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Procreative Choice for the Incompetent Developmentally Disabled: Conservatorship of Valerie N.

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NOTES

PROCREATIVE CHOICE FOR THE INCOMPETENT DEVELOPMENTALLY DISABLED: *CONSERVATORSHIP OF VALERIE N.*

Recognition of constitutional rights for the developmentally disabled[1] has occurred only recently[2] and has generated considerable controversy.[3] Histor-

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1. For the purposes of this Note the term "developmentally disabled" will refer exclusively to individuals who suffer from mental retardation. Mental retardation is defined by the American Association of Mental Deficiency as "subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." *See* North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 453 (M.D.N.C. 1976); Haggerty, Kane & Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAM. L.Q. 59, 65 (1972).

Not all mentally retarded individuals are incompetent, however, and some disabled individuals may have the capacity for the informed consent necessary to obtain or refuse a voluntary sterilization operation. *See* Neuwirth, Heisler & Goldrich, *Capacity, Competence and Consent: Voluntary Sterilization of the Mentally Retarded*, 6 COLUM. HUM. RTS. L. REV. 447 (1975). This Note is primarily concerned with the rights of those mentally retarded individuals incapable of informed consent.

2. *See* Dowben, *Legal Rights of the Mentally Impaired*, 16 HOUS. L. REV. 833, 833-34 (1976) (discusses the history of treatment of the mentally retarded from the 18th century to the present, and states that increased availability of federal funding in the 1950s and 1960s led to the development of mental health and retardation programs).

3. Not everyone is pleased that the developmentally disabled are being allowed to leave the institutions to live in community living arrangements. Programs designed to promote the mentally retarded individual's ability to survive in society are financed by state and federal funding. The use of public tax money to support training programs for these living arrangements is also a controversial issue. *See generally* Price & Burt, *Sterilization, State Action, and the Concept of Consent*, 1 LAW & PSYCHOLOGY REV. 57 (1975) (argues that the lack of state and federal funding of programs for the mentally retarded is being used as an excuse for the nonvoluntary sterilization of the incompetent developmentally disabled).

In addition, many communities are reluctant to allow the developmentally disabled to live in group homes in their area, primarily because of inordinate fear of the retarded. *See generally* Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community, reprinted in* THE MENTALLY RETARDED AND THE LAW 305 (M. Kindred ed. 1976) (many communities are reluctant to grant zoning variances for individuals planning to construct group homes for the mentally retarded); Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979) (discusses the various ways to avoid zoning restrictions designed to keep the mentally retarded out of the community); Comment, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 WAYNE L. REV. 1349 (1982) (discusses the conflict between the mentally retarded individual's interest in deinstitutionalization and the homeowner's interest in keeping the mentally retarded out of the community). Recently, the Supreme Court held that the Developmental Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081, does not confer upon the developmentally disabled any substantive right to "appropriate treatment in the least restrictive environment." *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S 1, 18 (1981). The Court reasoned that the Act showed no evidence of intent by Congress to impose on traditional

ically, the developmentally disabled have been subjected to compulsory "eugenic" sterilization[4] and institutionalized[5] to isolate them and to prevent them from passing "undesirable" traits to future generations. The developmentally disabled have also been labelled as sub-humans[6] and denied rights and privileges normally afforded to average individuals.[7]

Within the past two decades, both courts and legislatures have become inceasingly aware of the problems that confront the developmentally disabled. The courts have recognized the developmentally disabled individual's right to equal educational opportunities,[8] treatment,[9] and appropriate community

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areas of state sovereignty. Instead, the Court believed that the Bill of Rights provision was intended merely to encourage the states to provide better programs for the developmentally disabled. *Id.* at 18.

In another recent Supreme Court decision, the Court held that the mentally retarded are not a "quasi-suspect" class entitled to greater constitutional protection in cases where mentally retarded individuals alleged violations of the equal protection clause of the fourteenth amendment. *See* Cleburne Living Center, Inc. v. City of Cleburne, 105 S. Ct. 3249 (1985) (holding that the challenged legislation allegedly in violation of the equal protection rights of the mentally retarded need only be rationally related to a legitimate governmental interest). Both the *Pennhurst* and *Cleburne* decisions suggest that the developmentally disabled are not entitled to special protection from legislation that would interfere with "appropriate treatment" or that would violate the equal protection clause.

4. Eugenic sterilization refers to sterilization of individuals to prevent them from passing on "undesirable traits" to future generations. *See generally* Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995 (1977) (discusses the development of eugenic sterilization and the abuses practiced by the states under that theory); Kindregran, *Sixty Years of Compulsory Sterilization; Three Generations of Imbeciles and the Constitution of the United States,* 43 CHI.[-]KENT L. REV. 123 (1966) (discusses the abuse of eugenic sterilization).

For examples of the abuse under eugenic sterilization, see Stump v. Sparkman, 435 U.S. 349 (1978) (mildly retarded woman sterilized without her knowledge or consent sued the judge that authorized the operation); Buck v. Bell, 274 U.S. 200 (1927) (state police power authorizes the state to involuntarily sterilize individuals to prevent them from passing on their "undesirable" traits to future generations).

5. In the past, the developmentally disabled were separated from the rest of society and placed in institutions that provided little or no training to help their assimilation into society. *See* Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning,* 82 W. VA. L. REV. 669, 672 (1980).

6. The mentally retarded have often been considered sub-human, eugenic misfits, and eternal children. *See* Boyd, *The Aftermath of the D.D. Act: Is There Life After Pennhurst?,* 40 U. ARK. LITTLE ROCK L.J. 448, 456 (1981); Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions,* 9 FLA. ST. U.L. REV. 580, 599 (1981).

7. *See* Price & Burt, *supra* note 3, at 58 (the mentally retarded have been denied the rights to sexual relations, to marry, to have children, and to proper treatment). *See also* Shaman, *Person Who Are Mentally Retarded: Their Right to Marry and Have Children,* 12 FAM. L. Q. 61 (1978) (discusses the denial of the rights of the mentally retarded to vote, to marry, and to have children).

8. *See* Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

9. *See* Wyatt v. Stickney, 344 F. Supp. 373, 390 (M.D. Ala. 1972), *aff'd sub nom.*

services.[10] Moreover, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act[11] in order to afford the developmentally disabled minimal rights and to encourage the deinstitutionalization of the developmentally disabled.

In response to these new freedoms afforded the developmentally disabled, a growing minority of state courts have decided that the incompetent developmentally disabled[12] have the same procreative rights as competent individuals.[13] Consequently, these courts have concluded that the incompetent developmentally disabled cannot be denied access to a sterilization operation because sterilization is a form of contraception available to competent individuals.[14]

Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

In *Wyatt,* a federal district court held that the mentally handicapped can benefit from, and have a constitutional right to receive, adequate habilitation. As part of the constitutional right to habilitation, the court required a showing that admission to the institution was the least restrictive habilitation available to the mentally retarded person. *Id.* at 396. The court set forth several objective standards covering all facets of institutional care, including the hiring of qualified staff in numbers sufficient to administer treatment and individualized treatment plans. *Id.* at 394-95.

Eventually, some of the *Wyatt* standards were incorporated into the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6081. *See* Halpren, *Introduction to Symposium on the Mentally Retarded People and the Law,* 31 STAN. L. REV. 545 (1979).

The right of the mentally retarded to receive treatment outside of the institutions has been in question since the Supreme Court's decision in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), *rem'd on state law grounds,* 673 F.2d 647 (3rd Cir. 1982), 465 U.S. 89 (1984) (the Court held that the Act does not confer any statutory entitlement to deinstitutionalization).

10. *See* Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975).

11. 42 U.S.C. §§ 6000-6081 (1975).

12. *See supra* note 1.

13. *See, e.g., In re* C.D.M., 627 P.2d 607 (Alaska 1981) (incompetent individuals should not be denied their procreative rights to prevent pregnancy by means of a sterilization operation just because of their disability); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981) (lack of capacity for choice should not deprive the incompetent developmentally disabled of the right to procreative choice); *In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) (adopted guidelines to provide access by the incompetent developmentally disabled to their procreative right to sterlization); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc) (adopted safeguards designed to permit access by the developmentally disabled to a sterilization operation). *But see In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (any decision regarding the right of incompetent individuals to be sterilized should come from the legislature and not the courts).

14. Although the United States Supreme Court has not directly addressed the issue of whether sterilization is a constitutional right, the great majority of courts have held that sterilization is within the constitutional right of privacy. These courts have based their holdings upon the Supreme Court's decisions in Doe v. Bolton, 410 U.S. 179 (1973) and Roe v. Wade, 410 U.S. 113 (1973) (both of which concern a woman's right to an abortion). *See In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) (nothing that the Supreme Court implicitly recognized the right of a person to be sterilized as a fundamental right). *See also* Note, Ruby v. Massey: *Sterilization of the Mentally Retarded,* 9 CAP. U.L. REV. 191 (1979) (discusses implicit recogni-

In *Conservatorship of Valerie N.*,[15] the California Supreme Court held that incompetent developmentally disabled individuals may obtain sterilization operations when they meet strict substantive and procedural guidelines.[16] Unfortunately, the guidelines adopted by the court are not very rigid and do not afford the incompetent developmentally disabled realistic access to their newly recognized right.

This Note analyzes the reasoning of the *Valerie N.* decision, focusing particularly on the standards adopted by the California Supreme Court in an attempt to afford the developmentally disabled their fundamental right to procreative choice. The Note then concludes that the standards do not promote the developmentally disabled individual's interest in habilitation.

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tion of the right to sterilization as a method of birth control).

Not all commentators agree with those state court decisions that allow the incompetent developmentally disabled to be sterilized. Professors Burt and Price maintain that allowing the parents or guardians to consent to a sterilization operation for an incompetent individual does not protect the rights of the incompetent individual. Instead, they argue that third party consent is a fiction by which the severely disabled are kept from procreating. *See* Price & Burt, *supra* note 3, at 58.

Other commentators fear that incompetent individuals will be sterilized for eugenic reasons or in the parents' best interests rather than in the best interests of the incompetent individual. *See* Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives,* 60 N.C. L. REV. 943, 955 (1982) (when the deprivation of the fundamental right to procreate is involved, the parents or guardian should not have absolute power to authorize sterilization).

Some commentators support those state court decisions that adopt standards designed to allow access to sterilization by incompetent individuals. These commentators argue that the right to obtain a sterilization operation cannot be denied to the incompetent developmentally disabled merely because of their incapacity to consent. Instead, they propose that third parties must be allowed to consent on behalf of the incompetent in order to preserve their fundamental right to choose sterilization. *See* Comment, *Nonconsensual Sterilization of the Mentally Retarded-Analysis of Standards for Judicial Determinations,* 3 W. NEW ENG. L. REV. 689 (1981) (third party consent may be a way to allow the incompetent developmentally disabled access to sterilization, but it must be carefully applied in order to avoid unnecessary infringement of the fundamental right to procreate); Comment, *Procreation: A Choice for the Mentally Retarded,* 23 WASHBURN L.J. 359 (1984) (substituted consent provides the incompetent developmentally disabled with a means of access to procreative choice) [hereinafter Comment, *Procreation*].

15. 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985) (en banc).

16. *Id.* at 160, 707 P.2d at 777, 219 Cal. Rptr. at 404.

The *Valerie N.* majority adopted standards selected from state court decisions providing the developmentally disabled with access to a sterilization operation. *See supra* note 14. These standards provide that the incompetent individual must be represented by an independent guardian *ad litem,* and that the proponent of the operation must prove by clear, cogent, and convincing evidence, the need for contraception, the individual's incapacity to consent to the operation, and the inapplicability of other less intrusive forms of contraception. *See Valerie N.,* 40 Cal. 3d at 168, 707 P.2d at 777, 219 Cal. Rptr. at 404. In addition, the *Valerie N.* majority adopted the requirements of California Probate Code section 2357. Section 2357 governs intrusive medical procedures for individuals incapable of consent in situations where the operation is medically necessary to preserve the life or health of the incompetent individual. CAL. PROB. CODE § 2357 (West 1979).

Finally, this Note evaluates the impact of the decision on the fundamental due process rights of the developmentally disabled and proposes appropriate legislation.

I. HISTORICAL BACKGROUND

A. *Eugenic Sterilization*

In the early twentieth century, many people believed in the unproven and now discredited theory of negative eugenic sterilization.[17] Under this theory, the mentally ill and the habitual criminal were sterilized in order to prevent them from passing their undesirable traits to future generations.[18] Negative eugenic sterilization was based on the assumption that undesirable traits are

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17. In the nineteenth century, with the discovery of Mendelian genetics concerning the relationship between dominant and recessive genes and heredity, many people believed that through sterilization many of life's most undesirable individuals, including the mentally retarded, could be eliminated. The theory stated that through the sterilization of those with undesirable characteristics, those undesirable traits would eventually be eliminated. Sherlock & Sherlock, *supra* note 15, at 945.

Eugenic sterilization has not proven to be an effective means of eliminating mental retardation. The failure of eugenic sterilization can be attributed to the fact that many forms of mental retardation are not hereditary. The causes of mental retardation can be attributed to three general classifications; mental retardation that is (1) genetically transmitted; (2) a result of physical damage or maldevelopment of the brain; and (3) caused by environmental deprivation. *See* Ross, *supra* note 6, at 614. *See also In re* Hayes, 93 Wash. 2d 228, 235-36, 608 P.2d 635, 640 (1980) (en banc) (scientific evidence demonstrates little or no relationship between genetic inheritance and such conditions as mental retardation, criminal behavior, and diseases such as epilepsy); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 454 (M.D.N.C. 1976) (most competent geneticists now reject eugenic sterilizaton as a method to improve the quality of the human race). *See generally* P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 115-17 (1976) (80-90% of the mentally retarded are born to normal parents); Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 596, 602-604 (1966) (the scientific basis for eugenic sterilization has not proven true, and the individual's environment may play a bigger role than heredity); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 924-28 (1974) (eugenic basis for sterilization may be overinclusive and it does not account for retardation caused by environment); Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 YALE L.J. 618 (1943) (there are grave weaknesses in the scientific basis for eugenic sterilization and many diseases once thought to be hereditary have been proven not to be hereditary); Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DEN. U.L. REV. 631, 637-47 (1969) (present laws based on eugenic theory are unsound because they are not a rational means of attaining the governmental purpose asserted as their justification).

18. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (sterilization of the unfit would benefit the general health and welfare of society). *See also* Comment, *Constitutional Law . . . Sterilization of Defectives*, 1 S. CAL. L. REV. 73 (1927) (discusses the state eugenic sterilization laws and their treatment in the courts) [hereinafter Comment, *Sterilization of Defectives*].

inherited through a simple scheme of dominant and recessive genes,[19] and that certain traits are inherently undesirable.

The development of a relatively safe and simple surgical sterilization procedure prompted the eugenics movement.[20] Soon after the procedure was established, states began to enact compulsory sterilization laws that called for the sterilization of persons with undesirable traits including mental retardation.[21] In 1927, the Supreme Court affirmed the constitutionality of these statutes in *Buck v. Bell.*[22] *Buck* held that a eugenic sterilization statute was a valid exercise of state police power[23] and a reasonable procedure that enhanced the quality of future generations.[24]

B. Fundamental Right To Procreative Choice

Just fifteen years after *Buck v. Bell,* the eugenics movement was set back by the Supreme Court's decision in *Skinner v. Oklahoma.*[25] *Skinner* ruled that the right to procreate is among those fundamental rights that trigger more active review under modern interpretations of the equal protection and due process clauses.[26] In *Skinner,* the Court struck down a state

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19. "Negative eugenic" theory proposes elimination of the unfit by preventing these individuals from procreating while encouraging the fit to procreate. *See* Bligh, *Sterilization and Mental Retardation,* 51 A.B.A. J. 1059, 1060 (1965). *See also* Burgdorf & Burgdorf, *supra* note 4, at 997-99 (the eugenics movement sought to end the "propogation of degeneracy").

20. *See In re* Cavitt, 182 Neb. 713, 721, 157 N.W.2d 171, 179 (1968) (sterilization of males and females involves a relatively simple and safe operation); Gray, *Compulsory Sterilization In A Free Society: Choices and Dilemmas,* 41 U. CIN. L. REV. 529, 535 (1972) (the vasectomy operation on males is an extremely simple operation while the salpingectomy operation on females is slightly more involved).

21. *See generally* Comment, *Sterilization of Defectives, supra* note 19 (discusses the statutes enacted in response to the eugenic sterilization movement, and noted that California performed 2,558 of the 3,233 total nonvoluntary sterilizations performed in the United States between 1909 and 1921).

22. 274 U.S. 200 (1927) (Supreme Court upheld a Virginia statute that permitted sterilization of persons believed to suffer from hereditary conditions when the patient and society would benefit).

23. *Id.* at 207.

24. *Id.* Justice Holmes' opinion for the majority analogized compulsory sterilization to a statute requiring compulsory vaccination upheld in Jacobsen v. Massachusetts, 197 U.S. 11 (1905).

In a now famous quote from his majority opinion in *Buck,* Justice Holmes stated:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Id. (citations omitted).

25. 316 U.S. 535 (1942).

26. *Id.* at 541. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.76 (1973) (the right of procreation is among the rights of personal privacy protected under

involuntary sterilization statute, which included larcenists but excluded embezzlers, as a violation of the equal protection clause.[27] The Court's decision reflects a heightened sensitivity to the abuses practiced in the field of eugenic sterilization and establishes the right to procreate as "one of the basic civil rights of man."[28]

In subsequent cases, the Supreme Court has held that the right to procreate is a fundamental right included within the constitutionally protected right of personal privacy.[29] The right to personal privacy protects decisions made by married[30] and single adults,[31] and minors[32] to obtain contraceptives. In *Roe v. Wade,*[33] the Supreme Court also recognized a woman's right to have an abortion during the first trimester of pregnancy.[34] In reaching its decision, the Court stated that the right of privacy encompasses activities relating to marriage, procreation, contraception, child rearing, family relationships, and education.[35] A state may not abridge or deny the right to have an abortion

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the Constitution); Roe v. Wade, 410 U.S. 113, 154 (1973) (right to procreation included within the right of personal privacy under the penumbras of the first amendment); Loving v. Virginia, 388 U.S. 1, 12 (1966) (the rights of marriage and procreation are fundamental rights which trigger heightened scrutiny); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 921-23, 1010-11 (dicussing *Skinner* decision under both the equal protection and due process clauses).

27. 316 U.S. at 541.

28. *Id.* Justice Douglas' opinion for the majority states:

> [T]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic civil liberty.

Id.

29. Griswold v. Connecticut, 381 U.S. 479 (1965) (the Supreme Court held that a statute prohibiting the use of contraceptives violated the right to privacy under the penumbras of the first amendment).

30. *Id.*

31. Eisenstadt v. Baird, 405 U.S. 438 (1972) (the Court invalidated a statute that permitted distribution of contraceptives to married but not unmarried persons). Four justices observed that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. Thus, the right to privacy in procreation was extended to cover an individual's decision as well as a married couple's decision.

32. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (the decision to bear or beget a child is at the very heart of constitutionally protected choices).

33. 410 U.S. 113 (1973).

34. *Id.* at 163-64. *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (state may not "unduly burden" the right of adult and minor women to obtain an abortion).

35. 410 U.S. at 152-53.

absent a "compelling state interest,"[36] and the state interest may not be achieved by "means which are unnecessarily broad."[37]

Although the Supreme Court has not addressed the precise question of whether sterilization is protected under the right of privacy, several courts have held that the right to choose sterilization is a protected component of the right to procreative choice.[38] Sterilization is viewed by many to be an accepted method of contraception,[39] and many courts allow individuals to be voluntarily sterilized.[40] Consequently, it seems likely that the courts will agree that the right to choose sterilization as a form of contraception falls within the right of privacy.[41]

C. *Substituted Judgment*

Because sterilization involves a surgical procedure,[42] the individual's informed consent is a necessary prerequisite to the operation.[43] Most individuals

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36. *Id.* at 163-64. *See also* Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (state regulations of the right to obtain an abortion after the first trimester of pregnancy must be closely drawn to protect the state's compelling interest).

37. 410 U.S. at 155-56. *See also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Supreme Court invalidated a provision of a Missouri abortion statute prohibiting the use of saline amniocentesis method of abortion and prescribing the prostaglandin method).

38. *See, e.g.,* Hathaway v. Worchester City Hosp., 475 F.2d 701, 706 (1st Cir. 1973); Ruby v. Massey, 452 F. Supp. 361, 368 (D. Conn. 1978); Peck v. Califano, 454 F. Supp. 484, 486-87 (C.D. Utah 1977); North Carolina Ass'n for Retarded Citizens v. North Carolina, 420 F. Supp. 451, 454 (M.D.N.C. 1976); Relf v. Weinberger, 372 F. Supp. 1196 (D.C. 1974); *In re* A.W., 637 P.2d 366, 370 (Colo. 1981) (en banc); *In re* Grady, 85 N.J. 235, 247, 426 A.2d 467, 473 (1981). *See also* Jessin v. County of Shasta, 274 Cal. App. 2d 737, 744-45, 79 Cal. Rptr. 359, 364 (1969) (allowed competent adult to choose sterilization as a method of birth control).

39. *See In re* Moe, 385 Mass. 555, 564, 432 N.E.2d 712, 719 (1982) (right to sterilization as a method of contraception is protected under the right to personal privacy). *See also* Gray, *supra* note 20, at 533 (increase in the number of voluntary sterilizations as a method of birth control); Comment, *A Woman's Right to Voluntary Sterilization,* 22 BUFFALO L. REV. 291, 303 (1972) (as a method of birth control, voluntary sterilization falls within the *Griswold* decision) [hereinafter Comment, *A Woman's Right*].

40. *See supra* note 39.

41. *See In re* Grady, 85 N.J. 235, 247, 426 A.2d 467, 473 (1981) (the right to sterilization is implicit in the Supreme Court's abortion and contraception cases). *See also* Pilpel, *Voluntary Sterilization: A Human Right,* 7 COLUM. HUM. RTS. L. REV. 105, 116 (1975) (sterilization) as a method of contraception should be available to all who have the capacity for choice; proposes legislation to allow greater access to voluntary sterilization); Burnett, *Voluntary Sterilization for Persons with Mental Disabilities; The Need for Legislation,* 32 SYRACUSE L. REV. 913 (1981) (discusses sterilization rights of incompetents).

42. In females, the surgeon must make an abdominal incision, removing segments of the fallopian tubes (salpingectomy) and tying the cut ends. In males, the operation involves small scrotal skin incisions, and segments of the vas defrens are removed (vasectomy). The proximal ends are then tied. *See In re* Cavitt, 182 Neb. 713, 721, 157 N.W.2d 171, 179 (1968); S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 207 (rev. ed. 1971); Comment, *A Womens's Right, supra* note 42, at 291.

43. "Informed Consent" is based upon the knowledge and information received from the physician concerning all pertinent matters including the purpose and nature of the operation, the irreversibility of the operation, available options, and the potential medical and emotional

are capable of informed consent and can obtain the operation. Sterilization, however, may not be available to those individuals deemed incapable of informed consent due to mental retardation.[44] In order to protect the fundamental due process rights of those individuals incapable of informed consent, some courts utilize the doctrine of substituted judgment to achieve the consent necessary to obtain the operation.[45] Courts are especially likely to substitute their judgment when sterilization is the only available method of contraception for the individual.[46]

The doctrine of substituted judgment initially developed in cases involving the disposition of incompetent individuals' estates.[47] In order to effectuate an individual's intent, courts make a subjective inquiry into what the incompetent individual would do in that particular situation, taking into account

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consequences. Absent informed consent, the treating physician could be liable for battery. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 112-18 (5th ed. 1984) (consent avoids liability, but consent may not be effective if the individual is not capable of informed consent); *See generally* Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking A Balance Between Competing Values in Medical Decisionmaking,* 1979 WIS. L. REV. 413 (the doctrine of informed consent "promotes patient self-determination" in medical decision-making).

44. *See* Relf v. Weinberger, 372 F. Supp. 1196, 1198 (D.D.C. 1974) (minors and the mentally retarded do not have the capacity for informed consent to sterilization operation). *See generally* Neuwirth, Heisler & Goldrich, *supra* note 1 (not all mentally retarded individuals lack the capacity for informed consent).

45. *See In re* A.W., 637 P.2d 366, 375-76 (Colo. 1981) (en banc); *In re* Moe, 385 Mass. 555, 565-66, 432 N.E.2d 712, 719 (1982); *In re* Grady, 85 N.J. 235, 251, 426 A.2d 467, 475 (1981); *In re* Hayes, 93 Wash. 2d 228, 236-37, 608 P.2d 635, 640-41 (1980) (en banc).

46. Sterilization may be the last and best available method of contraception for an individual because the extent of the individual's disability may rule out contraception that requires the individual's conscious participation. For example, the individual may not remember to take birth control pills everyday and may be unable to insert a diaphragm prior to sexual intercourse. Thus, the individual may need contraception that is effective but does not require the individual to consciously remember to utilize it. *See* Green & Paul, *Parenthood and the Mentally Retarded,* 24 U. TORONTO L.J. 117, 120 (1974); Comment, *Procreation, supra* note 14, at 364.

Moreover, several state decisions addressing the issue of the mentally retarded individual's right to procreative choice and sterilization have involved mentally retarded females who would not cooperate in pelvic exams for the placement of an IUD. *See, e.g.,* Anonymous v. Anonymous, 469 So. 2d 588, 590 (Ala. 1985) (Jones, J., dissenting) (incompetent minor would have to be put to sleep due to her inability to remain still and tolerate the uncomfortable insertion of an IUD); *In re* Truesdell, 63 N.C. App. 258, 286, 304 S.E.2d 793, 810 (1983) (mentally retarded female's extreme fear of pelvic examinations). Thus, in some instances it may be that other conventional methods of birth control are inapplicable to the severely mentally retarded.

47. *See* City Bank Co. v. McGowan, 323 U.S. 594, 599 (1944) (the Court was to substitute itself as nearly as it could for the incompetent individual and to act upon the same motives and considerations as would have moved the individual). *See generally* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 752-53, 370 N.E.2d 417, 431 (1977) (the judge's decision should be the same decision the incompetent would make, but taking into account the present and future incompetency of the individual as one factor).

the individual's previously expressed desires.[48] The doctrine has been extended to other personal affairs of incompetent individuals through a series of organ transplant cases.[49] These courts focused on the individual's best interests[50] and attempted to benefit those individuals incapable of making their own decisions.[51] However, the decisions did not provide many procedural and substantive guidelines.[52]

A further extension of substituted judgment appeared in the New Jersey Supreme Court's decision of *In Re Quinlan*.[53] The *Quinlan* court employed the doctrine of substituted judgment to hold that a comatose patient's right to privacy includes the decision to consent to the removal of life-support equipment.[54] The court reasoned that the right to remove the equipment was a "valuable incident of her right to privacy."[55] Thus, the only way to protect her rights was to permit Karen Quinlan's guardian and family to render their best judgment as to whether she would terminate life support under the circumstances.[56] Although the decision was technically made by her parents, guardian, and medical staff, Karen Quinlan was recognized theoretically as the legal decision-maker.[57]

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48. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 751, 370 N.E.2d 417, 431 (1977) (the court allowed substituted consent to chemotherapy for an incompetent individual by examining what the individual would choose to do if competent); *In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (the only way to protect the incompetent woman's right to discontinue life-support was to allow her parents and guardians to choose for her). *But see In re* Storar, 52 N.Y.2d 363, 376-80, 420 N.E.2d 64, 70-72, 438 N.Y.S.2d 266, 272-74 (1981) (court rejected application of substituted judgment); *In re* Eberhardy, 102 Wis. 2d 539, 566, 307 N.W.2d 881, 897 (1981) (court rejected substituted judgment in sterilization petition for retarded woman).

49. *See* Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969) (court substituted its judgment for consent to kidney transplant from mentally retarded boy to his brother and focused on the benefit to the donor in keeping his brother alive). *See also In re* Boyd, 403 A.2d 744 (D.C. 1979) (court utilized substituted judgment to consent to medication for incompetent individual); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977) (court substituted its judgment to consent of an amputation for the incompetent individual). *See generally* Comment, *Spare Parts From Incompetents: A Problem of Consent*, 9 J. FAM. L. 309 (1969) (discussion of cases utilizing substituted judgment to consent to organ donations).

50. *See* Strunk v. Strunk, 445 S.W.2d 145, 148 (Ky. 1969).

51. *Id.* at 148. The *Strunk* court held that in light of the fact that the transplant would benefit the donor, the court would exercise discretion to substitute its judgment for the benefit of persons incapable of protecting themselves.

52. *Id.* at 148-49 (relied exclusively on the determination that the transplant would be in the incompetent's best interests). *See generally* Robertson, *Organ Donations By Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 57-68 (1976) (discusses use of substituted judgment and standards used in its application).

53. 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

54. *Id.* at 40, 355 A.2d at 664.

55. *Id.* at 41-42, 355 A.2d at 663-64.

56. *Id.*

57. *Id.* at 41-42, 355 A.2d at 664. *See generally* Note, *The Legal Aspects of the Right*

Despite the absence of legislation authorizing jurisdiction, a growing minority of state courts have utilized substituted judgment to act on petitions for sterilization of incompetent developmentally disabled individuals.[58] In these decisions, the courts have adopted substantive and procedural safeguards that allow the incompetent individual to exercise the right to procreative choice.[59] At the same time, other state courts have refused to assume jurisdiction over sterilization petitions.[60] These courts reject substituted judg-

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to Die: Before and After the Quinlan *Decision,* 65 KY. L.J. 823 (1977) (discussion of substituted judgment and its application to the *Quinlan* case). *But see* Note, *Due Process Privacy and the Path of Progress,* 1979 U. ILL. L.F. 469, 517-18 (The *Quinlan* decision represents "a right of privacy gone wild;" its presumption that an individual would choose to die cuts against human nature) [hereinafter Note, *Due Process Privacy*].

58. *See In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* A.W., 637 P.2d 366 (Col. 1981); *In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982); *In re* Penny N., 120 N.H. 269, 414 A.2d 467 (1981); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).

59. Most of the standards adopted by these courts provide similar determinations of the individual's incompetency, the need for contraception, and the inapplicability of other contraceptive methods. For example, in *In re* C.D.M., the Alaska Supreme Court held that the state's superior courts had jurisdiction to entertain and act upon petitions for sterilization. Moreover, the court stated that the proponents of the operation bear the burden of proving by clear and convincing evidence that the operation is in the individual's best interests. The court required that the incompetent individual be afforded a hearing at which the individual must be represented by a guardian *ad litem.*

Next, the court required that the superior court determine that the individual is incompetent on the basis of comprehensive medical, psychological and social evaluation. Such a finding requires that the individual in question "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."

The court must then determine that there is a need for contraception. The proponent of the operation must establish that the individual is capable of procreation and unable to adequately care and provide for her offspring. In addition, the court must examine the incompetent's physical and psychological ability to deal with pregnancy, and the likely detrimental emotional effects of the sterilization. This determination must be based upon medical evidence concerning other methods of contraception and why they are impractical for the incompetent individual. In effect, the proponent of the operation must show the court that there is no less drastic method of contraception available for the individual.

Finally, the court must examine the incompetent individual and attempt to elicit her views regarding sterilization and her understanding of the operation and its consequences. Moreover, the court must examine the proponent's motive in bringing the petition. The court should "give careful consideration to whether the petition is motivated by genuine concern for the best interests of the individual rather than concern for the petitioner's own or the public's convenience." *Id.* at 612-13.

A minority of the courts that allow jurisdiction to authorize sterilization petitions also require that the operation be "medically necessary." For example, the Colorado Supreme Court in *In re* A.W., would only allow sterilization where the operation is medically essential "to preserve the life or physical or mental health" of the individual. The Massachusetts Supreme Court in *In re* Moe, required the state's lower courts to examine the medical necessity for the operation as one factor in their determination. 385 Mass. 569, 432 N.E.2d 722 (1982).

60. *See* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971); Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1969); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

ment as a fiction by which the state infringes upon an individual's fundamental right to procreate.[61]

The Washington Supreme Court, in *In re Hayes*,[62] was among the first state courts to adopt comprehensive standards allowing incompetent individuals access to the right of procreative choice. The *Hayes* court attempted to protect the incompetent individual's right to procreative choice by authorizing the state's superior courts to permit sterilizations.[63] Moreover, the court established rigid substantive and procedural safeguards[64] to protect against infringement of the developmentally disabled individual's right to procreate. The *Hayes* factors require the proponent of the sterilization to prove by "clear, cogent, and convincing evidence"[65] that the individual cannot consent on his or her own,[66] that the operation is in the individual's best interest,[67] and that there is a need for contraception.[68] Finally, the judge must determine that sterilization is the only available method of contraception for the individual.[69] Only if all of the required evidence is proven will the court allow the operation for the individual.

The New Jersey Supreme Court also utilized substituted judgment in conjunction with the right to procreative choice to enable the incompetent developmentally disabled access to court-authorized sterilizations. In *In re Grady*,[70] the New Jersey court included substantive and procedural safeguards that resemble the standards adopted in *In re Hayes*. However, the *Grady* court's standards also included a factor that takes into account the physical

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61. *See In re* Eberhardy, 102 Wis. 2d 539, 576-77, 307 N.W.2d 881, 898 (1981) (Wisconsin Supreme Court held that lower courts had jurisdiction to authorize sterilization, but refused to allow the exercise of that jurisdiction due to the irreversibility of the operation and the potential infringement of the fundamental right to procreate).

62. 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).

63. *Id.* at 234, 608 P.2d at 639.

64. *Id.* at 234, 608 P.2d at 639-42.

65. *Id.* at 234, 608 P.2d at 641. The standard of clear and convincing evidence was adopted by the United States Supreme Court in a case dealing with involuntary civil commitment. That standard is an intermediate approach utilized when "the interest at stake is more than mere loss of money." *See* Addington v. Texas, 441 U.S. 418, 424 (1979). *See also* Comment, *Protection of the Mentally Retarded Individual's Right to Choose Sterilization: The Effect of the Clear and Convincing Evidence Standard*, 12 CAP. U.L. REV. 413 (1982) (argues that the clear and convincing evidence standard restricts access to court-authorized sterilization by the incompetent mentally retarded) [hereinafter Comment, *Clear and Convincing Evidence Standard*].

66. *Hayes*, 93 Wash. 2d 228, 238, 608 P.2d 635, 641 (1980) (en banc).

67. *Id.*

68. *Id.* The proponent of the operation must prove that the individual is capable of conceiving and that the individual is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy.

69. *Id.* All other less drastic methods of contraception, including supervision, education, and training must be prove unworkable or inapplicable by clear, cogent, and convincing evidence.

70. 85 N.J. 235, 426 A.2d 467 (1981).

and psychological impact of the operation on the individual.[71] The court focused on the individual's best interest, but unlike its decision in *In Re Quinlan,*[72] the *Grady* court required the ultimate decison to remain with the court rather than the parents or guardian of the incompetent individual.[73]

State court decisions that refuse to consider petitions for sterilization of the incompetent developmentally disabled assert that substituted judgment does not adequately protect the individual's right to procreate.[74] Moreover, they conclude that the doctrine of substituted judgment is subjective and should not be applied to cases involving individuals who have never had the capacity to express desires regarding either sterilization or procreation.[75] Instead, these courts view objective use of substituted judgment as insufficient protection of the individual's right to procreate.[76] Rather than assume jurisdiction, these courts defer to the legislature because of the permanent nature of the deprivation of the right to procreate that results if sterilization is allowed.

II. THE *VALERIE N.* DECISION

A. Facts and Procedural History

Responding to a history of abuse in the sterilization of the developmentally disabled, the California Legislature enacted Probate Code section 2356(d) in 1979.[77] The statute deprived the probate court of jurisdiction over petitions for the sterilization of incompetent wards and conservatees.[78] At the same

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71. *Id.* at 266, 426 A.2d at 483. In addition, the New Jersey Supreme Court required the proponents of the operation to demonstrate that they sought the operation in good faith and that their primary concern was for the best interests of the incompetent person rather than for their own or the public's convenience.

72. 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

73. *In re* Grady, 85 N.J. 235, 264, 426 A.2d 467, 482 (1981). The court stated that "it was the duty of the court, rather than the parents to determine the need for sterilization." The fundamental right to procreative choice is an individual right, and the parents' interests might not be the same as the child's interests.

In addition, the court rejected a requirement of "medical necessity" as a factor in the determination of sterilization petitions. The court stated that "a necessity standard would result in an unacceptable degree of state interference in the exercise of these rights concerning sterilization. It may prevent an individual who wishes to be sterilized from being so." *Id.* at 263 n.9, 426 A.2d at 481 n.9.

74. *See supra* note 61.

75. *In re* Eberhardy, 102 Wis. 2d 539, 578, 307 N.W.2d 881, 893-94 (1981). *See also* Price & Burt, *supra* note 3 (rejects third-party consent as a fiction and argues that strict controls must be placed on the use of substituted judgment).

76. *See In re* Eberhardy, 102 Wis. 2d 539, 576, 307 N.W.2d 881, 893-94 (1981); Hudson v. Hudson, 373 So. 2d 310, 312 (Ala. 1979).

77. CAL. PROB. CODE § 2356(d) (West 1979).

78. Section 2356(d) provides that "no ward or conservatee may be sterilized under the provisions of this division." *Id.* § 2356(d).

time, the California Legislature repealed Welfare and Institutions Code section 7254,[79] which authorized sterilization of patients in state institutions.[80] Because of these legislative actions, neither the probate court nor state hospitals retained authority to permit nontheraputic sterilizations of incompetent wards and conservatees.

Soon after the legislature enacted Probate Code section 2356(d) and repealed section 7254, the parents of Valerie, a severely mentally retarded twenty-nine year old woman, petitioned the probate court to be appointed conservators and for "additional powers" to consent to a sterilization operation in her behalf. Valerie suffered from Down's Syndrome,[81] had an Intelligence Quotient (I.Q.) of thirty,[82] and the functional level of a four year old.[83] Thus she was incapable of giving informed consent to a sterilization operations.[84]

At the probate court hearing, Valerie's mother testified that Valerie was not sexually active and that she had been closely supervised.[85] However, she testified that Valerie made inappropriate sexual advances to men[86] and that counseling directed to curb her aggressive behavior was ineffective.[87] She further testified that Valerie had been given two formulations of birth control pills in her early teens, but that she had rejected them and had become ill.[88]

Declarations of Valerie's physicians and her counselor were submitted at the hearing, and all agreed that the severity of Valerie's mental retardation meant that no other alternative forms of birth control were available that

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79. CAL. WELF. & INST. CODE § 7254 (repealed 1979).

80. At the time of its repeal section 7254 provided for sterilization of institutionalized patients. The section afforded an opportunity for judicial review and reflected primarily a eugenic-based policy. CAL. WELF. & INST. CODE § 7254 (repealed 1979).

81. Down's Syndrome is a chromosome disorder in which the individual's cells contain forty-seven rather than the normal forty-six chromosomes. The condition usually results in some degree of mental retardation. *See In re* C.D.M., 627 P.2d 607, 608 n.1 (Alaska 1981). Mental retardation is defined as "significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior." *See* North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 453 (M.D.N.C. 1976). *See also* Haggerty, Kane & Udall, *supra* note 1, at 64-65 (discusses the different problems and abilities of mentally retarded individuals with different levels of retardation).

82. *See* Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 124 n.1 (1976) (under Weschler I.Q. and Standford-Binet I.Q., an individual with an I.Q. of thirty is severely retarded). *See also In re* C.D.M., 627 P.2d 607, 608 n.2 (Alaska 1981) (severe mental retardation is characterized by "retarded speech, language and motor development").

83. *Valerie N.*, 40 Cal. 3d at 149, 707 P.2d at 763, 219 Cal. Rptr. at 390.

84. *See supra* note 45.

85. *Valerie N.*, 40 Cal. 3d at 149, 707 P.2d at 763, 219 Cal. Rptr. at 390.

86. *Id.* Valerie's mother testified at the probate court hearing that Valerie was "aggressive and affectionate towards boys. On the street she approached men, hugged and kissed them, climbed on them, and wanted to sit on their laps." *Id.*

87. *Id.*

88. *Id.*

would protect against pregnancy.[89] Moreover, all three declarants agreed that a pregnancy would cause "psychiatric harm" to Valerie[90] and that sterilization was "advisable and medically appropriate" in her case.[91] Her counselor further stated that close monitoring had severely hampered Valerie's ability to form social relationships.[92]

Valerie's appointed counsel did not offer any evidence at the hearing, but argued that less drastic alternatives to sterilization should be used.[93] He also asserted that the probate court lacked jurisdiction to authorize the operation. No evidence was presented at the hearing to show whether or not less intrusive means of birth control were available, and no evidence was presented to show that Valerie was capable of conceiving.[94]

The probate court agreed that a tubal ligation operation was medically safe and would enhance the quality of Valerie's life, and that Probate Code section 2356(d) was unconstitutional.[95] The court reasoned, however, that it was obligated to follow precedent holding that the probate court lacks jurisdiction to authorize the sterilization of wards and conservatees and therefore denied the petition.[96] The trial court judgment was affirmed on appeal, and Valerie's conservators appealed to the California Supreme Court.

B. The California Supreme Court's Rationale

In *Conservatorship of Valerie N.*, the California Supreme Court struck down Probate Code section 2356(d) and adopted substantive and procedural safeguards to allow the probate court the power to authorize sterilizations of wards and conservatees.[97] The court reasoned that the Probate Code section prohibiting sterilization of incompetent developmentally disabled

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89. *Id.* "Valerie was unable to apply other methods of birth control such as a diaphragm, and would not cooperate in a pelvic examination for an intrauterine device." *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 147, 707 P.2d at 764, 219 Cal. Rptr. at 391.

94. *Id.*

95. *Id.*

96. The probate court reasoned that California appellate court decisions in Guardianship of Tully, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978) and Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) denied probate court jurisdiction over petitions for sterilization of wards or conservatees in the absence of statutory authority. These decisions stated that a probate court was a court of limited jurisdiction and that in the absence of statutory authority, it lacked jurisdiction to order the involuntary sterilization of a severely impaired ward or conservatee. Moreover, the courts focused on the fact that sterilization is an extreme remedy that permanently deprives the individual of the ability to procreate. *But see* Maxon v. Superior Court, 135 Cal. App. 3d 626, 633-34, 185 Cal. Rptr. 516, 520-21 (1982) (court held that Probate Code section 2356(d) does not prohibit a hysterectomy where the incompetent woman has an 80% risk of cervical cancer without the operation, even though the operation renders the woman sterile).

97. *Valerie N.*, 40 Cal. 3d at 158-61, 707 P.2d at 775-78, 219 Cal. Rptr. at 402-05.

individuals denied those individuals their fundamental right to procreative choice[98] and held that the probate court did have jurisdiction to consider the petition for sterilization.[99] The court, however, denied authority to perform a sterilization on Valerie because there was insufficient evidence to allow the operation under the substantive and procedural framework.[100]

To reach its decision, the majority examined the constitutional rights of the incompetent developmentally disabled and found that Valerie had a right to have basic decisions made for her by her conservators.[101] The majority reasoned that the incompetent developmentally disabled have a right to personal growth and development that is implicit in *Roe v. Wade*[102] and *Allgeyer v. Louisiana*.[103] Thus, the court determined that the right to "habilitation"[104] is a constitutionally protected right under the United States[105]

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98. *See supra* notes 27-33 and accompanying text.

99. *Valerie N.*, at 160, 707 P.2d at 777, 219 Cal. Rptr. at 404.

100. *Id.* The majority stated that there was no evidence presented to show that Valerie was capable of conceiving, nor was there evidence that other less intrusive means of contraception were unavailable to Valerie. However, the court affirmed the probate court judgment without prejudice to a renewed application for additional powers.

101. *Id.*

102. 410 U.S. 113, 153 (1973). In *Roe*, the United States Supreme Court stated that the right obtain an abortion stems from the problems a woman would face if she were not able to obtain an abortion; "maternity, or additional offspring, may force upon a woman a distressful life and future." *Id.*

103. 165 U.S. 579, 589 (1897). In *Allgeyer*, the United States Supreme Court held that an individual must be free in the use of all his faculties and must be allowed to use them in any lawful way. *See also* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (individual liberty cannot be restricted except for a proper governmental objective); Smith v. Texas, 233 U.S. 630, 636 (1914) (free to pursue life in any lawful calling).

104. The court examined state and federal efforts to afford the developmentally disabled constitutional rights, services and training. California's Lanterman Developmental Disabilities Services Act establishes state regional centers for the developmentally disabled that provide training and other services. *See* Myers, Cvitanov & Lippman, *Legislative Evolution of a State-Wide Services System: California's Regional Centers for Developmentally Disabled Persons*, 14 RUTGERS L.J. 653 (1983). *See also* Kay, Farnham, Karren, Knakal & Diamond, *Legal Planning for the Mentally Retarded: The California Experience*, 60 CALIF. L. REV. 438 (1972) (discusses the Lanterman Act and its impact on guardianship, involuntary commitment and state-wide services for the retarded).

In addition, the court examined the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1) and (2). This federal Act includes within its provisions the right to "treatment, services, and habilitation for a person with developmental disabilities." The Act states that habilitation "should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." *Id.* The United States Supreme Court in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), stated that "habilitation . . . consists of education and training for those, such as the mentally retarded, who are not mentally ill." *Id.* at 7 n.2. However, the court held that the bill of rights provision of the Developmental Disabilities Act does not create any substantive rights to "appropriate treatment" in the "least restrictive environment."

After examining the legislation, the *Valerie N.* court concluded that neither Act provided a source of authority under which to allow court-authorization of sterilization of the developmentally disabled. *Valerie N.*, 40 Cal. 3d at 155, 707 P.2d at 771, 219 Cal. Rptr. at 398.

105. *Valerie N.*, 40 Cal. 3d at 157, 707 P.2d at 773, 219 Cal. Rptr. at 400.

and California[106] Constitutions.

Although the United States Supreme Court has not yet recognized a fundamental right to sterilization as a method of contraception,[107] the majority concluded that the interests of the incompetent developmentally disabled required recognition of fundamental due process rights on the same basis as women competent to give consent.[108] Because competent women could choose sterilization as a method of contraception in California,[109] the majority reasoned that incompetent developmentally disabled women should not be denied this right simply because of their disability.[110] The majority then subjected Probate Code section 2356(d) to strict scrutiny[111] analysis and determined that the state's interest in protecting the procreative rights of the incompetent developmentally disabled did not justify the prohibition on all nontheraputic sterilizations of wards and conservatees.[112]

In rejecting the argument that the past abuse of eugenic sterilization mandated the prohibition on court-authorized sterilizations of wards and conservatees, the majority stated that "less restrictive alternatives" to total prohibition were available in statutory and procedural safeguards "as yet untried in California."[113] These statutory safeguards included Probate Code section 2357[114] and the standards that the Washington Supreme Court adopted in *In Re Hayes.*[115]

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106. *Id.* at 162-63, 707 P.2d at 773, 219 Cal. Rptr. at 400. Article One, section one of the California Constitution provides that "all people are by nature free and independent and have inalienable rights. Among these are: enjoying and defending life and liberty, aquiring, possessing property, and pursuing and obtaining safety, happiness and privacy." *Id.*

107. *But see supra* note 40 (state and federal court decisions finding a constitutional right to voluntary sterilization).

108. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 772, 219 Cal. Rptr. at 399.

109. California has recognized the right of individuals to choose sterilization as a method of contraception under the right to personal privacy. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 263, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981) (constitutional right of women to exercise procreative choice "as they see fit"); Jessin v. County of Shasta, 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359, 366 (1969).

110. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 754, 219 Cal. Rptr. at 399. *Accord In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981); *In re* Moe, 385 Mass. 555, 564-65, 432 N.E.2d 712, 719 (1982); *In re* Hayes, 93 Wash. 2d 228, 237, 608 P.2d 635, 640 (1980) (en banc).

111. *See* Roe v. Wade, 410 U.S. 113, 155-56 (1973) (fundamental right to procreative choice received the greatest constitutional protection and infringement by the state upon these rights triggers strict judicial scrutiny).

112. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 772, 219 Cal Rptr. at 399.

113. *Id.* at 165, 707 P.2d at 774-75, 219 Cal. Rptr. at 402.

114. CAL. PROB. CODE § 2357 (West 1979). This sections governs consent to intrusive medical procedures for those wards and conservatees unable to give consent.

The Law Revision Commission comment to the section states, "Section 2357 provides for notice to interested persons, for the appointment of counsel to represent the ward or conservatee where necessary, for the presentation to the court of medical affidavits showing the need for the medical treatment, and for findings by the court before an order authorizing the treatment is made." CAL. PROB. CODE § 2357 (West 1979) (Law Revision Commission Comment).

115. 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc). The *Hayes* case concerned a peti-

Under the *Hayes* factors, inability to consent must be established by "clear, cogent, and convincing evidence" that the individual is incapable of making a decision about sterilization and is unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.[116] The determination can only be made in a court proceeding in which the incompetent is represented by a disinterested guardian *ad litem*.[117] The court must receive independent advice based on comprehensive medical, psychological, and social evaluations of the individual, and to the greatest extent possible the court must elicit and take into account the views of the incompetent individual.[118] The proponent of the operation must present clear, cogent, and convincing evidence that the operation is in the best interest of the incompetent individual.[119] The court must also take into account the age and educability of the individual, the likelihood of the individual bearing a retarded child, the individual's potential as a parent, and the availability of other less restrictive means of contraception for the individual.[120]

In addition, the court must find that the individual is physically capable of procreating and likely to engage in sexual activity at the present, or in the near future, under circumstances likely to result in pregnancy.[121] Furthermore, the court must find that the nature and extent of the individual's disability as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for a child, even with reasonable assistance.[122]

Finally, there must be no less restrictive alternative to sterilization. All contraceptive methods, including supervision, education, and training must be proven unworkable or inapplicable, and sterilization must entail the least

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tion for sterilization brought by the parents of a severely retarded sixteen year old girl. The Washington Supreme Court held that the state's superior courts had jurisdiction to consider the petition. Moreover, the court adopted guidelines in an effort to protect against abuse and to guide the lower courts in ruling on the petitions.

116. *Id.* at 235, 608 P.2d at 641.

117. *Id.* The court did not define the guardian *ad litem's* role in the proceedings, but other decisions have stated that the guardian has the authority to present proof and cross examine witnesses. *See In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981); *In re* Grady, 85 N.J. 235, 266, 426 A.2d 467, 482-83 (1981).

118. *Hayes,* 93 Wash. 2d at 235, 608 P.2d at 641.

119. *Id.* The *Hayes* court stated that unlike the situation involved in a normal medical procedure, the interests of the parents may not be the best interests of the child. For that reason, the court chose to analyze whether the operation is truly in the child's best interests. *Id. See also* Comment, *Sterilization, Retardation and Parental Authority,* 1973 B.Y.U. L. REV. 380, 393 (parents' interest in child's welfare is not always present when the child is mentally retarded; conflict is due to the fear of illegitimate retarded offspring and retarded grandchildren).

120. *Hayes,* 93 Wash. 2d at 234, 608 P.2d at 640.

121. *Id.*

122. *Id.* at 235, 608 P.2d at 641.

invasion of the body of the individual.[123] The court must then determine by clear, cogent, and convincing evidence that the current state of scientific and medical knowledge does not suggest that either a reversible sterilization procedure or other less drastic method of contraception will shortly be available, or that science is on the threshold of an advance in the treatment of the individual's disability.[124]

In addition to the *Hayes* factors, the *Valerie N.* majority adopted the requirements of Probate Code section 2357,[125] governing approval of intrusive medical procedures. The court reasoned that application of section 2357 would insure that the consevatee would receive independent representation and that "clear, cogent, and convincing evidence of the necessity for the procedure would be introduced by the applicant as a prerequisite to judicial approval."[126]

In *Conservatorship of Valerie N.*, the majority concluded that there was insufficient information in the record to authorize a petition for sterilization under the *Hayes* factors and section 2357.[127] The record contained no evidence of Valerie's capacity to conceive, whether less intrusive means were available as contraception, or whether the "course of treatment" was necessary under section 2357.

C. *The Concurring and Dissenting Opinions*

All seven justices concurred in the denial of authority to sterilize Valerie. Three justices, however, dissented from the majority's decision to rule Probate Code section 2357(d) unconstitutional and to adopt a substantive and procedural framework. Justices Reynoso and Lucas filed opinions in which they criticized the majority's decision to declare section 2356(d) unconstitutional in view of the history of abuse practiced under compulsory eugenic sterilization statutes.[128] Moreover, Justice Lucas rejected the majority's decision to substitute the court's judgment for the incompetent developmentally disabled individual.[129] He believed that the majority's decision overemphasized the parents' desires and did not adequately protect the incompetent individual from abuse.

Chief Justice Bird dissented from the majority on two grounds: the majority's treatment of the fundamental right to procreate and its use of the doctrine of substituted judgment. Because of the past abuse present

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123. *Id.*

124. *Id.* at 236, 608 P.2d at 642.

125. CAL. PROB. CODE § 2357 (West 1979).

126. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 777, 219 Cal. Rptr. at 404.

127. *Id.* at 161-62, 707 P.2d at 777-78, 219 Cal. Rptr. at 404-05. The court stated that there was neither a finding that sterilization was required nor evidence to support that finding.

128. *Id.* at 161, 707 P.2d at 777-78, 219 Cal. Rptr. at 405 (Reynoso, J., concurring and dissenting); *Id.* at 143, 707 P.2d at 781, 219 Cal. Rptr. at 408 (Lucas, J., dissenting).

129. *Id.* at 164, 707 P.2d at 781, 219 Cal. Rptr. at 407 (Lucas, J., dissenting).

under compulsory sterilization statutes, the Chief Justice reasoned that section 2356(d) was necessary to discontinue the practice of state-authorized sterilization of the developmentally disabled.[130] Moreover, she believed that the history of involuntary sterilization was the "frame of reference for evaluating the constitutionality of the legislature's ban on sterilization" of incompetent conservatees,[131] as well as the framework adopted by the majority from the *Hayes* decision.[132]

The Chief Justice rejected the majority's assertion that the right to procreative choice was paramount to the right to procreate.[133] Rather, she believed that the right to procreate is a basic civil liberty "that goes deeper than, and does not depend upon, rational choice."[134] In addition, Chief Justice Bird argued that the right to procreative choice concerning birth control and abortion could not be applied to incompetent developmentally disabled individuals since it creates "a false impression of equivalence between the 'decision' to procreate and the 'decision' to be sterilized."[135] She argued that the right to be sterilized depends upon the exercise of rational or knowing choice, but the right to procreate includes the right to retain physical integrity and biological capabilities.[136] On the question of substituted judgment, the Chief Justice criticized the majority's application of that doctrine to cases that involve an irreversible sterilization operation. Instead of allowing the incompetent developmentally disabled an opportunity to exercise their constitutional right to procreative choice, the Chief Justice believed that substituted judgment provided the means by which the state infringes upon the fundamental right to procreate.[137] In effect, she believed that substituted judgment under the *Hayes* factors adopted by the majority was inconsistent with the notion that the choice being made is the one that the conservatee would have made[138] and that the *Hayes* factors and section

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130. *Id.* at 144, 707 P.2d at 782, 219 Cal. Rptr. at 408 (Bird, C.J., dissenting).

131. *Id.*

132. *Id.*

133. The Chief Justice asserted that the right to procreate also included the right to bodily autonomy. *See* Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251-52 (1891) (common law right to be free from compulsory physical examination). However, the dissent does not acknowledge cases in which the right to procreative choice was held to be paramount to the right to procreate. For example, various United States Supreme Court decisions allow minor's decisions concerning contraception and abortion to override the parents' wishes under certain circumstances. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74-75 (1976). *See also* Hathaway v. Worchester City Hosp., 475 F.2d 701 (1st Cir. 1973) (woman's decision on sterilization paramount to husband's desires).

134. *Valerie N.*, 40 Cal. 3d at 169, 707 P.2d at 785, 219 Cal. Rptr. at 412 (Bird, C.J., dissenting).

135. *Id.* at 170, 707 P.2d at 786, 219 Cal. Rptr. at 413, (Bird, C.J., dissenting).

136. *Id.*

137. *Id.* at 175, 707 P.2d at 791, 219 Cal. Rptr. at 418. *See also* Burt & Price, *supra* note 3 (third-party consent "is a fiction which authorizes the state to intervene because a party other than the subject provides the green light").

138. *Id.*

2357 were inconsistent with the majority's concern for the habilitation of the developmentally disabled.[139]

III. ANALYSIS AND CRITICISM

Because the *Valerie N.* majority provided some access to the fundamental right of procreative choice, the standards established by the court are preferable to a total prohibition on access to court-authorized sterilization.[140] However, there are several problems with the majority's analysis and standards that remain unresolved. Habilitation connotes both the developmentally disabled individual's right to maximize his or her potential[141] and the right to be free in the enjoyment of all of his or her faculties.[142] However, the majority's standards contradict the apparent concern for the incompetent developmentally disabled individual's right to habilitation, and it does not provide adequate guidance to the probate court judge who must apply the standards.

Although the majority does provide a forum for the incompetent developmentally disabled to assert their right to procreative choice, the court's standards do not provide a realistic opportunity for those individuals to exercise their rights. Most problematic is the majority's decision to adopt Probate Code section 2357 as a threshold standard that must be met prior to analysis under the *Hayes* factors.[143] Probate Code section 2357 allows

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139. *Id.* at 176, 707 P.2d at 792, 219 Cal. Rptr. at 419. Chief Justice Bird stated that the *Hayes* factor requiring that all less intrusive means of contraception including supervision be ruled inapplicable was not consistent with the majority's position that Valerie has a liberty interest in being sterilized in order to be free of parental supervision.

140. *See In re* Moe, 385 Mass. 555, 564-65, 432 N.E.2d 712, 720 (1982) (inability of an incompetent mentally retarded individual to choose sterilization should not result in a loss of the person's constitutional interests); *In re* Grady, 85 N.J. 235, 272-73, 426 A.2d 467, 480-81 (1981) (allowing substituted judgment produces a more compassionate result than leaving the incompetent individual without a choice). *But see In re* Eberhardy, 102 Wis. 2d 539, 566, 307 N.W.2d 881, 893 (1981) (substituted judgment results in state intrusion into whether or not an individual will be allowed the opportunity to procreate).

141. *See supra* note 105.

142. *See supra* note 106.

143. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 777, 219 Cal. Rptr. at 402. The court stated that "pending action by the legislature to establish criteria and procedural protections governing these applications, the procedures governing approval of intrusive medical procedures set forth in section 2357 should be adapted and applied." *Id.* However, the majority never stated how section 2357 was to be "adapted and applied" to situations involving nontheraputic sterilization operations. Thus, the majority implicitly adopted a "medical necessity" threshold standard that the proponent must meet prior to analysis under the *Hayes* standards and "any other relevant factors brought to the attention of the court by the parties." Of the other state courts that have adopted standards to allow the mentally retarded access to the right to procreative choice, only one has adopted a medical necessity threshold requirement. *See In re* A.W., 637 P.2d 366, 375 (Colo. 1981) (Colorado Supreme Court adopting standards that allow for sterilization of an incompetent individual only upon a finding that the operation is "medically

access to probate court review whenever "the existing or continuing medical condition of the ward or conservatee requires the recommended course of treatment."[144] In *Conservatorship of Valerie N.*, Valerie's conservators sought the authority to use a nontheraputic sterilization and neither Valerie's life nor health were in jeopardy.[145] Valerie's conservators sought probate court authorization because sterilization is an irreversible method of contraception.[146] The majority held that there was no evidence to show that sterilization was "required" or even "necessary"[147] and that the conservators had not met the threshold requirement of section 2357.[148] The majority, however, ignored evidence presented in the declarations of Valerie's personal physicians and her counselor that pregnancy and childbirth would cause Valerie "severe psychiatric damage."[149]

As a result of the majority's narrow reading of section 2357, the probate court forum is potentially inaccessible, even where there is evidence that the individual could be harmed if not treated.[150] Although this interpretation

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essential" to preserve the life or physical health of the individual).

Other state courts have criticized the medical necessity requirement adopted in *In re* A.W. as too restrictive of access to court-authorized sterilization. *See In re* Grady, 85 N.J. 235, 261, 426 A.2d 467, 481 (1981) (New Jersey Supreme Court explicitly rejected a medical necessity requirement because it believed such a requirement would unduly restrict access to sterilization by those individuals unable to choose sterilization). *See also In re* Moe, 385 Mass. 555, 569 n.10, 432 N.E.2d 712, 722 n.10 (1982) (Massachusetts Supreme Court adopted a medical necessity factor, but it was only one of several factors under its analysis).

144. CAL. PROB. CODE § 2357 (West 1979).

145. However, the declarations of the physician and child counselor were in agreement that pregnancy and childbirth would cause "severe psychiatric harm" to Valerie. *See Valerie N.*, 40 Cal. 3d at 146, 707 P.2d at 763, 219 Cal. Rptr. at 390.

146. *Id.* at 146, 707 P.2d at 763, 219 Cal. Rptr. at 390. Valerie's doctor recommended a tubal ligation after Valerie rejected birth control pills.

147. *Id.* at 160, 707 P.2d at 777-78, 219 Cal. Rptr. at 404.

148. *See supra* note 144 and accompanying text.

149. The court's apparent rejection of "severe psychiatric harm" would seem to mean that the *Valerie N.* medical necessity requirement is even more stringent than the requirement adopted in *In re* A.W., 637 P.2d 366 (Colo. 1981). In the *In re* A.W. case, the medical necessity requirement was held to provide access to sterilizations where the proponent of the operation presented evidence that pregnancy would threaten the individual's physical or mental health, and where there were no less intrusive forms of contraception which would be safe and effective.

Because the *Valerie N.* majority rejects psychiatric harm as sufficient to meet the medical necessity standard, the *Valerie N.* standard is even more restrictive of access to court-authorized sterilization. In effect, it gives the mentally retarded conservatee the right to procreative choice with one hand, but takes it away with the other hand by imposing a stringent requirement that very few individuals will be able to meet. *See In re* Moe, 385 Mass. 555, 569 n.10, 432 N.W.2d 712, 722 n.10 (1982) (requiring a high burden of proof of medical necessity would defeat the purpose of the proceedings); *In re* Hayes, 93 Wash. 2d 228, 242, 608 P.2d 635, 643 (Stafford, J., concurring in part and dissenting in part) (stringent standards defeat the purpose behind the proceedings and take away the "forum" for the incompetent to exercise their procreative rights).

150. By rejecting psychiatric harm, the *Valerie N.* majority would apparently require some clear, cogent, and convincing evidence of physical harm before it would analyze the case under

represents a substantial barrier to court-authorized sterilization,[151] the court's narrow reading of the medical necessity standard has not been accepted by the other courts that have addressed the issue.[152]

If under section 2357 a sterilization is determined to be required or neccessary, the probate court judge must then analyze the facts under the *Hayes* factors.[153] Several of the *Hayes* factors, however, contradict the majority's emphasis on the individual's right to habilitation. One *Hayes* factor requires the probate judge to find by clear, cogent, and convincing evidence, that "all less drastic alternatives to sterilization, including supervision . . . have proven unworkable or inapplicable."[154] This factor places a high burden on the proponent of the operation[155] and unnecessarily interferes with access to sterilization,[156] even in cases where sterilization is in the individual's best interest and would promote personal development. As a method of contraception, supervision can protect against unwanted pregnancy,[157] but it does so at a high cost to the incompetent individual's liberty and privacy interests.[158] In effect, the court incorrectly ignored the main

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the *Hayes* standards. The Court's narrow reading of "harm" under section 2357, in conjunction with the clear, cogent, and convincing evidence standard, unnecessarily creates a high barrier to access to a court-authorized sterilization. *See* Comment, *Clear and Convincing Evidence Standard, supra* note 66, at 433-34 (medical necessity requirements are designed to protect against abuse, but the practical effect is to foreclose the right to choose not to procreate).

151. *See supra* note 150.

152. *See* Wentzel v. Montgomery Gen. Hosp., 293 Md. 685, 723, 447 A.2d 1244, 1263 (1982) (Donaldson, J., dissenting) (medical necessity requirement forces the lower court to place primary emphasis on single objective factor irrespective of the decision the incompetent individual would make if competent; requirement affords the individual's physician an absolute veto over access to court-authorized sterilization). *See also Comment, Clear and Convinving Evidence Standard, supra* note 66, at 433-34.

153. *Valerie N.*, 40 Cal. 3d at 160, 707 P.2d at 777, 219 Cal. Rptr. at 404. The probate court may also consider "any other relevant factors brought to the court's attention." *Id.* It is not impossible that the "other factors" could include information on the benefit to the parents and society in sterilizing the incompetent or other eugenically-based rationale. The eugenic basis for sterilization is clearly not in the individual's best interests.

154. *See Hayes,* 93 Wash. 2d at 238-39, 608 P.2d at 641.

155. Comment, *Clear and Convincing Evidence Standard, supra* note 66, at 431-32 (clear and convincing evidence standard forecloses access to the right to obtain a "best interest" sterilization).

156. *Id.* at 433-34 (The state supreme court decisions in *Hayes, Grady, In re A.W.*, and other cases do provide a forum for the mentally retarded. However, they do not provide realistic access to the right to choose not to procreate).

157. *See* Green & Paul, *supra* note 46, at 120 (mentally retarded individuals require contraception that does not require their conscious participation). If the mentally retarded are isolated from members of the opposite sex or supervised to make sure they take their birth control pills everyday, then the risk of pregnancy should be reduced.

158. The potential cost involved to the incompetent conservatee is that the standard, in combination with the clear, cogent, and convincing evidence requirement, could effectively foreclose sterilization to those individuals who would benefit most from greater freedom. Without any access to sterilization, and without the ability to utilize other forms of contracep-

reason Valerie's conservators sought a court-authorized sterilization.[159] Valerie's conservators wanted to allow Valerie more freedom to develop socially[160] without the need for constant supervision.[161] Consequently, if this *Hayes* factor is narrowly construed, incompetent individuals will be denied access to sterilizations that would allow them to participate in services and activities that do not provide for close supervision.[162]

Another defect in the court's decision is its failure to consider any physical and psychological harm that could result from the sterilization operation. It is anomalous to consider the physical impact of pregnancy and childbirth on the conservatee under section 2357, and then specifically ignore consideration of the psychological harm that could result from the sterilization operation itself.[163] The once popular view that the developmentally disabled do not care that they are sterilized has been severely criticized and dis-

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tion, the individual may be subjected to continued isolation from other individuals. That isolation does not promote the individual's ability to participate in services and programs provided for the mentally retarded. Consequently, the individual may be denied their liberty and freedom because supervision has proven to be an effective method of "contraception" in the past. *See* Comment, *Clear and Convincing Evidence Standard, supra* note 66, at 432.

159. Conservators have sought court-authorized sterilization on similar grounds in other cases. *See, e.g., In re* A.W., 637 P.2d 366, 367-68 (Colo. 1981) (en banc) (parents of mentally disabled woman were concerned that the girl's overnight trips with her school afforded opportunities for sexual activity; parents also concerned that girl's monthly periods brought her "a considerable degree of fright, fear, and a general feeling of unrest"); *In re* Moe, 385 Mass. 554, 555 n.1, 432 N.E.2d 712, 715 n.1 (1982) (severely retarded, institutionalized woman had previously suffered a "sexual incident" and was unable to effectively practice any other medically recognized method of birth control); *In re* Hayes, 93 Wash. 2d 228, 230, 608 P.2d 635, 636 (1980) (en banc) (sexually active severely retarded woman was unable to understand her own reproductive functions. Her physicians believed that long term methods of contraception other than sterilization could be harmful to her).

160. *Valerie N.*, 40 Cal. 3d at 146, 707 P.2d at 763, 219 Cal. Rptr. at 390.

161. Her parents stated that they planned to continue caring for Valerie at home, but their long range plan was to place Valerie in a residential home should they became mentally or physically unable to care for her. Valerie's counselor stated in her declaration that close monitoring of Valerie to avoid pregnancy "had severely hampered Valerie's ability to form social relationships." *Id.* at 146, 707 P.2d at 763, 219 Cal. Rptr. at 390.

162. For example, any overnight trips would be foreclosed to individuals in Valerie's situation that require constant supervision when with members of the opposite sex. *See In re* A.W., 637 P.2d 366, 367-68 (Colo. 1981). Moreover, any controlled housing situation for the mentally retarded could be foreclosed to individuals denied access to sterilization where conventional contraceptive measures are unworkable or inapplicable. *See In re* C.D.M., 627 P.2d 607 (Alaska 1981).

163. The New Jersey Supreme Court's decision in *In re* Grady, 85 N.J. 235, 262, 426 A.2d 467, 483 (1981), adopted such a standard rather than a medical necessity standard. Because the *Valerie N.* majority apparently reads "psychiatric harm" out of the requirements of section 2357, the court should have included some recognition that it is the developmentally disabled conservatee that may become pregnant or have the sterilization operation. Even though the court's opinion leaves open the possibility that the parties could bring this information to the court's attention, it would have been preferable to have specifically included that standard.

proven.[164] The majority should have included a factor specifically addressing the psychological impact of a sterilization operation on the incompetent individual. Failure to include that factor disregards the full consideration of the individual's "best interests" that should be made where infringement of the fundamental right to procreate is possible.[165]

In the court's analysis of the fundamental right to procreative choice, the majority held that a ward or conservatee's inability to consent should not result in a forfeiture of fundamental due process rights,[166] nor of the effective protection of his or her "best interests."[167] The majority reasoned that to preserve the right to procreative choice and the benefits that a meaningful decision would bring to the ward or conservatee, it may be necessary to assert that right on the ward or conservatee's behalf.[168] In reaching a decision, however, the majority did not adequately address the problems inherent in the application of substituted judgment in cases involving the sterilization of developmentally disabled individuals.[169]

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164. The fallacy of the opinion reflected in *Buck v. Bell* was revealed by several psychological studies. *See* Ross, *supra* note 6, at 621-22 (discusses results of psychological studies by Sabagh and Edgerton revealed in *Sterilized Mental Defectives Look at Eugenic Sterilization,* 9 EUGENICS Q. 215-16 (1962)). *See also* Ross, *Civil Rights of the Mentally Retarded: An Overview,* 1 LAW AND PSYCHOLOGY REV. 151 (1975) (discussion of study results of incompetent individuals sterilized prior to release from state institutions and their feelings about being involuntarily sterilized).

165. *See* Hayes, 93 Wash. 2d at 234, 608 P.2d at 639 (sterilization touches upon the individual's right to privacy and the right to procreate and, because it is an irreversible procedure, should be undertaken only after careful consideration of all relevant factors).

166. *Valerie N.,* 40 Cal. 3d at 146-47, 707 P.2d at 773-74, 219 Cal. Rptr. at 400-01.

167. *Id.*

168. *Id.* at 150, 707 P.2d at 777, 219 Cal. Rptr. at 404.

169. As it was originally developed, the doctrine of substituted judgment involved the court in a subjective inquiry in which the court was to "don the mental mantle of the incompetent." *In re* Carson, 39 Misc. 2d 544, 545, 271 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962).

However, where the court is asked to substitute its judgment for an individual who has been incompetent since birth, the court has no basis for a subjective inquiry and must interject objective analysis into the test. *See In re* Storar, 52 N.Y.2d 363, 376-80, 420 N.E.2d 64, 70-72, 148 N.Y.S.2d 266, 272-74 (1981). *See also* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 752-53, 370 N.E.2d 417, 431 (1977) (court rejected an objective "reasonable person" test and utilized substituted judgment to consent to chemotherapy for an incompetent individual).

Cases involving petitions for sterilization also present a problem in that substituted judgment must be made on the basis of objective factors rather than the incompetent individual's previously expressed desires and beliefs. *See In re* Moe, 385 Mass. 555, 565, 432 N.E.2d 712, 720 (1982) (court utilized substituted judgment to produce "a more just and compassionate result" than total prohibition of all sterilizations for the incompetent mentally retarded).

Not all the courts that have considered the issue agree that substituted judgment should be applied to situations involving nonvoluntary sterilization of the retarded. *See In re* Eberhardy, 102 Wis. 2d 539, 566, 307 N.W.2d 881, 893 (1981) (court rejected substituted judgment and stated that the "choice" involved in the decision to be sterilized under substituted judgment "clearly is not a personal choice, and no amount of legal legerdemain can make it so").

By allowing probate court judges to consent for the incompetent individual, the majority followed the decisions in *Hayes*,[170] *Quinlan*,[171] and *Grady*,[172] all of which blur the distinction between objective and subjective use of substituted judgment.[173] Application of substituted judgment to a case involving an individual who has never had the capacity to express any desires regarding procreation or sterilization does not adequately address the special problems and desires of the incompetent individual.[174] Instead, it involves the court in an objective inquiry into what a reasonable person would do under the circumstances.[175] Thus the probate judge's decision would not represent the best interests of the individual, but rather, the best interests of the average developmentally disabled individual under the circumstances. The irreversibility of a mistaken decision should caution the court against ruling in favor of sterilization under the objective test.[176]

Although substituted judgment provides the developmentally disabled with a "choice," the majority fails to address the fact that the choice is made by a probate court judge under the *Hayes* framework.[177] Supreme Court decisions in *Skinner v. Oklahoma*,[178] *Roe v. Wade*,[179] and other cases[180] establish that the government cannot intrude in decisions regarding the choice of whether to bear children absent a compelling state interest.[181] The majority did not require a compelling state interest in providing access to sterilization for incompetent developmentally disabled wards or conservatees. The majority's failure to take this extra step effectively abrogates the fundamental nature of the right to procreate as a "basic civil right of man,"[182] and does not adequately account for the developmentally disabled's right to bodily integrity.[183]

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170. *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).

171. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom.* Granger v. New Jersey, 429 U.S. 922 (1976).

172. *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).

173. *See supra* note 170.

174. *See* Sherlock & Sherlock, *supra* note 15, at 965 (objective use of substituted judgment turns the inquiry into a "reasonable person" test that is not adequately protective of the retarded individual's rights and interests).

175. *Id.*

176. *See In re* Eberhardy, 102 Wis. 2d 539, 578, 307 N.W.2d 881, 899 (1981) (sterilization is irreversible, and the judicial process could afford no method for correcting an error in the exercise of its discretion).

177. The probate court judge must hear the evidence and determine whether the proponent of the operation has met the clear and convincing evidence standard under the *Hayes* factors. If the proponent of the operation meets the burden of proof then authorization for the operation also comes from the court.

178. 316 U.S. 535 (1942).

179. 410 U.S. 113 (1973).

180. *See supra* note 36 and accompanying text.

181. Roe v. Wade, 410 U.S. 113, 154-55 (1973).

182. *See supra* note 25.

183. *See* Note, *Due Process Privacy*, *supra* note 57, at 515 (right to personal privacy is

Although other state supreme courts have adopted common law standards to allow access to the right to procreative choice, the decision in *Valerie N.* is novel in that the court ignored the question of probate court jurisdiction. In addition to *Hayes*[184] and *Grady,* [185] many decisions expressly address the question of jurisdiction.[186] The court's power to order nonvoluntary sterilization is not as clear as the majority's opinion would suggest. A number of state court decisions have precluded judicial action absent statutory authority, and those cases that allow judicial action do so in the absence of statutory authority to the contrary.[187] However, the *Valerie N.* majority was confronted with both a state statute expressly denying jurisdiction,[188] as well as appellate court precedent directly opposed to probate court authority to order sterilization. Consequently, since the court failed to address the question of jurisdiction, the majority implicitly accepted the rationale of those state court decisions which approve jurisdiction. However, they did so without adequately analyzing or distinquishing the rationale of other state court decisions which have held that the legislature is better able to address the interests involved in this confrontation of fundamental rights.[189] Legislative enactment of Probate Code section 2356(d) together with the repeal of Welfare and Institutions Code section 7254 clearly demonstrate the legislature's intent to restrict probate court jurisdiction.[190] In light of the irreversibility of a sterilization operation, the majority moved too quickly in discounting the legislature's decision to end nonvoluntary sterilization in California. Instead, the court should have addressed the controversy involved in the jurisdiction issue. However, it is not unrealistic to assume that the legislature believed that the opportunity for discretion in the determination of the indivdiual's

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based on the individual's interest in bodily autonomy). *See also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (right of an individual to be free from unwarranted governmental intrusion on right to use contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couples to be free from governmental interference with procreative choice).

184. 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).

185. 85 N.J. 235, 426 A.2d 467 (1981).

186. *See supra* note 61.

187. *See In re* Moe, 385 Mass. 555, 562, 432 N.E.2d 712, 719 (1982); *In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981); *In re* Grady, 85 N.J. 235, 237, 426 A.2d 467, 470 (1981); *In re* Hayes, 93 Wash. 2d 228, 231, 608 P.2d 635, 638 (1980) (en banc).

188. CAL. PROB. CODE § 2356(d) (1979).

189. *See supra* note 97.

190. *See In re* Eberhardy, 102 Wis. 2d 539, 566, 307 N.W.2d 881, 893 (1981). In *Eberhardy,* the court held that lower courts had jurisdiction to authorize sterilization petitions. However, the court refused to allow those courts to exercise their jurisdictional power. Instead, the court decided to defer to the legislature due to the irreversibility of the operation and the potential infringement upon the right to procreate. The court stated that "the legislature is far better able, by the hearing process to consider a broad range of factual situations." *Id.* The court also believed that the legislature could best attempt an in-depth study on the issues involved, with the help of experts in psychology, psychiatry, sociology, and medicine.

"best interest" could not be eliminated even by strict substantive and procedural safeguards.[191]

While all three dissenting opinions raised serious questions regarding the ramifications of state-authorized sterilization of the developmentally disabled, they failed to recognize the possibility that denial of probate court authority to approve sterilizations in exceptional cases "decides" the question of procreative choice in favor of procreation, but without any safeguards or standards to address the truly exceptional case.[192] In effect, the dissenting opinions would resolve the "decision" in favor of procreation no matter how beneficial the operation would be for the incompetent individual, and no matter how traumatic pregnancy and childbirth would be for the individual. The major strength of the dissents' position is that they completely preclude probate court authority and discretion, and protect the individual's fundamental right to procreation. On the other hand, the weakness of their position is that they fail to recognize situations in which the "best interests" of the individual overwhelmingly compel access to the equally fundamental right to procreative choice.[193]

The majority opinion provides the incompetent developmentally disabled a forum in which to assert the fundamental right to procreative choice. However, the requirements under section 2357 and the *Hayes* factors are an inadequate replacement for well-crafted legislative standards designed to specifically reduce the opportunity for abusive sterilization. As a result of the majority's standards, even developmentally disabled individuals that would benefit most from sterilization may be denied the chance to exercise their newly-recognized constitutional right; an anomalous result from a court concerned about the incompetent individual's chance to maximize his or her potential.

IV. IMPACT

The *Conservatorship of Valerie N.* decision is significant because it adds California to the growing minority of states that recognize the procreative rights of the incompetent developmentally disabled. The *Valerie N.* decision demonstrates that despite the resulting controversy, the states are concerned

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191. *Valerie N.*, 40 Cal. 3d at 154, 707 P.2d at 791, 219 Cal. Rptr. at 408.

192. *Id.* at 153, 707 P.2d at 781, 219 Cal. Rptr. at 407 (Lucas, J., concurring and dissenting). Justice Lucas stated that the legislature had a compelling state interest in enacting Probate Code section 2356(d). Moreover, he believed that the history of state compulsory sterilization could have made the legislature decide that the potential for abuse was too great to allow any court-authorized sterilizations. He also believed that the majority should have deferred to the legislature due to the irreversibilty of the operation.

193. *See In re* Eberhardy, 102 Wis. 2d 539, 597, 307 N.W.2d 881, 907 (1981) (Day, J., dissenting) (what the majority does not recognize is that by refusing to allow the individual's parents or guardians to decide in favor of sterilization, the majority decides the question in favor of procreation and potentially against the individual's best interests).

about allowing the developmentally disabled more freedom to live and interact outside of the institutions. Other states may also decide to afford the developmentally disabled their procreative rights to seek sterilization where sterilization is the only practical method of birth control available for the individual. These other states will probably also decide to adopt standards culled from the *Hayes, Grady*, and *Valerie N.* decisions. However, if they adopt a medical necessity prerequisite, or only allow sterilization if supervision is an inapplicable means of birth control, they will not be affording the developmentally disabled access to their newly recognized procreative rights.

The *Valerie N.* majority's opinion created ambiguities in the standards governing nonvoluntary sterilization of the developmentally disabled. Probate court judges will have to resolve these ambiguities on a case-by-case basis, and the standards are subject to both broad and narrow interpretations. Thus, the probate court judges must determine the construction to be given to the medical necessity requirement. Narrowly interpreted, the standard could be read to preclude access to court-authorized sterilization even where there is clear, cogent, and convincing evidence that the individual would suffer severe psychiatric harm if she became pregnant and went through childbirth. However, if judges read the section broadly, then severe psychiatric harm could be sufficient to allow further review under the *Hayes* factors.[194]

If the proponent of the sterilizaton has met and satisfied the medical necessity requirement, the probate court judge must then analyze the evidence under the *Hayes* factors and any other relevant factors brought to the attention of the court.[195] The *Hayes* factors are also ambiguous as to certain probate court determinations. For example, the requirement of "less drastic means of contraception" can be read narrowly to require that several formulas of birth control pills have proven "unworkable or inapplicable" as contraception. The majority opinion seems to favor the narrow reading.[196] Conversely, the probate judge could read the language to conclude that only one formula of birth control pill need be tried, and if the individual rejects that formula, then the birth control pill has been "proven unworkable or inapplicable" as a contraceptive measure.[197]

Moreover, a probate court judge could read the requirement narrowly to require that supervision be proven inapplicable by clear, cogent, and con-

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194. *See supra* note 32-38 and accompanying text.

195. *See supra* note 146. The majority's narrow reading of the medical necessity standard is contrary to prior decisions utilizing a medical necessity requirement in the context of the sterilization of the mentally retarded.

196. *Valerie N.*, 40 Cal. 3d at 150, 707 P.2d at 777, 219 Cal. Rptr. at 404.

197. *Id.* at 150 n.28, 707 P.2d at 777 n.28, 219 Cal. Rptr. at 404 n.28. In a footnote the majority stated that "forty-nine oral contraceptives are identified in the 1984 Physician's Desk Reference." *Id.* The majority opinion also stated that the record did not show "whether or not more than one formulation of birth control pill was tried." *Id.*

vincing evidence. Conversely, the judge could read the supervision requirement consistently with the majority's habilitation rationale and conclude that supervision need only be inapplicable where it would not substantially interfere with the individual's habilitation.

The confusion and complexity of the relationship between the medical necessity threshold requirement and the *Hayes* common law standards can be best appreciated by analysis of a hypothetical case based on the facts of *Conservatorship of Valerie N.* Assume that the parents of a twenty-five year old developmentally disabled woman petition the probate court to be appointed conservators of the woman and for additional powers to consent to a sterilization operation for her. The conservatee suffers from Down's Syndrome, has an I.Q. of thirty and the developmental level of a four year old child. Moreover, the conservators assert that the individual has not been sexually active in the past and has physically rejected birth control pills while in her early teens.

The conservatee's physician and psychologist assert in their declarations that the conservatee is physically capable of procreation and is unable to apply, or understand the implications of not applying less restrictive forms of contraception. An intrauterine device (IUD) is also not feasible because the conservatee refuses to co-operate in a pelvic exam. In addition, all three declarants agree that pregnancy and childbirth would cause severe psychiatric harm to the conservatee. Finally, the counselor has also stated that the woman's parents have isolated her from society and social activity due to the fear that she might become pregnant and that this isolation has substantially interfered with her ability to interact with other individuals.

The conservators' reason for petitioning the court for the operation is to allow the conservatee the opportunity to participate in a state and federally funded program designed to allow the developmentally disabled to live in a community setting that provides for greater social interaction without the need for constant supervision.

Under the majority's decision in *Valerie N.*, the case would be scrutinized under the medical necessity threshold requirement of section 2357. This section requires that the conservatee be represented by an independent guardian *ad litem,* and provides that "clear, cogent, and convincing evidence" of the "necessity" for the operation be presented. The hypothetical facts include the declarations of the conservatee's personal physicians and counselor, and all three agree that the conservatee would suffer "severe psychiatric harm" if she were to become pregnant. However, under the majority's opinion, "psychiatric" harm was not accepted as sufficient evidence of medical necessity under section 2357. The conservators seek sterilization as a nontheraputic method of contraception and not as a theraputic measure to protect the conservatee's life or physical health.[198] Thus, under the majority's

198. This reading of the "less intrusive" factor would better promote the individual's

analysis, this case would end here despite the counselor's declaration that the conservatee's isolation has interfered with her interest in maximizing her developmental potential.

Alternatively, if the probate court judge reads the medical necessity requirement broadly to encompass psychiatric harm, and the proponent proves the harm by clear, cogent, and convincing evidence, then the next step would be analysis under the *Hayes* factors. The *Hayes* factors place the burden of proof on the proponent of the operation. Due to the extent of the conservatee's disability, the hypothetical conservator will probably be able to prove that the conservatee is presently incapable of choice with regard to sterilization and not likely to develop the ability in the reasonably foreseeable future.

Analysis under the remaining factors is more difficult because the court could give them a broad or narrow interpretation. First, the proponent must prove by clear, cogent, and convincing evidence that the conservatee is likely to engage in sexual activity at the present time or the near future under circumstances likely to result in pregnancy. A narrow interpretation of this standard could require the individual to have engaged in sexual activity in the past or present. It would be very difficult to prove that contraception was necessary without some evidence of past sexual activity. Thus, even though the conservatee made "inappropriate sexual advances" under the facts of the hypothetical, the probate court could decide that there was no "necessity for contraception." If, on the other hand, a probate judge were to give the standard a broader interpretation, the judge could conclude that the lack of evidence of past sexual activity is not determinative. Instead, the court could construe the factor to mean that the absence of constant supervision presents a possibility of future sexual activity. Thus, the effectiveness of the parents' efforts to supervise their daughter and the isolation of their daughter from social activity, would not foreclose sterilization when they want to allow her more freedom.

The requirement of "less drastic methods of contraception" also leaves room for broad and narrow interpretations. The applicability of birth control pills as contraception for an individual presents the question of how many formulations of the pill must be proven "unworkable or inapplicable." The majority opinion would require evidence that the conservatee physically rejected several formulations before that method of contraception was ruled out. However, probate court judges could require only one or two formulations to be proven inapplicable.

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interest in obtaining a "best interest" sterilization. However, because of the irreversibilty of a sterilization operation, this factor can best be read as requiring some reasonable number of formulations to be tried and rejected. The exact number would depend on the reason the individual rejected the pill, and on the possibility that different formulations would be rejected by the individual. *See infra* note 204.

Moreover, the proponent of the operation would have to prove that supervision was "unworkable or inapplicable" as a method of contraception. Under the facts of the hypothetical, the conservatee's parents have prevented the conservatee from engaging in any sexual activity. In order for the conservators to meet the "clear, cogent, and convincing evidence" standard they would have to prove that the conservatee had engaged in sexual activity in the past despite their best efforts at supervision. If the probate court judge reads the factor as supervision of all interaction between the conservatee and members of the opposite sex, then that method of contraception has not been "proven unworkable or inapplicable." The result is continued isolation and supervision for the conservatee, and the parents' desire to allow their daughter more freedom from isolation could be defeated.

Finally, the requirement that the conservators prove by clear, cogent, and convincing evidence that science is not on the verge of discovering new, reversible contraception presents a difficult obstacle to court-authorized sterilization. It requires the conservator to prove a negative[199] and does not account for the possibility that future methods of contraception may be unworkable or inapplicable for the same reasons that current methods may be inapplicable.[200] Under the facts of the hypothetical, the conservators have a very high burden of proof, and the *Valerie N.* majority left the probate court judge without guidance on this issue. In future cases, the state courts that adopt similar standards may have to decide whether a medical necessity requirement presents an undue burden on the exercise of the right to procreative choice recognized by the *Valerie N.* majority and by other state courts.[201]

Very few, if any, petitions for sterilization will meet the medical necessity requirement. Consequently, analysis under the *Hayes* factors often will not be necessary, and few wards or conservatees will be sterilized. Moreover, the state courts may have to determine what construction the standards should be given by the probate courts. The *Valerie N.* majority did not fully define the scope of the "less drastic alternatives" standard, nor did it completely

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199. Nontheraputic sterilization is sterilization for the benefit of the individual as a method of contraception in which neither the life nor health of the individual is in jeopardy. *See* Gray, *supra* note 20, at 533; Comment, *A Woman's Right, supra* note 39.

Theraputic sterilization may be necessary to protect the physical health of the patient. For example, an operation may be necessary where a disease makes pregnancy dangerous for the woman. *See* Maxon v. Superior Court, 135 Cal. App. 3d 626, 185 Cal. Rptr. 516 (3rd. Dist. 1982) (theraputic sterilization approved where developmentally disabled woman had 80% risk of developing cervical cancer without the operation).

200. *Hayes,* 93 Wash. 2d at 242, 608 P.2d at 644 (Stafford, J., dissenting) ("[c]urrent state of medical knowledge" factor requires the proponent of the operation to litigate "nebulous eventualities of science"). *See also* Comment, *Clear and Convincing Evidence Standard, supra* note 66 (*Hayes* factor concerning future contraceptive developments requires the proponent to prove the impossible and forecloses sterilization).

201. *Hayes,* 93 Wash. 2d at 242, 608 P.2d at 644 (Stafford, J., dissenting).

rule out the possibility of allowing severe psychiatric harm to fulfill the medical necessity requirement. For example, the courts may have to decide whether a probate court judge properly authorized a petition for sterilization where the proponent produced clear, cogent, and convincing evidence that a conservatee rejected one or two formulas of birth control pills, but the other forty-seven were not tried.[202]

The *Valerie N.* decision may also impact on collateral issues involving other substantive due process rights. Under the court's decision, the developmentally disabled now may argue that they have the right to obtain an abortion or to have their guardians and conservators assert that right for them.[203] Under the *Valerie N.* standards, many of the same problems would exist as did under the right to procreative choice. The medical necessity requirement may unduly burden the right to obtain an abortion during the first trimester of pregnancy.[204] Under United States Supreme Court decisions, the state does not have the constitutional authority to give a third party an absolute veto over the decision of the physician and the patient to terminate pregnancy.[205] Perhaps the *Valerie N.* decision may produce a further exten-

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202. *See supra* note 13.

203. The number of formulations of birth control pills that must be tried is dependent upon the number of formulations that are different from each other, and thus provide the possibility that the individual will not reject them. For example, birth control pills come in two basic types: "combination" pills contain variable levels of estrogen and progestogen; "progestogen" pills contain only the hormone progestogen. The combination pill is both more widely used and more effective. Depending upon the individual's adverse symptoms, a doctor could prescribe a combination pill with a high, medium, or low level of estrogen, and a high, medium, or low level of progestogen. Thus, there are a total of nine combinations. In addition, "progestogen" pills could contain either progestogen, or a synthetic progestational agent such as norethundrone or norgestral. *See* R. BRESSLER, M. BOGOUFF & G. SUBAN-SHOPE, THE PHYSICIAN'S DRUG MANUAL: PRESCRIPTION AND NONPRESCRIPTION DRUGS 831-32 (1981).

The number of formulations of oral contraceptives that must be ruled inapplicable in an individual's case will depend upon (1) the reasons for the individual's adverse reactions, and (2) the effectiveness of other formulations that would not cause a reaction. In order to protect the individual from an unnecessary operation, an attempt must be made to find a formulation that the individual can tolerate. Although this requirement may take time, it is preferable to sterilization of the individual where another less intrusive means of birth control is available.

In the probate court proceeding, the proponent of the operation must present evidence that the nine combinations of oral contraceptives, as well as the progestogen formula, have been either (1) tried and rejected due to the nature of the individual's disability; or (2) either rejected or contraindicated due to the nature of the individual's adverse reaction. The opponent of the operation can cross examine the witnesses and present evidence to show that certain formulations were not tried or are not inapplicable. The burden is on the proponent of the operation to disprove the applicability of this and other forms of less intrusive contraception.

204. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to obtain an abortion during first trimester of pregancy).

205. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (husband could not veto wife's decision to obtain an abortion). *But see* Bellotti v. Baird, 433 U.S. 622 (1979) (where minor is not sufficiently mature or emancipated, the state may require parental consent to an abortion).

sion of substituted judgment to allow the court to consent to an abortion for the developmentally disabled ward or conservatee. In light of the *Valerie N.* decision, one may persuasively argue that the right to obtain an abortion cannot be prohibited merely on the basis of the incompetent individual's disability.

Another collateral issue effected by the *Valerie N.* decision is the incompetent individual's right to refuse treatment. Courts have already utilized substituted judgment to consent to electric shock therapy,[206] chemotherapy,[207] and organ transplants.[208] The *Valerie N.* decision utilizes these decisions and grants the developmentally disabled rights that all competetent individuals possess. Implicitly, the *Valerie N.* decision confirms that the developmentally disabled have the constitutional right to terminate life support and drug therapy. Moreover, it seems that the incompetent also have the right to "consent" to operations that would promote their best interests such as an operation to correct a cleft palate or other deformity.[209] The *Valerie N.* decision recognizes the constitutional rights of the developmentally disabled and thus brings those individuals closer to the status of competent persons.

V. PROPOSAL FOR LEGISLATIVE FRAMEWORK

The *Valerie N,* decision adopted a medical necessity requirement and the *Hayes* framework as standards for court-authorized sterilization "pending action by the legislature to establish criteria and procedural protection." Because of the *Valerie N.* majority's decision to adopt a medical necessity requirement, state legislation regulating access to sterilization for the incompetent developmentally disabled is necessary. This proposal will allow the developmentally disabled greater opportunity to exercise their newly recognized procreative rights while protecting against the abuse prevelant under eugenic sterilization statutes.[210]

A. Incompetency as a Threshold Requirement

Under this proposal, the ward or conservatee would be represented in the probate proceeding by a disinterested guardian *ad litem*[211] to protect against

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206. Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976).

207. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.W.2d 417 (1977).

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

209. *In re* Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783 (1974) (court utilized substituted judgment to authorize surgery for incompetent individual for dental work, hand surgery, surgery for a cleft palate and jaw, and intercranial surgery for facial restoration). *Id.* at 785.

210. *See* Maher v. Roe, 432 U.S. 464 (1977) (state could refuse to provide Medicaid funding for nontheraputic abortions even though it funded the expenses of childbirth). The Supreme Court held that *Roe v. Wade* meant that a woman has a fundamental right to be free from "unduly burdensome interference with her freedom to decide whether to terminate pregnancy." *Id.* It did not mean that a woman had a fundamental right to an abortion. *Id.* at 473-74.

211. The judge would appoint a public defender to represent the interests of the incom-

a court-authorized sterilization that is not the last and best alternative for the individual. The proponent of the sterilization must prove by clear and convincing evidence that the ward or conservatee is unable to choose between sterilization and procreation and does not understand the relationship between sexual intercourse and conception.[212] The determination must be made on the basis of evidence provided by independent physical and psychological evaluation of the ward or conservatee by two physicians and two psychologists appointed by the court. Moreover, the probate court judge must meet with the ward or conservatee and attempt to elicit his or her views regarding sterilization, and his or her capacity for choice regarding procreation.[213]

Once the proponent establishes the individual's incompetency by clear and convincing evidence, the proponent must then prove that contraception is necessary for the individual. Proof of the necessity for contraception requires that: (1) the ward or conservatee is capable of procreation based on medical tests conducted by two independent physicians appointed by the court; and (2) that the ward or conservatee was or is sexually active, or that the absence of constant supervision or isolation presents a substantial likelihood of sexual activity in the future.[214] The proponent must also establish, by the testimony of physicians, that: (1) physical and psychological harm and complications that would result from pregnancy and childbirth; and (2) a lack of physical and psychological harm and complications would result from the sterilization operation. The opponent must be allowed to cross examine witnesses, and must be allowed to call physicians to demonstrate the possible consequences of a sterilization operation, or the lack of potential problems related to childbirth and pregnancy.

B. Less Drastic Alternatives

The proponent must also prove by clear and convincing evidence that all less drastic methods of contraception are unworkable or inapplicable. The

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petent individual. To ensure that the individual's best interests are fully represented in the proceedings, the guardian *ad litem* must be allowed to present evidence, call witnesses and cross examine witnesses at the probate hearing.

212. The standard of clear and convincing evidence should apply to these cases because that standard represents an intermediate standard of review that is appropriate where more is at stake than the mere loss of money. *See* Addington v. Texas, 441 U.S. 418, 423 (1979).

213. The judge must meet with the incompetent individual and attempt to elicit her views regarding sterilization, procreation and child-rearing. This attempt protects against situations involving truly involuntary sterilizations where the parents want to sterilize their child for their own reasons rather than for the child's best interests.

214. Although the court should take into account past sexual behavior, it should also focus on the programs available for the individual that allow more freedom from isolation and greater social contact. At the same time, an individual's sexual activity ten years earlier should not necessarily provide a basis for a probate court determination that the individual needs contraception now. Factors for the court to consider include (1) the incompetent individual's past sexual activity; (2) whether the individual is presently sexually active; and (3) the programs and opportunities for social interaction available to the individual in the absence of the problem of a potential pregnancy.

less drastic alternatives standard requires evidence that the individual has rejected at least five different formulation of birth control pills.[215] In addition, evidence must be presented that an IUD is unworkable or inapplicable for medical reasons including: (1) the dangers presented to the individual's health; and (2) complications presented by the individual's disability in the performance of a pelvic examination for the insertion of an IUD. The proponent must also produce clear and convincing evidence of the unavailability or inapplicability the other forms of contraception.

C. *Best Interests and Habilitation*

Finally, the court must examine other factors that demonstrate that the operation would be in the individual's best interest and promote the individual's habilitation. The court must take into account the individual's age, educability, and developmental capacity. The court must also consider the psychological harm that would result from continued isolation and supervision of the ward or conservatee, and the services and opportunities available for the individual that she would be allowed to participate in if not for the guardian or conservator's fears of potential pregnancy. Moreover, the court should consider the individual's capacity to care for a child when given reasonable assistance.[216] The standards must not include a medical necessity test because such a standard unduly burdens the incompetent individual's opportunity to obtain a court-authorized sterilization.

VI. CONCLUSION

As a result of the California Supreme Court's decision in *Conservatorship of Valerie N.*, the probate court now has the authority to authorize sterilization of the developmentally disabled. The probate court judge's discretion is circumscribed by strict substantive and procedural safeguards that protect against the abuse prevalent under state eugenic sterilization statutes. In adopting the safeguards, the court provided a forum in which the conservator or guardian of a ward or conservatee can assert the incompetent individual's right to procreative choice. However, the court's decision to adopt a strict medical necessity standard unduly burdens the individual's ability to obtain a sterilization that would be the last and best resort for the individual. The strict standard contradicts the majority's apparent concern for habilitation, and it does not adequately account for situations in which the individual would truly benefit from a sterilization operation where the individual's life or health are not in jeopardy.

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215. *See supra* note 204.

216. The court must consider (1) the individual's ability to care for a child if given reasonable assistance; and (2) the chance of the child being born retarded. This standard must also take into account the individual's potential for child care in the future. For example, if the individual is allowed greater social interaction and training, she may become able to care for a child if given reasonable assistance.

As a result of the decision in *Conservatorship of Valerie N.*, the developmentally disabled will be able to have the right to procreative choice asserted for them by their guardians and conservators. Thus, the developmentally disabled can come closer to attaining the same rights and freedoms that competent individuals possess. However, the majority's decision adopts guidelines that are not adequately delineated and which are therefore, subject to broad and narrow interpretations. Because the *Valerie N.* decision denies access to court-authorized sterilization in all but medically necessary situations, this Note sets forth guidelines that would protect the incompetent individual from abuse and provide greater access to the incompetent individual's newly recognized procreative rights.

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