

# PROXY CONSENT AND COUNTERFACTUALS

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## ABSTRACT

When patients are in vegetative states and their lives are maintained by medical devices, their surrogates might offer proxy consents on their behalf in order to terminate the use of the devices. The so-called 'substituted judgment thesis' has been adopted by the courts regularly in order to determine the validity of such proxy consents. The thesis purports to evaluate proxy consents by appealing to putative counterfactual truths about what the patients would choose, were they to be competent. The aim of this paper is to reveal a significant limitation of the thesis, which has hitherto been recognised only vaguely and intuitively. By appealing to the metaphysics of counterfactuals I explain how the thesis fails to determine the validity of proxy consents in a number of actual cases.

## 1. INTRODUCTION

### Case 1:

*Brother Joseph Charles Fox was an 83 year-old priest who was a member of the Society of Mary. In 1979, following his doctor's advice, he decided to have a hernia operation. Although it was a routine operation Brother Fox lapsed into a coma during the surgical procedure. Heart massage restored the beat, but insufficient oxygen reached the brain, resulting in massive brain damage. He lost the ability to breathe spontaneously and was placed on a respirator. Medical experts who examined Brother Fox concluded that he was in a chronic vegetative state from which there was no chance of recovery. Brother Fox had not written a living will before he lost consciousness.*<sup>1</sup>

<sup>1</sup> The cases that I introduce in this paper are derived from E. Wierenga. Proxy Consent and Counterfactual Wishes. *J Med Philos* 1983; 8: 405–416.

In cases such as the above, where patients are incompetent, their surrogates – usually close relatives or medical experts – are permitted to offer proxy consents on their behalf to terminate the use of their respirators. It is of the utmost importance that the validity of such proxy consents be determined correctly, because whether or not patients' lives are to be ended depends on it. As Dan W. Brock notes, the most common way of determining the validity of proxy consent, particularly in the United States, is to appeal to the so-called 'substituted judgment thesis':

For decisions about life-sustaining treatment, the courts have consistently held since [the] Quinlan [case] that patients do not lose their rights when they become incompetent. Instead, surrogates, typically close family members, are entitled to decide for them, exercising so-called substituted judgment, that is, making the decision the patient

would have made in the circumstances that obtain were the patient competent.<sup>2</sup>

The substituted judgment thesis determines the validity of proxy consents by appealing to putative counterfactual truths about what the patients would choose, were they to be competent. The thesis has been defended in particular by those who attach significant importance to patient autonomy and self-determination in medical care. According to them, when patients are incompetent it is still better to make decisions regarding their lives by referring to what they themselves would think is the best for them, rather than what other people think is the best.

The aim of this paper is to reveal a significant limitation of the thesis, which has hitherto been recognised only vaguely and intuitively. By appealing to the metaphysics of counterfactuals I explain how the thesis fails to determine the validity of proxy consents in a number of actual cases. The paper has the following structure. In Sections 2 and 3, I introduce two classic formulations of the substituted judgment thesis. I argue that they are untenable by appealing to Edward Wierenga's objections. In Section 4, I provide a revised formulation of the substituted judgment thesis, which is not vulnerable to the objections. In Sections 5, I maintain that even this formulation of the thesis is untenable. I argue that the correct understanding of counterfactuals shows that there are a number of cases in which the thesis fails to determine the validity of proxy consents. In Section 6, I defend my argument from three possible objections. I conclude the discussion in Section 7.

## 2. FIRST CLASSIC FORMULATION OF THE SUBSTITUTED JUDGMENT THESIS

Father Eichner, a close friend of Brother Fox and the Director of the Society of Mary, applied to be a surrogate for Brother Fox with authority to offer proxy consent to remove the respirator on behalf of

Brother Fox. Although Brother Fox had not written a living will, he had publicly expressed his opposition to the use of a respirator in a vegetative state when he discussed the Karen Quinlan case (which I introduce below) with members of his community and Father Eichner. In particular, Brother Fox stated that he agreed with Pope Pius XII's view that the withdrawal of 'modern artificial respiration apparatus' is morally justified only in a case in which a patient is 'deeply unconscious' and 'completely hopeless'<sup>3</sup>

The trial judge for the Fox case stated as follows:

There is no doubt that this court is obligated to ascertain, if possible, the choice which Brother Fox, now incompetent, would make if he became competent for a moment and consciously faced his afflictions. . . . This court concludes . . . that were Brother Joseph Charles Fox competent he would direct the termination of the respirator that presently supports him.<sup>4</sup>

The New York Supreme Court supported this decision and ruled that Brother Fox, given his explicit statements of his opposition to the use of a respirator, should have the respirator removed.

In ruling that the respirator should be removed, the trial judge seems to make appeal to the following classic formulation of the substituted judgment thesis:

(1<sub>F</sub>) Father Eichner's proxy consent to the termination of the respirator that supports Brother Fox is valid if and only if, (i) Father Eichner is a legally recognised surrogate for Brother Fox and (ii) were Brother Fox able to offer consent, then he would consent to the termination of the respirator.

Or, more generally,

(1<sub>x</sub>) *x*'s proxy consent to the termination of a respirator that supports an incompetent patient *y* is valid if and only if, (i) *x* is a legally recognised

<sup>2</sup> D. W. Brock. A Critique of Three Objections to 'Physician-Assisted Suicide'. *Ethics* 1999; 109: 519–547; 521.

<sup>3</sup> Pius XII. The Prolongation of Life. *The Pope Speaks* 1957; 4: 393–398.

<sup>4</sup> *In re Eichner (Fox)* 102 Misc. 2d 184, affd. 426 N.Y.S.2<sup>nd</sup> 517. 1980: 210, 212f.

surrogate for  $y$  and (ii) were  $y$  able to offer consent, then  $y$  would consent to the termination of the respirator.<sup>5,6</sup>

Edward Wierenga maintains that the trial judge cannot validate Father Eichner's proxy consent on the basis of  $(1_x)$ .<sup>7</sup> Wierenga's reasoning goes as follows. If Brother Fox were competent obviously he would be conscious. (How could anyone offer consent while being unconscious?) If he were conscious, however, then he would not direct the termination of the use of the respirator. For Brother Fox explicitly stated that withdrawing a 'modern artificial respiration apparatus' is morally permitted only in a case in which a patient is 'deeply unconscious' and 'completely hopeless'. If Fox had an ability to consent then obviously he would be neither deeply unconscious nor completely hopeless. Therefore, Wierenga concludes, (1) does not validate Father Eichner's proxy consent.

Wierenga's objection can be generalised. Many, if not most, incompetent patients would not consent to the termination of their respirators if they were conscious and their physical conditions were good enough for them to make and express decisions. Therefore,  $(1_F)$  and  $(1_x)$  cannot be used to determine the validity of proxy consent.<sup>8</sup>

<sup>5</sup> On the right hands of  $(1_F)$  and  $(1_x)$ , I specified what I take as the two most important conditions in determining the validity of proxy consent. I do not, however, exclude the possibility that there are further conditions to be added. The addition of more conditions does not affect the strength of my objection to the substituted judgment thesis.

<sup>6</sup> Deborah Barnbaum formulates, without endorsing, a classic version of the substituted judgment similar to the one in the main text. See D. Barnbaum. *Interpreting Surrogate Consent Using Counterfactuals*. *J Appl Philos* 1999; 16: 167–172. Her formulation is as follow:

If  $x$ 's proxy consent to treatment (or non-treatment)  $T$  on behalf of  $y$  is valid, then if  $y$  were competent,  $y$  would consent to  $T$ . (168)

There are at least two problems with this formulation. First, we cannot determine the validity of proxy consent by relying on this formulation because it does not specify sufficient conditions for the validity of  $x$ 's proxy consent. Second, it is not clear what role  $x$  plays in this formulation because  $x$  appears only in the antecedent of the main conditional.

<sup>7</sup> Wierenga, *ibid*.

<sup>8</sup> For the sake of argument, I assume in this paper that the trial judge is right in concluding that Father Eichner's proxy consent to terminate Brother Fox's respirator is valid. Obviously, Wierenga makes this assumption too.

### 3. SECOND CLASSIC FORMULATION OF THE SUBSTITUTED JUDGMENT THESIS

Case 2:

*Karen Ann Quinlan, a 21 year-old woman, was at a party on 15<sup>th</sup> of April, 1975 when she lapsed into a coma. While awaiting the arrival of the ambulance her friends attempted to administer mouth-to-mouth resuscitation. It was ineffective, however, and Quinlan ceased breathing for at least two fifteen minute periods. She had consumed alcohol and tranquilisers before the collapse but her physicians could never identify the exact cause of her initial breathing problem. Quinlan's condition was described as a persistent vegetative state, resulting from extensive and irrecoverable brain damage. Her life was maintained by a respirator and artificial nutrition and hydration. The New Jersey Supreme Court granted her father's request to terminate the use of the respirator and allowed her to die. The disconnection of the respirator did not, however, conclude the story; Quinlan started breathing spontaneously and lived without a respirator almost for ten years until she died in June 1986.*<sup>9</sup>

This is the Karen Quinlan case that Brother Fox discussed when he was alive. Chief Justice Hughes in the Karen Quinlan case also made appeal to the substituted judgment thesis without endorsing it explicitly. He stated as follows:

We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death.<sup>10</sup>

It seems that in the above statement Chief Justice Hughes refers to the following version of the substituted judgment thesis:

$(2_Q)$  The proxy consent of Quinlan's father to the termination of the respirator that supports

<sup>9</sup> It is alleged that Quinlan was able to breathe without a respirator because the nuns in Quinlan's hospital were opposed to the Supreme Court's decision and had tried to wean her from the respirator.

<sup>10</sup> *Quinlan* 70 N.J. 10, 355 A. 2d 647. 1976: 39.

Quinlan is valid if and only if, (i) Quinlan's father is a legally recognised surrogate for Quinlan and (ii) were Quinlan miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, then she would consent to the termination of the respirator.

Or more generally,

(2<sub>x</sub>) *x*'s proxy consent to the termination of a respirator that supports an incompetent patient *y* is valid if and only if, (i) *x* is a legally recognised surrogate for *y* and (ii) were *y* miraculously lucid for an interval (not altering the existing prognosis of the condition to which *y* would soon return) and perceptive of *y*'s irreversible condition, then *y* would consent to the termination of the respirator.

(2<sub>Q</sub>) and (2<sub>x</sub>) represent another classic formulation of the substituted judgment thesis. In order to see that they are more sensible than the first classic formulation, consider again the case of Brother Fox. Suppose that Brother Fox is miraculously lucid for an interval. Now, even though he is conscious for a moment he knows, we can assume, that he will soon return to being deeply unconscious and that his situation will again be completely hopeless. We do not need to imagine an extraordinary, if not impossible, scenario in which Brother Fox can somehow offer consent even though he is deeply unconscious. Thus, it appears that the trial judge in the Fox case can validate Father Eichner's request to terminate Brother Fox's respirator on the basis of (2<sub>x</sub>).

As Wierenga points out, however, (2<sub>x</sub>) does not validate Father Eichner's proxy consent. For the truth-value of (2<sub>x</sub>) cannot be determined when it is applied to the Brother Fox case. Applying (2<sub>x</sub>) to the Fox case we can obtain the following:

(2<sub>F</sub>) Father Eichner's proxy consent to the termination of the respirator that supports Brother Fox is valid if and only if, (i) if Father Eichner is a legally recognised surrogate for Brother Fox and (ii) were Brother Fox miraculously lucid for an interval (not altering the existing prognosis of the condition to which he would soon return) and

perceptive of his irreversible condition, then he would consent to the termination of the respirator.

Again, Brother Fox had expressed his opinion that the withdrawal of a respirator was morally justified only in a case in which a patient is deeply unconscious and completely hopeless. In the case under consideration, however, Brother Fox recovers his consciousness for a short interval. It is perfectly possible that in this case Brother Fox would not consent to the termination of the respirator. He might beg his doctor, whether or not it is rational, not to terminate the respirator in the hope that this miraculous lucidity would continue for a long time or that another miracle would occur. Brother Fox had commented on a case in which a patient is deeply unconscious and completely hopeless, but he *did not* state anything about the case in which a patient recovers consciousness miraculously. Therefore, (2<sub>Q</sub>), (2<sub>x</sub>) and (2<sub>F</sub>) are also untenable formulations of the substituted judgment thesis.

#### 4. REVISED FORMULATION OF THE SUBSTITUTED JUDGMENT THESIS

The difficulties with the above two classic formulations of the substituted judgment thesis arise for the following reason. On the one hand, in order to know what Brother Fox would offer if he were competent, we need to imagine a situation in which he is conscious. On the other hand, however, we are not allowed to alter Brother Fox's condition; he has to remain deeply unconscious. How can we resolve this dilemma? How can we know, without altering his deep unconscious state, what Brother Fox would offer if he were conscious?

One might think that it is not possible to solve this dilemma because it is nomologically, and perhaps metaphysically, impossible for anyone to be conscious and unconscious simultaneously. Fortunately, however, we *can* solve the dilemma if we adopt the following revised formulation of the substituted judgment thesis:

(3<sub>x</sub>) *x*'s proxy consent to the termination of a respirator that supports an incompetent patient *y* is valid if and only if, (i) *x* is a legally recognised

surrogate for  $y$  and (ii) were  $y$  able to offer consent, then  $y$  would consent to the termination of the respirator in the actual world.<sup>11</sup>

On the face of it this is not radically different from (2<sub>x</sub>). However, the addition of the phrase ‘in the actual world’ does the trick.<sup>12</sup> In order to see this point rephrase (3<sub>x</sub>) according to possible world semantics:

(3<sub>x</sub>′)  $x$ ’s proxy consent to the termination of a respirator that supports  $y$  is valid if and only if (i)  $x$  is a legally recognised surrogate for  $y$  and (ii) in the nearest possible world to the actual world in which  $y$  is able to offer consent,  $y$  consents to the termination of the respirator in the actual world.

(ii) in (3<sub>x</sub>′) says that in the nearest possible world to the actual world in which  $y$  is able to offer consent, if  $y$  looks at the actual world in which  $y$  is unable to offer consent and  $y$ ’s life is maintained by a respirator,  $y$  says that  $y$  is willing to offer consent to the termination of the respirator in the actual world. The classic formulations of the thesis face the dilemma because they require Brother Fox to be conscious and unconscious simultaneously *in the same world*. (3<sub>x</sub>) solves this dilemma by requiring Brother Fox only to be deeply unconscious in the actual world and conscious in another world.

Applying (3<sub>x</sub>′) to the Brother Fox case we can obtain the following:

<sup>11</sup> Deborah Barnbaum introduces a similar formulation to this:

If  $x$ ’s proxy consent to  $T$  in the actual world on behalf of  $y$  is valid, then in the closest possible world, the consent world, in which  $y$  is able to offer consent,  $y$  consents to the performance of  $T$  in the actual world. (Barnbaum, *ibid.*)

This formulation also has the problems that I explained in Footnote 6. See also Footnote 12.

<sup>12</sup> One might claim that the idea of a person in one world approving or disapproving of events in another is a little strange. For example, I know that there is a possible world in which an evil dictator is ruling the entire universe, but my disapproval of it in the actual world might not mean much. In response to this point (3<sub>x</sub>) can be amended as follows:

(3<sub>x</sub>′)  $x$ ’s proxy consent to the termination of a respirator that supports an incompetent patient  $y$  is valid if and only if, (i)  $x$  is a legally recognised surrogate for  $y$  and (ii) were  $y$  competent, then  $y$  would believe that if  $y$  were incompetent under conditions that actually obtain the termination of the respirator in the actual world would be the best option for  $y$ .

In the main text I will retain (3<sub>x</sub>) for the sake of simplicity. Thanks to Adam Morton on this point.

(3<sub>F</sub>′) Father Eichner’s proxy consent to the termination of the respirator that supports Brother Fox is valid if and only if (i) if Father Eichner is a legally recognised surrogate for Brother Fox and (ii) in the nearest possible world to the actual world in which Brother Fox is able to offer consent, he consents to the termination of the respirator in the actual world.

Given what Brother Fox had said about the Quinlan case, (ii) in (3<sub>F</sub>′) seems true. In the nearest possible world to the actual world in which Brother Fox is able to offer consent, if he looks at the actual world in which he is unable to offer consent, deeply unconscious and completely hopeless, then he is willing to offer consent to the termination of the respirator in the actual world. Under this formulation of the substituted judgment thesis we do not need to imagine extraordinary, if not impossible, scenarios in which Brother Fox can somehow offer consent even though he is unconscious, or suddenly becomes lucid for an interval knowing somehow that his condition will be truly hopeless very soon. The revised formulation of the thesis does correctly validate Father Eichner’s proxy consent on behalf of Brother Fox.

In what follows, however, I argue that even this formulation of the thesis is not compelling because it has a significant limitation. In particular, I argue that there are a number of actual cases in which this formulation of the thesis fails to determine the validity of proxy consents.

## 5. DIFFICULTIES WITH THE REVISED FORMULATION OF THE THESIS

A crucial question in evaluating the validity of proxy consents is whether or not patients have ever stated, before entering a critical condition, what they would want their physicians to do should they ever enter such a condition. In the case of Brother Fox, a relevant statement is implicit in his remark on the Karen Quinlan case that he would want his physicians to terminate his respirator in such a situation. Although it is a matter of debate whether his implicit remark was in fact effective, it is relatively easy for proponents of the substituted judgment

thesis to determine the validity of proxy consent in this sort of case. By contrast, Quinlan did not state what she would like her physicians to do. It is difficult for proponents of the substituted judgment thesis to determine the validity of proxy consent in this case. It is often claimed that the existence of this sort of case generates the most serious difficulty for the substituted judgment thesis. I claim, however, that there is a further difficulty for the substituted judgment thesis, even in its revised formulation. I argue that there are a number of cases in which it is not just difficult, but *impossible*, for proponents of the substituted judgment thesis to determine the validity of proxy consents.

### Case 3:

*John Storar was a 52 year-old man in New Jersey. He was profoundly retarded with a mental age of about 18 months and his IQ was assessed at between 10 and 20. He was incapable of understanding the medical treatment that he was receiving and, of course, of making a reasoned decision about it. His physicians found that he had terminal cancer of the bladder and administered a blood transfusion after receiving permission from his 77 year-old mother. Ms. Storar, who had visited him at the Newark Development Center almost every day, was the nearest relative of John Storar. His treatment required frequent blood transfusions to replace blood loss from the inoperable tumour. His physicians informed Ms Storar that cancer of the bladder is extremely painful and their prognosis was that her son had a very limited life span, of only three to six months. Ms. Storar sought a court order to stop the transfusions.*

Justice Boehm, the trial judge in the Storar case, concluded that:

On the basis of clear and convincing evidence I concur with Mrs. Storar's opinion that . . . terminating the transfusions . . . would be . . . Storar's preference were he able to make a decision and to articulate it. Accordingly, the application of the respondent to discontinue the blood transfusions is granted.<sup>13</sup>

<sup>13</sup> *In re Storar* 106 Mis. 2d 880, affd. App. Div., 434 N.Y.S. 2d 467. 1980: 886.

Justice Boehm appeals, like others, to the substituted judgment thesis. Assume that he relies on the instantiation of the revised formulation of the thesis as follows:

(3<sub>s'</sub>) The proxy consent of Storar's mother to the termination of the blood transfusions that support Storar is valid if and only if, (i) Storar's mother is a legally recognised surrogate for Storar and (ii) were he able to offer consent, then he would consent to the termination of the blood transfusions in the actual world.<sup>14</sup>

Given the fact that he granted the validity of Ms. Storar's proxy consent, Justice Boehm is committed to the position that the left hands of (3<sub>s'</sub>), (i) and (ii) are all true. I submit, however, the truth-value of (ii) is *indeterminable*.

According to possible world semantics, (ii) is equivalent to the following:

(ii) In the nearest possible world to the actual world in which John Storar is able to offer consent he consents to the termination of the blood transfusions in the actual world.

Possible world semantics teaches us that in order for us to know the truth-value of (ii) we have to locate the closest possible world to the actual world in which John Storar is able to offer consent. It is impossible to locate such a world, however, for several reasons.

First, we have no idea at all about the character of the world in question. Is it a possible world in which the laws of nature are different from the ones in the actual world? If so, what exactly are the laws of nature in that world? Or is it a possible world in which some relevant contingent facts are different from the ones in the actual world? If so, exactly which facts are different? We have no basis upon which even to begin to answer these questions.

Second, even if we *were* to have a rough idea about the character of the closest possible world in which John Storar is competent, we still would not be able to pinpoint the world. For, there is no way for us to determine what sort of rational decision

<sup>14</sup> I have replaced the phrase 'respirator' with 'blood transfusions'. This replacement does not change the cogency of the formulation; Storar's life was maintained by the blood transfusions, just as Brother Fox's life was maintained by the respirator.

John Storar makes in such world (and indeed in any world). For, in the actual world, Storar has *always* been incompetent. We have no evidence at all to ground an inference as to what sort of choice he makes even counterfactually; all we know is that he has never made a rational decision in his entire life in the actual world because of his profound retardation.

There is yet a further difficulty in determining the truth-value of (ii). According to metaphysicians, there could be two or more possible worlds that are the closest possible worlds to the actual world in a relevant context. If so, there might be two possible worlds  $W_1$  and  $W_2$  such that (a)  $W_1$  and  $W_2$  are the closest possible worlds to the actual world in a relevant context, and (b) while Storar consents to the termination of the blood transfusions in  $W_1$  he does not do so in  $W_2$ . In this case, it is not possible to determine which world we should refer to regarding the matter of Storar's consent.<sup>15</sup>

Since the revised formulation of the substituted judgment specifies (ii) as a necessary condition for the validity of proxy consent, it fails to determine the validity of the proxy consent in the Storar case. The metaphysics of counterfactuals teaches us that the substituted judgment thesis fails to evaluate proxy consents in cases, like Storar's, in which patients have never been competent.<sup>16</sup>

## 6. POSSIBLE OBJECTIONS

I now consider three possible objections, to show that it is not easy to avoid the thrust of my argument.

First, one might claim that my argument fails because we do know that if John Storar were

<sup>15</sup> According to David Lewis's theory, a counterfactual conditional is true if and only if the consequent holds in all the nearest possible worlds in a relevant context. If this theory is true, then (ii) is not indeterminate but false. That is, Justice Boehm cannot justify his claim that terminating Storar's transfusions is valid. See D. Lewis. *Counterfactuals*. 1973. Oxford: Blackwell.

<sup>16</sup> It is interesting to note the following asymmetry: Normally, in cases where patients used to be competent but are no longer, there is a close connection between their critical conditions and their incompetence. On the other hand, in cases where patients have never been competent, as in the John Storar case, there is no connection between their critical conditions and their incompetence.

competent he would consent to the termination of the blood transfusions, that being so because *any* competent person would.

I do not think this objection can be sustained. The enormous controversy surrounding the case of Storar itself falsifies the claim that any competent person would consent to the termination of the blood transfusions in the Storar case.

Secondly, similarly, one might claim that we do know that John Storar would consent to the termination of the blood transfusions because that is what the normal average person would do.

Even if we grant, for the sake of argument, that the normal average person would, in fact, consent to the termination of the blood transfusions, this objection does not seem to succeed. In order for it to be cogent the following conditional has to be true: If John Storar were competent he would be the normal average person. However, there is no evidence that Storar would (or would not) be the normal average person if he were competent. We are unable to know that in the nearest possible world to the actual world in which John Storar is competent he happens (or does not happen) to be the normal average person. Hence, even if we grant the contentious assumption that the normal average person would consent to the termination of the blood transfusions it does not follow that John Storar would do the same if he were competent.

Third, one might argue that even if my argument is successful it does not have a significant impact on the substituted judgment thesis because it shows merely that the thesis cannot determine the validity of proxy consent in rather uncommon cases in which patients have always been profoundly retarded.

There are two responses to this objection. First, it is not obvious that such cases as John Storar's are uncommon. There are many profoundly retarded people who have always been incompetent in their lives. And surely they could enter critical conditions at least as easily as (and perhaps more easily than) other non-profoundly retarded people. Secondly, and more importantly, my argument is not actually limited to cases of profoundly retarded people. What we can generalise from my argument is that the substituted judgment thesis fails to determine the validity of proxy consent in *any cases where*

*patients have never been competent.* Probably the most common cases of this sort are the cases of babies and small children. It is uncontroversial that no baby or small child has ever been competent. Just like John Storar, they have never been able to understand the medical treatment that they receive or make a reasoned decision about it. Given that the substituted judgment fails to determine the validity of proxy consent in the cases of babies, small children and profoundly retarded people, which constitute a large part of a group of medical patients, my objection does seem to have an impact on the substituted judgment thesis.<sup>17</sup>

## 7. CONCLUSION

I have argued for three main points in this paper. First, the classic formulations of the substituted judgment thesis fail in the face of counterarguments. Second, we can provide a revised formulation of the thesis that is not vulnerable to the counterarguments. Third, even the revised formulation fails to determine the validity of proxy consents in cases where patients have never been competent.

I do not expect that my argument would sound totally new to proponents of the substituted judgment thesis, because its essence has been given expression from time to time, albeit vaguely and intuitively. Regarding the Storar case, for example, the New York Court of Appeals noted as follows:

[I]t is unrealistic to determine whether [John Storar] would want to continue potentially life prolonging treatment if he were competent. As one of the experts testified at the hearing, that would be similar to asking whether ‘if it snowed all summer would it then be winter?’ (52 N.Y. 2d 363, 380 (1981)).

As Wierenga points out, it is not analytic that summer is not a snowy season, nor that winter is a

snowy season. So even if it snowed in summer it would not follow that the summer is winter. Snowy summer is not self-contradictory. But in any case, the Court seems to be very vaguely aware of some metaphysical difficulties in considering what John Storar would choose if he were competent, which the substituted judgment thesis obliges us to consider. I hope to have shown convincingly that possible world semantics is helpful in pinpointing the exact metaphysical difficulties that the substituted judgment thesis inherits.

If my argument is successful, proponents of the thesis must either retract their position or weaken it significantly, so that the thesis is applied only to a small group of medical patients. One common way of weakening their position is to claim that while the substituted judgment thesis is still the best way to determine the validity of proxy consent another, less preferable, thesis such as the so-called ‘best interest thesis’, for example, should be used in certain limited cases where the substituted judgment thesis is not available. The best interest thesis says, roughly speaking, as follows:

(4)  $x$ 's proxy consent to the termination of a respirator that supports an incompetent patient  $y$  is valid if and only if, (i)  $x$  is a legally recognised surrogate for  $y$  and (ii) the termination of the respirator is in  $y$ 's best interests.

Appealing to a different thesis in a limited way like this certainly avoids the problems of the substituted judgment thesis that I have discussed. This hybrid strategy, however, has a difficulty of its own. That is, it fails to determine the validity of proxy consent in cases where (i) it is not obvious whether the substituted judgment thesis or the best interest thesis should be adopted and (ii) these theses entail opposite conclusions regarding the validity of proxy consent at issue. Since the focus of this paper is on the sole use of the substituted judgment thesis, I leave detailed discussion of the hybrid strategy for my next project.

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<sup>17</sup> I have tried to demonstrate the difficulty encountered by the substituted judgment thesis by claiming that there are many cases in which the thesis fails to determine the validity of proxy consent. I leave it an open question, however, whether this is a relatively superficial practical difficulty or whether the difficulty has more fundamental, philosophical roots. If the latter is the case, then perhaps there are acts that are morally justified but that cannot be determined to be such.

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