39 Misc. 2d 544, 545).

[74] Robbennolt, *supra* note 55, at 220-21. For example, if the incompetent person, while competent, made gifts or expressed some intention to act gratuitously, courts have only rarely refused to substitute its judgment for that of the incompetent adult. John A. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine,* 76 COLUM. L. REV. 48, 59-60 (1976) [hereinafter Robertson, *Organ Donations*]. Courts assume that, if competent, the incompetent person would have made the gift. *Id.* at 60.

[75] Scofield, *supra* note 70.

[76] *See In re* Dupont, 194 A.2d 309 (Del. Ch. 1963); *In re* Flagler, 162 N.E. 471 (N.Y. 1928); *Ex parte* Whitbread, 35 Eng. Rep. 878 (1816).

[77] *Saikewicz*, 370 N.E.2d at 428.

[78] *See Whitbread*, 35 Eng. Rep. 878. Courts presume that if the incompetent person recovers, he or she will not blame the guardian for carrying out an act based on a pattern established by the incompetent person while he or she was competent. Robertson, *Organ Donations*, *supra* note 75, at 60.

[79] Shartle, *supra* note 11, at 448.

or incompetent person's best interests.[80] Respect for persons requires that the choice the incompetent individual would make, if he or she were competent or a fully matured adult, has priority over any conflict with the incompetent individual's best interests.[81] It is the subjective personal preferences of the minor or incompetent adult that controls the court's decision-making authority.[82]

2. *Modern Application of the Substituted Judgment Doctrine*

While critics of the substituted judgment doctrine continue to wage war with its supporters over its appropriateness in medical contexts, courts have persistently applied the doctrine in several recent cases. After applying the substituted judgment doctrine, the court in *Strunk v. Strunk* permitted the harvesting of an incompetent adult's kidney.[83] In *Strunk*, the mother of an incompetent adult petitioned the court in order to permit the surgical removal of her son's kidney for the benefit and survival of his brother.[84] Although the father consented to the procedure as well, the guardian ad litem, who was appointed to represent the incompetent adult's interests, opposed the transplant. The court, after holding that the transplant was permissible, declared that "[t]he right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."[85] Although the court purported to apply the substituted judgment doctrine, it neglected to discuss what the incompetent adult would do if he were competent. Instead, the court focused on the psychological well-being of the incompetent donor by taking into account his dependency upon his brother and the emotional devastation he would face in the event of his brother's death.[86]

Three years after *Strunk*, a Connecticut court in *Hart v. Brown* determined that parents of minor twin daughters had the authority to consent to the transplantation of a kidney from one child to the other.[87] Like the court in *Strunk*, the *Hart* court claimed to apply the substituted judgment doctrine.[88] The court, however, failed to ascertain what the donating child would do if she were a competent adult. Rather, the court concluded that "after a close, independent and objective investigation of their motivation and reasoning," the parents could substitute their judgment for that of the child.[89] The court further noted,

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80. *Id.*
81. Robertson, *Organ Donations*, *supra* note 75, at 64.
82. Shartle, *supra* note 11, at 448.
83. Strunk v. Strunk, 445 S.W.2d 145, 149 (Ky. 1969).
84. *Id.* at 145-46.
85. *Id.* at 148.
86. *Id.* at 149.
87. Hart v. Brown, 289 A.2d 386, 391 (Conn. Super. Ct. 1972).
88. *Id.*
89. *Id.* at 390.

> [t]o prohibit the natural parents and the guardians ad litem of the minor children the right to give their consent under these circumstances, where there is supervision by this court and other persons in examining their judgment, would be most unjust, inequitable and injudicious. Therefore, natural parents of a minor should have the right to give their consent to an isograft kidney transplantation procedure when their motivation and reasoning are favorably reviewed by a community representation, which includes a court of equity.[90]

A Texas court also explicitly adopted the application of the substituted judgment doctrine in *Little v. Little*.[91] In *Little*, the mother of a mentally retarded minor child sought the removal of the child's kidney for the purpose of transplanting it into the child's ill brother.[92] The guardian ad litem assigned to the case opposed the operation.[93] After finding that the siblings had a close relationship, a concern for the well-being of one another, and the incompetent underage child was aware of her brother's condition and was aware that she was in a position to alleviate his pain, the court permitted the harvesting.[94] Furthermore, the court stated, "Assuming that [the incompetent child] is incapable of understanding the nature of death, there is ample evidence to the effect that she understands the concept of absence and that she is unhappy on the occasions when [her brother] must leave home for hours . . . for dialysis."[95] Additionally, the court established that the incompetent child was capable of experiencing an increase in personal welfare as a result of donating her kidney.[96] The court concluded that the "substantial psychological benefits from such participation" outweighed the minimal risks and discomfort associated with the donation.[97]

Though its use in the medical field continues to be debated, it is clear from these recent decisions that courts will not be influenced by biased commentary. From the earliest days of dividing land of an incompetent adult to permitting organ and tissue harvests from minors and incompetent adults, the substituted judgment doctrine has evolved into an innovative standard, which courts rely upon in a wide variety of contexts.

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90 *Id.* at 391.
91 Little v. Little, 576 S.W.2d 493, 498 (Tex. App. 1979).
92 *Id.* at 494.
93 *Id.*
94 *Id.* at 500.
95 *Id.* at 498-99.
96 *Id.* at 499.
97 *Id.* at 500.

3. Endorsements, Evaluations, and Criticisms of the Substituted Judgment Doctrine

Many supporters of the substituted judgment doctrine believe that its application is superior to the best interest standard because the doctrine respects individual autonomy.[98] Supporters believe that the substituted judgment doctrine is an appropriate test in medical contexts because it provides incompetent individuals with "the same degree of freedom as competent persons in deciding whether they will undergo or continue invasive medical treatment."[99] Thus, the doctrine is said to treat minors and incompetent persons as autonomous human beings who, like competent individuals, are entitled to consideration, dignity, and freedom of choice.[100]

> [T]he substituted judgment doctrine is explicitly non-utilitarian, and makes no claim that the rights of incompetents may be overridden to advance the interests of others, where the rights of competents may not be similarly overridden. Rather than detract from respect for the persons of incompetents, the substituted judgment doctrine, properly understood, actually fosters respect. For it seeks to treat incompetents as competents are treated – as creatures of choice, with the autonomy and dignity of choice, and whose choices as best as we can ascertain them are to be respected. It thus stands as a further elaboration of the personhood of incompetents.[101]

Because the fact finder determines what the minor or incompetent person would prefer were the minor or incompetent person capable of making the decision him- or herself,[102] many commentators believe that the substituted judgment doctrine takes into account a minor's or an incompetent person's autonomy and recognizes his moral worth.[103] This approach gives the incompetent person the benefit of the doubt by assuming his or her good nature and endowing him or her with humanity's finest qualities.[104] Likewise, philosopher John Rawls believes that in order to respect the integrity of a person, we must treat others "as we have reason to believe he would choose for himself if he

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98. Liacos, *supra* note 59, at 220-21; *see also* Robertson, *Organ Donations*, *supra* note 75, at 76 (stating that a person's choice regardless of competence should be respected).
99. Liacos, *supra* note 59.
100. *Id.*
101. Robertson, *Organ Donations*, *supra* note 75, at 76.
102. Edward D. Robertson, Jr., *Is "Substituted Judgment" a Valid Legal Concept?*, 5 ISSUES L. & MED. 197, 200 (1989) [hereinafter "Robertson, Jr., *Substituted Judgment*"].
103. *Id.* at 206.
104. *In re* Pescinski, 226 N.W.2d 180, 184 (Wis. 1975) (Day, J., dissenting).

were capable of reason and deciding rationally."[105] This is not to suggest, however, that we are to impose preferences he or she never had or that previous desires are to be ignored. Rather, "[p]aternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods."[106]

In addition to respecting personal autonomy, the substituted judgment doctrine is widely supported because the doctrine encourages consistency. Specifically, since incompetent adults are treated as persons with rights and awarded respect in other contexts,[107] consistency demands similar treatment for incompetent persons in this context.[108] "By failing to treat them as we treat competent persons, in similar situations, ascertaining and respecting their lawful choices, we might undercut respect for the incompetent persons in other situations, and eventually diminish respect for all persons."[109]

Despite the persuasive line of reasoning supporting the substituted judgment doctrine, the arguments against the doctrine cannot be ignored. The most compelling, and perhaps most disputed criticism of the substituted judgment doctrine, is that its use is not appropriate for individuals who were never before competent. The substituted judgment doctrine does not draw a distinction between persons whom have never before been competent and persons whom, though incompetent now, have been competent at some point in his or her life.[110] The doctrine applies in both classifications.[111] Since courts applying the substituted judgment doctrine seek to determine the decision a person would make if competent, many commentators find it "absurd" to apply this standard because it treats an incompetent individual as though he were competent when he possibly never had been.[112] It is impossible to discover a minor's or never-before-competent adult's preferences by looking at their "philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death."[113] Courts are forced instead to rely on "evidence [that] is unreliable or unavailable," when the doctrine is applied to never-before-competent individuals.[114] When the court has before it a petition with evidence representing a formerly competent person's treatment decisions, however, the court can truly

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105 JOHN RAWLS, A THEORY OF JUSTICE 209 (Belknap Press 1971).

106 *Id.* at 249.

107 For example, incompetent persons have rights equal to competent persons in the criminal context. *See People ex rel. Myers v. Briggs*, 46 N.E.2d 281, 288 (Ill. 1970) (stating that an incompetent person has a constitutional right to trial).

108 Robertson, *Organ Donations*, *supra* note 75, at 64.

109 *Id.*

110 Robertson, Jr., *Substituted Judgment*, *supra* note 103, at 208.

111 *Id.*

112 Robertson, *Organ Donations*, *supra* note 75, at 65.

113 *In re* Nancy Ellen Jobes, 529 A.2d 434, 445 (N.J. 1987).

114 Griffith, *supra* note 38, at 303.

communicate that person's decisions through the application of the substituted judgment doctrine.[115] On the other hand, it is impossible for judges to understand an incompetent person's wishes without ever having the slightest indication of those wishes.[116] Thus, the application of the substituted judgment doctrine in circumstances involving minors and never-before-competent individuals is said to result in a "legal fiction."[117]

Proponents of the substituted judgment doctrine respond that evidence of net benefits should serve as a surrogate for determining what the minor or incompetent adult would have chosen.[118] They justify this proposition by presuming that a child or incompetent adult would only choose what benefits him- or herself.[119] These benefits do not need to be tangible or physical benefits but can be psychologically or physiologically beneficial as well.[120] Proponents contend that if a court is convinced that no such benefit exists, only then may it decide that the minor or incompetent adult would not consent to the procedure if he or she were competent.[121]

Nevertheless, critics of the substituted judgment doctrine maintain that if the doctrine is applied to a never-before-competent incompetent person, it is the judge who determines the incompetent individual's *supposed* wishes and then renders a decision.[122] As a result of making a decision based on assumed wishes, the court and its litigants are attempting to be "blameless, choiceless assistants" while placing "all responsibility for the decision . . . with the incompetent . . . ."[123] Critics argue that this practice does not reflect the values of the never-before-competent adult at all but, in reality, represents the values of the true decision-maker: the judge.[124]

Yet another criticism confronting the substituted judgment doctrine is that it deprives individuals of free choice and moral dignity.[125] Some commentators maintain that if personal preferences of an individual are not known, the substi-

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[115] Robertson, Jr., *Substituted Judgment*, *supra* note 103, at 208. It is argued that the substituted judgment doctrine is "best left to situations where a previously competent person expressed definite preferences regarding medical treatment, including organ donation, and due to an accident or some other intervening circumstance, is later unable to effectuate her wishes on her own." Michael T. Morley, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215, 1235-36 (2002).

[116] Robertson, Jr., *Substituted Judgment*, *supra* note 103, at 208.

[117] Griffith, *supra* note 38, at 303. A legal fiction is "an assumption that something is true even though it may be untrue, made esp[ecially] in judicial reasoning to alter how a legal rule operates." BLACK'S LAW DICTIONARY 409 (2d. ed. 2001).

[118] Robertson, *Organ Donations*, *supra* note 75, at 56-57.

[119] *Id.* at 57.

[120] Dufault, *supra* note 8, at 224.

[121] *Id.*

[122] Robertson, *Organ Donations*, *supra* note 75, at 207.

[123] *Id.* at 207 n.48 (quoting Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 ISSUES L. & MED. 131, 137 (1985)).

[124] *Id.*

[125] Robertson, *Organ Donations*, *supra* note 75, at 61.

tuted judgment doctrine permits a court to impute the preferences of a reasonable, competent person onto the incompetent individual.[126] Proponents of the doctrine contend that assigning preferences to the individual is justified because "such an attempt would continue to regard him, even during his incapacity, as an individual with free choice and moral dignity, and not as someone whose preferences no longer mattered."[127] This suggestion, however, completely undermines the very nature of the substituted judgment doctrine. If the substituted judgment doctrine stands for anything, it is the idea that courts must ascertain what the particular incompetent individual would do and not what *another* reasonable competent person would do in the same situation. In *Superintendent of Belchertown State School v. Saikewicz*, the court warned, "Individual choice is determined not by the vote of the majority but by the complexities of the singular situation viewed from the unique perspective of the person called on to make the decision."[128] When a court applies this objective reasonable competent person standard and assigns preferences to an incompetent individual, the court no longer regards the incompetent individual as an individual with free choice. To clarify, this approach requires courts to impute upon an incompetent individual what *society* deems is reasonable, which, by definition, deprives the individual of any "free choice and moral dignity."[129]

Furthermore, many opponents consider it impossible to recognize autonomy within the substituted judgment doctrine, even though proponents of the doctrine strongly believe in the doctrine's capabilities.

> Autonomy means self-law; it means the ability to make decisions without reference to the values or wishes of others. . . . Incompetent persons are not autonomous; they have no ability to decide. Substituted judgment thus requires the acceptance of an oxymoron – that one's autonomy can be exercised by another. . . . "[T]hat decisions concerning a particular person's fate are better made *for* him than *by* him, because others wiser than he are more keenly aware of his best interests than he can be – conflicts with the notion of a right to self-determination."[130]

Lastly, critics of the substituted judgment doctrine have found that its use denies individuals the very autonomy from which it purports to be derived.[131]

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[126] *Id.*

[127] *Id.* at 63.

[128] Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 428 (Mass. 1977).

[129] Robertson, *Organ Donations*, *supra* note 75, at 63.

[130] Robertson, Jr., *Substituted Judgment*, *supra* note 103, at 206.

[131] *Id.* at 206.

A final argument made by opponents of the substituted judgment doctrine is that parents or guardians, to whom courts look for prior beliefs and values of the incompetent individual, may act with bias judgments and their own interests in mind. "If the decision-maker is affected by his own value judgments, involvement, emotions, and interest, he will not be detached and neutral, and hence will be less able to 'don the mental mantle of the incompetent,' as the doctrine of substituted judgment calls on him to do."[132] Although the presumption exists that the "natural bonds of affection" will necessarily cause parents to act in the best interests of their children, the ability of parents to act in the best interests of their minor child as a prospective organ or tissue donor has been criticized when those parents are faced with the potential death of another child.[133]

> If parents are given the authority to substitute their judgment for the child, they will undoubtedly be strongly influenced by what they hope their child would do if he or she were competent. Thus, parental aspirations for their child, usually including generosity and love toward the ill sibling, seem likely to bias the substituted judgment that they or the court reach for their child.[134]

Economic hardships as well as sibling-to-sibling donations, where families are under extreme emotional strain, may adversely affect a surrogate's decision-making ability.

B. The Best Interest Standard

Unlike the substituted judgment doctrine, whose roots date back to early English law, the best interest standard is derived from the state's parens patriae power.[135] As opposed to the subjectively applied substituted judgment doctrine, the best interest standard is an objective test, which focuses on protecting the minor or incompetent adult.[136] Under this standard, the court evaluates the benefits and risks of the transplantation to the potential donor in order to deter-

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132 Liacos, *supra* note 59, at 221.

133 Parham v. J.R., 442 U.S. 584, 602 (1979); *see* Robbennolt et al., *supra* note 55, at 226.

134 Robbennolt et al., *supra* note 55, at 226.

135 *In re* Conroy, 486 A.2d 1209, 1231 (N.J. 1985) ("[T]he state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests . . . ."); *see* Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925); Robertson, Jr., *Substituted Judgment*, *supra* note 103, at 211.

136 *See In re* Doe, 481 N.Y.S.2d 932, 933 (App. Div. 1984); *In re* Pescinski, 226 N.W.2d 180, 182 (Wis. 1975); Shartle, *supra* note 11, at 448-49.

mine if the transplant is appropriate.[137] The court will permit a transplant if it determines that the procedure is in the best interests of the prospective donor.[138] The primary consideration that the best interest standard seeks to discover is: "[W]hat will promote the welfare of the child [or incompetent adult]?"[139] Because in most cases it is not in the physical best interest of a healthy minor or incompetent adult to donate an organ or tissue,[140] courts consider whether the prospective donor will benefit psychologically from the procedure.[141]

1. The Best Interest Standard and the Use of Psychological Benefits

To determine whether the harvesting of organs or tissue is in the minor or incompetent donor's best interest, courts focus on the psychological impact of donating versus not donating.[142] If the court finds that a psychological benefit does in fact exist, it will then determine whether the psychological benefit outweighs the risks associated with the operation.[143] Some psychological factors courts have considered include the following: the quality of the relationship between the prospective donor and the recipient,[144] the possibility of alternative medical treatment,[145] the prospective donor's level of understanding of the purpose he or she plays in the situation,[146] and the recipient's medical condition both with and without the transplant.[147] The emerging rationale for allowing organ and tissue harvests from minors and incompetent individuals is that the donor will psychologically benefit from the procedure.[148] Many commentators, however, debate whether psychological factors should be taken into account at

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[137] *See* Curran v. Bosze, 566 N.E.2d 1319, 1343 (Ill. 1990); *Doe*, 481 N.Y.S.2d at 933; Shartle, *supra* note 11, at 448-49.

[138] *See Curran*, 566 N.E.2d at 1331; *Doe*, 481 N.Y.S.2d at 933; Charles H. Baron et al., *Live Organ and Tissue Transplants from Minor Donors in Massachusetts*, 55 B.U. L. REV. 159, 170 (1975).

[139] Robbennolt et al., *supra* note 55, at 222.

[140] *See Curran*, 566 N.E.2d at 1343.

[141] Baron et al., *supra* note 139.

[142] *See Doe*, 481 N.Y.S.2d at 932; Robbennolt et al., *supra* note 55, at 222.

[143] *See Doe*, 481 N.Y.S.2d at 933; Robbennolt et al., *supra* note 55, at 222.

[144] *See Curran*, 566 N.E.2d at 1343.

[145] *See Doe*, 481 N.Y.S.2d at 932.

[146] *See* Little v. Little, 576 S.W.2d 493, 500 (Tex. App. 1979).

[147] *See* Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); *Doe*, 481 N.Y.S.2d at 933; Robbennolt et al., *supra* note 55, at 223. It is argued that in its truest form, the best interest standard should focus solely on the interests of the donor and should not take into account the interests of the prospective recipient. Griner, *supra* note 67, at 607. As case law will suggest, however, courts often consider the interests of the recipient. *See Doe*, 481 N.Y.S.2d at 932; *In re* Richardson, 284 So. 2d 185 (La. Ct. App. 1973); Griner, *supra* note 67, at 600. For example, courts have considered factors such as the potential recipient's imminent need for the organ or tissue as well as the lack of alternative treatment for the recipient. *See Doe*, 481 N.Y.S.2d at 932; *Richardson*, 284 So. 2d at 185; Griner, *supra* note 67, at 600.

[148] Cheyette, *supra* note 32, at 471.

all.

Proponents of harvesting procedures and the use of psychological benefits argue that minors and incompetent adults will experience significant psychological benefits by preventing the loss of a loved one.[149] The donor is thus protected from any trauma he or she may have suffered from the loss of a relative.[150] Furthermore, it is argued that "by conferring on him or her benefits associated with altruistic acts," the donor will have an increased self-esteem and self worth.[151] "Studies of persons who have donated kidneys reveal resulting positive benefits such as heightened self-esteem, enhanced status in the family, renewed meaning in life, and other positive feelings including transcendental or peak experiences flowing from their gift of life to another."[152] It is psychological benefits such as these that supporters believe the court should consider when deciding whether to permit the transplant.

Opponents argue that, by considering psychological benefits, the court automatically assumes that the recipient will survive the transplant.[153] One of the main reasons courts permit the use of psychological benefits is to prevent any traumatic effects the vulnerable donor may endure from losing a close relative if the transplant is not permitted.[154] This justification, however, is entirely undermined if the recipient does not survive the transplant.

Moreover, an additional flaw exists when courts encompass psychological benefits into the best interest standard. When courts evaluate a harvesting petition and take into account psychological benefits to the donor, the court erroneously presumes that all individuals will be able to appreciate the psychological benefit. Low functioning mentally disabled individuals, however, may never be able to appreciate the nature of their altruistic acts. "The incompetent may not be able now, nor in the near future, to comprehend the meaning of charity or the social norms surrounding gift-giving, and thus may lack the capacity to taste the immediate psychological fruits of altruism."[155] Similarly, children may be unable to comprehend the nature of their altruistic behavior due to their young age.[156] When a situation such as this arises, psychological benefits may never be present and thus, may not need to be considered at all.

2. Application of the Best Interest Standard and the Use of Psychological Benefits

Regardless of the criticisms presented, courts continue to consider the

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149 *Id.*
150 *Id.*
151 *Id.*
152 Little v. Little, 576 S.W.2d 493, 499 (Tex. App. 1979).
153 Cheyette, *supra* note 32, at 474.
154 *Id.* at 471.
155 Robertson, *Organ Donations*, *supra* note 75, at 70.
156 Griner, *supra* note 67, at 600.

psychological benefits an individual may experience when determining whether it will permit the harvest. For example, the Louisiana Court of Appeals concluded that the possibility of the incompetent minor experiencing any psychological benefits was "highly speculative" and "highly unlikely."[157] In *Richardson,* the mother of an incompetent minor consented to a harvesting prodedure. Although the mother consented to the procedure, the father of the incompetent minor sued the mother in order to bring the issue of consent before the court.[158] The court examined the likelihood that the minor donor would experience any psychological benefits, such as the possibility that the recipient sister would be the incompetent minor's caretaker after the death of their parents. Nevertheless, the court declined to recognize any such psychological benefits.[159]

The court based its decision on principles found in Louisiana property law,[160] which promotes the best interest of the minor in property contexts. The court found a parallel between intruding into a minor's real property right and invading a minor's body.[161] The court insisted that because Louisiana property law maintains the same protection from "intrusion into a comparatively mere property right, 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 best interest of the minor."[162] The court then concluded that neither the incompetent minor's parents nor the court had the power to authorize the harvest for the purpose of donating his organ to his sister.[163] Thus, in *Richardson* the court denied the harvest petition ordering a kidney transplant from an incompetent minor to his sister.[164]

In *Pescinski,* the Wisconsin Supreme Court reached a conclusion similar to that in *Richardson* only two years later.[165] In *Pescinski,* the guardian of an incompetent adult petitioned the court to order a harvest of the incompetent adult's kidney and transfer it to his sister. The court affirmed the lower court's holding that the judiciary did not have the power to authorize the kidney harvest absent any "real consent on his part, and in a situation where no benefit to him has been established . . . ."[166] The court demonstrated its approval of the best interest standard and also explicitly rejected the substituted judgment doctrine.[167] After discussing the historical background of the substituted judgment

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[157] *In re* Richardson, 284 So. 2d 185, 187 (La. Ct. App. 1973)
[158] *Id.* at 186.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 187.
[164] *Id.*
[165] *In re* Pescinski, 226 N.W.2d 180, 180 (Wis. 1975).
[166] *Id.* at 182.
[167] *Id.*

doctrine and its use for allotting gifts of property taken from an incompetent individual, the court stated, "If applied literally, [the substituted judgment doctrine] would allow a trial court, or this court, to change the designation on a life insurance policy or make an election for an incompetent widow, without the requirement of a statute authorizing these acts . . . ."[168] The court concluded, "An incompetent particularly should have his own interests protected. Certainly, no advantage should be taken of him."[169] The best interest standard was the approach to provide such protection.

In *Doe*, unlike *Pescinski,* the New York judiciary declared that it did possess the power to authorize such a procedure, as derived from its parens patriae power.[170] In *Doe*, the court was asked to authorize a bone marrow transplant from an incompetent adult to his brother.[171] This court considered the psychological benefits the donor would potentially receive from the harvest.[172] The court determined that the risk to the donor was minimal and that the transplant from the incompetent individual was the only reasonable medical alternative. Thus, the court held that the benefits to the incompetent adult outweighed the risks associated with the procedure.[173] The court then concluded that the existence of psychological benefits, including the fact that the recipient was the sole family member making life decisions for the incompetent adult, determined that the procedure was in the incompetent adult's best interests.[174]

In 1990, the Illinois Supreme Court was faced with the landmark case of *Curran v. Bosze*.[175] Although equipped with rich substantive law from cases like *Richardson*, *Pescinski*, and *Doe*, the *Curran* court was faced with a slight variation on the factual circumstances making *Curran* more complex than the others.[176] In *Curran,* a father sought to compel a compatibility test for a bone marrow transplant from his dying son's half-siblings who were three-year-old twins (of whom he was also the father). The mother of the three-year-old twins refused to consent to the test. Further, pursuant to a court order, the mother had sole custody and care of the twins, and the evidence did not indicate that the twins had a familial relationship with their dying half-brother.[177] The facts presented in *Curran* are, therefore, different from those in previous cases where

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168 *Id.*

169 *Id.*

170 *In re* Doe, 481 N.Y.S.2d 932, 932 (App. Div. 1984).

171 *Id.*

172 *See id.* at 933.

173 *Id.*

174 *Id.* This court recognizes one of the criticisms of the best interest standard. The court acknowledges that there is a presumption that the recipient will unquestionably survive when psychological benefits are taken into consideration. The court stated, "We agree that the benefits to the incompetent *if his brother lives* outweigh the physiological and psychological risk . . . ." *Id.* The court, however, merely speaks of it and continues to conclude as it does.

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

176 *Id.*

177 *Id.* at 1344.

the donor and recipient are full siblings and had a social relationship.

In *Curran*, the court explicitly rejected the use of the substituted judgment doctrine.[178] The court found that the twins had not "yet had the opportunity to develop 'actual, specific express intent,' or any other form of intent, with regard to serving as a bone marrow donor."[179] In addition, the court stated, "A guardian attempting to prove what a 3 ½-year-old child would or would not do in a given set of circumstances at a given time in the distant future would have to rely on speculation and conjecture."[180] Moreover, the court held that "a parent or guardian may give consent on behalf of a minor daughter or son for the child to donate bone marrow to a sibling, only when to do so would be in the minor's best interest."[181] The court discussed the following three necessary factors in determining whether the donation would be in the best interests of the child.[182]

> First, the parent who consents on behalf of the child must be informed of the risks and benefits inherent in the bone marrow harvesting procedure to the child. Second, there must be emotional support available to the child from the person or persons who take care of the child . . . . Third, there must be an existing, close relationship between the donor and recipient.[183]

The court then applied these factors to the facts of the case. First, the court acknowledged that both the mother and the father were informed of the risks associated with performing a bone marrow harvesting procedure on the twins.[184] Second, the court recognized that there would be a lack of emotional support available to the twins from their mother because she did not consent to the procedure.[185] Third, the court stated that the half-siblings lacked the emotional bonds necessary to permit the harvest.[186] Based on that analysis, the court held that participation in the procedure would not be in the minor twins' best interest.[187]

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[178] *Id.* at 1326.
[179] *Id.*
[180] *Id.*
[181] *Id.* at 1331.
[182] *Id.* at 1343.
[183] *Id.*
[184] *Id.* at 1344.
[185] *Id.*
[186] *See id.* at 1343. The court stated, "Only where there is an existing relationship between a healthy child and his or her ill sister or brother may a psychological benefit to the child from donating bone marrow to a sibling realistically be found to exist." *Id.* at 1344.
[187] *Id.* at 1345.

3. *Endorsements, Evaluations, and Criticism of the Best Interest Standard*

Like the substituted judgment doctrine, the best interest standard faces both praise and criticism. One of the main reasons proponents of the best interest standard believe this test is superior to the substituted judgment doctrine is because of its focus on protecting the welfare of the prospective donor instead of substituting preferences for those minor and incompetent adults, whose values and beliefs are undefined.[188] On the other hand, opponents of the standard believe that this test is elusive and contains no model for determining what constitutes a benefit.[189]

The best interest standard has been criticized for its lack of standards or criteria and the amount of such benefit that must be shown in order for it to be in the individual's best interest.[190] One commentator argues that the best interest standard "has been so vaguely and loosely applied as to permit arbitrary manipulation for utilitarian ends."[191] He believes that by taking into account psychological benefits, courts encourage false testimony about the relationship between the donor and recipient siblings.[192] Unclear and imprecise criteria is just one reason why many critics believe that the best interest standard is inferior to the substituted judgment doctrine.

Yet another reason opponents disagree with the best interest standard is due to the belief that the standard's objective element demeans humanity. Specifically, it is argued that by objectively deciding what is in an individual's best interest, the individual's subjective wishes and desires are ignored.[193] By failing to acknowledge the individual's preferences, the individual's humanity is demeaned.[194] In *Saikewicz*, the court stated, "To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a

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[188] Robbennolt et al., *supra* note 55, at 224-25. *See supra* notes 106-13 and accompanying text.

[189] Robertson, *Organ Donations*, *supra* note 75, at 56.

[190] *Id.* The author argues:

> Courts have readily determined that such intangible psychological factors as the traumatic impact of the recipient's death on the donor, or the denial to him of the psychic pleasures he receives from interaction with the recipient are benefits that justify transplants. Even in cases where testimony on the psychic effects appears substantial, as in *Strunk*, skepticism about relying on such evidence of benefits seems warranted. At times this testimony appears contrived, as when the donor is too young to have developed the deep ties with the sibling that the testimony suggests.

Id.

[191] *Id.*

[192] *Id.*

[193] *See* Liacos, *supra* note 59, at 221.

[194] *Id.*

lesser value on his intrinsic human worth and vitality."[195] It has been suggested that when the best interest standard is forced upon individuals by the state, whether with benign motives or not, it "moves society one step further down the road toward authoritarianism."[196]

Lastly, the best interest standard is criticized for its use in situations when parents are the decision-makers for both the donor child and the recipient child.[197] Although they may deny its existence, parents "cannot divorce the extreme need of one child from the interests of the healthy child."[198] Consequently, when parents act as decision-makers for both the donor child and the recipient child, a conflict of interest results.[199] Such a conflict of interest ensues because a human element exists, and parents are "neither omnipotent nor immune to acting out of self-interest."[200] Moreover, the love and hopelessness felt for their other child "might blind them to the real magnitude of harms their donor child would suffer" from the transplantation.[201] Some commentators suggest that the best interest standard is more valuable "in situations where competing values are not involved, and families simply do not fall into that category."[202] It is often difficult, if not impossible, to separate individual interests from family interests.[203] Furthermore, when children or incompetent adults are only able to comprehend the familial relationship in its most elementary nature, the likelihood of coercion or influence exerted by a parent or guardian is increased. The parent's or guardian's view is imposed on the child. "The interests of more than one person are at stake. To attempt to cram a formal relation into an intimate context does violence to the morally significant aspects of the family relationship."[204]

Although the best interest standard focuses on protecting the welfare of the prospective donor instead of substituting the preferences for those whose values and beliefs are undefined, many commentators find its use inappropriate and inferior to the substituted judgment doctrine. Due to its paternalistic, unstructured approach, its high probability for coercion by a parent or guardian,

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[195] Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 428 (Mass. 1977); *see* Liacos, *supra* note 59, at 221.

[196] Liacos, *supra* note 59, at 221. It has further been argued that when the best interest standard is imposed upon individuals by the state, it "strips [incompetent potential donors] of their humanity and reduces them to mere vortices for resources and benefits." Morley, *supra* note 116, at 1241.

[197] Griner, *supra* note 67, at 602-03.

[198] *Id.*

[199] Susan Zinner, *Cognitive Development and Pediatric Consent to Organ Donation,* 13 CAMBRIDGE Q. HEALTH CARE ETHICS 125, 130 (2004).

[200] Dufault, *supra* note 8, at 235.

[201] Zinner, *supra* note 200.

[202] *Id.*

[203] *Id.*

[204] Robert A. Crouch & Carl Elliott, *Moral Agency and the Family: The Case of Living Related Organ Transplantation*, 8 CAMBRIDGE Q. HEALTH CARE ETHICS 275, 280 (1999).

and its failure to acknowledge the potential donor's actual preferences, the best interest standard faces persistent opposition throughout the medical world.

VI. POLICY CONCERNS RELATED TO HARVESTING ORGANS AND TISSUE FROM MINORS AND INCOMPETENT ADULTS

It is no surprise that in certain contexts incompetent adults do not enjoy the same legal rights as competent adults.[205] The law does not often extend to incompetent adults the same personal and property rights as other citizens.[206] Furthermore, while minors retain some liberty interests with respect to their bodies,[207] these rights are limited by laws enacted by a paternalistic legislature. Although these limitations are in place to provide protection to minors and incompetent adults, it is believed that many laws protecting the interests of minors and incompetent adults go well beyond what is necessary.[208] Much controversy transpires because courts and legislatures are quick to defend competent donors from compelled harvests while merely deferring to third parties when minors or incompetent persons are involved.[209]

A. No Duty to Rescue Tort Law Principles

To support the assertion that minors and incompetent adults should not be used in organ or tissue harvesting procedures, commentators cite the legal premise that there is no duty to rescue.[210] Opponents of the harvesting procedure argue that even when the benefits to the recipient are great or the recipient is in danger of losing his or her life, the law does not impose upon society a duty to donate one's organs or tissue.[211] The law does not impose this duty upon society because of the general notion that there is no duty to rescue or render aid, absent some special relationship giving rise to such duty.[212]

In *McFall v. Shimp*, the court applied the well-established principle to organ donations "which provides that one human being is under no legal compul-

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[205] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 289-92 (1990) (O'Connor, J., concurring) (recognizing a duty to protect the liberty interests of incompetent patients through the enactment of special procedures).

[206] Morley, *supra* note 116, at 1216, 1225.

[207] *See* Roe v. Wade, 410 U.S. 113 (1973) (establishing the right of privacy in the area of abortion); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (recognizing the right of a minor to consent to an abortion).

[208] Cheyette, *supra* note 32, at 467-68; *see* Griner, *supra* note 67, at 600; Harmon, *supra* note 65, at 57.

[209] Harmon, *supra* note 65, at 57.

[210] Zinner, *supra* note 200, at 129.

[211] *See* McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (1978); Zinner, *supra* note 200, at 129.

[212] People v. Oliver, 210 Cal. App. 3d 138, 147 (Ct. App. 1989); *see* Handiboe v. McCarthy, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966); RESTATEMENT (SECOND) OF TORTS § 314 (1965).

sion to give aid or to take action to save another human being or to rescue."[213] In *McFall*, the tissue recipient needed a bone marrow transplant in order to live.[214] His relative and only suitable donor, however, refused to consent to the transplant.[215] The recipient attempted to use the courts as a means of compelling his relative to donate.[216] Nevertheless, the court denied the compelled transplant and concluded that society should not infringe upon an individual's "absolute right to his 'bodily security'."[217] While the court noted that the defendant's refusal was "morally indefensible," it was quick to recognize that the decision ultimately rested with the defendant.[218]

> For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.[219]

In expressing its aversion to compelling an individual to undergo an invasion of his body for the benefit of another, the court further declared,

> For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.[220]

While it is clear that the law does not impose the duty to donate upon competent adults,[221] many critics feel that the law does not defend minors or incompetent adults in the same fashion.[222] Regardless of the judicial standard applied, many commentators believe that using minors and incompetent adults as potential donors imposes Good Samaritan duties upon these individuals that

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[213] *McFall*, 10 Pa. D. & C.3d at 91.
[214] *Id.* at 90.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.* at 92 (first emphasis added).
[221] *See id.* at 91.
[222] Dufault, *supra* note 8, at 216; *see* Griner, *supra* note 67, at 600.

are not imposed upon the rest of society.[223] Furthermore, it is believed that requiring the most vulnerable members of our society to donate "sacrifice[es] [them] in the name of a utilitarian calculation which betrays the loyalty we owe to their sacred, individual personhood."[224] While one who fails to render aid may be labeled a "ruthless savage"[225] and "morally indefensible,"[226] imposing a duty to rescue on minors and incompetent adults is believed "to restrict individual discretion unacceptably."[227]

B. The Right to Bodily Integrity

In 1891, the Supreme Court declared, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[228] Both federal and state courts continue to recognize that "[t]he right to control medical decisions affecting one's body is deeply rooted in our country's history and tradition"[229] and further hold that "a person has a strong interest in being free from nonconsensual invasion of his bodily integrity."[230] With respect to com-

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[223] Dufault, *supra* note 8, at 224.

[224] Zinner, *supra* note 200, at 129. In expressing his views on autonomy and personal liberties, Mill stated:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right." JOHN STUART MILL, UTILITARIANISM ON LIBERTY ESSAY ON BENTHAM 135 (Mary Warnock ed., World Publishing Co. 1971) (1859). Mill believed that individuals have absolute freedom over their bodies, and the state cannot interfere with this freedom merely because it believes it is acting in the individual's best interest. John Stuart Mill, *On Liberty in* PHILOSOPHY OF LAW, 259, 259 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000). Therefore, even if the individual's decision is contrary to society's prevailing morals, values, and beliefs, Mill believes that an individual's right to self-determination demands society's respect.

Id.

[225] Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1897).

[226] *McFall*, 10 Pa. D. & C.3d 90, 91 (1978).

[227] *See* Viola C. Brady, Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism,* 55 IND. L.J. 551, 551 (1979-1980).

[228] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[229] Gray v. Romeo, 697 F. Supp. 580, 584 (D.R.I. 1988).

[230] Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("[T]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); *Gray*, 697 F. Supp. at 590

petent adults, the rights of bodily integrity and self-determination are well established. These same rights, however, as applied to minors and incompetent adults are not as well defined.

Absent a compelling justification, the constitutional right to privacy protects every individual's right to bodily integrity.[231] The right to privacy "encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances."[232] Notions of autonomy prevent doctors, family members, and the state from compelling an individual to do what they believe is in the individual's best interest.[233] So why should privacy protections and notions of autonomy be any less respected merely because the individual is a minor or incompetent adult?

While the Supreme Court has never expressly afforded minors the right to bodily integrity, it has firmly implied that this right, in fact, does exist.[234] Furthermore, federal and state courts have explicitly stated that minors enjoy this right.[235] In *Bellotti,* the Court stated, "A child, merely on account of his minority, is not beyond the protection of the Constitution . . . . 'Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'"[236] Additionally, it is argued that constitutional rights "do not mature and materialize" only when children are considered legal adults or legally competent.[237] Thus, at least in certain circumstances, it is believed that children, as well as incompetent adults, should enjoy the same privacy protections and notions of autonomy as competent adults.[238]

Some rationalize permitting a bone marrow harvest from minors or incompetent adults, as opposed to organ harvesting, on the theory that a bone marrow transplant is less invasive.[239] This justification, however, is flawed because, "it is not the degree of bodily invasion itself that produces the problem.

("[T]he right of personal autonomy is the right to make medical decisions affecting oneself free from unwarranted governmental intrusion."); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("[E]very human being of adult years and sound mind has a right to determine what shall be done with his own body."); Hawkins, *supra* note 43, at 2094.

[231] *Gray*, 697 F. Supp. at 584.

[232] *Saikewicz*, 370 N.E.2d at 424.

[233] Liacos, *supra* note 59, at 219.

[234] Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("[W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that the Fourteenth Amendment liberty interests are implicated.").

[235] *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 450-51 (5th Cir. 1994); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 709 (3d Cir. 1993); *In re* L., 632 A.2d 59, 62 (Conn. Super. Ct. 1993); Custody of a Minor, 393 N.E.2d 836, 844 (Mass. 1979).

[236] Bellotti v. Baird, 443 U.S. 622, 633 (1979) (quoting *In re* Gault, 387 U.S. 1, 13 (1967)).

[237] Griner, *supra* note 67, at 600.

[238] *Id.* Because children and incompetent adults fall within the state's protective power, it is argued that the state is required to recognize "their dignity and worth and afford[] them the same range of rights and choices that it recognizes in competent persons." *See id.*

[239] *Id.* at 608.

The right to maintenance of bodily integrity is a matter of a right to privacy that is not subject to degrees of invasion."[240] Even the least invasive procedure, at a minimum, violates the right of privacy.[241] "It is recognized that children [and incompetent adults] may have different rights under the Constitution, but these differences are to protect. . . [them] and their particular vulnerabilities, not to make them more vulnerable."[242] Because harvesting tissue or organs from a competent adult would violate his or her right to privacy and right to bodily integrity (absent consent), at least one court believes that minors and incompetents should similarly be protected.[243]

C. Using the Fetus as an Organ Farm

Like the California couple who became overwhelmingly desperate to provide their terminally ill daughter with an organ, many parents and guardians have similarly conceived additional children as a means of providing a suitable donor.[244] Accordingly, critics believe that by allowing parents to consent for medical treatment on their child's behalf, parents are only further encouraged to conceive children for the sole purpose of using the fetus as an organ farm. Furthermore, many commentators criticize parents and guardians for conceiving children in these circumstances because some parents and guardians decide to abort the fetus or put the baby up for adoption after learning that the fetus is not a proper match.[245] This practice is perceived as "an immoral objectification of the donor child that leads parents to view it as instrumentally valuable for its organs, rather than as inherently valuable."[246] Although it does not consequentially prevent the family from loving the child, it is believed that conceiving a child under these circumstances "does present problems with respect to rationalizing consent for a procedure that confers no physiologic value on the donor."[247]

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240. *Id.*

241. *See id.*

242. *Id.*

243. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 428 (Mass. 1977) ("[T]he 'best interest' of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons similarly situated. It does not advance the interest of the state or the ward to treat the ward as a person of lesser status or dignity than others.").

244. Matthew B. Hsu, *Banning Human Cloning: An Acceptable Limit on Scientific Inquiry or an Unconstitutional Restriction of Symbolic Speech?*, 87 GEO. L.J. 2399, 2425 n.200 (1999). In 1991, one survey showed that at least forty bone marrow transplants were a result of parents conceiving a child to serve as a donor. *Id.*

245. Cheyette, *supra* note 32, at 499.

246. Morley, *supra* note 116, at 1246; *see* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he custody, care, and nurture of the child reside first in the parents.").

247. Griner, *supra* note 67, at 605-06. The author suggests that a child who is conceived primarily for his or her organs may suffer from some psychological distress later in life. *See id.*

Yet another criticism of conceiving a child primarily for his or her organs is that it presumes that family interests and family autonomy trumps an individual's self-interests.[248] Some commentators believe, however, that respect for persons should limit the right to family autonomy.[249] Respect for persons is derived from the traditional Kantian maxim that all persons should always be treated as an ends and never as a means.[250] The moral dilemma with conceiving a child to serve as an organ donor is that the conceived child is treated solely as a means rather than as an end, which is contrary to Kantian theory. As one commentator states, "[T]he state can and ought to prohibit parents from using their child as a donor. . . if it finds the donation incompatible with respecting the child's personhood."[251]

Supporters justify the practice arguing that donating an organ or tissue to a family member results in the child serving both as a means *and* as an end.[252] The child serves as a means by advancing the family's interest through donation of an organ or tissue.[253] Because the child is also a member of the family, any advancement of the family's interest advances the child's interest.[254] In addition to serving as a means for improving the health of another, the child is simultaneously serving as an end by advancing the child's own interests by saving the life of a loved one.[255] Arguably, the result is then in harmony with the Kantian principle.[256] The flaw in this theory, however, is that it assumes the child donor wants to donate his or her organ and promote the well-being of a family member. If the child, however, does not wish to donate then the child is being used solely as a means. The result, once again, is in conflict with Kantian theory.

Still another obstacle stands in the path of those who oppose this practice: the United States Constitution. Prohibiting parents from conceiving children is unconstitutional regardless of the motive for conceiving.[257] In *Eisenstadt v. Baird*, the Supreme Court stated, "If the right of privacy means anything, it is

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It is argued, however, that being born for a particular reason neither "inflicts a net harm on that child" nor is contrary to a child's best interests. Morley, *supra* note 116, at 1247. First, had the child not been conceived for the primary purpose of his or her organs, "the alternative for that child is never to have been born at all. . . . People conceive and give birth to children for a wide range of reasons, and often for mixed reasons or even no reason at all . . . . In light of some of the commonly accepted purposes for giving birth, doing so to save a life can hardly be a ground for moral reproach." *Id.* at 1247-48.

[248] Lainie F. Ross, *Moral Grounding for the Participation of Children as Organ Donors*, 21 J. L. MED. & ETHICS 251, 253 (1993).

[249] *Id.* at 252.

[250] *Id.* at 253.

[251] *Id.*

[252] *Id.*

[253] *See* Ross, *supra* note 249.

[254] *See id.*

[255] *Id.*

[256] *Id.*

[257] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[258] Although the Constitution prohibits laws attempting to regulate this type of practice, and defenders of the right to conceive believe that it is improper to question a parent's motive for conceiving, it is important to distinguish between exercising one's right to conceive from exercising control over an infant by subjecting him or her to a surgical procedure.[259] It is the latter that opponents of conceiving children primarily for their organs seek to regulate.

Many ethical and moral dilemmas arise because minors and incompetent adults do not enjoy the same legal rights as competent adults in medical contexts. The duty to rescue, the right to bodily integrity, and the right to and motive behind conception are just a few examples of the ethical and moral issues that arise in these legal and medical contexts. Regardless of the legal standard applied, however, much criticism transpires concerning the disparities between the medical rights afforded to competent adults and those provided to minors and incompetent adults.

VII. PROPOSED SOLUTION: AN END TO DUAL STANDARDS[260]

Although the substituted judgment doctrine and the best interest standard are operative, they have proven to be impractical, illogical, and inappropriate thus begging for the creation of a new test. First, the standards are impractical because there are no criteria for determining whether the substituted judgment doctrine or the best interest standard will be used. While Illinois clearly rejected the substituted judgment doctrine in *Curran* and Texas explicitly accepted the doctrine in *Little*, these decisions offered very little in terms of determining which standard to apply.[261] Not only are defined criteria necessary for future parents in similar situations, but also for consistency in and reliability on the judicial system.

Second, the substituted judgment doctrine and the best interest standard are illogical because the same standard applies whether or not the incompetent

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[258] *Id.* at 453.

[259] Griner, *supra* note 67, at 606 n.148 (citing Alan Derehowitz, *Don't Rush to Judge These Parents*, BOSTON HERALD, Feb. 26, 1990, at 23).

[260] It should be noted that this solution assumes that no removal will be permitted if certain to result in the minor or incompetent adult's death after the organ or tissue is removed. This does not, however, include state laws that permit such removal for persons in a persistent vegetative state. Furthermore, this solution does not allow any procedure to be performed on minors or incompetent individuals that the medical profession considers experimental.

[261] While the Illinois Supreme Court discussed why the substituted judgment doctrine was not appropriate in *Curran* specifically, the court's opinion is arguably limited to the facts of the case. *See* Curran v. Bosze, 566 N.E.2d 1319, 1325-26 (Ill. 1990). It is not clear that the substituted judgment doctrine is to be explicitly rejected in all future cases. *See id.*

adult was competent at some point in his or her life. When a court can ascertain an incompetent adult's wishes because he or she has been competent once before, it does not make sense to apply the same standard used for those whose wishes cannot be discerned. The court need not attempt to substitute its judgment nor determine what is in the incompetent's best interests when a formerly competent incompetent adult has expressly stated his or her wishes.

Third, the standards are generally inappropriate in the medical context when parents act as decision-makers for both the donor child and the recipient child. A conflict of interest results because it is nearly impossible for parents to separate the interests of the healthy child from the hopelessness felt for their ailing child. Therefore, the court should closely scrutinize any decision to harvest an organ or tissue that comes from a parent. The following factors provide the court with both a logical and practical way of reviewing petitions for harvesting organs and tissue from minors and incompetent adults.

A. Procedural Requirements

1. Courts Should Scrutinize Any Decision Coming From a Parent or Guardian

While deference to parental autonomy is "deeply rooted in our Nation's history and tradition,"[262] it is important for the court to closely examine the motive behind and reason for a parent's or guardian's petition for a harvest. The state should investigate because, although parental control should not be unreasonably hindered,[263] the state has a divergent interest in caring for members of our society in need of protection.[264] This power struggle between the state's interest in protecting vulnerable members of our society and a parent's or guardian's right to make important medical decisions for their issue is ever-so present when parents or guardians act as decision-makers for both the donor child and the child recipient.

It is often the case that parents or guardians, who are acting as decision-makers for both the donor child and the recipient child, are unable to separate their own values, interests, or emotions from the decision to harvest.[265] Although specifically applying the substituted judgment doctrine, the *Hart* court similarly recognized the potential for such abuse.[266] The court reviewed the parents' motivation and reasoning for seeking permission to harvest their

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[262] *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979).

[263] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

[264] Hawkins, *supra* note 43, at 2084.

[265] The concern about conflict is not an "accidental feature" of the best interest standard but is "the essence of the problem." James Dwyer & Elizabeth Vig, *Rethinking Transplantation between Siblings*, 25 HASTINGS CENTER REPORT 5, 7 (1995).

[266] *See* Hart v. Brown, 289 A.2d 386, 391 (Conn. Super. Ct. 1972).

child's organ.[267] In situations where the parents or guardians' interests are at odds with the donor's interests, the focus is no longer solely on the well-being of the minor or incompetent donor. Rather, the parent or guardian is imposing a sacrifice on one child to benefit the other. It is the state's duty, at this point, to intervene in the private relationship in order to protect the well-being of the child or incompetent adult. Due to the risk of abuse when the decision-maker is another family member or guardian, it is imperative that courts scrutinize any decision that comes from such a person.[268]

Even after the court finds that the purpose of the petition is favorable, parental or guardian consent should not be the sole grounds for permitting the transplantation. Rather, consent from such persons should merely serve as the procedural requirement, which would bring the issue before a court. After getting into court by way of this procedural requirement, it is only then that the adversarial process should begin.

2. The Adversarial Process Should be Used in All Cases

The adversarial setting should be used in cases even when all parties consent to the harvesting.[269] As such, the court should appoint a guardian ad litem for the prospective donor. This further protects the interests of the donor child from a conflict of interest concerning the parent or guardian mentioned above. While it is the prospective donor's family or guardian who may best know the donor and either what is in his or her best interest or what he or she would do if competent, a judge can and should gain this information from testimony offered by the prospective donor's family or guardian. It is through the adversarial process that the judge can discredit any potential biases a family member or guardian may have due to the nature of their relationship with the prospective donor.[270]

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[267] *Id.* at 390. In *Hart*, the court ultimately concluded that the parents could substitute their judgment for that of the child after their judgment was closely examined by the court. *Id.*

[268] *See* Korins, *supra* note 34, at 503.

[269] While utilizing the adversarial process in all cases may be costly and place additional burdens on an already overcrowded judicial system, the need to truly protect a child's or incompetent adult's interests substantially outweighs these costs and burdens. If petitions for organ or tissue harvests do become too great in number, however, the use of administrative law judges may provide an efficient and practical solution. Not only would the petitions no longer be inconveniencing the courts, but also the administrative law judges would become experts in organ and tissue harvest petitions, thus making the petitioning process more efficient and cost-effective for all parties involved.

[270] Normal trial techniques may be used during the adversarial process in order to seek the truth from any witness (i.e. cross-examination).

3. Courts Should Review Petitions Only if No Reasonable Medical Alternative Exists

Harvesting procedures should never include minors and incompetent adults, and courts should refuse to review petitions for such procedures unless all other reasonable opportunities for transplantation have been exhausted. Items the court should consider in determining whether a reasonable medical alternative exists include the following:[271] (1) whether a competent and compatible adult living donor exists;[272] (2) whether an effective transplantation from a cadaver donor is likely; (3) whether the recipient has enough time to wait for a cadaver donor; (4) whether extracorporeal mechanisms such as kidney dialysis are adequate for the recipient to survive;[273] and (5) whether a medical cure or alternate corrective procedure is imminent.[274] Only when reasonable alternatives do not exist should the court consider using a minor or incompetent adult as a donor. Even then, the court must consider all relevant remaining factors.

B. The Standard for Formerly Competent Adults

Neither the substituted judgment doctrine nor the best interest standard is applied differently to incompetent individuals who have once been competent. The result of this has two detrimental flaws: (1) it fails to recognize a (formerly competent) incompetent individual's freedom of choice regarding previously decided medical decisions; and (2) it attempts to treat minors and never-before-competent incompetent adults as though their wishes can be ascertained. As such, the court should no longer use the same standard for formerly competent individuals who are now incompetent compared with those individuals who were never before competent.[275]

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[271] While the last three factors on the list do not focus solely on the donor's interest, the harmful effect on the donor is minimal because all of these items are procedural issues rather than substantive requirements.

[272] A competent but unwilling donor does not qualify the individual as non-compatible. Also, the level of compatibleness should depend upon medical standards and testimony from medical professionals.

[273] In examining this factor, the court should not focus on whether the recipient desires to live on dialysis for the remainder of his or her life but whether such mechanisms are adequate for the recipient to survive.

[274] Given the significant advances in modern medicine and the fact that the medical field is developing new cures and technology for diseases at such a rapid pace, it is necessary to consider whether such a development is forthcoming. "Medical science has advanced to the point where some lives in the past [that] would have ended almost immediately can now be sustained or prolonged indefinitely." State v. Pine, 524 A.2d 1104, 1107 (R.I. 1987).

[275] Because an individual is presumed to have been competent at some point in his or her life under this new standard, any party claiming that an individual was never before competent has the burden of proving that at no time was the individual a competent adult. Furthermore,

A different standard should apply to formerly competent incompetent individuals because then the individual's autonomy will truly be respected. When the court applies the substituted judgment doctrine or the best interest standard to an incompetent individual whom has previously expressed his or her wishes during a period of competency, the court is essentially treating that person as though his or her wishes do not matter.[276] Thus, the court has stripped the individual of his or her free choice.[277] Conversely, by applying a different standard for individuals whose medical wishes can be ascertained with sufficient evidence, the court is able to give effect to those wishes and genuinely respect the individual's free choice and personal autonomy. "Complying with the previously expressed wishes of a now-incompetent [adult] pursuant to a subjective standard of decision-making would similarly be effectuating that person's right to self-determination."[278]

After it is established that the incompetent individual was formerly competent, the court should look at a variety of factors to determine whether the harvesting procedure should be permitted. The court should first focus on the donor's prior expressed preferences. While the donor's expressed preferences should be the primary consideration, values and beliefs of the incompetent individual may be used as evidence to help support the donor's expressed intentions. For example, the court may consider evidence of prior gift-giving in support of one's values. The incompetent individual's values and beliefs, however, may not be the sole evidentiary factor.[279]

Yet another aspect of this new standard is the standard of proof required. The donor's explicit expressions of intent and his or her values and beliefs should be shown by clear and convincing evidence by the party petitioning the court for the transplantation.[280] If the evidence is not clear and convincing, the

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this proposed test is clearly not appropriate for minors because it is not possible for minors to fall into the category of once-competent individuals.

[276] Robertson, *Organ Donations*, *supra* note 75, at 207; *see* Liacos, *supra* note 59, at 221.

[277] *Id.*

[278] *In re* Conroy, 486 A.2d 1209, 1240 (N.J. 1985).

[279] If the court were to focus solely on the individual's values and beliefs, the risk of abuse by all persons affected by the transplantation is too great. Specifically, the same concerns raised when parents and guardians act as decision-makers are similarly raised when the potential donor has not expressively stated his intentions. Again, family members and guardians may be unable to separate their own values, interests, or emotions. It should also be noted that the court should only consider evidence of the incompetent adult's intentions if his or her expressed preferences were made during a period of competency.

[280] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282-83 (1990). In *Cruzan,* the Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.* at 282 (quoting *In re* Winshop, 397 U.S. 358, 370 (1970)). "This Court has mandated an intermediate standard of proof – clear and convincing – when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Id.* (quoting Santosky v. Kramer, 445 U.S. 745, 756 (1982)).

court should not continue with this approach for formerly competent adults. Rather, the court should implement the standard set out in the following paragraph for minors and never-before-competent adults.[281] Only by requiring a heightened standard such as clear and convincing evidence can it truly be determined whether the incompetent individual had previously expressed his or her intentions and if so, what those intentions were. Thus, the court will be protecting the incompetent individual from any attempt to impose society's values or the values of his family members or guardian onto him. By utilizing two different standards for once-competent individuals who are now incompetent and individuals who were never before competent, the court will truly be respecting the individual's autonomy.

C. The Standard for Minors and Never-Before-Competent Incompetent Adults

When an incompetent individual has never been competent, as is the case with minors, courts should use an alternative standard for determining whether the harvesting of the minor's or incompetent adult's organ or tissue should be permitted. The court should look at a variety of factors and weigh these factors based on their relevance to the particular facts of the petition.[282]

1. The Donor's Expressed Preference

First, the court should consider the donor's expressed preferences. The preference of the minor or incompetent may be used as evidence in determining what is best for the donor; however, this factor is not dispositive. Like formerly competent incompetent adults, determining the donor's preferences under this standard similarly respects the minor or incompetent adult's personal autonomy.[283] Furthermore, ascertaining the individual's preferences will help determine the psychological impact the procedure may have on the donor. For example, if the minor or incompetent adult expresses a strong desire not to donate, it is unlikely that he or she will receive any psychological benefits as a result.[284]

Although many commentators argue that any attempt to establish a minor or never-before-competent adult's preferences creates a fictional determination

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[281] *See infra* Part VII.C (describing the standard for minors and never-before-competent incompetent adults).

[282] Not all factors will be relevant in every case. In such situations, the court shall disregard irrelevant factors and give considerable weight to others.

[283] *See supra* Part V. Minors' and never-before-competent individuals' preferences may be ascertained simply by asking the individual or may be inferred by the donor's set of values and beliefs. *Id.*

[284] *See supra* Part V.B.

of what the donor would decide if his or her values were more ascertainable,[285] this contention no longer finds support under this new standard. Unlike the current approaches, determining an individual's preferences is not the end of the inquiry under this new test. Under this standard, establishing an individual's preferences should be used as evidence to either bolster or defeat arguments that debate what is best for the minor or incompetent adult. This factor is simply one factor among many, which the court should review before concluding that the harvesting procedure should be permitted.

2. *Physical Benefit and Harm Associated with the Harvest*

Next, the court should consider the physical benefit and the physical harm to which the potential donor may be exposed by going forward with the transplantation. In most cases, it is extremely rare that a healthy minor or incompetent donor will receive any physical benefit.[286] If either a long-term or short-term physical benefit does exist, the court should consider it.

Likewise, long-term and short-term physical harm to the minor or incompetent donor must be minimal. As with any surgical procedure, there are risks associated with it, such as chances for infection as well as interactions with anesthetic.[287] For example, a California baby conceived primarily for her bone marrow had to undergo multiple harvests and had to have a larger amount of bone marrow extracted from her body.[288] This means that she was repeatedly exposed to the risks associated with anesthetic. While these risks are generally considered slight,[289] the court should hear testimony from medical professionals regarding a minor's or incompetent person's likelihood of permanent physical harm. Furthermore, the court should consider whether the donor is in good physical health and whether the donor could function normally after recovering from the operation.

3. *Psychological Benefit and Harm Associated with the Harvest*

In addition to the physical effects of the procedure, the court should consider the psychological impact of the harvest on the minor or incompetent adult. While a healthy individual will probably not receive any physical benefit from

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285 Griffith, *supra* note 38, at 303.

286 *See* Curran v. Bosze, 566 N.E.2d 1319, 1343 (Ill. 1990); Baron et al., *supra* note 139.

287 *See Curran*, 566 N.E.2d at 1344 ("[T]he risk of a life-threatening complication occurring from undergoing general anesthesia is 1 in 10,000 . . . . [T]he risks associated with general anesthesia include, but are not limited to, 'brain damage as a result of oxygen deprivation, stroke, cardiac arrest and death.'"); Shartle, *supra* note 11, at 438 (citing Gale Encyclopedia of Medicine 497 (1st ed. 1999)).

288 Trafford, *supra* note 2; *see* Stewart, *supra* note 2.

289 Shartle, *supra* note 11, at 438 (citing Gale Encyclopedia of Medicine 497 (1st ed. 1999)).

the removal of an organ or tissue,[290] the psychological benefit or harm from the donation may be great.[291] Therefore, the court should take into account any short-term or long-term psychological effects the minor or incompetent individual may experience. For example, a minor child may be able to grasp what it means to save a sibling's life and derive great satisfaction from the experience.[292] In *Little*, the court recognized studies indicating that donors benefit psychologically from donating an organ, including an increase in self-esteem and a renewed sense of worth in the family.[293] Another reason that psychological benefits should be considered is the need to avoid psychological devastation and guilt that accompanies the death of a sibling.[294] Likewise, the court should consider the potential for psychological distress to the minor or incompetent donor. For example, some studies indicate that psychological distress becomes significant when the recipient's body rejects the organ or tissue.[295] "[B]ecause the rejection rate for even closely matched kidneys can run as high as twenty percent, kidney donors may . . . feel that they underwent major surgery and gave up a kidney for nothing."[296] Therefore, it is necessary that the minor or incompetent adult have some form of emotional stability or an emotional support system to help them handle the situation.[297]

Although in certain circumstances, minors and incompetent adults may be unable to understand the nature of their altruistic acts,[298] the court should still consider the potential psychological benefits and harms. If the court does not take into account psychological benefits but focuses solely on the medical benefits to the minor or incompetent adult, the decision will never be in favor of the harvesting procedure.[299] This is because a healthy minor or incompetent adult will rarely benefit physically from having an organ or tissue harvested.[300] An alternative solution, however, such as prohibiting harvests from minors and incompetent adults altogether, is not proper either. A *per se* rule preventing harvesting procedures frustrates these individuals' ability to ever act altruistically.[301] Such regulation imposes narrow self-seeking values on individuals who may have broader, altruistic ideals.[302]

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[290] *See Curran*, 566 N.E.2d at 1343; Baron et al., *supra* note 139, at 170.
[291] Cheyette, *supra* note 32, at 471.
[292] *See id.*
[293] Little v. Little, 576 S.W.2d 493, 499 (Tex. App. 1979).
[294] Cheyette, *supra* note 32, at 471.
[295] Morley, *supra* note 116, at 1223; *see* Cheyette, *supra* note 32, at 475.
[296] Cheyette, *supra* note 32, at 479.
[297] *See* Curran v. Bosze, 566 N.E.2d 1319, 1343 (Ill. 1990).
[298] Griner, *supra* note 67, at 600.
[299] *See* Dufault, *supra* note 8, at 237.
[300] *See Curran,* 566 N.E.2d at 1343; Dufault, *supra* note 8, at 237.
[301] *See In re* Pescinski, 226 N.W.2d 180, 184 (Wis. 1975) (Day, J., dissenting).
[302] *See id.*

4. *The Recipient is Likely to Benefit From the Transplant*

Although there is much debate about whether courts should focus solely on the benefit and harm to the donor,[303] it is necessary to determine whether the recipient is likely to benefit from the transplant as well. This factor is essential to the court's analysis because the experience of donating an organ is unlikely to produce any psychological benefit to the minor or incompetent donor if the transplant has no reasonable chance of saving or prolonging the recipient's life. Thus, the court need not delve into the psychological realm of the minor's or incompetent adult's ability to comprehend the grief associated with the loss of a sibling. To determine whether the transplant has a reasonable probability of success, courts should hear medical testimony from the recipient's doctors about the recipient's condition, the chances of the organ being rejected, and the likelihood that the transplant will produce any long-term benefits to the recipient.

5. *The Potential Donor and Potential Recipient Have an Existing Relationship*

The presence or absence of an ongoing social and emotional relationship should be another factor the court considers before permitting an organ or tissue harvest.[304] Absent such a relationship, the court is unable to conclude that the donor will experience any psychological benefit as a result of the procedure.[305] When both a physical and a psychological benefit are lacking, the harvest petition will inevitably be denied due to its inadequate foundation under this standard.

In *Curran*, the court noted that the existence of an established relationship "as well as the potential for a continuing . . . relationship," is necessary in order for the court to find that a psychological benefit exists.[306] Additionally, the court concluded that a "psychological benefit is grounded firmly in the fact that the donor and recipient are known to each other as family."[307] Although a blood relationship is not necessary,[308] the requirement of a close relationship between the donor and the recipient will protect minors and incompetent adults

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303 *See* Griner, *supra* note 67, at 607.

304 *See Curran*, 566 N.E.2d at 1344.

305 *See id.*

306 *Id.*

307 *Id.*

308 A blood relationship is not necessary because adopted siblings can have just as intimate of a relationship with their siblings as blood-related siblings. *See* Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 844 (1977) ("Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' . . . as well as from the fact of blood relationship.").

from being used as donors for third party strangers. The parameters of this requirement also allows for donation in cultures where the concept of family is broadly defined. This alleviates "the fear expressed that institutions for the mentally ill will merely become storehouses for spare parts for people on the outside . . . ."[309] Because a psychological benefit will only realistically exist when there is an ongoing relationship between the potential donor and potential recipient,[310] the absence of such relationship should preclude the transplantation.

VIII. CONCLUSION

While the substituted judgment doctrine and the best interest standard have been the standards used for many years, both tests produce nothing more than irrational and illogical decisions. Not only will the proposed solution provide courts with guidance when faced with a formerly competent individual, but also, it will grant individuals the respect and personal autonomy they deserve. Although this proposed solution does not end the debate concerning the duty to rescue and harvesting procedures, an absolute prohibition against harvesting procedures fails to recognize that these individuals may choose to act altruistically. Finally, because parental consent is so closely scrutinized under this standard and because the adversarial process will be used in all situations, it is anticipated that parents who intend to use a fetus as an organ farm will be deterred from engaging in this practice.

Understandably, minors and incompetent adults need the assistance of parents, guardians, and courts when making medical decisions. Although the right to parental control and familial autonomy is given great deference in this area, the court should not hesitate to exercise its parens patriae power when these rights are abused. When minors and mentally incompetent adults neither voluntarily donate their organs nor consent to the harvest, a petition from a parent or guardian seeking to compel the transplant is undeniably problematic. In such a situation, courts have both a legal and ethical duty to protect our most vulnerable members of society from potentially depraved and coercive practices.

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[309] *In re* Pescinski, 226 N.W.2d 180, 183 (Wis. 1975) (Day, J., dissenting).
[310] *Curran*, 566 N.E.2d at 1344.