Forthcoming in the INDIANA LAW JOURNAL (2024)

LOVE, LIBERALISM, SUBSTITUTED JUDGMENT

James Toomey[*]

Abstract

Under the doctrine of substituted judgment, decision-makers for adults without legal capacity are to make the decision the person in their care would have made. In cases involving irreversible cognitive decline—where substituted judgment is most frequently applied—scholars have struggled to explain it, resorting to mysterious metaphysical claims. These philosophical acrobatics seem necessary because the person for whom the decision is made cannot appreciate it, and, philosophically, they may not be the same person they had been.

This Article offers a novel account of substituted judgment that circumvents these challenges. I argue first that the doctrine is straightforwardly justified in cases of temporary incapacity, such as that of a psychotic episode, and then explain why the law might justifiably treat permanent incapacity as though it were temporary. In cases of temporary incapacity, substituted judgment is grounded in love. "Love" describes (at least) intimate knowledge of and concern for the personal identity of another. To make the decision someone would have made while they are temporarily unable to is an act of love.

And there are at least three reasons the law might justifiably treat permanent incapacity as though it were temporary. First, there is substantial medical uncertainty about the prognosis of brain disorders. Second, it is characteristic of love that it is partially constitutive of the identities of those who love—a doctrine justified by love might recognize this. Finally, a liberal private law might acknowledge that, under many worldviews, what looks like permanent incapacity is in fact temporary.

[*] Assistant Professor of Law, Elisabeth Haub School of Law at Pace University. Thanks to Alexander Boni-Saenz, I. Glenn Cohen, Bridget Crawford, Jonathan Eubank, Andrew Gold, Nina Kohn, Stacey McGlynn, and W. Nicholson Price for helpful comments on and discussions about the draft.

TABLE OF CONTENTS

Forthcoming in the INDIANA LAW JOURNAL (2024)

INTRODUCTION

Imagine that someone you love is in the later stages of Alzheimer's dementia. They generally do not recognize you, and are often confused about where they are. Suppose also that a court, finding this person unable to make decisions, has appointed you their "guardian"—empowered with legal authority to decide on their behalf. You could, in principle, make these decisions in almost any way.[1] You could do what you think is best. You could do what appears to make this person happiest. You could even do what you think is best for society. But under the doctrine of "substituted judgment," you will be directed to make the decision the person you love would have made themselves if they could, what they "would have wanted."[2] In the past five-odd decades, this standard has become the ubiquitous paradigm of deciding for others—endorsed by the Supreme Court of the United States.[3]

Despite its widespread application, substituted judgment has always been a puzzle. In cases like this one, the person for whom the decision is made, having undergone irreversible cognitive decline, may never appreciate it.[4] And from a philosophical perspective, someone who has experienced so much fundamental cognitive change may not even be the same person they always had been—no longer *truly* the person that you love.[5] Accounts of substituted judgment thus far have been forced to rely on

---

[1] *See, e.g.*, Susan Greene, *Through the Guardianship Looking Glass: A Personal Perspective on Conflicting Commitments*, 28 ELDER L. J. 1, 10 (2020) (identifying seven conceivable standards for surrogate decision-making).

[2] *See, e.g.*, Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 NOTRE DAME J. L. ETHICS & PUB. POL. 1, 35 (2020) ("The equitable doctrine of substituted judgment . . . requires the court to give effect to what the incapable individual would have wanted if she was capable.").

[3] *See, e.g.*, CRUZAN V. DIR., MO. DEPT. HEALTH, 497 U.S. 261, 265 (1990) (considering the applicability of substituted judgment in cases involving persistent vegetative states); Uniform Power of Attorney Act, § 114(a)(1) ("Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest."); Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and the Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1215 (2012) (noting that the National Guardianship Association's Standards of Practice "require[] that a guardian use substituted judgment, which is what the ward would have decided if asked when competent").

[4] *See, e.g.*, Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 59 (2007) (noting that in applying substituted judgment "we are no longer concerned with benefiting the ward as all benefits of the gift flow to the recipient of the gift").

[5] *See, e.g.*, Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual*

controversial and mysterious metaphysical claims—that people can be harmed without being affected; that some abstraction of the person's whole life, not their present living and breathing self, is what matters.[6]

These metaphysical difficulties do not arise, however, when substituted judgment is applied in cases of temporary or reversible incapacity—the incapacity of, say, a psychotic episode rather than Alzheimer's disease. Largely ignored by the literature—understandably focused on explaining the doctrine in dementia cases, where it is most frequently applied[7]—substituted judgment applies in temporary cases too.[8] And in *these* cases, the person you love *will* return to appreciate the decisions you've made. If you love them, you will make the decision they would have made while they're unable to. And maybe—if the law has reasons to treat all cases of incapacity *as though* they were temporary—this is all it needs to be justified in endorsing substituted judgment generally.

This Article offers a novel account of why the law might be justified in applying substituted judgment in all cases that elides metaphysical challenge. First, I examine how the doctrine might straightforwardly be justified in cases of *temporary* incapacity. Next, I argue that, regardless of one's views on obscure questions of metaphysics, the law might justifiably treat all cases of incapacity *as though* they were temporary. Thus, *the law* might be justified in applying substituted judgment in all cases even if it is, indeed, at least sometimes a *philosophical* misfire.

In cases of temporary incapacity, the substituted judgment standard is justified in a straightforward but surprising place—love.[9] "Love"—at least

---

Infirmities and Hidden Values in the Law, 28 ARIZ. L. REV. 373, 380 (1986) ("Because illness and injury often produce significant changes in an individual's beliefs, values, and goals, and hence her interests, conflicts between past and present interests, and perhaps the development of a new person, might not be uncommon."); Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients With Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 575 (2001) ("If the patient with Alzheimer's is genuinely 'no longer himself,' the directives of precedent autonomy are . . . irrelevant to him.").

[6] *See, e.g.*, DAVID BOONIN, DEAD WRONG: THE ETHICS OF POSTHUMOUS HARM 2–3 (2019) (arguing that it is possible to benefit or harm someone without affecting them); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND, INDIVIDUAL FREEDOM 190–96 (1993) (arguing that substituted judgment is justified with reference to the course of a person's life as a whole).

[7] *See infra* note 35.

[8] *See, e.g.*, Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L. J. 1, 16 (1990) (noting that substitute judgment was originally developed to address those without mental capacity who were "presumed potentially curable").

[9] Other scholars have observed the relationship between love and surrogate decision-making. *See, e.g.*, Erica Lucast Stonestreet, *Love as a Regulative Ideal in Surrogate Decision Making*, 39 J. MED. & PHIL. 523 (2014). These previous accounts, however, focused on cases of permanent incapacity as the paradigmatic case and relied on different

the kind of love between adult friends, family members, or romantic partners that is of most interest to philosophers[10]—describes (at minimum) an intimate knowledge of and deep concern for the personal identity of another.[11] To make the decision someone else would have made during the disruption of their personal identity, from this perspective, is an act of love. And the private law may be justified in adopting a standard grounded in love because at its core is the conviction that persons—individual persons, and the identities that constitute them—matter.[12]

Armed with a justification of substituted judgment in temporary cases, I suggest there are at least three reasons that the law might treat all incapacity *as though* it were temporary. First, because of medical uncertainty, the law could reasonably presume that even apparently permanent decline might turn out to be temporary. After all, the human brain remains one of science's least credibly mapped domains.[13] Egregious mistakes have been made, and might be ongoing.[14] And science does not yet even know how to go about answering the questions we really care about in this context—how much of an individual's consciousness of their identity remains.[15]

Second, an essential characteristic of interpersonal love is that it is partially identity-constituting for those who love as much as those who are loved. This role in the identity of the one who loves can survive the permanent incapacity, even the death, of the person loved—we're talking about the people who visit the graves of their parents every year, who still remember a dead young man in the rain when they hear a certain song,[16]

---

theories of love. *See id.* & *infra* Part III.B.

[10] *See, e.g.*, Niko Kolodny, *Love as Valuing a Relationship*, 112 PHIL. REV. 135, 137 (2003) ("The species of love that involves caring for another person is the species that most attracts the interest of moral philosophers.").

[11] *See infra* Part III.B.

[12] *See infra* Part III.C.

[13] *See, e.g.*, Elizabeth A. Buffalo, J. Anthony Movshon & Robert H. Wurtz, *From basic brain research to treating human brain disorders*, 116 PNAS 26167, 26167 (2019) ("The human brain is the most complex entity we know.").

[14] *See, e.g.*, Jerome Groopman, *The Troubled History of Psychiatry*, THE NEW YORKER (May 27, 2019), https://www.newyorker.com/magazine/2019/05/27/the-troubled-history-of-psychiatry (surveying harmful mistakes in psychiatry, including cavalier lobotomization and the view of homosexuality as a mental illness); BUCK V. BELL, 274 U.S. 200 (1927) (affirming the forced sterilization of an individual who appears not to have been mentally ill at all, but the victim of rape, *see* Paul A. Lombardo, *Three generations, no imbeciles: new light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985)).

[15] *See, e.g.*, Alison Warren, *Preserved Consciousness in Alzheimer's Disease and Other Dementias: Caregiver Awareness and Communication Strategies*, 12 FRONTIERS PSYCH. 790025, 790025 (2021) ("[E]vidence of preserved consciousness in persons with AD was demonstrated from multiple disciplines, including neurobiological, psychological, and biopsychosocial models.").

[16] James Joyce, *The Dead*, in DUBLINERS 175, 220 (Terence Brown, ed., 1967) ("It

"she still lives inside of me/we've never been apart."[17] To the extent that substituted judgment is grounded in love, it might make sense for the law to recognize this characteristic of the doctrine's organizing concept.

Finally, applying substituted judgment in permanent cases could alternatively be grounded in the political philosophy of liberalism—the principle that laws ought to be agnostic to the truth of citizens' worldviews.[18] Anglo-American private law is committed to liberalism in this sense.[19] Under many worldviews extant in the United States, what might, to a philosophical materialist, seem like the "permanent disruption of personal identity" actually looks a lot like temporary disruption.[20] And a liberal private law might acknowledge this worldview in a default presumption out of which those who do not accept it could opt—as in fact substituted judgment operates in our legal system.

This set of justifications does not *prove* that the law has made the right call in adopting the substituted judgment standard in all cases. It might be that surrogate decision-making ought to be governed by some organizing principle other than love.[21] Or perhaps substituted judgment is simply too hard to apply in practice, and that another heuristic would be preferable practically.[22] But the account offered here shows that substituted judgment is *justifiable*—that there are good reasons for it—largely regardless of one's

---

was a young boy I used to know . . . named Michael Furey. He used to sing that song, *The Lass of Aughrim*.").

[17] Bob Dylan, If You See Her, Say Hello (Columbia – 1975); *see also generally* Unforgotten (Toomstone Productions – 2017).

[18] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM xix (2005) (noting that liberalism "has to be impartial . . . between the points of view of reasonable comprehensive doctrines"); Ronald Dworkin, *Liberalism*, in A MATTER OF PRINCIPLE 181, 191 (1985) (defining liberalism as the proposition that "government must be neutral on what might be called the question of the good life").

[19] *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c. (Am. Law Inst. 2003) ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.").

[20] *See, e.g.*, Pew Res. Center, *Views on the afterlife* (Nov. 23, 2021), https://www.pewresearch.org/religion/2021/11/23/views-on-the-afterlife/ ("Nearly three-quarters of U.S. adults say they believe in heaven.").

[21] *See, e.g.*, Joan C. Tronto & Berenice Fisher, *Toward a Feminist Theory of Caring*, in CIRCLES OF CARE 40 (E. Abel & M. Nelson, eds., 1990) (arguing for a paradigm of decision-making rooted in "care"); *see also generally* Eva Feder Kittay, *The Ethics of Care, Dependence, and Disability*, 24 RATIO JURIS 49 (2011) (same).

[22] *See, e.g.*, David I. Shalowitz, Elizabeth Garrett-Mayer & David Wendler, *The Accuracy of Surrogate Decision Makers*, 166 ARCHIVES OF INTERNAL MED. 493, 493 (2006) (a meta-analysis finding that "[o]verall surrogates predicted patients' treatment preferences with 68% accuracy"); Stonestreet, *supra* note 9, at 525 (citing a "massive amount of evidence that suggests that surrogates are terrible at making decisions as their wards would have").

views on metaphysics. The debate, then, must at least reckon with the arguments from love and liberalism.

Moreover, this theory has several practical implications for the legal standards governing surrogate decision-making. First, clarifying that substituted judgment is grounded in love can offer both guidance and assurance to surrogate decision-makers.[23] And it can help reckon with the law's approach to surrogates in the unfortunate situation of deciding for someone they do not know—because no one does.[24] Applying substituted judgment in these cases cannot be directly grounded in love. But perhaps here, too, the law has good reasons to endorse substituted judgment anyway. After all, *aspiring* to do what the person would have done in these cases can express that the law *does* care about the identities of everyone, even those presently not loved.

The Article proceeds in five parts. First, in Part I, I explain the role of the substituted judgment standard in the law of surrogate decision-making, showing that, although it used to be rivaled by the so-called "best interests" standard, it has become the widely-accepted paradigm. Moreover, I discuss the preoccupation in the literature with the challenge of justifying substituted judgment in cases of irreversible cognitive decline.

In Part II, I explain why taking cases of temporary incapacity as the paradigm makes sense, circumventing the evidently unavoidable conceptual difficulties in permanent cases and the philosophical gymnastics previously required to address them. And I suggest that starting with temporary cases takes seriously the historical genesis of the doctrine.

Part III argues that substituted judgment in temporary cases is justified because making the decision someone whose personal identity is temporarily absent would have made is an act of love. In this context, I distill an intended-to-be-uncontroversial "Thin Theory of Love" from the philosophical literature that explains this role. And I explain why it might make sense for the private law to incorporate a standard grounded in love.

With this justification for substituted judgment in temporary cases, in Part IV I discuss some reasons the law might treat cases of permanent incapacity as though they were temporary. Indeed, I offer three—sounding in medical uncertainty, the nature of love, and liberalism.

Finally, in Part V, I discuss some practical implications of this account—providing guidance and affirmation to surrogates who love the person for whom they are deciding, and aspiration for those who do not.

I. SURROGATE DECISION-MAKING AS SUBSTITUTED JUDGMENT

[23] *See infra* V.A.
[24] *See infra* V.B.

The law generally directs surrogate decision-makers for incapacitated adults to make the decision that the person under their care would have made. The literature—focused on cases of dementia or permanent vegetative states—has struggled to explain why. This Part offers an overview of the status of the substituted judgment standard in private law doctrine and the scholarly literature.

A. Substituted Judgment and Private Law

Private law paradigmatically enforces the decisions that people make for themselves—the contracts they enter into, the decisions they make about their property, their choices of medical treatment.[25] But this is, in fact, only true for decisions made by adults with sufficient cognitive functioning at the time the decision was made.[26] Indeed, the law will not recognize decisions made by someone without sufficient "physical ability to think and reason."[27] Specifically, in order to make an enforceable decision, an individual must have the contemporaneous cognitive ability to "understand the nature and consequences of the decision he or she is making."[28] Decisions by people with cognitive functioning below this threshold are not entitled to judicial enforcement.[29]This standard applies across a wide range of mental illnesses, brain disorders, or and even intoxication.[30]

Adults who are legally incapacitated fall into three general categories.[31]

---

[25] *See, e.g.*, Thomas W. Merrill, *Private and Public Law* in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 575 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, eds., 2020) ("Private law supplies the tools that make private ordering possible—the discretionary decisions that individuals make in structuring their lives.").

[26] *See, e.g.*, Betsy J. Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 2018 WIS. L. REV. 735, 737 (2018) (noting that the private law's commitment to autonomy "is not absolute" and "sometimes the law removes an individual's decision-making authority" on a finding of "incompeten[ce]"); Jalayne J. Arias, *A Time to Step In: Legal Mechanisms for Protecting Those with Declining Capacity*, 39 AM. J. L. & MED. 134, 136 (2013) ("[W]hen an individual lacks capacity or a court declares her incompetent, her decision-making authority may be restricted.").

[27] NINA A. KOHN, ELDER LAW 17 (2d ed. 2020).

[28] *Id.* at 28.

[29] *See, e.g.*, Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 IND. L. J. 1619, 1622 (2008) ("Fall on the side of competence and your right to autonomy requires that your decisions be respected. Fall on the side of incapacity and the decision is made on your behalf by others.").

[30] *See, e.g.*, Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 92 WASH. L. REV. 581, 587 (2016) ("As a practical matter, those found to be incapacitated for the purpose of guardianship are a diverse group.").

[31] This typology is similar to that of Alexander Boni-Saenz, who divides incapacity

First, there are those who have never had legal capacity due to lifelong cognitive impairments, cases of *lifelong* incapacity. We can set these cases aside. Although the substituted judgment standard has been applied to make decisions on behalf of this group, doing so raises a distinct set of conceptual and philosophical issues than in other cases and, indeed, is widely recognized to be a misapplication of the standard.[32]

Next, we have those who *used to* have capacity—and built a life in the law accordingly—but have now lost it in a permanent and irreversible way, as a result of dementia or other cognitive deterioration. Because we're setting lifelong cases aside, I'll refer to these cases simply as *permanent* throughout. Finally, there are those who temporarily and reversibly do not have capacity, but are expected to regain it—say, because they are suffering from an acute mental health crisis brought on by psychosis, schizophrenia, bipolar disorder, or another intermittent mental illness. Call these cases of *temporary* incapacity.[33]

Today, the bar of mental capacity is overwhelmingly applied in cases involving individuals with permanent incapacity. More specifically, the doctrine is most frequently applied to older adults with dementia—incurable, irreversible cognitive decline that typically arises in later life.[34] Indeed, a number of studies have shown that the law of mental capacity is most frequently invoked in dementia cases,[35] involving older adults.[36]

---

into "temporary transient," "persistent lifelong," and "persistent acquired" (as well as the "temporary extended incapacity" of minority, which I'm also setting side here). *See* Alexander Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L. J. 1201, 1212 (2015).

[32] *See, e.g.*, Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155, 158 (2005) ("[T]he bulk of commentators and courts have rejected application of the substituted judgment standard . . . in the context of a never-competent person."); Allen E. Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 U.C.L.A. L. REV. 386, 396–97 (1981) (describing as "nonsensical" application of substituted judgment to the lifelong incapacitated).

[33] *See, e.g.*, *supra* note 31.

[34] *See* Rebecca Dresser, *Precommitment: A Misguided Strategy for Security Death With Dignity*, 81 TEX. L. REV. 1823, 1836 (2003) (observing that "[d]ementia is the most common condition producing decisional incapacity in older people").

[35] *See, e.g.*, Jennifer Moye, et al., *Guardianship Before and Following Hospitalization*, HEC FORUM 1, 10 (2022) ("Hospitalized persons subject to guardianship appointment had a mean age of 71.34 . . . Guardianship was most often sought for diminished capacity related to dementia (56%), schizophrenia (16%), substance use (8%), brain injury (5%), or a delirium (5%)."); Robin J. Bandy, Paul R. Helft, Robert W. Bandy & Alexia M. Torke, *Medical Decision-making During the Guardianship Process for Incapacitated, Hospitalized Adults: A Descriptive Cohort Study*, 25 J. GEN. INT. MED. 1003, 1005 (2010) (finding that in a population of incapacitated, hospitalized patients "[t]he most common cause of incapacity was dementia"); Jennifer Moye, et al., *Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-State Study*, 47 THE

When an individual has been found to lack mental capacity, the law provides a number of mechanisms for decisionmaking on their behalf, known as "surrogate decision-making." The most prominent of these are guardianship and durable powers of attorney.[37] Guardianship is the background case.[38] After a court finds that an individual is generally incapacitated—unable, by virtue of mental or cognitive challenges to make a broad range of decisions on their own—and without alternative arrangements, it will appoint a "guardian" legally empowered to make decisions for that person.[39]

A durable power of attorney is the most common alternative arrangement. Under traditional common law, agency relationships terminate upon the incapacity of the principal.[40] To provide an alternative to the expense, exposure, and judicial-involvement of guardianship, however, all states have passed laws authorizing "durable" powers of attorney, which preserve something like an agency relationship after a principal's incapacity.[41] Durable powers of attorney let people select a particular surrogate decision-maker in advance and give general instructions in the event of their incapacity.[42]

To guide and review the decisions made by surrogate decision-makers, the law has broadly settled on the standard known as "substituted

---

GERONTOLOGIST 604, 607 (2007) (finding that in a population of adults the subject of guardianship proceedings, 59% had dementia, and another 11.4% other neurological disorders, including Parkinson's disease).

[36] *See, e.g.*, Grey, *supra* note 26, at 737 ("Legal guardianship, in which decision making authority is transferred to another individual, may be imposed at any age, but the vast majority of guardianships are imposed on individuals over the age of sixty.").

[37] *See, e.g.*, Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1237 (2013) ("The three primary legal mechanisms that govern the delegation of decisions in the event of decisional incapacity are the durable power of attorney, statutory surrogacy, and guardianship."). Statutory surrogacy only applies in the healthcare context, and, although also governed by substituted judgment, is less directly relevant here. *Id.*

[38] *See, e.g.*, Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardianship: A Research Note*, 40 AM. J. LEGAL HIST. 146, 146 (1996) ("Guardianship goes back quite far in legal history; it has been a feature of American law since the colonial period.").

[39] *See, e.g.*, Arias, *supra* note 26, at 147; KOHN, *supra* note 27, at 154–57.

[40] *See, e.g.*, 2A C.J.S. Agency § 136 ("Since the principal's control of the agent is generally deemed an essential element of the agency relationship, under the common law, the principal's incapacity brings the relationship to an end.").

[41] *See, e.g.*, Mark R. Caldwell, J. Brian Thomas & Marisol Trottier, *Ensure Powers of Attorney Fulfill Intended Purposes*, 45 EST. PLAN. 3, 3 (2018) ("Modern statutes generally provide for the option of durability so that the agency relationship survives the incapacity of the principal.").

[42] *See, e.g. id.* at 6 ("The express terms of the POA determine the scope of an agent's authority to bind the principal.").

judgment." This standard directs surrogate decision-makers to make the decision that the person for whom they are deciding would have made, generally speaking and to the extent possible.[43] In other words, the law asks surrogate decision-makers to do what the person would have done, based on their knowledge of and inferences about the person before their incapacity.[44]

This principle is most firmly-established—indeed, recognized by the Supreme Court[45]—in healthcare decision-making, where it took off in both practice and the theoretical literature in the middle of the twentieth century.[46] By now, "substituted judgment has become widely accepted as an approach to decision-making for incapacitated patients."[47] But the substituted judgment standard has, in recent years, come to be broadly accepted for other kinds of decisions as well—it is adopted by guardianship statutes that address the issue,[48] governs in cases in which a guardian has the opportunity to ask a court for explicit prior authorization,[49] and has been endorsed by the National Guardianship Association,[50] and the Uniform Power of Attorney Act.[51] "The modern trend," in other words, "is to require the surrogate decision makers for adults to make the decision the adult would have made if able."[52]

The substituted judgment standard has long been thought rivalled by an

---

[43] *See, e.g.*, Boni-Saenz, *Personal Delegations*, *supra* note 37, at 1255 ("[T]he common view is that the surrogate must employ a substituted judgment standard [under which] she must mimic, to the extent possible, the decisions the ward would make if the ward had capacity"); *see also* Caldwell, Thomas & Trottier, *supra* note 41, at 4 (noting that the Uniform Power of Attorney Act, adopted by many states, "represents a preference for 'substituted judgment' whenever possible").

[44] *See, e.g.*, Eric Virgil, *Substituted Judgment—How Do You Prove What an Incapacitated Person Would Want?*, 46 ACTEC L. J. 119 (2020) (discussing ways to prove in court that a decision is consistent with what the person would have done).

[45] *See* CRUZAN V. DIR., MO. DEP'T HEALTH, 497 U.S. 261 (1990) (holding that a state's imposition of a "clear and convincing" evidentiary standard to prove that, under the substituted judgment substantive standard, they would not want have wanted to be kept alive in a vegetative state).

[46] *See, e.g.*, Frolik, *supra* note 4, at 67 (observing that in healthcare "the substituted-judgment doctrine is the overwhelming choice").

[47] Jacob M. Appel, *Substituted judgment for the never-capacitated: Crossing* Storar's *bridge too far*, 36 BIOETHICS 225, 225 (2022).

[48] *See, e.g.*, Boni-Saenz, *Personal Delegations*, *supra* note 37, at 1255 ("[F]or those states that have addressed the issue, the common view is that the surrogate must employ a substituted judgment standard.").

[49] *See, e.g.*, Chen, *supra* note 2, at 35.

[50] *See, e.g.*, Boxx & Hammon, *supra* note 3, at 1250.

[51] *See* Uniform Power of Attorney Act, § 114(a)(1).

[52] Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 249, 258 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019).

alternative standard, known as the "best interests" test, which would ask decision-makers to make the decision in the objective best interests of the individual.[53] Not long ago, scholars would typically discuss how there are *two* standards applied to guide the decision-making of surrogate decision-makers—substituted judgment on the one hand and best interests on the other.[54] But best interests has fallen broadly into disfavor as compared to substituted judgment.[55] Today, it mainly serves as a fallback standard where substituted judgment would be impossible or dangerous to apply.[56] And although only best interests ever seriously rivaled substituted judgment, in principle the law *could* endorse any number of alternative standards—from, say, giving the decision-maker unguided discretion to exhorting them to make the decision randomly.[57]

In sum, the law recognizes a number of mechanisms of surrogate decision-making, most commonly invoked on behalf of older adults undergoing cognitive decline. And in general, the standard that the law prescribes for these surrogates is substituted judgment—they are to make the decision that the individual would have made.

B. The Puzzle of Substituted Judgment in Dementia Cases

---

[53] *See, e.g.*, Boxx & Hammond, *supra* note 3, at 1241 ("Analogizing to other fiduciary purposes, the purpose of a guardianship should be to a great extent dictated by the life choice's made by the ward when competent . . . .").

[54] *See, e.g.*, Mark Strasser, *Incompetents and the Right to Die: In Search of Consistent Meaningful Standards*, 83 KY. L. J. 733, 733 (1995) ("The two most frequently discussed paradigms for medical decisionmaking for incompetents are substituted judgment and best interests."); Dresser, *Precommitment*, *supra* note 34, at 1841 ("When advance directives are absent or imprecise, two standards guide patient care.").

[55] *See, e.g.*, Megan S. Wright, *Dementia, Healthcare Decision Making, and Disability Law*, 47 J. L. MED. & ETHICS 25, 26 (2019) ("Healthcare decision-making law . . . emphasi[zes] . . . following advance directives and directions to surrogates to make decisions based on a patients' prior wishes, but does acknowledge a role for using a best interests determination as a last resort."); Lois Shepherd, *The End of End-of-Life Law*, 92 N.C. L. REV. 1693, 1702 (2014) (noting that the best interests test is "by far the less preferred option").

[56] *See, e.g.*, Caldwell, Thomas & Trottier, *supra* note 41, at 4; Kohn, *Fiduciary Principles*, *supra* note 52, at ("The surrogate is only to make a decision in the best interest of the adult if an exception applies."); *see also* Stonestreet, *supra* note 9, at 524 ("A survey of the literature . . . shows that any discussion of the subject begins by noting the two current models a surrogate ought to apply, and the court-mandated lexical order of priority between them . . . .).

[57] Frolik, *supra* note 4, at 61 (listing conceivable standards that could guide surrogate decision-making); *see also* Greene, *supra* note 1, at 10 (same); J. Eric Virgil & Stacy B. Rubel, *Is My Judgment in Your Best Interest? How Decisions are Made in Guardianships and A Suggested Reform*, 93 FLA. BAR J. 46, 46 (2019) (same)).

In legal and philosophical discussions, making sense of substituted judgment in cases of permanent incapacity is widely understood to be the essential task.[58] Consider, for instance, the famous debate between Rebecca Dresser and Ronald Dworkin.[59] Dworkin argues that advance healthcare directives ought to be followed in cases of permanent incapacity.[60] His argument is based on the arc of the person's *prior* life, their "whole life," not their potential return to capacity or the continuity of identity.[61]

Dresser, a critic of substituted judgment, disagrees. She argues that in cases of permanent incapacity, "a person's interests can change radically over time, so radically that in some cases it could be said that a new person exists."[62] From her perspective, decision-making on behalf of the permanently incapacitated should be guided by their apparent interests in their current state, coupled with the interests of others.[63] Like Dworkin, she doesn't consider substituted judgment in cases of temporary mental illness from which the person can be expected to return.[64]

This debate still preoccupies the literature today.[65] Not all that much progress has been made, with partisans of the camps epitomized by Dworkin and Dresser offering variations on their arguments.[66] And the philosophical and legal debate continues overwhelmingly to focus on the justification, if any, for substituted judgment in dementia cases.[67] Largely

---

[58] *See, e.g.*, Allen E. Buchanan & Dan W. Brock, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION-MAKING (1990); Dresser, *supra* note 5, at 373.

[59] *See, e.g.*, Alexander Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 25 (2016) (summarizing the Dresser-Dworkin debate and noting that it "presents compelling arguments on both sides, and it is unlikely to be resolved any time soon").

[60] DWORKIN, *supra* note 6, at 190–96.

[61] *Id.* at 230.

[62] Dresser, *supra* note 5, at 379

[63] *Id.* at 389–90.

[64] *Id.*

[65] *See, e.g.*, Samuel Dale, *Personhood, Critical Interests, and the Moral Imperative of Advance Directives in Alzheimer's Cases*, 7 VOICES IN BIOETHICS (2021) (summarizing the state of the debate).

[66] *See, e.g.*, Joseph P. DeMarco & Samuel H. Lipuma, *Dementia, Advance Directives, and Discontinuity of Personality*, 25 CAMBRIDGE Q. HEALTHCARE ETHICS 674, 674 (2016) ("We argue that an advance directive (AD) is not invalidated by personality changes in dementia, as is claimed by Rebecca Dresser.").

[67] *See, e.g.*, Devan Stahl & John Banja, *The Persisting Problem of Precedent Autonomy Among Persons in a Minimally Conscious State: The Limitations of Philosophical Analysis and Clinical Assessment*, 9 AJOB NEUROSCIENCE 120, 120 (2018) ("Determining whether it is ethical to withdraw life-sustaining treatments (WOLST) from a patient in the minimally conscious state (MCS) recalls recurring debates in bioethics, including the applicability of precedent autonomy and the usefulness of quality of life assessments."); Betty S. Black, et al., *Surrogate Decision-makers' Understanding of Dementia Patients' Prior Wishes for End-of-Life Care*, 21 J. AGING HEALTH 627 (2009).

absent from the discussion is the role of the substituted judgment standard in cases of temporary acute mental health crises.[68]

Of course, this focus on explaining substituted judgment in cases of permanent incapacity makes practical sense—it is in these cases that the standard is most frequently relied on in practice.[69] If the substituted judgment standard cannot be justified in dementia cases, then it may well not deserve the ubiquitous role it has come to play in the law of surrogate decision-making.[70] But perhaps justifying substituted judgment in cases of permanent incapacity is not the place to start. After all, a legal doctrine can be justified generally if it is justified in what turns out to be a minority of cases, but there are good reasons to treat all cases as though they were in that minority.[71] And indeed, for the reasons that follow, shifting the justificatory project of substituted judgment to cases of temporary incapacity makes sense.

II. FROM PERMANENT TO TEMPORARY INCAPACITY

If it has been a challenge to justify substituted judgment in cases of permanent decline, perhaps we are looking in the wrong place. This Part argues that shifting the explanatory focus to temporary cases makes sense. First, I argue that focusing on temporary cases sidesteps the persistent metaphysical difficulties encountered by efforts to justify substituted judgment in permanent cases on their own terms. Next, I point out that this shift takes the history of the doctrine seriously on its own terms.

A. Two Challenges in Permanent Incapacity Cases

Any account purporting to justify substituted judgment in permanent cases must contend with two persistent challenges. First, the person for whom the decision is made will never appreciate it—the "Appreciation Challenge." Second, the "Identity Challenge," holds that the person for whom we are deciding may not be the same person that they were

---

[68] There is, however, some limited *clinical* literature offering guidance to medical professionals applying the substituted judgment standard in cases involving acute mental health crises. *See, e.g.*, Kriste E. Babbitt, et al., *Professional responsible intrapartum management of patients with major mental disorders*, 210 AM. J. OBSTETRICS & GYNECOLOGY 27, 27 (2014) ("This article provides the obstetrician with an algorithm to guide professionally responsible decision making with these patients."); Jeffrey L. Geller, *The Use of Advance Directives by Persons with Serious Mental Illness for Psychiatric Treatment*, 71 PSYCH. Q. 1 (2000).

[69] *See, supra* note 35 & accompanying text.

[70] *See supra* Part I.A.

[71] *See infra* 187–190 & accompanying text.

throughout their life. Neither difficulty applies in temporary cases. This Section discusses each challenge in turn.

1. The Appreciation Challenge

We generally think of ethics as having some necessary connection to the effects of actions on *persons*.[72] This is what Derek Parfit refers to as the mainstream, "person-affecting" view of ethics.[73] Moreover, we tend to think that something can only be good or bad for someone if they, at a minimum, *know* about it—if an action has some effect on their subjective experience.[74] It is intuitively difficult to think of actions that have no effect on the subjective experience of another person as "person affecting" in the relevant sense, and as having any ethical content at all.[75]

But when an individual has undergone substantial and irreversible cognitive decline, they will never be aware of *any* actions that taken on their behalf.[76] Call this the *Appreciation Challenge*—the argument that making the decision the person "would have made" cannot be justified as to the benefit of *that person* because they will never appreciate it.[77] And if not justified as a benefit for the person on whose behalf we are deciding, why substituted judgment based on *their* personal identity and not, say, deciding based on what is best for others?

Philosophers resisting the Appreciation Challenge's implications for substituted judgment have generally made two kinds of responses. The first is to argue that indeed someone *can* be benefitted or harmed without knowing of it.[78] The argument typically proceeds by thought experiment.

---

[72] *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 363 (1987) (defining the "Person Affecting Principle" as the intuition that in order for something to be "bad," it must be bad *for* someone). Of course, there are alternative views, but the person affecting principle is at least a widespread intuition. *See generally, e.g.*, Melinda A. Roberts, *Is the Person-Affecting Intuition Paradoxical?*, 55 THEORY & DECISION 1 (2003).

[73] *Id.*

[74] *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Dover ed., 2007) ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question . . . .").

[75] *See, e.g.*, JAMES STACEY TAYLOR, DEATH, POSTHUMOUS HARM, AND BIOETHICS 45 (2012) ("At first blush, event E causes harm to a person P iff it adversely affects the experiences that he has . . . .").

[76] *See, e.g.*, Frolik, *supra* note 4, at 59 ("If the ward is defined as the once cognitively aware individual, once cognition is lost, we are no longer concerned with benefiting the ward as all benefits of the gift flow to the recipient of the gift." (citing Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 60 (1999)).

[77] *Id.*

[78] *See, e.g.*, BOONIN, *supra* note 6, at 2–3 ("The argument's first premise maintains

For example, the philosopher Raymond Bellioti:

> Your neighbor is an incorrigible peeping tom who gains much pleasure from monitoring the nightly activities of others. One weekend while you are away, he enters into your home and installs monitoring devices in your bedroom. He is so proficient that you never learn of his act. . . . Not a moment of your life is different, at least in terms of your lived experiences.[79]

Belliotti would have us see this case as a wrong.[80] Similar thought experiments abound in the philosophical literature—infidelities never discovered;[81] Arthur Ripstein surreptitiously sleeping in my bed.[82]

The essential problem with this move is not so much that it is wrong as that it is *weak*—it depends entirely on intuition-pumps to which people genuinely respond differently.[83] Personally, I don't get much more out of thought experiments like Bellioti's than—maybe? *Maybe* the case describes a real wrong to me outside of my awareness. But I'm at least as open to the counterarguments that intuitive objections to these kinds of thought experiments are either (1) misfires, because by telling me the hypothetical (even telling me I have to assume that I don't know what my neighbor has done) I *do* know what my neighbor has done; or (2) moral prophylaxis, because there is obviously a strong *probabilistic* relationship in real life between spying on me and inducing an extreme subjective experience—in real life, you can't stipulate non-discovery.[84]

If this is all we've got, it's a rather dubious platform on which to build a

---

that it is possible to harm a person while they are alive even if the act has no effect on that person's conscious experiences."); RAYMOND ANGELO BELLIOTTI, POSTHUMOUS HARM: WHY THE DEAD ARE STILL VULNERABLE 10 (2012) (arguing against the "experience requirement" of harm).

[79] BELLIOTTI, *supra* note 78, at 11.

[80] *Id.* at 11 ("You have been *harmed*, your rights have been violated, even though you have not been *hurt* because you are unaware of the harm, and have not suffered unpleasant states of consciousness from the violation.").

[81] BOONIN, *supra* note 6, at 16.

[82] Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFFS. 215, 218 (2006)

[83] *See, e.g.*, JAMES RACHELS, THE END OF LIFE: EUTHANASIA AND MORALITY 133 (1986) ("The trouble with this is that we have no guarantee that our intuitions are perceptions of the truth."); BOONIN, *supra* note 6, at 3 ("As far as I can tell, the arguments that can be offered for or against each of the argument's three premises inevitably depend at some point or another on claims about intuitive plausibility.").

[84] *See, e.g.*, Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 251–52 (1981) (arguing that common intuitive responses to thought experiments such as these reflect these factors); James Stacey Taylor, *The Myth of Posthumous Harm*, 42 AM. PHIL. Q. 317, 317 (2005) (same).

legal doctrine.[85] Indeed, those making this kind of argument periodically admit that they are not fully convinced of it themselves.[86] Belliotti claims in the middle of his argument that "[l]iving robustly requires faith."[87] Maybe, but I'd imagine that we at least aspire for legal doctrines grounded in something more.

In cases of temporary incapacity, in contrast, the Appreciation Challenge simply doesn't arise. Suppose, in perhaps the simplest case, an individual undergoes a temporary psychotic episode, of which they have no memory. During this time, suppose that a surrogate decision-maker makes the "right" decision (under whatever standard surrogates ought to make decisions—we haven't gotten to explaining why that might be substituted judgment yet). Upon the individual's return to their earlier cognitive functioning, the surrogate will tell them what happened and the decision that was made. It was the right decision, and the person for whom it was made *appreciates* it. The Appreciation Challenge evaporates.

Thus, in acute mental health crises, it simply does not matter how we respond to thought experiments like Bellioti's, and we need not engage in mental gymnastics about the conceptual possibility of rights or wrongs that do not affect the subjective experience of their subject in any way. In cases of temporary incapacity, the decisions that we make on the individual's behalf *will* affect them.

2. The Identity Challenge

The second move philosophers make to explain how persons can be benefitted without their conscious awareness brings us to the second difficulty in justifying substituted judgment. The move is to urge us to abstract our understanding of the affected "person" (in the morally relevant sense) from the subjective experiences of the living and breathing entity presently before us. For example, philosophers sometimes argue that substituted judgment is a benefit to the person with "an eye to the course of his whole life;"[88] their "biographical" as opposed to "biological" life;[89] the

---

[85] *See, e.g.*, BOONIN, *supra* note 6, at 6 ("Contemporary philosophers who have written on the subject thus far seem to be roughly evenly divided between those who defend the possibility of posthumous harm and those who reject it . . . ."); *see also generally* TAYLOR, *supra* note 75 (defending the principle that someone cannot be benefitted or harmed if it has no effects on their experiences).

[86] *See, e.g.*, BOONIN, *supra* note 6, at ix ("Maybe I shouldn't admit this in the preface to the very book in which I defend the claim, but I'm not even I am completely convinced of it.").

[87] BELLIOTTI, *supra* note 78, at 76.

[88] DWORKIN, *supra* note 6, at 221 (1993).

[89] William Ruddick, *'Biographical Lives' Revisited*, 9 J. ETHICS 503, 503 (2005).

distinction between "*having a life*" and "merely *being alive*;"[90] or a benefit to some other entity such as a "Human Subject," which is really what matters.[91] From this perspective, we substitute the judgment of this broader, more ethically-significant entity for that of the presently compromised individual before us.

This move may sidestep the Appreciation Challenge, but brings on another fundamental difficulty in justifying substituted decision-making—the argument that a person who has undergone substantial cognitive changes may no longer be the same person they were.[92] If that's right, it makes no sense to make the decisions that *someone else* would have made on their behalf—[93]even setting aside metaphysical objections about whether any of these proffered entities exist and why they would have ethical status.[94] Call this the *Identity Challenge* to substituted judgment. If the Identity Challenge is right, it is not clear why trans-temporal abstractions such as the "course of a whole life" or the "biographical" life of the individual ought to guide decision-making now. If the entity before us is no longer the same person, why should the course of *someone else's* life govern them?

Although the notion that an individual can remain constituted of the same body and yet be a different *person* is controversial,[95] the Identity Challenge trades on a great deal of support. Indeed, it is common in ordinary English to refer to people with advanced dementia as "not the same person;" "not the *true*" person; "a different person."[96] And research in

---

[90] RACHELS, *supra* note 83, at 5.

[91] DANIEL SPERLING, POSTHUMOUS INTERESTS 34–35 (2008)

[92] *See, e.g.*, Dresser, *Life, Death*, *supra* note 5, at 380 (arguing that because a person with dementia may not be the same person that they were previously, there is no reason to enforce their prior wishes over current interests); *see also* Francis, *supra* note 5, at 575 (describing this view as the "'different person' argument).

[93] *See id.* at 381 ("[A]s Parfit's theory graphically suggests, the past and present individuals could be different persons, the authority of the past preferences to determine future treatment is substantially reduced.").

[94] *See, e.g.*, BELLIOTTI, *supra* note 78, at 90 ("The Human Subject is oddness on stilts."); TAYLOR, *supra* note 75, at 36 (observing that these kinds of entities are posited "*only* to explain how posthumous harm is possible while avoiding the problem of the subject and the problem of backward causation"); *see also* BOONIN, *supra* note 6, at 116 ("It is implausible to deny that harm requires a subject.").

[95] *See, e.g.*, Bernard Williams, *The Self and the Future*, 79 PHIL. REV. 161 (1970) (arguing that the continuity of metaphysical personal identity is constituted of the continuity of a human body).

[96] *See, e.g.*, Pat Sikes & Mel Hall, *'It was then that I thought 'whaat? This is not my dad': Implications of the 'still the same person' narrative for children and young people who have a parent with dementia*, 17 DEMENTIA (LONDON) 180, 186 (2018) ("In the stories participants told, references to how they believed dementia had changed their parent and how they felt about this were ubiquitous."); Agnieszka Jaworska, *Respecting the Margins*

experimental philosophy has shown that people intuitively contemplate the possibility that dementia could change them into someone who is not their true self anymore.[97]

Indeed, the notion that individuals' personal identity can be disrupted by psychological or cognitive disruption—that they can be, temporarily or permanently, not *themselves*—has longstanding support in the philosophical literature. John Locke, for example, argued that personal identity was made up of the continuity of memory, such that sufficient loss of or disconnection to one's memories would mean that they were no longer the same person.[98] And most contemporary philosophers, following him, accept that the self is a creature of the mind, and that sufficient mental or cognitive change can disrupt it, whether they ground personal identity in a thin kind of psychological connectedness,[99] Locke's continuity of memory,[100] or a thicker view under which identity is made up of an individual's self-narrative.[101]

But as with the Appreciation Challenge, cases of temporary incapacity do not give rise to the Identity Challenge. Under almost any theory of personal identity, psychotic episodes or other acute mental health crises are prime candidates for disruption of personal identity.[102] Indeed, by their nature such episodes disrupt psychological continuity, the continuity of memory, and the continuity of a self-narrative.[103]

---

of Agency: Alzheimer's Patients and the Capacity to Value, 28 PHIL. & PUB. AFFS. 105, 113–14 (1999) (describing an Alzheimer's patient as ascribing certain challenges to 'the Alzheimer's at work").

[97] *See, e.g.*, James Toomey, *Understanding the Perspectives of Seniors on Dementia and Decision-Making*, 12 AJOB EMPIRICAL BIOETHICS 101 (2020) (finding that participants thought the ethical permissibility of intervening in their decision-making turned on whether dementia had disrupted personal identity); Brian D. Earp, Ivar R. Hannikainen, Samuel Dal & Stephen R. Latham, *Experimental Philosophical Bioethics, Advance Directives, and the True Self in Dementia*, in EXPERIMENTAL PHILOSOPHY OF MEDICINE (A. De Block & K. Hens, eds., 2022) (same).

[98] *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, chap. 27 (2d ed. 1694).

[99] *See, e.g.*, PARFIT, *supra* note 72, at 275–304 (outlining a theory of personal identity grounded in psychological connection across time).

[100] *See, e.g.*, R.G. Swinburne, *Personal Identity*, in PERSONAL IDENTITY 123, 123 (Harold Noonan, ed., 1993) (arguing that "memory and character" are relevant to the continuity of personal identity).

[101] *See, e.g.*, MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 93; 87 (1996) ("On this view, a person's *identity* . . . is constituted by the content of her self-narrative, and the traits, actions, and experiences included in it are, by virtue of that inclusion, hers.").

[102] *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1106–11 (2022) (arguing that the loss of legal capacity is best understood as a disruption of personal identity).

[103] *See, e.g.*, SCHECHTMAN, *supra* note 101, at 103 (using an "extreme psychotic" as an

Take person P, organized for a long time by whatever continuity of psychology, memory, or narrative is required for ongoing personal identity at T_1. At T_2, P experiences a psychotic episode that severs the continuity required for personal identity. For convenience, let's just say that during this psychotic episode, P is unconscious; maybe they are still moving around and speaking, but they have temporarily become a philosophical zombie. They have *no* psychological connection to their prior self, they remember nothing, and they have no sense of narrative continuity with that self. Under plausible theories of personal identity, at T_2, they are not P. But at T_3, the psychotic episode is resolved, and they return to themselves. Their subjective experience picks up right where it left off at T_1, and they regain psychological connectivity, memories, and narrative coherence with their self at T_1. For convenience, assume that P at T_3 has no memory of T_2, only T_1. At T_3, P is once again P. Thus, it can be no objection to decisions we made at T_2 that the person for whom we made them is gone—*they're not*.

This may seem straightforward enough, but for the fact that you may be wondering that if P is not themselves at T_2, *who are they*? As fair as this question seems, it is not clear it actually requires an answer. We are, after all, perfectly comfortable with the idea that people experience temporary disruptions of their personal identity every night when they are asleep without asking the difficult metaphysical question of who, if anyone, someone is while they are sleeping. As a philosophical matter, I imagine that while someone is undergoing a temporary mental health crisis—or asleep—they are presumably *no one*. [104] Because they are unconnected by

---

example of disruptions to a narrative conception of personal identity); Maura Tumulty, *How Philosophers Think About Persons, Personal Identity, and the Self*, in PERSONAL IDENTITY AND FRACTURED SELVES 16, 20 (2009) (observing that in "steroid-induced psychosis" we might "question . . . whether it is the same person, on and off the steroids"); *see also* Paul Henry Lysaker & John Timothy Lysaker, *Narrative Structure in Psychosis: Schizophrenia and Disruptions of the Dialogical Self*, 12 THEORY & PSYCH. 207, 207 (2002) ("There is nearly universal acceptance that persons with schizophrenia often experience a profound disruption in their basic sense of self.").

[104] This conclusion is defensible in cases, involving, say psychotic episodes or temporary catatonia. However, we might be able to imagine mental illnesses for which it is seems less plausible. The case in point would be Dissociative Identity Disorder, in which two distinct, mutually-independent personal identities co-exist at different times in the same body. Luckily for us, however, Dissociative Identity Disorder probably does not exist, at least not in its Hollywood form. *See, e.g.*, Joel Paris, *The rise and fall of dissociative identity disorder*, 200 J. NERVOUS & MENTAL DISORDERS 1076, 1076 (2012) (describing Dissociative Identity Disorder as a "medical fad" "based on poorly conceived theories"). However, assuming that such a condition did exist, the analysis would be similar to that described above, with the caveat that any decisions taken on behalf of one individual while absent (and another present) could not ethically prejudice the other identities.

So suppose that we really had an individual who was P_1 on even days, and P_2 on odd

psychological connectivity, memory, or narrative continuity to themselves, they are not themselves. But because they lack the capacity to create an alternative complex of psychological connection, memory, and narrative, they *can't be anyone else either*.[105]

Of course, this may *sound* strange—to hold that an individual undergoing a psychotic episode is at present not only not themselves, but is also *no one in particular*—but indeed, something like this view is necessary to make sense of why we would *ever* allow others to decide on their behalf. If the person is simply some*one* else, they would of course be permitted to make their own decisions. Thus, if we accept that there are any circumstances in which others ought are permitted to decide for them, a conclusion like this one is required. And it is not actually all that counter-intuitive—indeed, in the locution "that's not him talking, it's the schizophrenia," no one thinks of the "schizophrenia" as an individual person the subject of our moral concern.

Just as with the Appreciation Challenge, then, the Identity Challenge evaporates in cases of temporary incapacity.

B. The Origins and Context of Substituted Judgment

Finally, focusing on temporary incapacity as the paradigm of substituted judgment makes sense on its own terms, particularly in the historical context in which the doctrine arose. Under the old English common law, there were two categories of adults considered unable to decide for themselves—"lunatics" and "idiots."[106] "Idiots" were those with lifelong

---

days; and that P_1 and P_2 each had a distinct, continuous personal identity and no awareness of the other. In this case, we might think that at the end of each even day, P_1 "goes to sleep [or experiences a psychotic episode]" and P_2 "wakes up," only to "go to sleep" at the end of the odd day while P_1 again "wakes up." Thus, on odd days, P_1 is absent—as though they were asleep or having a psychotic episode—and others may decide for them. The Identity Challenge is no challenge so long as any decisions made during this time affect only P_1 and not P_2. If, say, the decision is to enroll P_1 in a class that meets only on even days, we are deciding for P_1 based on P_1's identity, not imposing anyone's identity on anyone else.

[105] *See, e.g.*, SCHECHTMAN, *supra* note 101, at 150–51 ("[T]he formation of a narrative self-conception of the proper form creates a persisting subject with the phenomenological life and set of capacities peculiar to persons, and these last only as long as the narrative does."). Note that this is different from cases of dementia, where we can imagine that people with dementia may actually be able to maintain psychological continuity, some temporary memory, and narrative, with respect to their present selves, if not their life as a whole. It's really *this* distinction that makes that Identity Challenge so powerful in dementia cases—not the fear that the person is *no one*, but that they might be *someone else*. But it is not a problem in psychosis cases.

[106] *See* 1 W. BLACKSTONE, COMMENTARIES *302; *see also* Harmon, *supra* note 8, at 16 (discussing this distinction).

cognitive deficits that prevented them from ever being capable of making their own decisions—the *lifelong* cases set aside above.[107] "Lunatics" in contrast, had periods—maybe long periods—of capacity, their sanity was understood to come and go.[108] Under the common law, "even a lunatic who appeared permanently insane was presumed potentially curable."[109] Lunatics were, therefore, legally understood to be temporarily incapacitated.

There was no third category. In other words, the common law recognized nothing like what today we think of as the typical case of substituted judgment—in which an individual previously had typical cognitive function, lived a life and developed an identity accordingly, but has now irreversibly lost it.[110] "The closest legal category that the common law had to describe [such people] was 'decedent,' but the persistence of . . . brain function . . . m[eant] the[y were] not dead—not dead, not alive, not an idiot, not a lunatic."[111] It was a *numerus clausus* of the *non compos mentis*.

The doctrine of substituted judgment arose in the common law of lunacy.[112] In the 1816 case *Ex Parte Whitbread*, the English Court of Chancery held that the court could authorize a gift of assets to a family member of a lunatic to the extent that the individual himself would have if competent.[113] For a century thereafter, the doctrine was limited in application to common law lunatics, individuals understood, at least as a legal matter, to be capable of return.[114]

Much later, and much more controversially, the doctrine was first applied to those that the common law would have categorized as idiots—those permanently incapacitated from birth.[115] And it wasn't until *even later*

---

[107] *See, e.g.*, Harmon, *supra* note 8, at 16 ("The idiot's condition was static. He came into the world with a certain deficient mental apparatus and generally left it in the same way.").

[108] *See, e.g.*, Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 782 (2004) ("Lunacy was a form of temporary insanity, which derived its name from the popular belief that it was caused by the phases of the moon."); L. SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 3 (1833).

[109] Harmon, *supra* note 8, at 16.

[110] *Id.* at 37–38.

[111] *Id.*

[112] *Id.* at 19; *see also* Boni-Saenz, *Personal Delegations*, *supra* note 37, at 1255 (noting that the doctrine of substituted judgment arose "in the common law of lunacy").

[113] EX PARTE WHITBREAD, 2 Meriv. 99, 102 (1816) ("We find it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.").

[114] *See, e.g.*, Harmon, *supra* note 8, at 22–28 (surveying application of the doctrine of substituted judgment in the nineteenth and early twentieth centuries).

[115] *See, e.g.*, STRUNK V. STRUNK, 445 S.W.2d 145, 148 (Ky. 1969) (applying the doctrine of substituted judgment to make a medical decision for an individual with lifelong

that the substituted judgment standard was applied to the remaining category of the incapacitated, the category absent from the common law, but to whom substituted judgment is most frequently applied today—people who had once lived a capacitated life, but had permanently lost cognitive functions.[116] Today's paradigmatic application, then, is historically an aberrational one, indeed one not even contemplated by the common law.

Having arisen in the law of lunacy—not permanent incapacity, and certainly not permanent incapacity *after* a capacitated life—temporary mental health crises were the problem that the doctrine of substituted had been developed to solve. In explaining the doctrine, those cases make sense as the place to start.[117]

III. LOVE, SUBSTITUTED JUDGMENT, AND TEMPORARY INCAPACITY

Our first question, then, is whether substituted judgment *can* be justified in cases of temporary incapacity. This Part argues that it can be. Indeed, to make the decisions another would have made during the absence of their otherwise continuous personal identity is an act of love for that person, and one that the law has good reasons to recognize. In this Part, I first make the case for the relationship between love and substituted judgment with a thought experiment. Next, I derive from the philosophical literature a "Thin Theory of Love" that would explain that relationship. Finally, I explain why the private law might seek to facilitate, or even codify, so human a thing as love.

A. Love and Decision-Making

Suppose that you're temporarily unconscious. This shouldn't be hard to do—it happens every night while you sleep. Further suppose that you are a lifelong fan of singer-songwriter Taylor Swift. Her music has grown with you, been with you, and gotten you through the past decade and a half of your life as nothing else—you thought about high school crushes with "Love Story;"[118] you cried with "All Too Well" after your first real

---

intellectual disabilities); *see also* Harmon, *supra* note 8, at 32 ("*Whitbread* was about a lunatic and his money. *Strunk* was an idiot and his body. The situations were not all that similar.").

[116] *See, e.g.*, IN RE QUINLAN, 355 A.2d 647 (1976) (applying the substituted judgment standard to terminate artificial ventilation for a woman in a vegetative state who had lived an ordinary life until age 21).

[117] *See, e.g.*, Frolik, *supra* note 4, at 63 (arguing that the common law development of the substituted judgment standard was justified "in the event that the ward should regain capacity").

[118] TAYLOR SWIFT, LOVE STORY (TAYLOR'S VERSION) (Republic – 2021).

heartbreak;[119] you've been the archer, and you've been the prey;[120] *Evermore* got you through the dark winter of '21;[121] you're the problem, it's you.[122] You couldn't tell the true story of your life without accounting for the role of Taylor Swift's music in it—the soundtrack to lonely nights and long parties, to picking up the pieces and falling all over.

But let's say that you've never seen Swift perform live. Your friends—with their own musical tastes, interests, and things that matter to them—have never had the relationship with Taylor Swift's music that you do. You'd go to a concert by yourself, and you could comfortably afford it, but the moment has never arisen.[123] You know tickets to her shows sell out near-instantaneously.[124] You've always thought maybe next time; one day.

Before you fell asleep, it was an ordinary night. But overnight—while you are unconscious—Taylor Swift unexpectedly announces a new tour; first stop, the city in which you live.[125] It will sell out before you wake up. If you were awake, you would absolutely buy a ticket—the concert is affordable enough that you wouldn't hesitate to spend the money. Someone who loves you—a romantic partner, a close friend, a family member, whoever—sees the announcement. They buy the tickets on your behalf.

Why? Because they *know* all this about you—about what Taylor Swift means to you, about how you've never seen her, and how much it means to you to be able to see her someday. And they *care* about all that. It's the decision you would have made if you were awake. This person *loves* you. Indeed, someone who didn't love you might not have known how much Taylor Swift meant to you. Or if they did, they wouldn't have cared about that fact in this way—they wouldn't have taken it as among *their* projects to advance the story of your life the way *you* want it to go.

So that's love, at least part of it—some kind of intimate knowledge of and deep concern about the personal identity of another, which, when that person is unconscious and incapable of deciding for themselves, may involve making the decision they would have made. But we haven't said

---

[119] TAYLOR SWIFT, ALL TOO WELL (TAYLOR'S VERSION) (Republic – 2021).

[120] TAYLOR SWIFT, THE ARCHER (Republic – 2019).

[121] *See generally* TAYLOR SWIFT, EVERMORE (Republic – 2020).

[122] TAYLOR SWIFT, ANTIHERO (Republic – 2022).

[123] Assume, indeed, throughout, that the prices of these tickets are negligible enough (admittedly unlikely!) that you are agnostic as to whether you were to get them by spending your own money or another person were to pay for it on your behalf.

[124] *See, e.g.*, Karli Bendlin, *Taylor Swift's Eras Tour: A Timeline of the Ticketmaster Fiasco*, PEOPLE (Dec. 12, 2022), https://people.com/music/taylor-swift-eras-tour-ticketmaster-timeline/

[125] Indeed, she is famously prone to making announcements in the middle of the night! *See, e.g., Taylor Swift drops "3am edition" of Midnights 3 hours after album's 12 a.m. release*, CBS NEWS (Oct. 21, 2022), https://www.cbsnews.com/news/taylor-swift-midnights-3am-anti-hero-video/.

anything yet about the kinds of mental health crises that would legally justify others in deciding. By playing around with the details of the thought experiment, however, we can see the essential role of love in making decisions for those temporarily incapacitated by mental health crises. Indeed, the hypothetical is already a case of substituted judgment—making the decision you would have made but for your temporary unconsciousness. And its basic structure holds however we alter the details.

First, the thought experiment works regardless of the *kind* of decision made. Of course if you *don't* have a relationship with Taylor Swift's music as intimate as the one described, or you've been to her concerts many times and found them unstimulating, then buying Taylor Swift tickets while you are asleep would hardly be loving. What matters is that the decision is the one that *you would have made*, not its particular substance.

And this principle applies to small decisions as well as big ones. Consider a loving couple out to dinner at a nice restaurant; while one is in the bathroom the other orders that that person's favorite dessert. Or a houseguest wakes up early to make the host the egg breakfast that he's made for himself every morning since college. These are acts of love—maybe smaller, but acts of love nevertheless. Indeed, *any* gift, surprise, or taking-care-of-business in another's absence based on knowledge of and concern about the identity of that person exhibits similar characteristics.

Perhaps more significantly, the thought experiment leads to the same results regardless of *why* you were unable to make the decision yourself. We've already seen that the thought experiment holds if you were temporarily absent because you were in the bathroom. Surely the analysis would be the same if you were temporarily absent because you were, say, off fighting in the war or on safari. And while in the initial thought experiment, you were temporarily unconscious because you were asleep, we can imagine any number of alternative reasons you might be temporarily unconscious—perhaps you have been hit over the head, or are having an epileptic episode, or have been put in a medically-induced coma.

The point in all of these cases is that *you*—the personal identity that constitutes you in the morally relevant sense—are in some way not present to decide, such that another either had to or had an opportunity to do so for you. In some of these cases you weren't there because you were physically elsewhere—the bathroom, the war, or safari. But in others—unconscious due to sleep, head injury, epilepsy, or coma—you weren't here because you, temporarily, weren't *anywhere*.[126] In these kinds of cases, your personal identity has been, in a meaningful sense, disrupted, and is temporarily not present. So perhaps you weren't *un*conscious, but were experiencing a

[126] *See supra* Part II.A.2.

substantial deviation from your personal identity because of a schizophrenic or psychotic episode. As in cases of unconsciousness, there is a real sense in which *you*—the *real* you—are absent. Indeed, this is not radically dissimilar from the perspective of those who love you to your absence in the bathroom, off at war, or on safari, either. To make the decision that you would have made is to love you.

To be sure, there are *legal* distinctions among these kinds of cases. In cases where you are in the bathroom, or on safari, or off at war, the law recognizes your legal capacity. You *can* make your own decisions. In an important sense, your failure to purchase Taylor Swift tickets while asleep, in the bathroom, on safari, or in the war is a personal problem with which the law need not concern itself. There's no *legal* barrier to your buying them yourself. If you were particularly worried about this possibility, you could have authorized an agent to purchase any Taylor Swift tickets on your behalf. Given that you haven't done this, and can't purchase the tickets yourself, it is an exemplary act of love for someone who loves you to purchase them for you. But it is not law's problem.

This analysis is different in the cases in involving the absence of personal identity because of mental illness. In these cases, it is *precisely* the law that is depriving the person from deciding themselves.[127] In *these* cases, the law *must* provide some standard for decision-making because it has foreclosed its own typical mechanism of deferring to expressed preferences.[128] And it is out of this legal necessity, then, that the standard of substituted judgment arises.

B. A Thin Theory of Love

The concept of love is—perhaps unsurprisingly—an undertheorized and controversial one in the philosophical literature.[129] Indeed, we use the word "love" to refer to all sorts of things—love for persons, things, and abstractions such as the Buffalo Bills—such that general theorizing might be an exercise in futility.[130]

---

[127] *See supra* Part I.A.

[128] *Id.*

[129] *See, e.g.*, W. Newton Smith, *A Conceptual Investigation of Love*, in EROS, AGAPE, AND PHILIA: READINGS IN THE PHILOSOPHY OF LOVE 199, 199 (Alan Soble, ed., 1989) ("Concepts like love . . . have received scant attention in the recent Anglo-American philosophical tradition."); IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 2 (1970) (describing love as "forgotten or 'theorized away'" by modern philosophy).

[130] *See, e.g.*, Alan Soble, *An Introduction to the Philosophy of Love*, in EROS, AGAPE, AND PHILIA: READINGS IN THE PHILOSOPHY OF LOVE i, xix (Alan Soble, ed., 1989) (observing that the "so many different answers [to the question what is love?] exist and debates about the nature of genuine love seem impossible to resolve").

In this Article, I am taking the paradigm of the kind of "love" under discussion to be a relationship between adult persons—what is sometimes called "interpersonal love" in analytical philosophy.[131] This understanding of "love" applies not just to romantic or sexual partnerships, but the kinds of relationships between many close friends and adult family members.[132] But this conception of interpersonal love sets aside many relationships that we might understand as "love" (and, indeed, relationships some might even think of as *more* paradigmatically "loving"), including the love between parents and young children, and between persons and the impersonal things that matter to them.[133]

Cabining the concept of love in this way is fairly typical in the philosophical literature, and, indeed, there is something of a consensus that love between adult persons is at least of the most philosophical interest, even if it what follows is not a *general* theory of love but a theory of a *certain kind of* love (or even some other concept that would be properly called something else).[134] "So call it what you want, yeah, call it what you want to."[135]

With these preliminary caveats, there is something of a broad consensus on a handful of essential characteristics of the concept of interpersonal love sufficient for our purposes. Indeed, only a relatively thin understanding of love is required to understand its relationship to substituted judgment. This Thin Theory of Love holds that love is, at a minimum, an *intimate*

---

[131] *See, e.g.*, Susan Wolf, *Love: The Basic Questions* in OXFORD HANDBOOK ON THE PHILOSOPHY OF LOVE 1, 8 (Christopher Grau & Aaron Smuts, eds., 2017) ("[W]hen we say or approve of the thought that love makes the world go round, it is interpersonal love that we have in mind . . . .").

[132] *See, e.g.*, Kolodny, *supra* note 10, at 137 ("I apply the word 'love' not only to the attitudes that family members and romantic lovers have to each other, but also to the attitudes that friends have to each other."); *see also* Wolf, *supra* note 131, at 4 ("[A]lthough the character of loving relationships between lovers and friends, on the one hand, and siblings, parents, and children on the other, may well be markedly different in their early stages, they tend to grow more similar to each other over time, suggesting that they do have something valuable in common worth trying to articulate.").

[133] *See, e.g.*, Kyla Ebels-Duggan, *Against Beneficence: A Normative Account of Love*, 119 ETHICS 142, 147 (2008) (arguing that some of the philosophical literature on the nature of love has been led astray by taking the paradigmatic case of love as between parents and children rather than adult persons).

[134] *See, e.g.*, Wolf, *supra* note 131, at 3 ("I shall . . . assume that when people talk or write about love's importance, what they have in mind, first and foremost, are loving *relationships*, and, typically, loving relationships with other human beings."); Kolodny, *supra* note 10, at 137 ("The species of love that involves caring for another person is the species that most attracts the interest of moral philosophers."); *see also* Newton Smith, *supra* note 129, at 202 (theorizing about love "only in cases where the object of love is some one or more persons").

[135] TAYLOR SWIFT, CALL IT WHAT YOU WANT (Big Machine – 2017).

knowledge of, and some kind of *deep concern* for, the *personal identity* of another.[136] This theory has three essential features. First, the object of love is the *personal identity* of another individual person. Second, love requires an intimate knowledge of the other person's identity. Finally, love requires a relationship of deep concern towards the identity of the person loved.

First, the object of love is an individual's personal identity.[137] Indeed, it is widely taken as given that love is a relationship with a *particular* person, that "love is not a transferable attitude,"[138] and that theories that would contemplate the substitutability of the object of love are non-starters.[139] "No one else could play that tune/you knew it was up to me."[140] And it is our personal identities that make us particular persons; that make us *who we are* as opposed to *anyone else*—[141]love "singles us out and affirms us in our unique personality and not simply as a human person in general."[142]

When we understand ourselves to love someone, we love them for *who they are* (their personal identity, as constituted by their mind), not as some fungible collection of characteristics related to their identity, or for their

---

[136] *Cf., e.g.*, Wolf, *supra* note 131, at 7 ("Loving, then, is fundamentally, caring, deeply and personally, for a person for her own sake.").

[137] *See, e.g.*, BENNETT W. HELM, LOVE, FRIENDSHIP AND THE SELF: INTIMACY, IDENTIFICATION, AND THE SOCIAL NATURE OF PERSONS 200 (2009) ("I have claimed that to love someone is to find him to have import to you as this particular person. This requires that the object of your concern is understood (perhaps implicitly) not only as *a* person but also as having a particular identity, so that you come to share that identity with him.").

[138] Roger E. Lamb, *Love and Rationality*, in LOVE ANALYZED 26, 43 (Roger E. Lamb, ed., 1997)

[139] *See, e.g.*, Ginger T. Clausen, *Love of Whole Persons*, 23 J. ETHICS 347, 348 (2019) (noting that it would be "unloving" to see others as a "suitable replacement" for someone that one purportedly loves); Benjamin Bagley, *Loving Someone in Particular*, 125 ETHICS 477, 481 (2015) ("Someone you love as a particular individual, then, is someone you value as irreplaceable."); Agnieszka Jaworska & Monique Wonderly, *Love & Caring* in THE OXFORD HANDBOOK OF THE PHILOSOPHY OF LOVE 2 (Christopher Grau & Aaron Smuts, eds., 2018) ("[F]or an individual who is concerned to help the poor, any poor person will do, but *love* does not admit of such indifference to the beloved's identity.") *see also* HARRY FRANKFURT, NECESSITY, VOLITION & LOVE 170 (1998) ("The focus of a person's love is . . . the specific particularity that makes his beloved *nameable*—something that is more mysterious than describability, and that is in any case manifestly impossible to define.").

[140] BOB DYLAN, UP TO ME – TAKE 1 (Columbia 2018).

[141] *See, e.g.*, SCHECHTMAN, *supra* note 101, at 2 (arguing that the construct of personal identity is about "which beliefs, values, desires, and other psychological features make someone the person she is"); *see also* Alan Soble, *Where We Are*, in EROS, AGAPE, AND PHILIA: READINGS IN THE PHILOSOPHY OF LOVE (Alan Soble, ed., 1989) (arguing that a thorough account of love "might require an account of personal identity (or at least how people conceive of their identity) . . . .").

[142] Robert R. Ehman, *Personal Love*, IN EROS, AGAPE, AND PHILIA: READINGS IN THE PHILOSOPHY OF LOVE 254, 261 (Alan Soble, ed., 1989).

body.[143] In the spirit of the philosophy of personal identity, I take it that if the brain of someone we love were transplanted into a new body, we would continue to love them.[144] This is because it is their *personal identity*, "what [their] soul is made of . . . . [their] identity or character,"[145] "a person's essential qualities . . . inseparable from [their] numerical or historical identity"[146] that we love. As Ginger Clausen puts it, "very often, the best we can do is say, 'I love you because you're you,' and hope our loved ones understand that there is an entire unwritten novel behind those words."[147]

Next, love requires some kind of intimate knowledge of the personal identity that it takes as its object[148]—"love is based on knowing the beloved."[149] It is conceptually impossible, in other words, to love someone that you do not know.[150] Indeed, this criterion is tied up with the fact that the object of love is a particular personal identity—to identify a particular personal identity in order to love it requires knowing what it is and what it is not.[151] Love "presupposes an awareness of the separate self" and "an experience of the most concrete personal reality of the beloved."[152]

---

[143] *See, e.g.*, Kieran Setiya, *Love and the Value of Life*, 123 PHIL. REV. 251, 262 (2014) ("The object of respect and love is not a property . . . but its instance in a particular human being.").

[144] There are certain kinds of loving relationships—namely, romantic relationships—where we might find this claim odd. No doubt, most romantic loves are at least partially contingent on the particular body in which a beloved's identity was first encountered. And many people would presumably no longer experience the same *kind* of love for a romantic partner if their brain were transplanted into a body of the opposite sex. But if we ceased to love this person *at all* in such an eventuality, I take it that we never actually *loved them* in the first place, but were perhaps merely titillated by their body.

[145] Bagley, *supra* note 139, at 490.

[146] Neera Kapur Badhwar, *Friends as Ends in Themselves*, 48 PHIL. & PHENOMENOLOGICAL RES. 1, 19 (1987).

[147] Clausen, *supra* note 139, at 366.

[148] *See, e.g.*, Rae Langton, *Love and Solipsism*, in LOVE ANALYZED 123, 128 (Roger E. Lamb, ed., 1997) ("Friendship is a duty to know another person, and to allow oneself to be known."); Newton-Smith, *supra* note 129, at 204 (listing "A knows B" as a conceptual characteristic of A loving B); Soble, *Where We Are*, *supra* note 130, at 3 ("[W]e desire . . . *not* to be loved just because our lover has grossly false beliefs about us.").

[149] HUGH LAFOLLETTE, PERSONAL RELATIONSHIPS: LOVE, IDENTITY, AND MORALITY 113 (1996).

[150] *See, e.g.*, Bagley, *supra* note 139, at 507 ("The improvisational model shows how it is possible to be loved in this way, as persons who are both knowable and endlessly interesting and surprising, with identities that escape determinate categorization but can nevertheless be responded to with fluency and delight.").

[151] Kolodny, *supra* note 10, at 148 (describing a "relationship"—a prerequisite for love—to "obtain between *particular* people over time"); Dean Cocking & Jeanette Kennett, *Friendship and the Self*, 108 ETHICS 502, 522 (1998) (arguing that a prerequisite of friendship is that a friend is "interested in *me*).

[152] Ehman, *supra* note 142, at 254; 257.

Thus, of now-loveless relationships, "all I need for you to admit/is that you never knew me like you thought you did,"[153] "I couldn't believe after all of these years/You didn't know me better than that."[154] People sometimes say that they love all of mankind. But they can't really mean it (at least they can't mean they have the kind of interpersonal love under consideration here)—they don't even *know* all of mankind.[155]

Finally, the *substance* of love has something to do with a kind of concern for, or care about, the continuation of the other's personal identity, as *they* want it to go, for *its own sake*.[156] To love someone is not merely to know their identity, even intimately. Love requires *caring about* the person's personal identity.[157] We must be disposed towards the individual's identity as they are, to take among our projects that of advancing their identity in the way that they want it to, from their perspective.[158] And this care must not merely be derivative or instrumental.[159] "[L]oving someone always involves caring about the person for his or her own sake."[160] Indeed, that love is a relationship having something to do with knowledge and care for an individual's personal identity is why it can be so alienating for someone who used to love us to make a decision—or even say something—based on earlier aspects of our personal identity that we've repudiated.[161]

---

[153] LUCY DACUS, BRANDO (Matador – 2021).

[154] BOB DYLAN, IDIOT WIND (Columbia – 1975).

[155] *See, e.g.*, Ehman, *supra* note 142, at 257 ("The emotional affection for the beloved is not mere blind force but a disclosure of the person as is evidenced by the fact that we feel as though we know the person we love more intimately than we know others."); *see also* Wolf, *supra* note 131, at 6 ("Certainly, a general attitude of good will to all men, or to all people, or to all of sentient creation, falls short of what I mean by love.").

[156] *See, e.g.*, Jaworska & Wonderly, *supra* note 139, at 1 ("It does not seem possible to love someone or something and yet not care about the object of one's love."); Bagley, *supra* note 139, at 507 ("In wanting to be loved as distinctive, we want our lovers to see, and value us for, aspects of our characters that distinguish us from others."); *see also* Setiya, *supra* note 143, at 253 (noting that, in the philosophical literature, "a recurring theme is that to love someone is to care about them"); Kolodny, *supra* note 10, at 149 ("A friendship or romantic relationship just is an ongoing pattern of concern."); Alan Soble, *Union, Autonomy, and Concern*, in LOVE ANALYZED 65, 65 (Roger E. Lamb, ed., 1997) ("A quite ordinary (and true) thought is that when *x* loves *y*, *x* wishes the best for *y* and tries, as far as he or she is able, to pursue the good for *y*."); Newton-Smith, *supra* note 129, at 211 ("[I]t is g-necessary that a case of love involves concern").

[157] *See, e.g.*, Kolodny, *supra* note 10, at 136 ("I understand love exclusively as a state that involves caring about a person.").

[158] *See, e.g.*, HELM, *supra* note 137, at 134 (arguing that to love someone else is to be disposed towards their "evaluative identity" as they are).

[159] *Id.* at 76 ("The kind of caring at issue [in love] involves a concern for the well-being of the agent *for its own sake*, and not merely for the sake of something else, such as a psychology experiment or stud fees.").

[160] Wolf, *supra* note 131, at 6.

[161] *See, e.g.*, Cocking & Kennett, *supra* note 151, at 522 (noting as an example of an

Either this person doesn't know the ways in which we have evolved, or they don't care.[162]

This relatively uncontroversial theory of love explains why buying the Taylor Swift tickets above is so paradigmatically loving. In the thought experiment, the music of Taylor Swift is an important feature of your personal identity—that which makes you *you*, both yourself across time, and yourself as distinct from others. To buy the tickets when you cannot requires both an intimate knowledge of that fact and concern for it—taking it as a reason for acting.[163]

Finally, it is worth pointing out that under the Thin Theory of Love, love is a matter of degree—it is something that we can have more or less of.[164] This makes sense because its constituents—knowledge and concern—are themselves matters of degree.[165] So of course it is possible to "love" someone and not know *everything* about them—indeed, it is *impossible* to know everything about anyone, and if that were a conceptual *sine qua non*, love would be impossible in a superficial sense.[166] But, all else equal, the better we know the personal identity of someone else, the more we can love them. And, all else equal, the more we care about that identity, the more we do in fact love them.

That may well not be all love between persons is. But certainly it's a big part, and sufficient for understanding the relationship between love and substituted judgment in temporary cases.

C. Love and the Law

Fair enough, you might be willing to accept that making the decision someone else would have made in their absence is an act of love. But why might the private law—that notoriously hard-edged maze of doctrines often explained in terms of economic incentives—ground a legal doctrine in so romantic a concept of love?

---

alienated love one in which "I feel that she no longer knows who I am").

[162] LAFOLLETTE, *supra* note 149, at 113 ("Unless we have regular intimate exchanges . . . we will no longer know each other as well as we once did; perhaps we may lose touch altogether.").

[163] *See, e.g.*, Setiya, *supra* note 143, at 253 (observing that a theme in the literature on philosophy of love involves taking the beloved's "interests . . . as reasons for you to act").

[164] *See, e.g.*, Ehman, *supra* note 142, at 259 (arguing that love can be "deeper and purer" in some cases over others); Bagley, *supra* note 139, at 480 (theorizing about the "best kind of love"); Ebels-Duggan, *supra* note 133, at 152 (same for an "ideal of loving interaction between adults").

[165] *See, e.g.*, Newton-Smith, *supra* note 129, at 204 (noting that "in certain paradigm cases of love" the theorized prerequisites "would all be satisfied to a high degree, they are not jointly necessary").

[166] *Id.* at 209 ("But a theory to the effect that we never love persons is just wrong.").

On the one hand, this might simply be the wrong way to think about the question. The law *must* prescribe some standard to guide surrogate decision-making,[167] and there are, ultimately, only so many cognizable alternatives.[168] Conceivably, that is all that's necessary for the law to endorse a standard grounded in love—presumably a reasonable default rule based on what people generally would do and want anyway.[169]

Moreover, it is not as though love is actually a concept alien to the private law. It is the organizing principle of the private law institution of marriage.[170] Through loss of consortium claims, tort law offers damages for the loss of love, as immeasurable in dollars and cents as they may be.[171] And notwithstanding black-letter principles that, say, do not allow recovery for emotional anguish in breach of contract actions, courts routinely award them in breaches related to things like weddings.[172] Indeed, the apparently hard-hearted black letter in some of these domains is at least plausibly motivated not by apathy to love, but more quotidian evidentiary concerns and prophylaxis against opportunism.[173] In other words, the private law *does* care about love in a number of places, and its endorsement of substituted judgment could be justified on similar grounds.

But observing that the private law acknowledges love in a number of ways is hardly an account of why it ought to. Such an explanation will necessarily more speculative, but here's one. As discussed at greater length below, Anglo-American private law is committed in general to the political philosophy of liberalism—it leaves for the most part the question of the nature of the good life to individuals rather than endorsing particular views

---

[167] *See supra* Part I.A.

[168] *See supra* note 1 & accompanying text.

[169] *See* Frolik, *supra* note 4, at 61–64 (finding the substituted judgment and best interests standards the only serious contenders for a standard of surrogate decision-making).

[170] *See, e.g.*, Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 821 (2008) (observing that marriage is a private law institution shaped by social values).

[171] *See, e.g.*, Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L. J. 590, 617 (1976) (describing the loss of consortium claim as for "loss of love and companionship"); Wash. Rev. Cod Ann. § 4.24.010 (West 1988) (defining loss of consortium in terms of love).

[172] *See, e.g.*, KOSMALA V. PAUL, 644 So. 2d 856, 858–59 (La. Ct. App. 1994).

[173] *See, e.g.*, Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1095–96 (2001) ("Courts quail, however, at granting or upholding large damage awards, a reluctance that seems to reflect several concerns: a reluctance to award people damages for idiosyncratic attachments to property; a concern that documented proof of such damages is difficult to obtain (and thus exaggeration would be easy to get away with); discomfort with monetizing some sorts of losses; and a sense that people need to keep their property losses in perspective. . . .").

with the force of law.[174] But private law is not *entirely* agnostic to essential questions of value. One commitment the law makes is to the moral primacy of personal identity.[175]

Indeed, the law recognizes the continuity of personal identity—the capacity of persons to build themselves over time—by enforcing the promises they make through the law of contracts.[176] "[T]he obligation to keep a promise is grounded . . . in respect for individual autonomy and in trust."[177] As for the institution of property, "[m]ost people possess certain objects they feel are almost part of themselves. These objects are . . . part of the way we constitute ourselves as continuing personal entities in the world."[178]

These characteristics of our legal system are, in principle, choices. They could have been otherwise. Some philosophers, for example, do not think personal identity is something that matters.[179] But our law does. If it didn't, we wouldn't have a doctrine of contract at all—and likely no property, probate system, family law, or tort either. The entire apparatus of private law, in crucial ways, depends on a presumption of the ethical significance of personal identity.[180]

Love, like the private law, is grounded in the ethical significance of personal identity.[181] Indeed, it is perhaps the strongest relationship that one can have with the personal identity of another. Love is a powerful expression that our personal identities—the stories of who we are and the selves that they make up—*matter*.[182] "More than anything else, love makes

---

[174] *See infra* Part IV.C.

[175] *See* Toomey, *Narrative Capacity*, *supra* note 102 at 1106–1110 (making this argument).

[176] *See, e.g.*, Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 81 (2014) (arguing that contract law "generally assumes the existence of a continuous personal identity"); *see also, e.g.*, Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727 (2008) (describing contract law as "an act of self-legislation in which the parties create new legal obligations for themselves"); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 16 (2d ed. 2015) ("Suffice it to say here that unless one assumes the continuity of the self and the possibility of maintaining complex projects over time, not only the morality of promising but also any coherent picture of the person becomes impossible.").

[177] FRIED, *supra* note 177, at 16.

[178] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

[179] *See, e.g.*, PARFIT, *supra* note 72, at 217 ("Personal identity is not what matters."); Galen Strawson, *Against Narrativity*, 17 RATIO 428, 428 (2004) ("I have absolutely no sense of my life as a narrative with form, or indeed as a narrative without form. Absolutely none.").

[180] *See* Toomey, *Narrative Capacity*, *supra* note 102, at 1106–1110.

[181] *See supra* Part III.B.

[182] Bagley, *supra* note 139, at 507 ("[L]ove says, in effect, that you are worthy, at least to someone, of special interest and attention . . . .").

human lives seem meaningful to those who live them."[183] Love is what makes clear that our stories matter in a more than solipsistic sense; matter more than to ourselves as their authors.[184] "In a more radical manner than other forms of experience, personal love reveals the value and uniqueness of the individual person."[185]

In other words, love is perhaps the most powerful affirmation of a concept that private law takes to be an organizing principle. This is, of course, not to say that the private law is *based on* love. But it is to say that we can expect love to have a unique significance in private law doctrine, the object of special solicitude—as indeed it does.[186] In other words, private law is based on the premise that the identity of individual persons matters. Love is the highest expression of that conviction. Where possible, it makes sense for the private law to endorse it in doctrine.

IV. DECIDING FOR THE PERMANENTLY INCAPACITATED

This brings us to the final piece of the puzzle—explaining the law's adoption of the substituted judgment in the cases in of permanent, irreversible cognitive decline. But because we have explained substituted decision-making in cases of temporary incapacity with reference to love, we need not explain the standard on its own terms in dementia cases. The question, instead, is whether there are good reasons for the law *to presume that all cases of incapacity are temporary*.

In this Part, I suggest three such reasons. First, because of continued medical uncertainty and the cost of error, categorically adopting the substituted judgment standard in all cases is a reasonable prophylactic rule. Second, it is in the nature of love that it is identity-constituting not only of its object but also of the person who loves—if love is the organizing principle of the doctrine of substituted judgment in general, it makes sense for the law to acknowledge this characteristic. Finally, many—indeed, most—Americans endorse worldviews under which "permanent" incapacity is not really permanent at all. A liberal private law might recognize these theories in its default rule.

---

[183] Sam Shpall, *A Tripartite Theory of Love*, 13 J. ETHICS & SOC. PHIL. 91, 92 (2018).

[184] *See, e.g.*, Langton, *supra* note 148, at 129 ("To have a friend is to have someone who enables you to escape from the prison of the self:; someone whom you can know, someone to whom you can make yourself known, someone who will help you better to know yourself, someone who will help you to be good, someone who will bring you happiness."); *see also generally* JAMES JOYCE, ULYSSES (1921) (that is what this book is about, as far as I am concerned).

[185] Ehman, *supra* note 142, at 270.

[186] *See supra* notes 170–173 & accompanying text.

A. Medical Uncertainty

All legal principles and systems make errors—applying consequences to people where the facts don't fit the law, or not applying them where they do.[187] The goal of legal design is not the elimination of error, but the *minimization* of *harm*, constrained by cost.[188] Where either the risk of error is high, or the moral harm of different errors are asymmetric, or both, the law may be justified in adopting prophylactic rules designed to avoid the more harmful error.[189] So, for instance, a presumption of innocence overcome only by the highest evidentiary standard governs criminal cases because the moral harm of incarcerating an innocent person is thought to be far higher than that of letting a guilty person free.[190]

In determining whether to treat someone undergoing cognitive changes as though they have changed forever or are likely to return to their former state, the risk of error is both high and asymmetric. Of course, medicine and psychiatry have advanced dramatically since the common law's presumption that lunacy was always temporary.[191] In a world in which we understand that the mind is the product of the brain,[192] and that, for example, the cognitive effects of Alzheimer's disease are the causal result of irreversible neuron death,[193] we might think such a legal presumption

---

[187] *See, e.g.*, Reid Kress Weisbord & George C. Thomas III, *Judicial Sentencing Error and the Constitution*, 96 B.U. L.. REV. 1617, 1619–1623 (2016) (discussing errors in increasingly complex sentencing regimes).

[188] *See, e.g.*, Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1107 (2009) (arguing for rules with the goals of "minimizing errors and allocating the risk of error").

[189] *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1910–1911 (1987) ("A prophylactic rule aims to ensure free choice—negative liberty—by the best possible coercion-avoidance mechanism under conditions of uncertainty.").

[190] *See, e.g.*, Chrisoph Engel & Alicja Reuben, *The People's Hired Guns? Experimentally Testing the Motivating Force of a Legal Frame*, 43 INT'L REV. L. & ECON. 67, 68 (2015) ("The presumption of innocence is the cornerstone of criminal procedure. False positives, i.e., convicting an innocent, carry much more weight than false negatives, i.e. acquitting a guilty defendant.").

[191] *See, e.g.*, Russell A. Poldrack & Martha J. Farah, *Progress and challenges in probing the human brain*, 526 NATURE 371 (2015) ("The methods of contemporary human neuroscience have provided a much more complex and nuanced view of the human brain as a dynamic network with multiple levels of organization, in which function is characterized by a balance of regional specialization and network integration.").

[192] *See, e.g.*, CHRIS FRITH, MAKING UP THE MIND: HOW THE BRAIN CREATES OUR MENTAL WORLD (2d ed. 2013) ("In this book I shall show that this distinction between the mental and the physical is false. . . .").

[193] *See, e.g.*, Melissa K. Edler, et al., *Neuron loss associated with age but not Alzheimer's disease pathology in the chimpanzee brain*, 375 PHIL. TRANSACTIONS ROYAL SOC. BIOLOGICAL SCI. 1, 1 (2020) ("[P]athological age-related conditions, particularly Alzheimer's disease (AD), result in extensive neocortical and hippocampal atrophy, neuron

unjustified, as biomarkers and direct scans of the brain promise ever more accurate diagnosis of brain disorders and an individual's position in their course.[194]

Yet, for all this progress, the sciences of the mind remain deeply uncertain.[195] Indeed, the human brain is often described as among the "most complex"[196] if "least understood"[197] things we have ever studied. In an important sense, "the brain remains an unknown frontier."[198] Even with respect to Alzheimer's disease—one of its common and pervasively studied disorders—we are frequently reminded how little we know about its etiology.[199]

Moreover, by far the most complex, and least understood, aspect of the brain is the one most relevant here—the relationship between measurable biological phenomena and subjective experience, in particular the subjective

---

death, substantial Aβ plaque and tau-associated neurofibrillary tangle pathologies, glial activation, and severe cognitive decline."); Paraskevi Krashia, Annalisa Nobili & Marcello D'Amelio, *Unifying Hypothesis of Dopamine Neuron Loss in Neurodegenerative Diseases: Focusing on Alzheimer's Disease*, 12 FRONTIERS IN MOLECULAR NEUROSCIENCE 1, 1 (2019) (same).

[194] *See, e.g.*, Grey, *supra* note 26, at 738–39 ("[S]cientists are discovering biological markers of [Alzheimer's disease], which identify early states of the disease, even before observable outward behavioral changes occur."); Keith A. Johnson, Nick C. Fox, Reisa A. Sperling, & William E. Klunk, *Brain Imaging in Alzheimer Disease*, 12 COLD SPRING HARBOR PERSPECTIVES IN MED. 1, 1 (2012) (summarizing biomarker research in Alzheimer's).

[195] *See, e.g.*, Martyn Pickersgill, *Ordering Disorder: Knowledge Production and Uncertainty in Neuroscience Research*, 20 SCI. AS CULTURE 71, 72 (2010) ("[U]ncertainties remain, and the neurosciences may in fact add to rather than minimize the lack of clarity so characteristic of the psychopathological image."); Des Fitzgerland, *The trouble with brain imaging: Hope, uncertainty and ambivalence in the neuroscience of autism*, 9 BIOSOCIETIES 241, 241 (2014) (noting that neuroscientists talk about their research in "entangled registers of *both* promising hope and deflated uncertainty").

[196] *See, e.g.*, Danielle S. Bassett & Michael S. Gazzaniga, *Understanding complexity in the human brain*, 15 TRENDS IN COG. SCI. 200, 207 (2011) (describing the human brain as "one of the most complex multicellular structures in biology"); Elizabeth A. Buffalo, J. Anthony Movshon & Robert H. Wurtz, *From basic brain research to treating human brain disorders*, 116 PNAS 26167, 26167 (2019) ("The human brain is the most complex entity we know.").

[197] *See, e.g.*, Min D. Tang-Schomer, et al., *Bioengineered functional brain-like cortical tissue*, 111 PNAS 13811, 13811 (2014) ("The brain remains one of the most important but least understood tissues in the body, in part because of its complexity as well as the limitations associated with in vivo studies."); Walter Glannon, *Neuroethics*, 20 BIOETHICS 37 (2005) (same).

[198] James L. Olds, *Exploring the unknown frontier of the brain*, NATIONAL SCIENCE FOUNDATION (April 2, 2015), https://beta.nsf.gov/news/exploring-unknown-frontier-brain.

[199] *See generally, e.g.*, JASON KARLAWISH, THE PROBLEM OF ALZHEIMER'S: HOW SCIENCE, CULTURE, AND POLITICS TURNED A RARE DISEASE INTO A CRISIS AND WHAT WE CAN DO ABOUT IT (2021)

experience of selfhood.[200] Here, we've made little experimental—and indeed, little theoretical—progress.[201] What this means is that, while science has become increasingly equipped to make certain kinds of physical claims about the brain—for example that "individuals with [Alzheimer's disease] lose brain volume at approximately two-to-four times more than the rate of healthy controls"[202]—we currently don't even know how to go about making claims based on physical evidence about the subjective experience an individual has about their identity.[203] We don't how we could be justified in saying something like "with this much pre-frontal cortex atrophy, the Jim you know and love is gone."

Indeed, it is hardly irrelevant in this context that science has a long history of epistemic hubris in claims about the brain, in particular with respect to the nature, etiology, prognosis, and treatment of mental illness.[204] Many things that are simply not pathological at all—most famously, homosexuality and "hysteria"—have been considered mental illnesses by the best-respected clinicians and scientists of the day, treated with involuntary commitment, electroshock therapy, and more.[205] The

---

[200] *See, e.g.*, David Chalmers, *The Hard Problem of Consciousness*, in THE BLACKWELL COMPANION TO CONSCIOUSNESS (Susan Schneider & Max Velmans, eds., 2d ed. 2017) (describing the so-called "hard problem of consciousness" correlating neural activity to subjective experience).

[201] *See, e.g.*, Jonathan Y. Tsou, *Origins of the Qualitative Aspects of Consciousness: Evolutionary Answers to Chalmers' Hard Problem*, in ORIGINS OF MIND 259, 261 (Liz Swan, eds., 2012) (noting that "little progress" has been made in addressing the question of how experience arises from physical activities, and that "[a]t present, we lack a strong scientific understanding of how our qualitative experiences (e.g., the felt quality of an emotion, the subjective experience of blue) arise from brain states").

[202] *See, e.g.*, Robert Barber & John T. O'Brien, *Structural brain imaging* in DEMENTIA 92, 99 (David Ames, John O'Brien & Alistair Burns, 5th ed. 2017).

[203] *See, e.g.*, Stefanie Blain-Moraes, Eric Racine & George A. Mashour, *Consciousness and Personhood in Medical Care*, 12 FRONTIERS IN HUMAN NEUROSCIENCE 1, 2 (2018) ("At this time, since a direct measure of subject experience currently does not exist and advanced neuroimaging remains mostly a research tool, inferences of consciousness are made based on responsiveness as observed by clinicians.").

[204] *See, e.g.*, Alan J. Tuckman, *Intrafamilial Child Sexual Abuse and Forensic Psychiatrists*, in JUVENILE PSYCHIATRY AND THE LAW 107, 107 (R. Rosner & H.I. Schwartz, eds., 1989) ("Psychiatry has a long history of jumping into an issue (or being pulled in by the courts), only to find itself over its head, embarrassed that it promised more than it could deliver.").

[205] *See, e.g.*, Glenn Smith, Annie Bartlett & Michael King, *Treatments of homosexuality in Britain since the 1950s—an oral history: the experience of patients*, 328 BRITISH MEDICAL J. 427 (2004) (noting that the "most common treatment" for homosexuality in the early 1960s to early 1970s was "electric shock aversion therapy," and "[o]ther forms of treatment were electroconvulsive therapy, discussion of the evils of homosexuality, desensitization of an assumed phobia of the opposite sex, hypnosis, psychodrama, and abreaction"); Emmanuel Broussoulle, et al., *History of physical and*

psychiatrists of the mid-century thought they could mold what they saw as the brain's blank slate however they wanted, with costs measured in the vast crimes of Soviet social engineering.[206] Before that eugenicists thought they could eliminate mental illness by involuntary sterilization of people they didn't like for other reasons.[207] Today, of course, we think that we've moved past these calamitous hypotheses, but many mental illnesses remain effectively un-understood and untreatable, and many hypotheses falsified.[208]

And, finally, the *law* has a long history of epistemic overconfidence in the science of the mind—adopting and sanctioning scientific claims later disproven.[209] In living memory, courts sent people to prison on the basis of debunked, purportedly scientific testimony about the alleged existence of repressed memories.[210] To this day, nearly half the states admit

---

'moral' treatment of hysteria, 35 FRONTIERS NEUROLOGICAL NEUROSCIENCE 181, 181 (2014) ("Hysterical women, who represented the great majority of cases, were cured by physical therapy (notably physio-, hydro-, and electrotherapy, and in some cases ovary compression) and 'moral' therapies (general, causal therapy, rest, isolation, hypnosis, and suggestion.").

[206] *See generally* Ivan Z. Holowinsky, *Soviet Psychology and its View of American Behaviorism*, 56 PSYCH. REPS. 803 (1985) (surveying intellectual relationships between American behaviorism and Soviet psychology).

[207] *See, e.g.*, Daniel J. Kevles, *Eugenics and human rights*, 319 BRITISH MEDICAL J. 435 (1999) ("The experts raised the specter of social degeneration, insisting that 'feebleminded' people . . . were responsible for a wide range of social problems and were proliferating at a rate that threatened social resources and stability."); Bernard A. Fischer, *Maltreatment of People With Serious Mental Illness in the Early 20th Century: A Focus on Nazi Germany and Eugenics in America*, 200 J. NERVOUS & MENTAL DISEASE 1096, 1096 (2012) ("The worst instance of this prejudice [against the mentally ill] was connected to the rise of the eugenics movement in the early 20th century.").

[208] *See, e.g.*, Joanna Moncrieff, et al., *The serotonin theory of depression: a systematic umbrella review of the evidence*, MOLECULAR PSYCH. (2022) (reviewing evidence falsifying the so-called "serotonin hypothesis" of depression).

[209] *See generally, e.g.*, ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL (2001) (surveying the legal mistreatment of mentally ill people based on bad science); *see also* Samantha Godwin, *Bad Science Makes Bad Law: How Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. SOC. JUSTICE 647 (2011) (arguing that traditional legal deference to the claims of psychiatry has had negative effects); Frederick Schauer, *Can Bad Science be Good Evidence—Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1215 (2010) ("[M]any traditionally used methods of forensic identification . . . have less scientific backing than their proponents have claimed and less than the legal system has historically accepted.").

[210] *See, e.g.*, Henry Otgaar, et al., *The return of the repressed: The persistent and problematic claims of long-forgotten trauma*, 14 PERSPECTIVES ON PSYCH. SCI. 102 (2019); R.J. McNally, *Is traumatic amnesia nothing but psychiatric folklore?*, 33 COGNITIVE BEHAV. THERAPY 97 (2004); COMMONWEALTH V. STANLEY, 919 N.E.2d 1254 (Mass. 2010) (upholding conviction based on evidence of allegedly repressed memories).

pseudoscientific polygraph evidence in criminal trials.[211] In short, the law has hardly distinguished itself over the years in its ability to discriminate between true scientific advances and pseudoscientific hubris.

In this these circumstances, courts attempting to adjudicate whether a particular individual is capable of coming back are bound to regularly make errors. These errors inevitably take one of two forms—either a court holds that someone might come back, when in fact they do not; or holds that someone will never come back, and is effectively dead, when in fact they do. The moral consequences of these distinct kinds of errors are profoundly asymmetric.

Suppose, indeed, that the legal system declares someone permanently gone when indeed they come back. To do so is effectively to declare them dead; a non-person. Imagine yourself waking up from such a state. Your belongings have been given away, with no regard for your continued interest in them. Those you love have moved on—perhaps squabbling about the belongings they now own. You find that you have been treated in ways during your illness that you find morally revolting—subjected to treatments you have always objected to on ethical grounds, your belongings used in ways that you find immoral, the home you love sold and destroyed. This is a *grave* moral harm, perhaps the gravest—treating a person as a non-person.

In short, the moral consequences of mistakenly treating someone as not returning when they do are very high. In a still uncertain medical environment in which individualized determinations are bound to lead to errors, the law may be justified in adopting the prophylactic presumption that anyone suffering from a brain disorder may be curable.

B. Loving

When you love someone, you want them to be happy.[212] You do things to improve their well-being, make sacrifices based on what they want, contribute to their projects.[213] Love is, in this way, always *about* the person who is its object—it matters who they are, what they want, and what makes them happy.[214]

---

[211] *See, e.g.*, Christina Majaski, *Are Lie Detector Tests Admissible in Court?*, LAWINFO (Feb. 2, 2021), https://www.lawinfo.com/resources/criminal-defense/are-lie-detector-tests-admissible-in-court.html. (listing states that "sometimes allow polygraph tests as evidence in criminal case[s]").

[212] *See, e.g.*, Ebels-Duggan, *supra* note 133, at 142 ("Contributing to the happiness of loved ones is something that many people take to be among their central aims.").

[213] *See, e.g.*, FRANKFURT, *supra* note 139, at 129 (arguing that love is grounded in the goal of promoting the well-being of a beloved).

[214] *See, e.g.*, Clausen, *supra* note 139, at 348 (arguing that love must be for a particular, irreplaceable person); Jaworska & Wonderly, *supra* note 139, at 1 ("It does not

But that is not *all* there is to love—a benefit accruing to the person loved.[215] Though it might sound crude, loving someone is not only about them. It's also about you.[216] Loving someone changes you.[217] Indeed, when you love someone, you come to share their interests, even if they weren't previously yours, support their aspirations, even if they are things you wouldn't want for yourself, and respect their values, even if, at bottom and in the end, you disagree.[218] The other person's identity becomes a part of your life, and your story—*your* identity—is different than it would have been had you never met that person.[219] Love, in short, is identity-constituting on both sides of the relationship—for those who love as much as those who are loved.[220] As Kyla Ebels-Duggan puts it, "[a]nyone who has ever loved anyone" finds familiar the idea that "love directs you toward a relationship with the beloved that you are incapable of bringing about on your own."[221]

Consider the Taylor Swift hypothetical above. We've thus far

---

seem possible to love someone or something and yet not care about the object of one's love. . . . It thus appears that Harry Frankfurt was correct in asserting that love is a mode of caring.").

[215] *See, e.g.*, Stonestreet, *supra* note 9, at 530 ("Love's reflexivity is also important because it plays a vital role in constituting someone as the person she is.").

[216] *See, e.g.*, Wolf, *supra* note 131, at 6 ("[I]t is sometimes said that who and what we love defines us; our loves are closely bound up with and partly constitutive of our identities.").

[217] Bagley, *supra* note 139, at 489; *see also* Cocking & Kennett, *supra* note 151, at 503 ("Our positive thesis . . . is this: as a close friend of another, one is characteristically and distinctively receptive to being directed and interpreted and so in these ways drawn by the other.").

[218] *See, e.g.*, Cocking & Kennett, *supra* note 151, at 509 ("We are thus, to a significant extent, each other's creators."); Bagley, *supra* note 139, at 504 ("If you had a different partner, you'd have different standards: there's no common basis of comparison.").

[219] *See, e.g.*, Ebels-Duggan, *supra* note 133, at 155–56 ("Rather than contributing to each other's welfare, doing things for each other, I hold that love directs us to share in each other's ends, doing things with each other."); Kolodny, *supra* note 10, at 163 ("My claim, then, is that the presence of an established, ongoing friendship or romantic relationship—understood, in part, as a history of shared concern and activity, and, in part, as one's friend's or lover's present disposition to perpetuate this concern—can be a reason for one's present concern, a concern that constitutes the relationship going forward."); Jaworska & Wonderly, *supra* note 139, at 10 ("[B]eloved objects have the ability to directly and nontrivially impact . . . the lovers' self-understanding as a subject of a life: her sense of what she stands for, her agency, her understanding of herself as a bearer of a meaningful life narrative, and the like").

[220] *See, e.g.*, Cocking & Kennett, *supra* note 151, at 505 ("[O]n account of this receptivity to Iris's interests or Judy's interpretations of my traits, I develop in a way that is particular to the relationship; the self my friend sees is, at least in part, a product of the friendship."); Bagley, *supra* note 139, at 505 ("[T]he things our lovers bring out of us might not be things we're capable of bringing out ourselves.").

[221] Ebels-Duggan, *supra* note 133, at 167.

considered things from the perspective of the person loved—of being someone for whom Taylor Swift's music has played so essential a role and waking up to feel so known and cared about. But of course, someone had to do that—had to know about the importance of Taylor Swift to you and care enough to act. They might be anyone, in terms of where they came from and who they were before they met you.[222] They need not themselves be particularly interested in Taylor Swift—perhaps before they knew you they hadn't even heard of her, having dedicated their ears to bossa nova.

But because they love you, they've heard of her, and care about her in some sense—they might still not particularly like her music and maintain that the world would be better if instead João Gilberto were breaking all these Spotify records. But they care about Taylor Swift because *you* care about Taylor Swift, and they *love you*.[223] Indeed, it might be that they actually *do* get into Taylor Swift, not because they would have on their own, but because in coming to understand why her music matters to you, they've found something of value in her work to them.[224]

This of course is all part of what it means to love someone—to incorporate, to some extent, their story into your own.[225] "This is the time of day she tries to imagine him, wherever he is and whatever surrounds him. . . . Every living creature reminds him of her."[226] This is Molly and Leopold Bloom thinking of the same essential moments of their shared life together on June 16, 1904.[227] "We'll always have Paris."[228] "I'll see you in the sky above/In the tall grass, in the ones I love."[229] "I never saw you coming/and I'll never be the same."[230] Love is identity-constituting for those who love, too.

---

[222] *See, e.g.*, Cocking & Kennett, *supra* note 151, at 503 ("One's close friends need not be markedly similar to oneself . . . .").

[223] *See, e.g.*, *id.* at 504 (describing a close friendship in which one person gets into ballet because of their friend's interest in ballet, even though they would not have been interested in ballet on their own).

[224] *Id.*

[225] *See, e.g.*, Kolodny, *supra* note 10, at 162 (arguing that love consists "in our history of shared concern and activity"); Ebels-Duggan, *supra* note 133, at 142 (describing love as "work[ing] out shared ends together"); *see also* HELM, *supra* note 137, at 204 ("[T]he feelings of loss we ought to have at the loss of a loved one include not merely feelings of heartbreak at our beloved's inability to uphold his values and so pursue the kind of life he finds worth living, but also feelings of desolation at our own inability to act in support of our beloved.").

[226] AMINATTA FORNA, HAPPINESS 307–08 (2018).

[227] JAMES JOYCE, ULYSSES 144; 608–644. (Hans Walter Gabler, ed., 1986)

[228] CASABLANCA (Warner Bros. – 1942).

[229] BOB DYLAN, YOU'RE GONNA MAKE ME LONESOME WHEN YOU GO (Columbia – 1975)

[230] TAYLOR SWIFT, STATE OF GRACE (TAYLOR'S VERSION) (Republic – 2021).

This characteristic of love—the role it plays in the identity of one who loves—survives the permanent incapacity of its object. Indeed, it even survives their *death*. Think of how Gretta Conroy is struck, years later, by a song by a boy long dead whom she had loved,[231] or the plot of the movie *Titanic*.[232] "What died didn't stay dead/You're alive, you're alive in my head."[233] "Why love what you will lose?/There is nothing else to love."[234]

I could cite the various philosopher-poets of the soul for this proposition until the cows come home, but I suspect I don't have to. You probably already know it. You probably know people who every year on the day of their mother's death mix themselves a drink that was her favorite; or care about something and incorporate it into their lives not really for themselves but because their father cared about it; or who measure their lives and their choices against the voice of someone they carry around with them in their head; whose way of speaking and thinking carry the unmistakable traces of someone whom they loved who is gone—maybe to death, maybe to the final stages of Alzheimer's dementia.[235] You're probably one of them.

Love matters, in short, to those who love just as those who are loved. And if I'm right that the doctrine of substituted judgment is justifiable in terms of its relationship to love, then it would make sense for the law to recognize this side of love as well. Indeed, to do so is just to take account of an essential feature—love's multilateral role in constituting personal identity—of the organizing concept of the doctrine. In other words, if the law justifiably cares about love at all, then it has reasons to care about love's implications for both an incapacitated individual and those who love them. Indeed, this might not be the only place where the law recognizes the constitutive value that loving someone plays in personal identity—it may also be why the law enforces posthumous wishes through wills.[236]

From this perspective, applying the substituted judgment standard in cases involving permanent incapacity might not have all that much to do with the permanently incapacitated person at all. But it might really mean a

---

[231] James Joyce, *The Dead* in DUBLINERS (1914).

[232] *See generally* TITANIC (Paramount Pictures – 1997).

[233] TAYLOR SWIFT, MARJORIE (Republic—2020).

[234] Louise Glück, *From the Japanese*, in POEMS 1962-2012 192, 195 (2012).

[235] *Cf.* HELM, *supra* note 137, at 202–203 (describing similar cases).

[236] Why the law enforces the wishes of the dead has long been a puzzle for many of the same reasons that substituted judgment is a puzzle—no person is benefitted by doing so, and it's hard to imagine the person's identity carrying on beyond their death. *See, e.g.*, Paul B. Miller, *Freedom of Testamentary Disposition* in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TRUSTS 1, 11 (Simone Degeling, Jessica Hudson & Irit Samet, eds., 2022) ("[L]eading defenses of testamentary freedom are half-hearted or implausible."); *see also* Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 288 (2017) ("The underlying rationale of freedom of disposition has long been a topic of debate.").

lot to those who love them in a way that it makes sense for the law to care about. To the extent that making the decision that the individual would have made is an expression of love, and expressions of love are sources of identity-constituting value for those who love, the law may have reason—based ultimately in its recognition of love as a basis for the doctrine of substituted judgment—to apply it in cases of permanent incapacity.

C. Liberalism

Liberalism is a political philosophy that holds that governments ought to be agnostic towards the truth of their citizens' worldviews.[237] This principle is most frequently justified on pragmatic grounds, or with reference to the long, bloody history of contestation between worldviews,[238] or on ethical grounds of mutual respect for one's fellow citizens.[239] Within broad parameters, liberal legal systems respect and enforce choices consistent with the divergent worldviews of private citizens, regardless of the views of government actors on their veracity.[240]

Anglo-American private law is distinctively liberal in this sense.[241] That is, it does not adopt a substantive worldview according to which it

---

[237] *See, e.g.*, RAWLS, *supra* note 18, at xix (noting that liberalism "has to be impartial . . . between the points of view of reasonable comprehensive doctrines"); Ronald Dworkin, *Liberalism*, in A MATTER OF PRINCIPLE 181, 191 (1985) (defining liberalism as the proposition that "government must be neutral on what might be called the question of the good life").

[238] *See, e.g.*, ARNAUD BLIN, WAR AND RELIGION: EUROPE AND THE MEDITERRANEAN FROM THE FIRST THROUGH THE TWENTY-FIRST CENTURIES 3 (2019) ("[T]he belief in a universal truth fosters a compelling desire to share this truth with others, which naturally attracts those with this desire to power and prompts them, once in the saddle, to use the traditional instruments at the disposal of those who wield power, including force.").

[239] *See, e.g.*, Han van Wietmarschen, *Political Liberalism and Respect*, 29 J. POL. PHIL. 353, 353 (2021) (arguing that "by far the most common and prominent" justification for liberalism is "in terms of respect").

[240] *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1350 (2020) ("[W]e understand [liberalism] at a minimum to require that the state not concern itself with the salvation of its citizens."); Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L. J. 770, 781 (2013) ("In the liberal tradition, the government's role is not to make theological judgments but to protect the right of the people to pursue their own understanding of the truth, within the limits of the common good.").

[241] *See, e.g.*, Toomey, *supra* note 102, at 1124–25 (characterizing the traditional doctrine of mental capacity as grounded in liberalism); Bertram Lomfeld & Dan Wielsch, *The Public Dimension of Contract: Contractual Pluralism Beyond Privity*, 76 LAW & CONTEMP. PROBS. i, i (2013) (observing that the "type of law deemed best suited to achieve [the goal of liberalism] was private law"); *see also generally* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) (outlining a liberal theory of private law).

adjudicates which private decisions to recognize; rather, it enforces freely made contracts and dispositions of property regardless of the worldview animating them.[242] For instance, courts will enforce bequests to religious organizations goofy at best and patently wrong about the nature of the universe at worst;[243] you can leave your fortune to the Communist Party USA even if your probate judge happens to be a hardened Cold Warrior.[244] Consider the countless contracts that religious people—who structure their lives and personal decision-making around their worldview—can call on courts to enforce, from marriages[245] to just, say, purchase contracts for a Bible, Torah, or what have you.[246]

Indeed, it is a doctrinaire principle of Anglo-American private law that the law will generally enforce decisions made for "any or no reason."[247] This commitment not to scrutinize reasons is grounded in liberalism—it removes courts from the position of relying on their own theories of the good life to adjudicate whether an individual's reasons are "good" ones, consistent with what the state deems to be "correct" views of ethics and metaphysics.[248] Indeed, our private law—rather notoriously—does not

---

[242] *See, e.g.*, WATSON V. JONES, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."); James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 720 (2015) (summarizing contexts in which secular courts enforce religious decisions in private law).

[243] *See, e.g.*, Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1355 (1994) (discussing bequests upheld to organizations such as the New Jerusalem, Christian Science, Secular Humanism, Witchcraft, Scientology and Ethical Culture).

[244] *See, e.g.*, IN RE ESTATE OF MEALY, 204 P.2d 971 (Cal. Dist. Ct. App. 1949) (holding bequest to Communist newspaper was not void as against public policy).

[245] *See, e.g.*, 45 N.Y. Jur. 2d Domestic Relations § 37 (noting that the state will recognize a marriage solemnized by "[a] clergyman or minister of any religion").

[246] *See, e.g.*, LIFSCHITZ V. SHARABI, 153 A.D. 3d 1338, 1339 (2017) (refusing to dismiss an action to recover damages for breach and contracts and fraud, alleging that plaintiff "made several payments to the defendants totaling $214,000 for the purchase of three torah books" because "defendants failed to demonstrate that the plaintiff's causes of action cannot be determined solely upon the application of neutral principles of law . . . .").

[247] *See, e.g.*, Laurent Sacharoff, *Criminal Trespass & Computer Crimes*, 62 WM. & MARY L. REV. 571, 632 (2020) (observing that "[r]ecent trespass cases . . . show us that trespass law bestows a great power upon property owners: the power to selectively exclude for any reason or no reason at all"); Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 961 (2021) ("If you don't consent to my presence in your home . . . you may exclude me for any reason whatsoever with the backing of trespass law. Your discretion is absolute.").

[248] *See, e.g.*, FRIED, *supra* note 177, at 1 ("In private law in particular [liberal] premises have taken root and ramified in the countless particulars necessary to give them

endorse even a thin theory of the good life under which parents are expected to provide their children after their death.[249] The only limitation in most states on testamentary decision-making is the forced share to one's spouse.[250] But marriage is optional.[251]

The private law's commitment to liberalism could well be otherwise.[252] Indeed, civil law systems opine on reasons for disinheritance, deeming some acceptable and others not.[253] And, of course, Anglo-American private law is hardly agnostic to the truth of theories of the good life in an absolute sense.[254] As discussed above, our private law rests on the philosophically contestable view that individual personal identities matter.[255] But on the spectrum of legal systems, the common law is both liberal and distinctive in its commitment to liberalism.

Many Americans are philosophical materialists who accept what is sometimes called the "annihilation theory" of death.[256] Philosophical materialists hold that an individual's personal identity is a construct or an

---

substance."); Daniel Markovits, *Contract and Collaboration*, 113 YALE L. J. 1417, 1421 (2004) (arguing that the freedom to collaborate through contracts is grounded in liberalism).

[249] *See, e.g.*, Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 621 (2020) ("In forty-nine states, parents have the right 'to disinherit their children and grandchildren for any reason or no reason' . . . ." (quoting Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 131 (2008)).

[250] *See, e.g.*, JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS & ESTATES 4 (10th ed. 2017) ("[F]reedom of disposition at death is curbed only by wealth transfer taxation . . . the forced share of a surviving spouse . . . rules protecting creditors [and] public policy constraints such as the Rule Against Perpetuities, the rule against trusts for capricious purposes, and the rule against restraints on alienation.").

[251] *See, e.g.*, James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 119 (2016) (describing marriage as a consensual change of legal status).

[252] *See, e.g.*, Mark D. Rosen, *Faith-Based Private Arbitration As A Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 138 (2015) (noting that, with the American private law's solicitude to religiously-motivated private agreements, "[a]ll this need not be so: the law need not be this friendly to religious groups").

[253] *See, e.g.*, Tate, *supra* note 249, at 138 ("In most civil law jurisdictions, descendants are generally entitled to a reserved share of the estate unless interested parties show some specific grounds for disinheritance.").

[254] *See, e.g.*, MATTER OF BABY M., 537 A.2d 1227 (1988) (invalidating a surrogacy contract on public policy grounds); MOORE V. REGENTS OF UNIV. OF CAL., 793 P.2d 479 (1990).

[255] *See supra* Part III.C.

[256] *See, e.g.*, Peter Cave, *Death as Annihilation*, in THE WILEY BLACKWELL HANDBOOK OF HUMANISM (Andrew Copson & A.C. Grayling, eds., 2015) ("Humanists acknowledge the absolute finality of death: it is annihilation.").

abstraction of a person's brain, and nothing more.[257] From this perspective, there is no such thing as an immortal soul constitutive of an individual's personal identity that will continue to exist after the cessation of brain function.[258] Moreover, permanent incapacity—the degradation of an individual's brain matter physically incapable of re-establishing psychological continuity with its prior state—is an equivalent kind of annihilation.[259]

To materialists, after enough of a human brain has irreversibly deteriorated that we are justified in deciding for them—the person that we knew and loved is irreversibly *gone*.[260] They are not there, they do not exist anywhere.[261] It is this theory—the view that death is annihilation and the moral significance of death is in its relationship to brain functioning—that raises the Appreciation Challenge discussed above.[262] In other words, in order for the claim that there is no person to appreciate a decision to serve as an objection to substituted judgment, we must accept a worldview under which there is no person after death or permanent incapacity.

But the private law is *liberal*, not philosophically materialistic. Indeed, from the perspective of the law, philosophical materialism is simply one worldview among others.[263] Of course the law will enforce private decisions

---

[257] *See, e.g.*, Udo Thiel, *Locke and eighteenth-century materialist conceptions of personal identity*, 29 LOCKE NEWSLETTER 59 (1998);

[258] *See, e.g.*, Charles T. Wolfe, *Early Modern Medical Materialism*, in ENCYCLOPEDIA OF EARLY MODERN PHIL. & SCI. (D. Jalobeanu & C.T. Wolfe 2020) (defining philosophical materialism as a doctrine under which "there is no soul, only body, or no immortal soul, or all mental processes can be explained in corporeal and/or cerebral terms").

[259] *See, e.g.*, Michael B. Green & Daniel Wikler, *Brain Death and Personal Identity*, 9 PHIL. & PUB. AFFS. 105, 105 (1980) (arguing that "a large number of physicians, jurists, and philosophers now hold that brain death is death"); Robert F. Almeder, *Materialism and the Future of Aging in America*, 16 INT'L J. AGING & HUM. DEV. 161, 161 (1983) ("It is shown how philosophical materialism *requires* an attitude of denigration toward aging and the elderly, and that the future of our collective attitude toward the elderly is wedded philosophically to the future success or failure of philosophical materialism.").

[260] *See, e.g.*, WALTER GLANNON, BIOETHICS AND THE BRAIN 44 (2007) ("[N]europsychiatric disorders can adversely affect the physical and psychological capacities that make us the persons we are and that constitute our selves."); David DeGrazia, *Advance Directives, Dementia, and 'The Someone Else Problem'*, 13 BIOETHICS 373, 386 (1999) ("Consider [persistent vegetative states], which ends the existence of a person (assuming, for simplicity's sake, that personhood was not previously lost due to dementia).").

[261] *Id.*

[262] *See, e.g.*, BELLIOTTI, *supra* note 78, at 9–11 (arguing that the question of whether the dead or permanently incapacitated can still be harmed is only difficult if one accepts that death is annihilation).

[263] *See generally, e.g.*, Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012) (arguing that there are no compelling reasons for the law to treat

grounded in philosophical materialism—but just as it will decisions grounded in Buddhism, Christ, or the I-Ching.[264] This all is consistent with liberalism—the law's posture leaves answering the question of the truth of philosophical materialism vis-à-vis its alternatives to individuals, not the state.[265]

Many Americans—indeed, as it turns out, most Americans, by a substantial majority—are not philosophical materialists.[266] Consider the traditional Christian doctrine of the immortality of the soul.[267] Under mainstream Christian theology, personal identity is constituted of an immortal, indestructible, and individual soul.[268] This soul persists after death and through incapacity.[269] It *can* appreciate the love it is shown.[270] Moreover, it is the same entity as the individual's personal identity, resolving at the same time the Identity Challenge.[271]

---

traditionally "religious" worldviews differently from secular worldviews such as philosophical materialism).

[264] *See generally* CRUZAN V. DIR., MO. DEP'T. HEALTH, 497 U.S. 261 (1990) (holding that states may constitutionally require clear and convincing evidence of individual preferences—whatever their basis—before terminating life sustaining treatment).

[265] *See supra* 237–240 & accompanying text.

[266] *See, e.g.*, *Religious Landscape Study*, PEW RES. CTR., available at https://www.pewresearch.org/religion/religious-landscape-study/ (reporting that only 3.1% of Americans describe themselves as atheists). It is possible to be an atheist but not a materialist, and perhaps vice versa, but the doctrines are deeply intertwined intellectually and historically. *See, e.g.*, Frederick Gregory, *Scientific Versus Dialectical Materialism: A Clash of Ideologies in Nineteenth-Century German Radicalism*, 68 ISIS 206, 208 n. 7 (1977) ("Historically materialists have been atheists, but the relationship is not a necessary one.").

[267] *See, e.g.*, Encyclopedia Britannica, *The immortality of the soul*, https://www.britannica.com/topic/Christianity/The-immortality-of-the-soul (summarizing the Christian doctrine of the immortality of the sould).

[268] *Id.*

[269] *See, e.g.*, Jennifer Graham, *What Alzheimer's disease teaches us about the soul*, DeseretNews (Aug. 18, 2016), https://www.deseret.com/2016/8/18/20594230/what-alzheimer-s-disease-teaches-us-about-the-soul ("Most theologians believe the soul enters the body at either conception or birth and leaves the body with the last gasp of breach. Dementia does not affect the soul any more than an infant's inability to talk or think logically does.").

[270] *See, e.g.*, Don Stewart, *What Happens to a Believer After Death*, BLUE LETTER BIBLE, https://www.blueletterbible.org/faq/don_stewart/don_stewart_116.cfm ("Believers are in a state of awareness after death."); Faith Eng & Sarah Freyermuth, *What Happens When You Die?*, CRU, available at https://www.cru.org/us/en/train-and-grow/spiritual-growth/core-christian-beliefs/what-happens-when-you-die.html ("When people die, their souls live on.").

[271] *See, e.g.*, Michael A. Milton, *What Happens After Death? Understanding Where Your Soul Goes*, BIBLE STUDY TOOLS (Feb. 23, 2022), https://www.biblestudytools.com/bible-study/topical-studies/where-does-our-soul-go-when-we-die.html ("[T]he word 'soul' is not merely a disembodied entity. In the Bible,

This view—that personal identity is constituted by some kind of immortal soul that remains itself and conscious through permanent incapacity and after death—is by no means limited to Christianity. It is doctrinaire Islam, as well,[272] and endorsed by some strands of Judaism.[273] In Hinduism and Buddhism too, the soul persists in some sense, actually physically re-incarnated in our world and sustaining connections with its former self.[274] Indeed, nearly 75% of Americans tell pollsters that they believe in some form of life after death—the continuity of their self beyond even cessation of *all* brain function.[275]

The point is not, of course, that traditionally-religious views are *right* about the nature of human persons, or that in fact we have immortal souls that can continue to be the object of love after death. The point is that many people believe these things—consistent with one hardly absurd worldview or another. It makes sense for our liberal system of private law to enable and enforce private decision-making consistent with these worldviews. Of course, a liberal legal system could not *endorse* this particular set of worldviews over others, nor *insist* that surrogate decision-makers apply standards consistent with them.

But there are many circumstances—like this one—where the law must provide default, background rules to guide individual decision-making, because not providing default rules amounts to endorsing an unacceptable one. Here, not providing a default rule amounts to recognizing standardless discretion in surrogate decision-makers—an intolerable standard that would facilitate familial conflict and endorse naked abuse.[276] It is not inconsistent with liberalism that the law adopt a default rule that works for many people,

---

'soul' is who you are."); Cameron Joyner, *Will We Recognize Our Loved Ones in Heaven?*, FRIENDS OF ISRAEL GOSPEL MINISTRY (July 3, 2019), https://www.foi.org/2019/07/03/will-we-recognize-our-loved-ones-in-heaven/ ("Scripture itself indicates that personal identities are retained after death.").

[272] *See, e.g.*, Wahaj D. Ahmad, *An Islamic View of Death and Dying*, 28 JIMA 175 (1996) (summarizing Islamic doctrine regarding the immortality of the soul).

[273] *See, e.g.*, BBC, *Life After Death*, https://www.bbc.co.uk/bitesize/guides/zm2tb9q/revision/3 (summarizing controversies within Judaism about life after death and the immortality of the soul).

[274] *See generally, e.g.*, Christopher Key Chapple, *Reincarnation: Mechanics, Narratives, and Implications*, 8 RELIGIONS 236 (2017) (discussing Hindu and Buddhist doctrine on reincarnation).

[275] *See Views on the Afterlife*, PEW RES. CTR. (Nov. 23, 2021), https://www.pewresearch.org/religion/2021/11/23/views-on-the-afterlife/#:~:text=Overall%2C%2068%25%20of%20U.S.%20adults,by%20science%20or%20natural%20causes. (reporting that "[n]early three-quarters of U.S. adults say they believe in heaven").

[276] *See, e.g.*, Frolik, *supra* note 4, at 61 (dismissing out of hand standardless discretion in surrogate decision-makers as "lacking any foundation in law").

so long as those with other worldviews are allowed to opt out if they choose. Consider freedom of testation, discussed above as a paradigm of liberalism in the private law—it takes place in the shadow of the default rule of intestacy, based on a rough estimate of what most people want.[277] If you subscribe to a fairly typical worldview, you don't have to do anything. If you follow a different one, all you have to do is write a will.[278]

And substituted judgment *is* a default rule. With durable powers of attorney or trusts, private individuals can opt out, directing what they want to happen with their property and body in the event of their permanent incapacity. Substituted judgment only comes into play if the individual hasn't arranged any of those alternatives, and the court appoints a guardian, or if a decision is not provided for in the relevant instruments.[279]

Liberalism, then, and its relationship to the private law, can justify applying substituted judgment in permanent cases. Indeed, substituted judgment is only a puzzle in the first place under the annihilation theory of death—perhaps the prevailing theory in the academy (or at least the assumption upon which academic philosophy proceeds) but clearly not outside of it.[280] For the people that accept the immortality of the soul in some form or another, dementia is just another kind of temporary incapacity—and applying substituted judgment is justified on its own terms.

V. IMPLICATIONS

The account of substituted judgment outlined here—if ultimately persuasive—would have a number of practical implications for the law. Two are worth sketching. First, understanding the law of substituted judgment as grounded in love can help guide surrogates' decision-making. Second, the account can clarify the role of substituted judgment in more difficult cases where an individual has no close friends, and an appointed guardian is by necessity a stranger.

A. Deciding for Others, on Love

Most surrogate decision-makers are family or close friends.[281] They can

---

[277] *See, e.g.*, Kaiponanea T. Matsumura, *Beyond Polygamy*, 107 IOWA L. REV. 1903, 1942 (2022) ("Intestacy laws . . . are based on the probable intent of the average decedent . . . .").

[278] *See supra* note 250.

[279] *See supra* 37–42 & accompanying text.

[280] *See, e.g.*, BELLIOTTI, *supra* note 78, at 10 (conceding that his project of justifying posthumous harms and benefits would be easier if he rejected the annihilation theory of death).

[281] *See, e.g.*, Thaddeus Mason Pope, *Unbefriended and Unrepresented: Better Medical*

be presumed to love the person for whom they are deciding.[282] But the law gives surrogate decision-makers precious little concrete guidance for decision-making, even in states that have clearly adopted the substituted decision-making standard.[283]

Making clear that the relevant legal standards are grounded in love can provide guidance to surrogate decision-makers, clarifying their role and the aspirations of their decision-making. This is so in three ways. First, while love tells surrogate decision-makers that they should always aspire to make the decision that the person would have made, that decision need not necessarily be the decision that the person wrote down or communicated previously, to the extent that changes in circumstances lead a surrogate decision-maker to think that they would have changed their mind.[284]

This, indeed, is perhaps the single most challenging situation faced by surrogate decision-makers—where the person had previously expressed a clear preference not to be kept alive in a diminished state; but when they are actually in such a state, seem happy and content, and are diagnosed with something easily treatable.[285] In these cases, traditional justifications for substituted judgment in terms of respect for autonomy would typically have the decision-maker decline treatment, to much criticism.[286]

Decision Making for Incapacitated Patients Without Healthcare Surrogates, 33 GA. ST. U. L. REV. 923, 979 (2017) ("Most guardians are family or friends."); Stonestreet, *supra* note 9, at 536 ("Surrogates are typically loving family members . . . ."); Chen, *supra* note 2, at 25 ("The available empirical evidence suggests that most guardians and agents are lay persons who are closely related to, or friends with, the incapable individual.").

[282] *See, e.g.*, Sarah V. Harvey, Adam Y. Adenwala & Meghan B. Lane-Fall, *Defining Familial Interactions and Networks: An Exploratory Qualitative Study on Family Networks and Surrogate Decision-Making*, 3 CRITICAL CARE EXPLORATIONS p e0504 (2021) (citing love as a reason that people nominate surrogates).

[283] *See generally, e.g.*, Greene, *supra* note 1, at 1 (reporting from personal experience that as a guardian for her father, whom she loved, she felt that the law provided little and often conflicting guidance about decision-making).

[284] *See, e.g.*, Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J. L. REFORM 7339, 749 (2012) (noting that under the proposed UPC substituted judgment standard where a preference has "become unreasonable because of changed circumstances," a surrogate decision-maker "may justify rejection of a previously stated preference when it is likely that the incapacitated person would make a different decision if able to comprehend the new circumstances").

[285] *See, e.g.*, Earp, Hannikainen, Dale & Latham, *supra* note 97, at ("A particularly tragic scenario is one in which a seemingly happy person with dementia, who now lacks decision-making capacity, falls ill with a curable condition such as pneumonia and (thereby) meets the criteria set forth in an [advance directive] for treatment to be withheld."); Emily Walsh, *Cognitive Transformation, Dementia, and the Moral Weight of Advance Directives*, 8 AM. J. BIOETHICS 54 (2020) (describing a case study in which something like this happened).

[286] *See, e.g.*, Dresser, *Life, Death, supra* note 5, at 377; Jaworska, *supra* note 96, at

Making sense of substituted judgment as grounded in love does not, in fact, compel this outcome. Of course people can and do change their minds over the course of their lives in response to changes in circumstances or new experiences.[287] To *really* make the decision the person would have made is *not* necessarily blindly to follow what they have written down, or what they said cavalierly in the flush of youthful good health.[288] It is to make the decision that they *would have made*, which would be based on knowing what the person now knows and is experiencing.[289]

As discussed above, the more we love someone, the more deeply we know their personal identity. And the more deeply we know an individual's personal identity, the more we know the kinds of things that change their minds and the kinds of things that don't—we know more about the strength of their commitments one way or another, and the kinds of things that are unlikely to change and those they think of as today's preferences.[290] Grounding substituted judgment in love suggests that decision-making ought to be more than consultation of prior written and oral expressions of preferences. It allows for surrogate decision-makers to recognize the ways in which those they love would change their mind based on new circumstances.[291]

Consider two cases. In both, the person has previously said and written that they would not want to be kept alive in the case described.[292] But in the first case, imagine that the person was a philosopher, a lifelong advocate of

---

105; Walsh, *supra* note 285, at 54 (arguing that the moral weight given to prior-expressed preferences in the philosophical literature is "out of touch with real clinical practice" which "favors giving moral weight to the preferences expressed by dementia patients after onset").

[287] *See, e.g.*, Stonestreet, *supra* note 9, at 534–35 (observing that a person's narrative identity "may display growth and change as circumstances warrant").

[288] *See, e.g.*, Dresser, *Precommitment*, *supra* note 34, at 1834 (noting that "a person's preferences regarding future life-sustaining treatment may change over time" and noting that empirical research has found only "'moderate' stability" of treatment preferences over time).

[289] *See, e.g.*, Stonestreet, *supra* note 9, at 527 ("Given her unequivocal and well-known preferences before the onset of her dementia, a substituted judgment may seem clear . . . . But it is less clear what Mrs. P would have decided for herself *in this situation* . . . .").

[290] *See, e.g.*, Cocking & Kennett, *supra* note 151, at 516–17 ("My close friend will know well how much I care about my children, the nature of my interest in the movies and in cars, and the kinds of things that make me laugh and make me angry.").

[291] *See, e.g.*, Stonestreet, *supra* note 9, at 528 ("With a particularly rich understanding of the patient . . . a loving surrogate may find the requirements of the traditional standards inadequate or at least oversimplifying.").

[292] In these case studies, assume that the documentary evidence regarding their preferences is clear and unequivocal, sufficient even to be "clear and convincing evidence" of their preferences, but it is not in a format that would be legally-binding in the relevant jurisdiction.

euthanasia, and generally rigid thinker. She's explained at length her preference for euthanasia on the grounds that she is a committed philosophical materialist who believes that persons are the only entities of moral significance in the universe, and that dementia degrades personhood quickly. Those who love this person know that, while smart, the way she thinks about things is not particularly flexible—she's always tended to reach a conclusion on instinct and then defend it vigorously. In this case, the decision grounded in love—the decision that she would have made—is likely indeed to refuse treatment.

But in the second case, imagine that the document was written at the urging of family. Having recently read a book on the Terri Schiavo case, our protagonist expressed that she would never have wanted to be such a burden. This person, though, is a different person than the first. Her friends will tell you she is someone open to new experiences and perspectives. Her perspectives shift by what she's read or watched recently. She values this openness about herself—her identity is more closely tied to her openness to new experiences and perspectives than it is to any particular substantive value or position she's espoused. In *this* case, the loving decision may well be to decline to follow the prior expression of preference. Experiencing what she is now experiencing, she might really have come to change her mind. Someone who loves her might know that and care.

Second, grounding substituted judgment in love can help explain to surrogate decision-makers which domains of decision, if any, the person might want surrogates to make in their best interests.[293] One of the difficulties of substituted judgment is that it sometimes asks surrogates to attempt to discern a decision that the person would have made, when in fact they would have deferred to someone else, or not particularly cared.[294] For instance, if someone has more or less lived their financial lives following an advisor, or investing in index-funds not out of conviction but convenience, there is something artificial in trying to make portfolio allocation decisions after their permanent incapacity with reference to what they "would have done." What they would have done is deferred.

Someone who loves this person may well know this about them. They might know that the person wasn't someone who cared about their portfolio allocation. The substituted judgment decision as to management of the

---

[293] *See, e.g.*, Frolik & Whitton, *supra* note 284, at 750 (arguing that substituted judgment and best interests are "better . . . place[d]. . . on a continuum").

[294] *See, e.g.*, Ardath A. Hamann, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 VILL. L. REV. 103, 164 (1993) ("The problem with the substituted judgment test is that the person often has not expressed his desires in language that satisfies evidentiary standards."); Cantor, *supra* note 32, at 1734 (describing "indeterminacy" as one of the central challenges to substituted judgment).

person's finances *is* indeterminate. And that's OK. Everyone has things that they don't care about, and would want others to decide based on their own assessment of their best interests. Those who love someone may know what they are. Instead of trying to discern some fictional abstraction of what someone would have done if confronted with the particular decision and forced to choose, those deciding in these cases should be permitted to make their own judgments.

Finally, clarifying that substituted judgment is rooted in love can also offer an atmospheric benefit for surrogate decision-makers. In the abstract, the substituted judgment doctrine appears to ask surrogate decision-makers to step into the shoes of the person—to in some sense replace them for legal purposes.[295] This is, obviously, always a fiction.[296] And indeed, it is one with which many surrogate decision-makers report struggling.[297]

Justifying substituted judgment in terms of love discards the fiction of *actually* substituting oneself for another, or stepping into their legal shoes.[298] On the account offered here, surrogate decision-makers make the decision that the person would have made because they *love* the person, not because they *are* them. The distinction is not merely semantic, but can be deeply affirming for surrogates. Indeed, because most surrogates are people who love the person for whom they are deciding, deciding based on love is probably *what they would have done anyway*.[299] In this way, the law can make clear that it is *supporting* the decision-making they want to make out of love for the person, rather than offering some arcane alternative standard.[300]

Moreover, surrogate decision-makers often express anxiety and concern

---

[295] *See, e.g.*, Ian Kerr & Vanessa Gruben, *AIs as Substitute Decision-Makers*, 21 YALE J. L. & TECH. 78, 81 (2019) ("The substitute decision-maker's role is to place herself in the patient's position").

[296] *See, e.g.*, Harmon, *supra* note 8, at 68 ("Once the judge steps into the *Alice in Wonderland* agency relationship created by the doctrine of substituted judgment, attempting to determine what 'X would desire if X were still a being capable of having beliefs and desires,' he runs the risk of becoming X . . . .").

[297] *See, e.g.*, Elizabeth K. Vig, et al., *Surviving Surrogate Decision-Making: What Helps and Hampers the Experience of Making Medical Decisions for Others*, 22 J. GENERAL INTERNAL MED. 1274 (2007) (discussing challenges surrogate decision-makers have in balancing their legal responsibility for the person's decision-making with their own identity).

[298] *Cf.* Frolik, *supra* note 4, at 62 n. 73 (observing that under general agency law "[a]gents follow the instructions of the principal but do not claim to 'be' the principal"),

[299] *See, e.g.*, Stonestreet, *supra* note 9, at 537 (noting that "theoretical support for what happens in practice can give surrogates some confidence in their own judgments and ease psychological burdens").

[300] *See, e.g.*, *id.* at 536 (observing an "advantage of acknowledging that people cannot make such decisions wholly by putting themselves in another's shoes . . . .").

about whether they made the right decision.[301] These decisions are often high-stakes, made quickly, and ethically challenging no matter how much the decision-maker knew the person—they would be high-stakes, made quickly, and ethically challenging even if we were deciding for ourselves. Justifying the doctrine of substituted judgment in terms of love implies that the law should back any decision that is a good faith expression of love—even if it is contestable whether the individual would have made it.[302] Clarifying this posture might, perhaps, ease some of the stress and difficulty of the surrogate role.

B. Deciding for Strangers

Not everyone has close family or friends who love them.[303] Deciding for this population is "one of the most difficult problems in medical decision making."[304] In such cases, decisions will necessarily be made by strangers who presumably do not love the person, at least in the sense that they have an intimate knowledge of the person's identity and are committed to its continuing the way the person wants it to for their own sake.[305] One practical implication of my account, then, is that it cannot directly explain applying substituted judgment in these kinds of cases.

On the one hand, this means that the case for the law's endorsement of substituted judgment in cases of stranger-surrogate decision-making will be weaker than in cases in which love can be presumed. Indeed, it may be that the case cannot be made on its own terms, and could only be by analogy, extension, or prophylaxis, if at all.[306] In these kinds of cases, the law could

---

[301] *See, e.g*, Deirdre Fetherstonhaugh, et al., *"Did I make the right decision?": The difficult and unpredictable journey of being a surrogate decision maker for a person living with dementia*, 18 DEMENTIA 1601, 1607 (2019) ("Several carers described feeling confused and uncertain about making decisions on their family member's behalf, especially when it was necessary to override the person's wishes, or if the person with dementia resisted the decision.").

[302] *See, e.g.*, Kohn, *Fiduciary Principles*, *supra* note 52, at 263 ("The surrogate decision maker for an incapacitated individual is a servant of at least two masters: the individual prior to the onset of incapacity and the individual after the onset of incapacity. Behaving loyally to one may mean failing to follow the direction of the other.").

[303] *See, e.g.*, Pope, *supra* note 281, at 944 (noting that studies suggested that there are "more than 70,000 unbefriended patients and long-term care residents in the United States").

[304] THE HASTINGS CENTER, GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 24 (David H. Smith & Robert M. Veatch, eds., 1987).

[305] *But see generally, e.g.*, Eva Feder Kittay, *At the Margins of Moral Personhood*, 116 ETHICS 100, 100 (2005) (arguing that one can have a loving relationship with someone who lacks the cognitive capacities traditionally associated with philosophical personhood).

[306] Nothing about the theory presented in this Article requires that love be the *exclusive*

consider revitalizing the best interests standard—or even some alternative standard taking into account the interests of others and society. It would certainly be coherent for a legal regime to apply substituted judgment in cases where the decision-maker can be presumed to love the person, and another standard where they are a stranger.

But the fact that substituted judgment may not be justifiable on its own terms in these cases does not compel the conclusion that it ought not be applied. After all, I've argued that although substituted judgment may not be justifiable on its own terms in permanent cases, the law has good reasons for doing so anyway. The same might be true here. It might be that the paradigm case of substituted judgment—in which it is fundamentally justified—is a temporary, loving case. But the law might nevertheless have good reasons to apply the same principle to permanent cases without love as well, as I've argued with respect to permanent cases above.

The reasons for legally extending substituted judgment to permanent cases—medical uncertainty, the role of love in the identity of the decider, and liberalism—do not apply with the same force in cases in which a stranger must decide.[307] Those reasons justify treating permanent cases as though they were temporary, not extending substituted judgment to cases where the problem is the absence of love, not the possibility of return.

But there could be other reasons for the law to endorse substituted judgment in these cases as well. Two are worth discussing briefly. First, to the extent that the law cares about love because it cares about identity,[308] it might be justified in *aspiring* towards love in these cases, even if it can't reach it. Loving someone is a form—the highest form—of valuing their identity.[309] But surely it is not the only way to value an identity. And if the best the law can do in these cases is *come close*, or *aspire* towards love, perhaps the doctrine could be justified on similar, if not identical, grounds. *Trying one's best* to make the decision the person would have made is not *love*. But it is a form of concern for their identity that the law could care about for reasons similar to its solicitude for love.

Another reason might take account of the expressive function of law. As many scholars have pointed out, the law can express—in socially meaningful ways—values and commitments beyond its positivistic effects, narrowly understood.[310] So supporters of capital punishment may

---

justification of substituted judgment. It could be that some alternative concept justifies its application in cases with stranger-decision-makers. But the difficulty the literature has had in justifying substituted judgment in general suggests that such alternative foundations, if they exist, are at least not obvious.

[307] *See supra* Part IV.

[308] *See supra* Part III.C.

[309] *See supra* Part III.B.

[310] *See, e.g.*, Sara Emily Burke & Roseanna Sommers, *Reducing Prejudice Through*

reasonably be unmoved by evidence that it is not a very good deterrent, if what they care about is that the law *says* that some things are just *that* wrong.[311] The law might reasonably criminalize hate crimes harshly even if only to *say* how wrong it thinks such motives.[312] Empirical studies have shown that the expressive function of law really can affect how people think and behave.[313] In short, we might care about what the law *says*, in addition to what it *does*.

And if the law were to adopt a different standard for decision-making on behalf of those without family or friends, there are good reasons to be concerned about what that would say. It would be hard not to read this difference as implying that those who are unloved are in some way worse—the group to whom we apply the alternative, disfavored standard. And indeed, there is a sense in which declining to apply a standard grounded in love to a group is perhaps to suggest that they are unworthy of it. In short, there seems to be something deeply unsettling—or at least gross—about the law formally saying that a different standard be applied in these cases, *even if*, as a practical matter, it is impossible to rigorously apply substituted judgment. And it ought to be so unsettling to all of us, who no doubt could find ourselves so alone.[314]

So, maybe indeed substituted judgment doesn't make a lot of sense on its own terms in cases where no one loves the person. And certainly it could not be applied in the same way where no one knows what the person would have done. But it might still be worth the law's saying that substituted

---

Law: Evidence From Experimental Psychology, 89 U. CHI. L. REV. 1369, 1372 (2022) ("Many legal scholars have suggested that legal rules affect attitudes and behaviors beyond their instrumental consequences, through what is known as the 'expressive function of law.'"); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) ("What can be said for actions can also be said for law. Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.").

[311] *See, e.g.*, Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 L. & SOC'Y REV. 21, 40 (1982) (finding that "[p]olitical and social beliefs . . . exercise[d] a strong influence upon support for capital punishment, while the influence of crime-related concerns was small").

[312] *See, e.g.*, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1267–1268 (2000) (suggesting that hate crime legislation might be partially justified on expressive grounds).

[313] *See, e.g.*, Burke & Sommers, *supra* note 310, at 1369 ("We find that learning that discrimination is unlawful does not simply lead people to believe that an employer is more likely to face punishment for discriminatory behavior. It also leads some people to report less prejudicial attitudes and greater feelings of interpersonal warmth toward members of that group.").

[314] *See, e.g.*, Pope, *supra* note 281, at 946–952 (summarizing characteristics of this population and noting that many lack people who love them for no other reason than, for example, outliving their friends).

judgment is the doctrine in all cases of surrogate decision-making. In so doing, the law would express the conviction that the identity of every individual matters. That all of us are, at least, love's proper subjects.

CONCLUSION

In the cases of permanent incapacity in which the doctrine of substituted judgment is most commonly applied, it has always been difficult to explain. Indeed, philosophers and legal theorists hoping to do so have thus far largely found themselves compelled to rely on obscure and controversial metaphysical claims.

This Article has offered an alternative account. Justifying the substituted judgment standard as a philosophical matter is much more straightforward—and depends on far fewer controversial metaphysical presuppositions—in cases of temporary incapacity. And indeed, in the temporary incapacity of a psychotic episode, to make the decision the person would have made is an expression of love for that person, under only a relatively thin and uncontroversial theory of love. As for permanent cases, the law has at least three reasons to treat them as though they were temporary—including medical uncertainty, the role love plays in the identities of those who love, and philosophically liberal accommodation of diverse worldviews.

This theory does not *prove* that substituted judgment is the *right* standard for surrogate decision-making—there may well be other strikes against it. But it reveals that the law can justifiably adopt the substituted judgment standard without committing itself to the controversial metaphysics of prior accounts. Wherever it comes out, the debate, then must reckon with arguments from love and liberalism in substituted judgment.