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THE CAPACITY OF A MENTALLY RETARDED PERSON TO CONSENT: AN AMERICAN AND JEWISH LEGAL PERSPECTIVE

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I. INTRODUCTION

Mental retardation is an imprecise term used to describe the condition of a large group of people who do not possess the cognitive ability to meet the demands of society.[1] There are many causes of retardation including birth defects, head trauma, disease, and environmental factors.[2] The condition is not necessarily static, and in some cases it may be improved by training and support. Many retarded individuals can lead increasingly

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1. *See* Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1213, 1248 n.249 (1990). Note that for the purposes of this chapter, the terms "disabled" or "handicapped" are also used to described a person with diminished mental capacity.

2. *See id.* at 1213.

"normal" lives.[3] American jurisprudence recognizes that the mentally disabled are at a disadvantage and, therefore, limits their capacity to consent in certain legal situations.[4] Under the legal theory of *parens patriae*, the state may limit the power of a mentally disabled person to consent when the individual is deemed incapable of making competent decisions concerning a fundamental right.[5] Jewish law (Halacha) recognizes the same disadvantages but approaches the issue from a less paternalistic vantage. The obligation of society to aid the mentally incompetent person is considered fulfilling the higher ideals of Halachic law.

This chapter examines in Part I the American jurisprudence in fashioning safeguards for the protections of the mentally handicapped. Part II explores the Jewish priority of evaluating the extent to which a mentally incompetent person requires assistance by others in forming consent.

II. UNITED STATES LAW

In the United States, the capacity for the mentally disabled to consent[6] is governed by state laws and common law. Since there is a divergence of standards in common law and the individual states have formulated their own standards for consent, the standards applied are not identical. The standards governing the capacity to consent, however, are usually determined by evaluating the severity of the retardation.

The American Association on Mental Deficiency and the American Psychiatric Association divide retardation into four classifications according to intellectual functioning and adaptive behavior.[7] These categories are mild,

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3. *See* William Christian, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 413 (1994).

4. *See* People v. Cratsley, 653 N.E.2d 1162, 1164-65 (N.Y. 1995).

5. *Id.* at 1165.

6. In American jurisprudence, "consent" is a "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something [or agree to something] proposed by another." BLACK'S LAW DICTIONARY 305 (6th ed. 1990).

7. *See, e.g.*, Helvey v. Rednour, 408 N.E.2d 17, 21 (Ill. App. Ct. 1980) (stating the different classifications of mental retardation used by the American Association on Mental Deficiency and describing briefly how the magnitude of the disability can affect the outcome in an adoption case); Patricia Werner, *Terminating the Rights of Mentally Retarded Parents: Severing the Ties that Bind*, 22 J. MARSHALL. L. REV. 133, 133 n.1 (1988) (discussing the types of retardation used by the American Psychiatric Association).

moderate, severe, and profound retardation.[8] The differences in the functioning level of each classification can be paramount in decisions concerning whether a mentally disabled person has the capacity to consent. When the patient is mildly retarded, the mentally disabled person is usually held to be capable of giving consent. If the patient is profoundly retarded, consent is normally assumed by either a guardian, the courts, or the state.

State laws concerning the capacity to consent demonstrate the myriad of standards used to determine the severity of the retardation and whether a mentally disabled person has the capacity to consent. This area of American law is particularly fascinating since it adds another layer of debate to topics which are not without their own intrinsic legal and public policy controversy. The remainder of Part I of this chapter will explore how the issue of consent by the mentally disabled is considered in deciding issues concerning abortion, sterilization, adoption, participation in experimental medical research, medical treatment, institutional commitment, and sexual acts.

A. Abortion

Courts have held that the decision of whether to carry to term or to abort a child is a fundamental right held by all citizens including the mentally retarded or incompetent.[9] When a guardian is seeking an abortion for a mentally retarded ward, a court will first consider whether the ward has the capacity to consent. The court has to determine whether the ward, despite

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8. There are four subtypes of mental retardation based on the Wechsler Intelligence Quotient (IQ) ascribed to the person: (1) Mild: IQ 50-70. People within this range of retardation are often not distinguishable from normal children until later in life. They can generally learn academic skills until approximately the sixth-grade level and can usually achieve vocational and social skills sufficient for self-support. About 80% of mentally retarded people fall within this category; (2) Moderate: IQ 35-49. People falling within this range of retardation are likely to progress to, but not beyond, the second-grade level. They may be able to perform unskilled or semiskilled work when closely supervised. When under stress, they may need supervision and guidance; (3) Severe: IQ 20-34. Approximately 7% of the mentally retarded population falls within this range. They are generally unable to profit from vocational training and often have poor motor development; (4) Profound: IQ below 20. Less than 1% of the mentally retarded fall within this category. There may be impaired motor development. A person in this category may develop minimal self-care skills, and requires a highly structured and well-supervised environment. Werner, *supra* note 6, at 133 n.1 (quoting the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37-38 (3d ed. 1984)).

9. *See In re* Moe, 579 N.E.2d 682, 685 (Mass. App. Ct. 1991) (quoting *In re* Moe, 432 N.E.2d 712 (1982)) (the choice to "bear or beget a child is a right so fundamental that it must be extended to all persons, including those who are incompetent.").

her mental infirmity, is capable of making an informed decision.[10] If the ward can make an informed choice, then her decision is dispositive.[11] If the ward is deemed incapable of providing consent, the consent of the court or family members can be substituted for the ward's consent depending upon state statute. Courts are required to determine competency of a ward to consent to an abortion. When a court determines that the capacity to consent is lacking, some states use the doctrine of substituted judgment[12] or a best interest test.[13] Other states allow the authorized relative to have sole discretion to consent.[14]

Substituted judgment directs that judges base their decisions on what the incompetent person would decide "if he or she were competent."[15] This doctrine does not state that the judge has to make the best decision in light of the facts.[16] Instead, "[t]he courts . . . must endeavor, as accurately as possible, to determine the wants and needs of this ward as they relate to the abortion procedure."[17] If the ward is deemed incompetent to make the decision, the ward's expected preference is still a paramount consideration under the substituted judgment doctrine.[18]

The Massachusetts Appellate Court applied the substituted judgment doctrine in *In re Moe*,[19] The guardian, the patient's mother, sought an abortion for her 24-year-old daughter who was pregnant for the fifth time and had three previous abortions.[20] The daughter, who was borderline mildly retarded with an IQ in the high 70's to low 80's, also had a daughter who was

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10. *See id* at 686 (citing *In re Moe*, 432 N.E.2d at 712).

11. *See id.* "Only if the ward is determined to be incompetent to make the decision is a substituted judgment to be made." *Id.*

12. *See infra* notes 15-35 and accompanying text.

13. *See infra* notes 36-44 and accompanying text.

14. *See infra* notes 45-55 and accompanying text.

15. *In re Moe*, 432 N.E.2d at 720 (quoting *In re Moe*, 385 Mass. at 565).

16. *See id.*

17. *See id.* (quoting *In re Moe*, 385 Mass. at 566).

18. *See id.* at 720-721 (quoting *In re Moe*, 385 N.E.2d at 570).

> Even if the ward is found incompetent to make the decision, the ward's actual preference "is an important part of the substituted judgment determination. The result of the judge's exercise of discretion shall be the same decision which would be made by the incompetent person, 'but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person.'"

Id. (quoting *Moe*, 432 N.E.2d at 723).

19. *See In re Moe*, 579 N.E.2d at 685.

20. *See id.* at 683-84.

primarily cared for by the guardian.[21] The probate court denied the ward's request for an abortion holding her to be incompetent to make decisions concerning such procedures.[22] Yet, the Appellate Court reversed the probate court's order and granted petitioner the right to an abortion.[23]

The appellate court held that the determination that the ward had been in need of a guardian due to her mental retardation was not dispositive in reaching the determination that she was incompetent to consent to an abortion.[24] The court stated that "[a] person may be incompetent to make some decisions but competent to make others."[25] The probate court judge found that the patient was incompetent to make a decision concerning an abortion because she did not know the length of her pregnancy.[26] The appellate court, however, found this determination to be contrary to the ward's expressed preference and also contrary to the evaluations of an expert neurologist and psychologist who said the patient was competent to make the abortion decision even though she was not competent to raise a child.[27] The appellate court concluded that reversal of the probate court was required under the doctrine of substituted judgment regardless of the patient's competency. The preference of the patient must be considered in the decision and the probate judge did not adequately consider that preference.[28]

The probate court based its decision on the lack of medical necessity for the procedure.[29] The appellate court determined that the medically essential element is not a paramount consideration in the doctrine of substituted judgment.[30] While courts do not have to consider whether there is a

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21. *See id.* at 684-685. For an explanation of the different types of retardation, *see supra* note 8.

22. *See id.* at 685. Although the patient stated that she wanted the abortion, the probate court found that since "there [was] no compelling medical reasons for the abortion, the Court cannot state with clarity that it would be the ward's substituted judgment to assent to the recommended treatment," and therefore denied the petition to consent to the abortion. *Id.*

23. *See In re Moe*, 579 N.E.2d at 684.

24. *See id.* at 686.

25. *See id.*

26. *See id.* (The probate judge did not make any specific finding as to the patient's incompetency).

27. *See id.*

28. *See id.* at 686-87 ("In the absence of any evidence negating the ward's preference,... we consider that, as a matter of law, the [probate] judge in applying the substituted judgment analysis gave inadequate weight to the preference of the ward."). *Id* at 687.

29. *See id.* at 685 ("The judge's ruling denying the guardian's petition discounts the clear preference of the ward and appears to be based on the lack of a compelling medical reason for abortion."). *Id.*

30. *See id.* at 687.

compelling medical reason or necessity for the performance of an abortion,[31] medical necessity can be considered in implementing the substituted judgment doctrine.[32] The appellate decision also affirms that "the present and future incompetency of the individual" can be an included factor in the substituted judgment doctrine.[33]

There are jurisdictions which give broader power to guardians to act in the best interest of the mentally retarded ward. In *In re Estate of D.W.*, the Illinois Appellate Court opined that "[a]bsent any proof that the guardian was not acting in the best interest of [the ward], the trial court had no legal basis for denying the guardian's request for authority to consent to an abortion [for the ward]."[34] The court held that the Illinois statute[35] gives the guardian broad authority to act as long as it is within the best interests of the ward.[36] The court's role is to ensure that the decisions made by the guardian are in the best interest of the ward and to intervene only when the guardian's acts threaten to harm the mentally retarded person.[37]

In *Estate of D.W.*, a mother was seeking authority to consent to an abortion for her severely retarded 18-year-old daughter who possessed the intelligence of a 5-year-old.[38] The probate court denied the application for authority because an abortion was not necessary for the protection of the life or health of the patient.[39] The appellate court, however, found that there was no evidence to refute that an abortion was in the best interests of the patient. The appellate court reviewed the testimony of a psychologist, an obstetrician/gynecologist, and the patient's mother. These witnesses collectively testified that the young woman could not understand the consequences of being pregnant, that the delivery would pose serious health risks, and that the patient could not take care of herself or make rational decisions concerning her pregnancy.[40] Similar to the court's reasoning in *In re Moe*, the court in *Estate of D.W.* held that "there is no legal requirement

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31. *See id.* at 687; *see also In re* Estate of D.W., 481 N.E.2d 355 , 357 (Ill. App. Ct. 1985).

32. *See In re* Moe, 579 N.E.2d at 687 (citing *In re* Moe, 432 N.E.2d at 722 n.10).

33. *See id.* at 686 (citing *In re Moe*, 432 N.E.2d at 723).

34. *In re Estate of D.W.*, 481 N.E.2d 355, 357 (Ill. App. Ct. 1985).

35. *See* 755 ILL. COMP. STAT. ANN. 5/11a-17 (West 1992). This statute was cited in *Estate of D.W.* and the language was formerly found in 110 1/2 ILL. COMP. STAT. ANN. 11a-17(a).

36. *See In re* Estate of D.W., 481 N.E.2d at 356.

37. *See id.* at 356-357.

38. *See id.* at 355.

39. *See id.* at 356.

40. *See id.*

that a medical necessity exist before a guardian can consent to an abortion for a ward."[41]

New York law provides the broadest authority for family members to consent to an abortion for a mentally retarded woman, allowing the court to resolve only whether the patient can give consent.[42] The court only makes the ultimate decision of whether an abortion should be performed when there are no family members.[43] When the "substantial judgment" of an appropriate relative is available, the court need not apply the "best interest" standard that demands a judge's subjective opinion.[44] Under New York law, the director of a medicare facility needs the consent of the patient[45] or of a person who is authorized to act on behalf of the patient, such as a spouse, parent, adult child, or court, before performing surgery.[46]

In *In re Barbara C.*, a director of a mental health facility sought permission to perform an abortion on a profoundly retarded 25-year-old with the equivalent mental age of two.[47] Barbara was held to be "clearly incapable of giving such consent,"[48] but the court did not provide any analysis as to her inability to consent beyond finding her mental age being that of a 2-year-old. The court held that once the patient is considered incompetent to make the decision, then the relative can consent.[49] If there is an available relative, then the court only determines whether the patient can

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41. *See id.* at 357.

42. *See In re* Barbara C., 474 N.Y.S.2d 799, 801 (N.Y. App. Div. 1984) ("[W]here an appropriate relative is available to grant or deny consent, the sole role of the judiciary is to resolve any dispute which may arise concerning the patient's ability to grant consent. Once the incapacity of the patient to consent has been established, the institution may rely on the consent of the patient's prescribed relative. . . ."). *See id.*

43. *See id.* (stating that if a mentally retarded female does not have any "prescribed relatives is available to give consent," then the court has to exercise its *parens patriae* power to determine whether the procedure is in the best interests of the patient). *See id.*

44. *See id.*

45. *See* N.Y. MENTAL HYG. LAW § 33.03(b)(4) (McKinney 1996) (stating that the director needs to obtain consent for "surgery [or] major medical treatment in the nature of surgery.").

46. *See* N.Y. COMP. CODES R. & REGS. tit. 14, § 27.9(b); *see also Barbara C.*, 474 N.Y.S.2d at 801.

47. *See In re Barbara C.* at 800; *see also In re* Barbara C., 455 N.Y.S.2d 182, 183 (Sup. Ct. 1982); *see also supra*, note 8 (for a discussion of the classifications of mental retardation).

48. *In re Barbara C.*, 474 N.Y.S.2d at 800.

49. *See id.* (stating that when a patient's incapacity to consent is beyond legal question, an institution can accept consent from an authorized relative without judicial review).

consent.[50] If no relative is available, judicial approval must be sought, and only at this point will the court consider the best interests of the patient.[51]

In analyzing these cases, we conclude that the common thread connecting differing jurisdictions concerning standards of consent is that courts will base the capacity to consent to abortion primarily on a determination of the severity of the mental retardation.

B. Sterilization

The laws concerning sterilization place emphasis on consent being obtained from the mentally retarded person. Similar to considerations regarding ability to consent to an abortion, courts have found that consent for sterilizations can be delegated on behalf of a mentally disabled individual.

The first consideration is whether a mentally retarded patient can give consent to the sterilization.[52] Many mentally retarded people are "capable of understanding the implications of sterilization and the responsibilities of parenthood, and are competent to make a decision regarding sterilization."[53] A mentally retarded patient is capable of consenting to sterilization if the patient "understands the nature of the district court's proceedings, the relationship between sexual activity and reproduction and the consequences of the sterilization procedure."[54] This understanding, however, need not include a technical knowledge of bodily functions or an understanding of the possible complications or risks resulting from a sterilization procedure.[55] The patient also does not need to understand the risks associated with pregnancy or childbirth to have the capacity to consent.[56] Furthermore, a court cannot say that a person is incompetent to give consent just because the decision made by the individual may be considered unreasonable.[57]

These standards were applied in *In re Romero* where a guardian, the mother of the patient, petitioned the court for an order to sterilize her thirty-seven year-old daughter who had two children.[58] The patient was mildly impaired due to oxygen deprivation resulting in brain damage when she was

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50. *See id.*

51. *See id.*

52. *See In re* Romero, 790 P.2d 819, 822 (Colo. 1990).

53. *See id.*

54. *See id.* at 823.

55. *See id.*

56. *See id.*

57. *See In re Romero*, 790 P.2d at 822.

58. *See id.*

thirty-three.[59] The Supreme Court of Colorado held that the patient had the capacity to withhold consent to the procedure.[60] She had an intelligence quotient of 74, barely higher than the quotient of 70, below which a person is legally considered mentally retarded.[61] In addition, her testimony was articulate, she demonstrated an understanding of the court procedure, and expressly stated that she wanted the ability to have additional children.[62] She also showed an understanding that it would be risky having a child as a diabetic, but asserted that she wanted the option of having more children if her condition improved.[63] The court concluded that "a court's role is not to pass judgment upon the wisdom of Ms. Romero's decision or the importance she assigns to potential risks and benefits. If Ms. Romero is competent to make a decision, she must remain free to do so . . . ." Therefore, the sterilization order was denied.[64]

Other considerations in sterilization cases are whether the procedure is medically essential[65] or in the retarded patient's best interests.[66] These analyses are applied only after the petitioner demonstrates that the patient is incompetent to consent and that their ability to give consent will not improve over time.[67] When the patient is adjudicated to be incompetent to make the decision, most states use some type of variation of the medically essential and best interests tests. The best interests analysis includes the wishes of the person, and states that the person's desire not to be sterilized must weigh heavily against authorizing the procedure."[68] A procedure is considered medically essential if it is "clearly necessary to preserve the life or physical or mental health" of the mentally retarded individual.[69] The medically essential test can include different components, such as the medical risks of

59. *See id.* at 820.

60. *See id.* at 823.

61. *See id.* at 823.

62. *See In re Romero* at 823.

63. *See id.* at 824.

64. *See id.*

65. *See id.* at 822; *see also* Chasse v. Mazerolle, 580 A.2d 155 (Me. 1990) (holding that in order to get a sterilization order it is necessary to demonstrate that the procedure would prevent further mental deficiency or that the physical or mental condition of the person would be improved).

66. *See generally In re* Romero, 790 P.2d 819.

67. *See id.*

68. *In re* A.W., 637 P.2d 366, 372 (Colo. 1981).

69. *See id* at 372.

sterilization,[70] whether alternative methods of contraception are available to the patient,[71] and whether the mentally disabled patient is likely to engage in intercourse[72] or is capable of becoming pregnant.[73]

Another issue is who is allowed to give consent when the mentally retarded person is deemed incapable of giving consent. Most states delegate this role to the courts and not to the guardians.[74] Some courts have noted that allowing the parents or guardians to substitute their decision and consent is not adequate since parental consent to sterilization has a history of being abused, and it cannot be presumed that they have the same interests as their child.[75] This is a significant point of departure from permitted delegated consent in abortion, where parents and guardians are given the responsibility more frequently. Courts may be less inclined to allow for the possibility of self-interested third parties when the result of consent permanently impacts future choices in the life of the mentally disabled individual.

C. Adoption

The ability to adopt the child of a mentally disabled parent hinges upon the termination of the disabled parent's parental rights. When the parent is mentally disabled, the ability to obtain the parent's consent is complex and varies between states, but is always determined pursuant to a hearing.[76] The majority of states hold that the capacity to consent is determined by analyzing whether the parent is capable of caring for the child, and/or considerations of the best interest of the child.

Initially, a hearing must be held to determine the capacity and fitness of the mentally retarded parent. In *Helvey v. Rednour*,[77] the Illinois Appellate

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70. *See In re* Welfare of Hillstrom, 363 N.W.2d 871, 874, 877 (Minn. Ct. App. 1985).

71. *See id. See also* In re A.W., 637 P.2d at 376.

72. *See In re Welfare of Hillstrom*, 363 N.W.2d 871, 874; *see also In re A.W.*, 637 P.2d at 376.

73. *See id* at 877; *see also In re A.W.*, 637 P.2d at 376.

74. *See In re Welfare of Hillstrom*, 363 N.W.2d at 875 ("[The laws] provide for sterilization when the mentally retarded person cannot make a personal procreative choice, and the exercise of the personal procreative right must come from the court."); *see also In re* A.W., 637 P.2d at 375 (stating that neither the parents or guardians, or a mentally retarded minor, can consent to sterilization without a court order).

75. *See, e.g., In re* A.W., 637 P.2d at 370 ("The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights."). *Id.*

76. Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (holding that the requirements of due process need to be met to terminate parental rights).

77. 408 N.E.2d 17 (Ill. App. Ct. 1980).

Court held that the Illinois Adoption Act[78] was unconstitutional because it appointed a guardian ad litem with the power to consent to adoption for mentally retarded parents.[79] This act was held unconstitutional because it omitted a fitness hearing, a violation of the Equal Protection and the Due Process Clauses of the Fourteenth Amendment.[80] Since there was no requirement in the statute mandating a "finding of parental unfitness as a condition precedent to the appointment of the guardian," the statute "creates a presumption that all retarded parents are unfit, which is unconstitutional."[81] The court stated that although the right to procreate and raise children is a fundamental right,[82] the right of the mentally retarded to raise children is not absolute.[83] This right can be curtailed by the state if there is a compelling interest.[84] The court states that this right can be impaired if it is in the best interests of the child.[85] The court held that a fitness hearing is required and if the parent is determined to be unfit, then their consent to the adoption will be waived. The best interests of the child are paramount, but if unfitness cannot be established, then the welfare of the child becomes *de minimis*.[86] The court notes that these hearings are important in cases of mild mental retardation where the parents may be capable of raising a child but may still be considered disabled.

> Any presumption of unfitness is particularly inappropriate when it involves parents who fall into the mildly retarded category. Since these parents are borderline cases, it cannot be said with certainty whether they are in fact retarded or, if they are, whether they display a character trait deemed to render them unfit to raise children.[87]

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78. ILL. STAT., ch. 40, ¶ 1501 et seq. (1977). This statute is now located at 750 ILL. COMP. STAT. ANN. 50/1 et seq.

79. *See Helvey*, 408 N.E.2d. at 23.

80. *See id.*

81. *See id.* at 20.

82. *See id.* at 21 (citing Zablocki v. Redhail, 434 U.S. 374 (1978); *see also* Carey v. Population Services International, 431 U.S. 678 (1977); *see also* Roe v. Wade, 410 U.S. 113 (1973); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965).

83. *See Helvey*, 408 N.E.2d 17, 21.

84. *See id.*

85. *See id.*

86. *See id.* at 22.

87. *See id.* at 21, 22.

During the hearing process, courts decide whether to terminate parental rights by using a combination of parental fitness and best interests of the child tests to determine whether the mentally retarded parent has the ability to consent. In *Adoption of Abigail*,[88] the court declared that the mental retardation of a parent is not sufficient grounds for the termination of parental rights.[89] For the parental rights to be terminated, it is necessary to show that the mental retardation affects the parent's fitness or the child's well-being.[90]

This is a factual determination which is taken on a case-by-case basis. In *Abigail*, the mother was mildly mentally retarded, but her condition was deemed severe enough that she could not care for her mentally retarded daughter. The court noted that "[i]f the question were simply one of the mother's limited intelligence, matched with a child of normal needs, there might not be a lawful basis for the radical step of terminating the link between natural mother and child."[91] But the mother was of such limited judgment,[92] the court held that she was incapable of administering the child's required medication and performing the child's speech and physical therapy.[93] "[These] activities require concentration and orderliness which cannot reasonably be expected of someone with the mother's limited abilities."[94] The court agreed with the probate judge's application of the combined parental fitness and best interests analysis and with the judge's conclusion that "the mother's deficits, matched with Abigail's deficits, would put the child's welfare greatly at hazard."[95]

Similarly, in *In re A.M.K.*,[96] the parental rights of a mildly retarded father with a personality disorder and a borderline retarded mother with an IQ in the low 80s were terminated because they were incapable of caring for their developmentally and physically disabled child.[97] The Department of Social Services provided them with training to care for their child and to

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88. 499 N.E.2d 1234 (Mass. App. Ct. 1986).

89. *See id.* at 1237 (citing Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption, 20 Mass. App. Ct. 689, 696 & n. 4 (1985)).

90. *See id.* (citing Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption, 392 Mass. 696, 701 (1984)).

91. *See id.*

92. *See id.* at 1236.

93. *See id.* at 1237.

94. *See id.*

95. *See id.* (citing Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 328 N.E.2d 854 (Mass. 1975); Petition of Catholic Charitable Bureau to Dispense with Consent to Adoption, 430 N.E.2d 1245 (Mass. 1982)).

96. 420 N.W.2d 718 (1988).

97. *See id.* at 719.

administer the child's physical therapy,[98] but the parents were unable to do so.[99] The juvenile court terminated the parental rights,[100] and the appellate court agreed,[101] because a court may terminate parental rights when it is in the best interests of the child to do so and "[when] '[t]he parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.'"[102]

Some states only consider whether the parent is capable of caring for the child as the standard as to whether a mentally disabled parent is capable of consent. In New York, it is not necessary to obtain the consent of a mentally retarded parent in order for the child to be adopted.[103] Nevertheless, New York has produced guidelines which must be followed to ensure that the due process rights of all parties are protected.[104] In *In re Caroline*,[105] the child of mildly mentally retarded parents was adopted in a private placement adoption[106] by the sister and brother-in-law of the father who were raising the child.[107] The parents retained the right to visit the child at least once a week.[108] Adoption without the consent of the mentally disabled parents is allowed when it is shown by clear and convincing proof that they are not capable of caring for the child.[109]

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98. *See id.*

99. *See id.* at 720.

100. *See id.* at 719.

101. *See id.*

102. *See id.* at 720 (citing NEB. REV. STAT. § 43-292(5) (Reissue 1984)).

103. *See* N.Y. DOM. REL. LAW §111(2)(d) (McKinney 1988) (stating that a court can dispense with parental consent of parents who by reason of mental retardation is presently and for the foreseeable future unable to provide for a child).

104. *See In re* Adoptions of Michael S. & Samantha S., 607 N.Y.S.2d 214, 215 (Fam. Ct. 1993) (stating that proceedings must be originated by an authorized agency or foster parent in a public placement; whereas in a private placement the legal guardian must be notified and the court will usually notify all parties believed to be necessary for the adoption).

105. 638 N.Y.S.2d 997 (1996).

106. A private placement adoption is "any adoption other than that of a minor who has been placed for adoption by an authorized agency. . . ." *Id.* at 998 (quoting N.Y. DOM. REL. LAW §109(5) (McKinney 1988)).

107. *See id.*

108. *See id.*

109. *See id.* at 999. New York law states that "consent shall not be required of a parent . . . who, by reason of . . . mental retardation . . . is presently and for the foreseeable future unable to provide proper care for the child." *Id.* (quoting N.Y. DOM. REL. LAW §111(2)(d) (McKinney 1988)). Social Services Law § 384-b(6)(b) defines mental retardation as "subaverage intellectual functioning which originates during the developmental period and

An additional issue concerning the mentally retarded parent's capacity to consent is raised by cases where parents want to rescind their consent after the adoption has occurred. If a mentally retarded parent attempts to withdraw consent, the court has to determine whether the mentally retarded person initially gave informed and intelligent consent to the adoption.[110] In *Good v. Zavala*,[111] this issue was presented when a mildly retarded mother withdrew her consent to the adoption of her daughter after signing a consent agreement.[112] While the mother recognized that she could not raise her daughter, she sought advice concerning adoption and its legal alternatives, and understood that if she gave her daughter up for adoption, she would no longer be her child's legal mother.[113] The court in rejecting the withdrawal of consent opined that the mother "formed a sane, rational, and intelligent decision to give her daughter up for adoption; that [she] gave a knowing, informed, and intelligent consent to the adoption; and that she understood the important ramification of her consent to the adoption of her child."[114]

Some courts also consider the ability to nullify an adoption as a contract matter. In such a situation, the burden to prove incapacity to contract is on the mentally retarded parent, and must be proven by convincing evidence.[115] In *In re Adoption of Smith*, the mother, who was mildly retarded, wanted to invalidate her written surrender of her children because she did not comprehend that she was giving up her parental rights.[116] The adoptive

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is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child. . . ." A determination under the foregoing subdivision that a parent, by reason of mental retardation, is presently and for the foreseeable future unable to properly and adequately care for his or her child must be supported by clear and convincing proof. *Id.* (internal citations omitted). For more on the clear and convincing standard of proof, see *In re* Inquiry into J.L.B. Youth in Need of Care, 594 P.2d 1127 (Mont. 1979) (holding that a borderline mentally retarded mother did not have the power to consent to the adoption because she was proven to be an unfit parent by substantial credible evidence). *Id.* at 1137.

110. *See, e.g.*, Good v. Zavala, 531 So. 2d 909, 910 (Ala. Civ. App. 1988) ("A natural parent's mere change of mind cannot justify a rescission of the natural parent's consent to an adoption provided the natural parent gave an informed, intelligent consent and all of the procedural safeguards were followed.)" *Id.* (citing Ex Parte Nice, 429 So. 2d 265 (Ala. 1982)).

111. *See* 531 So. 2d 909 (Ala. Civ. App. 1988).

112. *See id.* at 910.

113. *See id.*

114. *See id.*

115. *See In re* Adoption of Smith, 578 So. 2d 988, 992 (La. Ct. App. 1991).

116. *See id.* at 989-990. The court noted that she has the ability to remember addresses, numbers, and birthdays, but reads at only a second grade level and does not understand concrete words. *See id.*

parents were trusted friends and neighbors of the mother. They cared for two of her children while the third was in the hospital, and aided the mother with shopping and paying bills.[117] However, the mother was dependent on the adoptive parents and was induced into signing the agreement.[118] The court held that the consent was void because she did not understand the repercussions of her act.[119] Without such an understanding, there could have been no meeting of the minds and, therefore, the consent for the adoption was rescinded using basic contract theory.[120]

D. Participation Experimental Medical Research

There have been several instances of experimental research performed without consent on the mentally retarded and the vulnerable in this country.[121] Although the abuse of experimentation on the vulnerable is

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117. *See id.* at 990-991.

118. *See id.* at 993.

119. *See id.*

120. *See id.* at 994.

121. *See* Diane E. Hoffman & Jack Schwartz, *Proxy Consent to Participation of the Decisionally Impaired in Medical Research—Maryland's Policy Initiative*, 1 J. HEALTH CARE L. & POL'Y 123,135-136 (1998). For examples of nonconsensual medical experimentation on the mentally disabled, *see, e.g.*, Barrett v. U.S., 660 F. Supp. 1291 (S.D.N.Y. 1987) (discussing the experimentation of a mescaline derivative on a mental patient to test potential chemical warfare); T.D. v. New York State Office of Mental Health, 626 N.Y.S.2d 1015, 1017 (N.Y. Sup. Ct. 1995), *aff'd* 650 N.Y.S.2d 173 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997) (deciding a case brought by mental patients who were involved in non-consentual potentially high-risk experiments including anti-psychotic drugs and drugs not approved by the Food and Drug Administration); Michael J. Loscialpo, *Nontherapeutic Human Research Experiments on Institutionalized Mentally Retarded Children: Civil Rights and Remedies*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 143-45 (1997) (discussing research performed at the Fernald State School in Massachusetts where mentally retarded boys were given radioactive calcium and iron tracers in their breakfast cereal without the consent of their parents); *id.* at 181 n.11 (describing the deliberate infection of mentally retarded children without consent at the Willowbrook State School).

For additional examples of nonconsensual experimentation on vulnerable people, *see, e.g.*, Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973) (vacating an order dismissing a prisoner's case because the nonconsensual administration of a nontherapeutic "fright drug" was sufficient to prove cruel and unusual punishment); Loscialpo, *supra*, at 181 n.11 (discussing the 1932 Tuskegee Syphilis study where researchers injected 400 syphilis infected and 200 healthy African-American men with drugs containing heavy metals without the patients' consent, and the instance when researchers from the Strong Memorial Hospital, Rochester, New York, injected eleven people with radioactive material as part of a Manhattan Project study in order to set standards for workers who were involved in making atomic bombs).

unjust, research is needed to develop new medical treatments for the mentally ill and disabled.[122] The need for incompetent subjects is sometimes crucial to performing these tests. However, this is complicated since the rights of the mentally retarded and mentally ill have to be protected, and especially since medical experimentation can have severe consequences and many mentally disabled individuals do not have the capacity to consent to such tests.[123]

The possibility of severe side affects due to experimental medical research has resulted in the courts categorizing research into two areas—therapeutic and non-therapeutic. Most of the experimental research performed on the mentally retarded consists of therapeutic research.[124] Therapeutic research is experimentation with new drugs or medical procedures which is meant to provide a medical benefit to the subject.[125] These cases are rarely contested due to the fact that the state has an interest in furthering medical treatments available to the mentally retarded. In the case of therapeutic experiments, there is a valid state interest in promoting the health of the mentally retarded. This interest may even outweigh the liberty interests of a vulnerable child where the child would benefit from the

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122. *See T.D.* 626 N.Y.S.2d at 1016 ("[T]he benefits of planned and objective research on human beings . . . are self-evident for the intelligent development of effective therapeutic modalities with minimization of unanticipated and detrimental side effects. . . . There comes a time, before a new treatment can be accepted, when there must be an assessment of controlled experiments with human beings."); *see also* T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d 173, 176 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997):

> [T]he controversy [concerning medical experimentation on incompetents] has wide significance since it arises within the larger context of medical research involving human subjects, and necessarily requires a balancing of this State's responsibility to protect individuals who, because of mental illness, age, birth defect, other disease or some combination of these factors, are incapable of speaking for themselves, from needless pain, indignity and abuse, against its worthwhile goal of fostering the development of better methods to diagnose, treat and otherwise care for these same individuals through cooperation with the medical community and private industry.

123. *See T.D.*, 626 N.Y.S.2d at 1016-17 (stating that there is a "need to balance the demands of scientific research with the rights of the individual human beings who may be the subject of experiments," and that this has led to the court system, legislators and advocates to try to develop procedures which will allow "effective research while safeguarding the rights of the individual."); *see also T.D.*, 650 N.Y.S.2d at 177 (recognizing the state's concurrent responsibilities to conduct research to prevent and treat future mental disorders and to care for the mentally challenged in its care).

124. *See T.D.*, 650 N.Y.S.2d at 177.

125. *See T.D.*, 626 N.Y.S.2d at 1018.

results of the experimentation. The use of mentally competent noninstitutionalized children, however, would not serve this interest.[126]

It is harder to justify or get consent for non-therapeutic experimentation on the mentally disabled since the treatment does not benefit the patient, but seeks to obtain knowledge which may help future patients.[127] Non-therapeutic research may involve treatments that involve "more than minimal risk."[128] These procedures include those "which may cause stroke, heart attack, convulsions, hallucinations, or other diseases and disabilities including death, and which, while possibly shedding light on possible future treatments to others, offer no direct therapeutic benefit to the participating subject."[129] Successful applications to the court for non-therapeutic experimentation are rare since the state has a lesser interest due to the vulnerability of the patient, since mentally disabled people cannot give consent to possibly harmful treatments, and since there is rarely an "acceptable reason why such research cannot be conducted with subjects who are free and fully competent."[130] Most case law concerns non-therapeutic experimentation on the mentally retarded.[131] In these cases, it is necessary first to consider whether the mentally retarded individual is capable of providing informed consent to experimental research and, if not, if a surrogate, give consent on their behalf.

Informed consent is the "knowing consent of an individual or his legally authorized representative, with sufficient capacity to consent and so situated to be able to exercise free power of choice. . . ."[132] The ability to consent is determined by establishing whether the patient can "understand the purpose,

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126. *See* Loscialpo, *supra* note 121, at 156 (discussing the causes of action available to subjects of non-consensual experimental research involving radioactive substances when they were children).

127. *See T.D.*, 626 N.Y.S.2d at 1018; *see also* Loscialpo, *supra* note 121, at 153.

128. *See T.D.*, 626 N.Y.S.2d at 1018.

129. *Id.* at 1017. *See also T.D.*, 650 N.Y.S.2d 173, 185 ("[E]xperiments involving more than minimal risk expose the subjects to . . . invasive and painful procedures and/or the administration of psychotropic drugs, antipsychotic drugs and other medications, which have harmful side effects as severe or even worse than similar medications and procedures currently used for treatment.").

130. *See* Loscialpo, *supra* note 121, at 156 (citing *Statement of ABA Commission on the Mentally Disabled before National Human Experimentation Group*, MENTAL DISABILITY L. REP. 156-57 (1997)).

131. *See, e.g.*, *T.D.*, 650 N.Y.S.2d at 177, 184 (stating that the plaintiffs did not challenge procedures used for minimal risk experiments and that the "large majority of studies, which are therapeutic and/or proceed upon the informed consent of subjects . . . will remain unaffected [by this decision].").

132. N.Y. COMP. CODES R. & REGS. tit. 14, § 527.10(c)(4).

nature, risks, benefits and alternatives (including nonparticipation) of the research, to make a decision about participation, and to understand that the decision about participation in the research will involve no penalty or loss of benefits to which the patient is otherwise entitled."[133]

If the research is federally funded, the federal regulation takes precedence over the state statutes and common law.[134] Federal law has very stringent consent requirements.[135] Under federal regulations, the consent for non-therapeutic procedures must be documented in writing.[136] This requirement is not necessary for therapeutic experiments.[137] In order for the consent to be informed, it is required that "all foreseeable risks" must be disclosed to the patient.[138] Finally, all experimental research must be

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133. *See T.D.*, 626 N.Y.S.2d at 1019 n.6 (quoting N.Y. COMP. CODES R. & REGS. tit. 14, § 527.10(c)(2)).

134. *See T.D.*, 626 N.Y.S.2d 1015, 1023 (1995) ("[A]ll federally funded research is subject to the federal regulations promulgated by the United States Department of Health and Human Services . . . for the protection of human subjects[, but federal regulations] do not affect the applicability of any additional protections provided to human subjects by state or local laws. . . .").

135. *See* 45 C.F.R. § 46.116 (1997) ("[N]o investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative."). To obtain legally effective consent, the patient or representative has to have "sufficient opportunity to consider whether or not to participate and to minimize the possibility of coercion or undue influence." *Id.* The information provided to the subject has to be in understandable common language, the subject's legal rights cannot be waived, and the investigator, sponsor, or the institution cannot be released from negligence liability. *See id.*

136. *See* 45 C.F.R. § 46.117 (1997) ("[I]nformed consent shall be documented by the use of a written consent form approved by the IRB [institutional review board] and signed by the subject or the subject's representative.").

137. *See* 45 C.F.R. § 46.117(c)(2) (stating that the IRB may waive the signed consent requirement if "the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context"); *see also* 45 C.F.R. § 46.116(d)(1) (stating that the IRB may approve experimentation even if all the elements of consent are not met or can waive the requirements to obtain consent if "[t]he research involves no more than minimal risk to the subjects"); 45 C.F.R. § 46.117(c)(1). It is up to the subject as to whether or not to take documentation associating them with the experiment. *See id.*

138. 45 C.F.R. § 46.116(a)(2). To gain informed consent the subject needs to be provided with the following information:

> (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;
> (2) A description of any reasonably foreseeable risks or discomforts to the subject;

approved by an institutional review board (IRB).[139] The IRB approves of experimental procedures only if the risks to the patient are reasonable and if informed consent can be obtained. Although federal regulations provide greater protection than state law, they do not include specific provisions on the rights of surrogates to make decisions on behalf of incompetents. The regulations only state that informed consent can be obtained from the "subject's legally authorized representative."[140] The "legally authorized representative" is defined as any "individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research."[141] This imprecise language appears to designate state or local law to determine who the surrogate for consent will be and the procedures for giving consent.[142]

Whether the experimental research is being conducted under federal or state law, many mentally disabled patients are incapable of giving consent to

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> (3) A description of any benefits to the subject or others which may reasonably be expected from the research;
> (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that may be advantageous to the subject;
> (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
> (6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of or where further information may be obtained;
> (7) An explanation of whom to contact for answers to pertinent questions about the research and the research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and
> (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

Id. § 46.116(a). There are also additional elements of informed consent which may be appropriate depending on the type of research. *See id.* § 46.116(b) (stating additional elements such as possible unforeseeable risks, possible circumstances leading to the termination of the experiment, any costs that will have to be assessed to the subject, consequences of withdrawing from the research, a statement of findings resulting from the research, and the number of people in the study).

139. *See* 45 C.F.R. § 46.108(b) (stating that approval must come from a majority of the IRB members at the meeting).

140. *See* 45 C.F.R. § 46.116.

141. *See* 45 C.F.R. § 46.102(c).

142. *See* 45 C.F.R. § 46.116(e) ("The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.").

experimental treatment and, therefore, many states provide for a surrogate to make decisions on behalf of the mentally retarded patient. Some states have responded to the consent problem by prohibiting incompetent persons from participating in experimental medicine,[143] but most states allow for a surrogate, either the mentally disabled patient's guardian or relative or a court, to approve experimental treatment.[144] Surrogate consent statutes apply

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143. *See id. See also* MO. ANN. STAT. § 630.115(8) (West Supp. 1997) (prohibiting involuntary patients in state mental health facilities from participating in experimental research); ALASKA STAT. § 47.30.830(a) (Michie 1996) (prohibiting mental health facilities from performing experiments which have a "significant risk of physical or psychological harm" on mental patients); Kaimowitz v. Michigan Department of Mental Health, 1 Mental Disability L.Rep. 147 (1976) (holding that experimental surgery could not be performed on mentally incompetent patients even if a surrogate decision maker consented); DEL. CODE ANN. tit. 16, § 5175(f) (1995) (prohibiting pharmaceutical research on patients in state mental facilities if they are "incapable of understanding the nature and consequences of his consent"); DEL. CODE ANN. tit. 16, § 5174 (1995) (prohibiting certain state mental hospital patients from being subjects in medical research regardless of competency); MASS. REGS. CODE tit. 104, §§ 13.01-.05 (1995) (prohibiting non-therapeutic and high risk research on mental patients).

144. For examples of states statutes allowing the legal guardian or relatives to be the surrogate, *see* CAL. HEALTH & SAFETY CODE § 24175(b)(2) (West 1992) and CAL. PROB. CODE § 2355(a) (West 1991) (permitting conservator of patient who has not been adjudicated to lack the capacity to provide consent to medical experimentation when the patient does not object to participation or when there is a medical emergency); CAL. HEALTH & SAFETY CODE § 24175(b)(2) (West 1992) and CAL. PROB. CODE § 2355(a) (West 1991) (permitting conservator of patient who has been adjudicated to lack the capacity to provide consent to give consent even over the objections of the patient); CAL. HEALTH & SAFETY CODE § 24175(d) (West 1992) and CAL. PROB. CODE §§ 4512(a), 4655(c) (West 1991) (allowing another person to provide consent for a developmentally disabled person who lacks consent if there is no conservator); COLO. REV. STAT. § 27-10.5-114(7) (1990) (stating that consent can be given by a competent developmentally disabled adult patient or a legal guardian); FLA. STAT. § 393.13(4)(c) (Supp. 1991) (allowing consent from a competent mentally-retarded patient, a legal guardian, or the patient's parents); GA. CODE ANN. § 31-8-108(c) (1991) (stating the patient or guardian can consent); ME. REV. STAT. ANN. tit. 34-B, §5605.8.G (1988) (stating that consent can be provided by the mentally- retarded patient or a guardian if the patient is incompetent); MO. REV. STAT. § 630.115(8) (1986) (stating consent can be acquired from the mentally-retarded patient or the patient's guardian); N.Y. PUB. HEALTH LAW § 2444(2) (McKinney 1996) (requiring consent of the mentally-retarded subject, the institution's human research review committee, and the Commissioner of Public Health); R.I. GEN. LAWS § 40.1-22.1-5(4) (1991) (allowing the mentally-retarded patient to consent if competent, otherwise a legal guardian or court may consent); VA. CODE ANN. § 37.1- 84.1(4) (Michie 1996)(stating that the mental health patient, guardian, or committee may consent); WYO. STAT. § 25-5-132(d)(ii) (1990) (allowing consent to be obtained from the mentally-retarded patient, court, guardian, parent, or guardian ad litem).

For examples of state statutes which require judicial intervention, *see* CAL. HEALTH & SAFETY CODE § 24175(b)(1) (West 1992) and CAL. PROB. CODE § 2354 (West 1991) (requiring that a conservator of a mental patient who has not been adjudicated to be incompetent obtain a court order before consenting on the patient's behalf where the patient

when the incompetent patient or the courts have not appointed an agent.[145] The statutes allow the surrogate to make medical decisions for the patient based on substituted judgment or upon the patients best interest.[146] Surrogate statutes normally have a priority ranking of those authorized to make decisions, starting with a spouse, and followed by adult children, parents and adult siblings.[147] Some even include more distant relatives and friends.[148] In the realm of experimental medical research, surrogate laws are troublesome since most of them do not explicitly address consent to participation in medical research,[149] and they do not specify how the surrogate should make decisions for the incompetent person. It is difficult, therefore, to discern whether or not the surrogate is actually protecting the best interests and the rights of the patient.

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refuses to consent); CONN. GEN. STAT. ANN. § 45a-677(e) (West Supp. 1997) (allowing a guardian to consent to experimental research or procedures only "if it is intended to preserve the life or prevent serious impairment of the physical health of the ward or it is intended to assist the ward to regain his abilities and has been approved for that person by the court"); DEL. CODE ANN. tit. 16, § 5174(1) (mentally-ill defendants and prisoners cannot participate in pharmaceutical research without their informed consent and court approval); 405 ILL. COMP. STAT. ANN. 5/2-110 (West 1993) (providing that a guardian or parent cannot consent to experimental treatments without approval of the court and a determination that the treatment is in the best interests of the patient); MINN. STAT. § 525.56(3)(4)(a), (b) (1991) (forbidding a guardian to consent to experimental research without approval of the court which must consider the best interests of the patient); NEV. REV. STAT. § 159.0805 (1986) (requiring that a guardian must be empowered by a court to consent to experimental medical treatment); N.H. REV. STAT. ANN. § 464-A:25(I)(c)-(e) (1995) (establishing that a court can authorize a guardian to consent to experimental treatment after finding that the treatment is in the best interests of the patient); N.J. REV. STAT. § 30:6D-5.a.(4) (1981) (stating that a guardian ad litem appointed by a court to give consent may consent to experimentation for a developmentally disabled patient); OKLA. STAT. tit. 30, § 3-119(3) (1991) (stating that the guardian needs authorization from the court to consent to the ward's involvement in experimental research).

145. *See* Hoffman & Schwartz, *supra* note 121, at 131 (citing ALAN MEISEL, THE RIGHT TO DIE § 14.4, at 253 (2d ed. 1995).

146. *See id.* (citing MEISEL, *supra* note 144, § 14.8, at 263-66).

147. *See id.* (citing MEISEL, *supra* note 144, § 14.4, at 254).

148. *See id.* (citing MD. CODE ANN., HEALTH-GEN. § 5-605(a)(2)(vi) (1994)).

149. *See* Hoffman & Schwartz, *supra* note 121, at 131 (stating that in "determining whether the health care decision-making laws encompass research will require attention to the specific definition of health care in the statutes or to an inference from the other parts of the statutes to determine whether they should be interpreted to apply to any type of research, potentially therapeutic or otherwise.").

Many states attempt to rectify this problem by instituting a research review committee similar to the federal IRB.[150] New York State has been at the forefront of attempting to provide standards for experimental research performed on the mentally impaired.[151] New York requires more than just the voluntary informed consent of the mentally retarded subject.[152] The New York statute creates a "human research review committee,"[153] and requires the consent of this committee as well as the Commissioner of the Department of Health for any experimental research involving the mentally disabled.[154] The New York State Office of Mental Health created further procedures for the participation of patients who do not possess the capacity to provide informed consent in high-risk research.[155] Similar to the federal procedures, the New York regulations required that the informed consent of the patient or of the legally authorized representative[156] had to be obtained and documented,[157] and that all experimental research on human subjects must be reviewed by an IRB.[158] The IRB had to document that the study cannot be conducted without the incompetent subjects and that the research will

150. *See* Hoffmann & Schwartz, *supra* note 121, at 126; *see also* 12 VA. ADMIN. CODE 5-20-40 (Michie 1997); N.Y. PUB. HEALTH LAW § 2444(2) (McKinney 1996) (requiring consent of the mentally-retarded subject, the institution's human research review committee, and the Commissioner of Public Health). Virginia's statute states that an incompetent may "[n]ot be the subject of experimental or investigational research without his prior written and informed consent or that of his legally authorized representative," but does not define "legally authorized representative." VA. CODE ANN. §§ 37.1-84.1 (Michie 1996). This appears to provide little protection for those patients lacking capacity. *See* Hoffmann & Schwartz, *supra* note 122, at 126. "However, regulations promulgated under the statute provide that '[n]on-therapeutic research using patients or residents within an institution [for the mentally ill or mentally retarded] is forbidden unless it is determined by the research review committee that such non-therapeutic research will not present greater than minimal risk.'" *See id.* at 126-27 (quoting 12 VA. ADMIN. CODE 5-20-40 (Michie 1997)).

151. *See* Hoffmann & Schwartz, *supra* note 121, at 127.

152. *See* N.Y. PUB. HEALTH LAW § 2442 (McKinney 1993).

153. *See id.* § 2444

154. *See id.* § 2444(2) ("[T]he consent of the committee and the commissioner shall be required with relation to the conduct of human research involving . . . incompetent persons [and] mentally disabled persons. . . .").

155. N.Y. COMP. CODES R. & REGS. tit. 14, § 527.10 (1990). This law was repealed as of July 1, 1998.

156. A legally authorized representative is the patient's spouse, parent, adult child, adult sibling, guardian, or a committee of the person which is authorized to consent to research. *See id.* at §527.10(e)(2)(iv).

157. *See id.* § 527.10(e)(2)(i).

158. *See id.* § 527.10(d)(6).

produce knowledge that has therapeutic importance for the understanding or treatment of a condition that is present in the patient.[159]

The requirement of therapeutic benefit could be waived if the IRB determined that the research would have a direct benefit that is important to the general health or well-being of the patient and was available only in the context of research.[160] If the research involved more than a minimal risk, certain information about the experiment must have been provided to the patient or the representative.[161] If the person was incapable of providing consent, consent could be obtained from an individual appointed pursuant to a duly executed durable power of attorney specifying the authority to consent to participation in research,[162] or specifying that an individual be appointed by the patient to consent or withhold consent.[163] If the patient lacked capacity to consent and had not designated anyone with this power, consent could be obtained from a patient's legally authorized representative.[164] If there was no legally authorized representative, then consent could come from a close friend,[165] or from a court which finds that there is a direct benefit from the research.[166] Finally, no patient would become or remain a research subject over the objection of the patient or the people authorized to represent him.[167] Any objection would be honored unless an independent psychiatrist finds that there will be direct benefit to the patient and a court authorized overruling the objection.[168]

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159. *See id.*

160. *See id.* § 527.10(d)(7).

161. *See id.* § 527.10(e)(1)(ii)(a)-(h).

162. *See id.* § 527.10(e)(2)(iii)(a).

163. *See id.* § 527.10(e)(2)(iii)(b).

164. *See id.* § 527.10(e)(2)(iv).

165. *See* N.Y. COMP. CODES R. & REGS. tit. 14, § 527.10(c)(3) (1990). Close friend is defined as:

> "[A]n adult who presents an affidavit to the director which states that he is a close friend of the patient and that he has maintained such regular contact with the patient to be familiar with the patient's activities, health, and religious or moral beliefs and stating the facts and circumstances that demonstrate such familiarity."

Id.

166. *Cf.* Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986) (stating that if a mental patient refuses to take medication there needs to be a judicial hearing to decide if the patient has the capacity to make reasoned decisions with respect to treatment, since the right to refuse treatment is not absolute and may yield to compelling state interests, such as in situations where the patient is a danger to himself or others).

167. *See* N.Y. COMP. CODES R. & REGS. tit. 14, § 527.10(d)(2); *id.* § 527.10(e)(2)(vii).

168. *See id.* § 527.10(e)(2)(viii).

These regulations, however, were short-lived. In *T.D v. New York State Office of Mental Health*,[169] the trial court held that the regulations were inconsistent with the New York Public Health Law because they were promulgated under the Office of Mental Health instead of the Commissioner of Health, who actually has the right to consent to research involving the incompetent.[170] The appellate court agreed with this finding,[171] and also held that the regulations violated the constitutional rights of the mentally disabled patient under both the New York Constitution[172] and the Fourteenth Amendment of the United States Constitution.[173] The appellate court stated that the experiments being performed provided no or minimal benefit and involved more than a minimal risk:[174]

> [T]he well being of potential subjects . . . must . . . be the overriding concern in the research context and should be the focus

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169. 626 N.Y.S.2d 1015 (N.Y. Sup. Ct. 1995), *aff'd* 650 N.Y.S.2d 173 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997).

170. *See T.D.*, 626 N.Y.S.2d at 1022 ("[T]he court declares that the OMH regulations for the conduct of human subject research were promulgated by the Commissioner of OMH beyond his authority and are thus invalid."); *see also* N.Y. PUB. HEALTH LAW § 2444(2) (McKinney 1985) (stating that where the subject is an incompetent or a mentally disabled person, the consent of the patient, the human research review committee, and the Commissioner of Health is required).

171. *See* T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d 173, 176 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997) ("[W]e agree with the hearing court that the Commissioner of the OMH lacked the authority to promulgate the challenged regulations governing human subject research....")

172. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

173. *See* T.D., 650 N.Y.S.2d at 176 ("[W]e conclude that the challenged regulations do not adequately safeguard and therefore violate the State and Federal constitutional rights to due process, as well as the common-law right to personal autonomy, of the patients . . . who are, or potentially may be, subjects for the experimentation at issue."). The court stated that they would include a constitutional analysis of the New York regulations because it was likely that the Commissioner of Health would issue new regulations covering the experimental research of incompetents incapable of providing consent, since they struck down the regulations by the Office of Mental Health. *See id.* at 185. The Fourteenth Amendment states that a state cannot deprive "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

174. *See* T.D., 650 N.Y.S. 2d at 185 ("[The experiments] expose the subjects to . . . invasive and painful procedures and/or the administration of psychotropic drugs, antipsychotic drugs and other medications, which have harmful side effects as severe or even worse than similar medications and procedures currently used for treatment.").

> of . . . protocols and practices in assessing capacity and obtaining informed consent from capable individuals and/or from properly designated surrogates of individuals found to lack the capacity to give or withhold consent.[175]

The court held that the potential subject needed to be given adequate notice that his or her capacity was being evaluated.[176] They found a lack of requirement for notice to the patient or to the representative when the patient objects to continuation in the experiment and then is overridden by a psychiatrist and the court and, therefore, there was no opportunity for administrative or judicial review of the psychiatrists' opinion.[177] In addition, the psychiatrist could overrule the patient's decision if there will be a direct benefit, but the nature of the benefit is undefined.[178] Therefore, while the benefit had to be important to the health or well-being of the patient, it was not required to be a product of the research procedures or related to the condition from which the patient suffers.[179] The regulations also did not identify or set out any qualifications for the individual who initially assessed a patient's capacity. In addition, the individuals who may act as a surrogate were found to be unacceptable.[180] Many of the people who could act as surrogates do not have to be appointed as a guardian nor are they guaranteed to act in the patient's best interest.[181] The court also found alarming the option provided to researchers to experiment on incompetent persons when the benefit was for general health.[182] Although the court struck down the regulations, the decision provides guidance as to the minimum protections needed in order to meet the constitutional standard: "at the very least, [regulations need to] contain appropriate and specific provisions for notice to the potential subject that his or her capacity is being evaluated and for

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175. *Id.*

176. *See id.* at 187, 189 (stating that, "at the very least," that adequate notice of a capacity inquiry and judicial review of the capacity finding is necessary for the regulations to be constitutional).

177. *See id.* at 193.

178. *See id.*

179. *See* T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d 173, 193 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997).

180. *See* T.D. v. New York State Office of Mental Health, 650 N.Y.S.2d 173, 190 (N.Y. App. Div. 1996), *appeal dismissed by* 680 N.E.2d 617 (N.Y. 1997), *leave to appeal granted by* 684 N.E.2d 281 (N.Y. 1997).

181. *See id.*

182. *See id.* at 188.

appropriate administrative and [a process for] judicial review of a determination regarding capacity."[183]

The lack of concrete statutory authority will lead researchers who want to perform medical experiments on incompetent persons to seek approval from the courts by means of the appointment of a guardian who would have the legal power to make decisions on behalf of the mentally retarded patient.[184] A court in Michigan held that experimental treatments could not be performed on a mentally incompetent person even if a surrogate decision-maker who is not a guardian consented.[185] This would be consistent with the *parens patriae* role of states in protecting incompetent individuals and ensuring that decisions made on their behalf are made in their best interests.[186]

E. Medical Treatment

The mentally retarded maintain the right to consent to medical treatment,[187] but the informed consent of the patient, or someone authorized to act on their behalf, must be obtained before the patient can undergo surgery.[188] In cases where the patient is placed in a facility or hospital, "[t]he

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183. *See id.* at 187.

> [I]t is possible that, under [these] regulations, an otherwise capable person may be determined to be incapable for defendants' purposes because he or she is found to lack the ability to understand and make a decision about whether or not to participate in a particular study. In that event, neither the determination of lack of capacity itself nor the decisions of the surrogate are reviewable at the patient's request. Indeed, given the lack of notice requirement, the patient may not even be informed of either determination and may not even be aware he or she is involved in research. Therefore, we hold that the provisions for determining a potential subject's capacity under the challenged regulations fail to adequately protect the individual's due process rights guaranteed under both the New York State and United States Constitutions and declare them unconstitutional for that reason.

Id. at 190.

184. *See* Hoffman & Schwartz, *supra* note 121, at 128.

185. *See* Kaimowitz v. Michigan Department of Mental Health, 1 MENTAL DISABILITY L. REP. 147 (1976).

186. *See* Hoffman & Schwartz, *supra* note 122, at 128.

187. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 427 (Mass. 1977).

188. *See* Hanes v. Ambrose, 437 N.Y.S.2d 784, 785 (3d Dep't 1981) (holding that a woman refusing to consent to surgery to cure an abscess from a past surgery was capable of giving consent even though experts were not sure if she understood the severity of her

fact that the patient is involuntarily retained is not presumptive of incompetence or a lack of mental capacity to knowingly consent or withhold consent. . . ."[189] If the patient refuses to give consent, it is determinative unless the state convincingly demonstrates that the patient lacks the mental capacity to consent.[190]

If the person cannot understand the severity of the condition or the surgery, or provide informed consent, the state has to care for and protect the best interest of the incompetent person under the doctrine of *parens patriae*.[191] When the state exercises its *parens patriae* powers, the state must act in the best interests of the mentally retarded person.[192] This standard is used to ensure that the rights of the mentally retarded to accept or refuse medical treatment are protected to the same extent as a competent person.[193] In considering what is in the best interest of an incompetent person, the courts do not consider how a competent would respond if in a similar situation.[194] In essence, the state cannot impose the consensus of the majority in determining whether to impose the medical treatment upon an incompetent person: Individual choice is determined not by the vote of the majority but by the complexities of the singular situation viewed from the unique perspective of the person called on to make the decision. To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent

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condition). The court decided that:

> [G]iven the non-emergency character of her condition, the absence of pain or discomfort associated with it, her age, her very real fear she would be unable to survive another operation, and petitioner's admission that, barring complications, she could continue to live a good many years without the operation, it is our view that the State did not carry the burden of proving that she was incapable of consenting. *Id.*

189. *Id.* (citing N.Y. MENTAL HYG. LAW § 29.03).

190. *See id.* (citing New York City Health & Hosp. Corp. v. Stein, 335 N.Y.S.2d 461 (Sup. Ct. 1981); *see also* New York City Health & Hosp. Corp. v. Stein, 335 N.Y.S.2d 461, 465 (Sup. Ct. 1981) (stating that the "respondent does have the mental capacity to know and understand whether she wishes to consent to electroshock therapy. It does not matter whether this Court would agree with the judgment; it is enough that she is capable of making a decision, however unfortunate that decision may prove to be.").

191. *See Saikewicz*, 370 N.E.2d at 427.

192. *See id.* at 427.

193. *See id.* at 427 (recognizing that the right to refuse medical treatment "must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both.").

194. *See id.* at 428.

person by placing a lesser value on his intrinsic human worth and vitality.[195] The court has to determine with as much accuracy as possible the wishes and needs of the individual involved.[196] A court uses substituted judgment in order to act in the best interest of a mentally retarded patient.[197] In applying substituted judgment, the court imposes the decision that the incompetent person would make, were the person competent, taking into account future competency.[198] This standard is used even though the patient has been retarded his entire life.[199]

The doctrine of substituted judgment was used in *Superintendent of Belchertown State Sch. v. Saikewicz*.[200] Saikewicz was a profoundly retarded man suffering from acute leukemia.[201] Due to his retardation, Saikewicz did not have capacity to give informed consent for the needed treatment.[202] He was incapable of understanding his disease, disoriented when outside of his usual environment, and incapable of communicating if he was in pain.[203] In addition, besides having harsh side effects with chemotherapy, Saikewicz's chance of remission were only thirty to fifty percent.[204]

The court stated that the fact that most people would choose chemotherapy was not sufficient evidence that Saikewicz would come to the same conclusion since he did not understand his condition or prognosis.[205] The patient's age of sixty-seven,[206] along with the side effects of the treatments, the low chance for recovery, and the patient's inability to cooperate with treatment were unique to Saikewicz, and were found to be vital components of the substitute judgment analysis.[207] The court held that

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195. *See id.*

196. *See id.* at 430.

197. *See id.*

198. *See id.* at 431; *see also* Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 286-87 (1990); Little v. Little, 576 S.W.2d 493, 494, 497 (Tx. 1979).

199. *See* Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 430-31 (Mass. 1977).

200. *See id.*

201. *See id.* at 418, 420 (stating that Saikewicz possessed an IQ of 10 and a mental age of approximately two years of age).

202. *See id.* at 419.

203. *See id.* at 420.

204. *See id.*

205. *See id.* at 430.

206. *See id.* at 420.

207. *See id.* at 431.

withholding treatment was in his interest since it would ensure his comfort for the remainder of his life.[208]

The substituted judgment doctrine was not accepted by the Supreme Court in *Cruzan v. Director, Missouri Dept. of Health*.[209] The Court stated that courts can use the wishes of an incompetent person if expressed during a period when they were competent, if such were shown through clear and convincing evidence.[210] The Supreme Court rejected the use of the substituted judgment of the family, since the family was not a disinterested party and may not focus purely on the best interest of the patient, and ruled that the right of refusal may have to be exercised by a surrogate.[211] The state only has to consider the wishes of the patient.[212]

Substituted judgment has also been used in cases where the mentally disabled person is an organ donor.[213] In such cases, substituted judgment requires consideration of whether or not the transplant benefits the mentally disabled person, not whether the person would consent if competent.[214] In *Little v. Little*,[215] the court allowed a mother to authorize the transplant of her mentally retarded daughter's kidney to her son who had renal disease.[216] The court found that it was beneficial for the patient to donate her kidney because her brother's death might be psychologically detrimental[217] and she would suffer limited pain from the operation.[218]

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208. *See id.* at 432.

209. 497 U.S. 261 (1990). In *Cruzan*, the Court was determining whether or not to disconnect the feeding and hydration tube from an incompetent person. *See id.* at 266. Cruzan suffered from permanent brain damage, but had not been mentally retarded her entire life. *See id.*

210. *See id.* at 284.

211. *See id.* at 286.

212. *See id.* at 286-87

213. *See* Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. San Antonio 1979).

214. *See id.* at 498.

215. 576 S.W.2d 493 (Tex. Civ. App. San Antonio 1979).

216. *See id.* at 494.

217. *See id.* at 499.

218. *See id.*

F. Voluntary Commitment

The idea of voluntary commitment for the mentally disabled or the mentally ill is an almost extinct concept in its literal form. Mentally disabled persons cannot check themselves into a mental facility without a competency hearing first.[219] Although there are few cases about the capacity to consent for voluntary commitment of the mentally disabled, *Zinermon v. Burch* is a case concerning the difficulties of consent for the mentally ill.[220] In *Zinermon*, the mentally ill patient was "hallucinating," "confused," and "believed that he was 'in heaven.'"[221] The staff diagnosed the patient as having "paranoid schizophrenia and gave him psychotropic medication."[222] A few days later the patient signed forms admitting himself to a mental hospital.[223] After his subsequent release, the patient asserted that he was not properly admitted and that he did not remember signing the voluntary admission forms.[224] This case was decided under Florida law where hospitals can admit patients voluntarily if the patient makes the "application by express and informed consent."[225]

The standard for competency is whether the patient was capable "of voluntary, knowing, understanding and informed consent to admission and treatment."[226] The Supreme Court stated that the hospital admitted the patient even though it should have known the patient was incapable of informed consent, and that he was held without a hearing, a violation of his due process rights under the Fourteenth Amendment.[227] The court further stated that "without a hearing or any other procedure to determine either that he validly had consented to admission, or that he met the statutory standard

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219. *See* Zinermon v. Burch, 494 U.S. 113, 131 (1990) (finding that a mentally ill patient who voluntarily admitted himself to a mental hospital was deprived of his procedural due process rights because there was no hearing to determine whether he was competent to commit himself).

220. *See id.*

221. *See id.* at 118.

222. *See id.*

223. *See id.* at 118-19.

224. *See id.* at 120.

225. *See* Zinermon v. Burch, 494 U.S. at 123 (quoting FLA. STAT. ANN. § 394.465(1)(a) (1981)). "Express and informed consent" is defined as A consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion." *Id.* (quoting FLA. STAT. ANN. § 394.455(22) (1981)).

226. *See id.* at 122.

227. *See id.* at 121.

for involuntary placement, [there is a] clear infringement on his liberty interest."[228] The court does recognize in a footnote that if the patient was competent to consent there would be no deprivation of his liberty.[229] The Supreme Court stated that there needs to be a process to determine whether a patient is competent:

> [O]nly a person competent to give informed consent may be admitted as a voluntary patient. There is, however, no specified way of determining [under Florida law], before a patient is asked to sign admission forms, whether he is competent. It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value and not initiate involuntary placement procedures.[230]

G. Sex Acts

A mentally disabled person is deemed to be unable to consent to sexual acts if the person, due to their mental retardation, is unable to provide "intelligent assent or dissent or of exercising judgment,"[231] and if they are incapable of understanding the nature or consequences of the act of sexual intercourse.[232] If consent is verbally obtained from a mentally retarded person, a partner can still be convicted of rape, even though consent would ordinarily negate the element of force.[233]

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228. *See id.* at 131.

229. *See id.* at 131 n.17.

230. *See id.* at 136.

231. Baise v. State, 232 Ga. App. 556, 558, 502 S.E2d 492, 495 (1998). *See also* Durr v. State, 493 S.E.2d 210, 212 (Ga. Ct. App. 1997) (providing the standard of "knowing and intelligent consent to the alleged sexual act"); *In re* Sechler, No. 96-T-5575, 1997 WL 585928, at *4 (Ohio App. Ct. Aug. 29, 1997); Ely v. State, 384 S.E.2d 268, 271 (Ga. Ct. App. 1989).

232. *See* State v. Ortega-Martinez, 881 P.2d 231, 235, 237 (Wash. 1994).

233. *Baise*, 232 Ga. App. at 558 ("[I]n a forcible rape case where the victim indicates consent and does not resist, but by reason of mental retardation she is incapable of intelligently consenting, the lack of actual force necessary to overcome a resistant victim in other cases is supplied constructively by the rule that no more force need be used than that necessary to effect the penetration made by the defendant."); *see also* Durr v. State, 493 S.E.2d 210, 211 (Ga. Ct. App. 1997).

In the ordinary case the force to which reference is made is not the force inherent in the act of penetration but is the force used to overcome the resistance of the female. When the victim is physically or mentally unable to give consent to the act, as when she is intoxicated, drugged, or mentally incompetent, the requirement of force is found in constructive force, that is, in the use of such force as is necessary to effect the penetration made by the defendant.[234] A defendant can also be convicted of rape if the defendant knows that the person is incapable of consent due to her mental condition, even if the mentally retarded person submits to the sexual act.[235]

In deciding whether a mentally disabled person has the capacity to consent, the standard of intelligent and knowing consent has been adopted in most states, even though it may be termed differently. A mentally disabled individual is unable to give consent when there is a lack of understanding.[236] The question is "whether a person possesses sufficient resources—intellectual, emotional, social, psychological—to determine whether to participate in sexual contact with another" and is determined by the jury evaluating the "victim's ability to function in society."[237] These statutes cannot be interpreted to prohibit all retarded individuals from engaging in consensual sex[238] and, therefore, each case must be analyzed on a case-by-case basis. Although most states have this standard, there are two different interpretations.[239] To "know, apprehend, or appreciate" the "nature and consequences" of sexual intercourse can range from a simple understanding of how the act of coitus is physically accomplished together with an understanding that a sensation of pleasure may accompany the act, to a thorough and comprehensive understanding of the complex psychological and physiological "nature" of "the sexual act involved" and

234. Durr v. State, 493 S.E.2d 210, 211 (Ga. Ct. App. 1997).

235. *See id.*; *see also* Doe v. Shaffer, Nos. A-9304212, C-970057, 1998 WL 140042, at *2 (Ohio Ct. App. March 27, 1998) (stating that the defendant knew of the severe mental retardation of the victim, and therefore there was no consent). "[T]he deliberate preying upon [of] 'innocent and vulnerable victims' who are incapable of consenting to sexual contact is so reprehensible as to preclude liability coverage for injuries resulting from these intentional acts of sexual molestation." *Id.* (citing Gearing v. Nationwide Ins. Co., 665 N.E.2d 1115, 1118-19 (1996).

236. *See* People v. Cratsley, 86 N.Y.2d 81, 87, 653 N.E.2d 1162, 1165 (N.Y. Ct. App. 1995).

237. *Id.*

238. *See* Adkins v. Commonwealth, 457 S.E.2d 382, 387 (Va. Ct. App. 1995).

239. *See id.*

that, aside from immediate gratification, the act may have dire familial, social, medical, physical, economic or spiritual consequences.[240]

Some jurisdictions require evidence that the retarded victim was incapable of understanding the "distinctively sexual nature of the conduct."[241] These states hold that the range of mental functioning among mentally disabled persons varies and therefore it is not fair to punish the sexual partners of these individuals who have a rudimentary understanding of the act and are capable of making a volitional choice to engage or not engage in such conduct.[242] "Persons are mentally defective . . . only if incapable of understanding the nature of their conduct, i.e., that they are engaged in sexual activity."[243] If a person is mentally incapacitated but understands the nature and consequences of intercourse, "which understanding includes the capacity to make a volitional choice to engage or not engage in such act," then the mentally disabled person has the capacity to consent even if the decision is unwise.[244]

Other jurisdictions require that the state show that the victim was incapable of understanding not only the sexual nature of the act but also "the physiological, social, and moral ramifications of his or her actions."[245] An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important.[246] These other jurisdictions hold that it is necessary to show more than a superficial understanding of the act of sexual intercourse in order to demonstrate that a mentally disabled individual

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240. *Id.* at 388.

241. *See id.* at 387; *see also* State v. Olivio, 568 A.2d 111 (N.J. Super. Ct. App. Div. 1989).

242. *See id.* at 388.

243. State v. Olivio, 568 A.2d 111, 112 (N.J. Super. Ct. App. Div. 1989) (acknowledging that the earlier standard called for an understanding of the sexual conduct including whether the behavior was morally right or wrong).

244. *Id.* at 388-89.

245. *Id. See also* People v. Easley, 364 N.E.2d 1328, 1332 (N.Y. 1977); People v. McMullen, 414 N.E.2d 214, 217 (Ill. App. Ct. 1980); State v. Soura, 796 P.2d 109 (Idaho 1990); Bozarth v. State, 520 N.E.2d 460, 463 (Ind. Ct. App. 1988) ("[T]he capacity to consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences." (citing Stafford v. State, 455 N.E.2d 402 (Ind. Ct. App. 1983)); State v. Sloan, 481 P.2d 646, 647 (Or. Ct. App. 1971) ("Legal consent... presupposes an intelligence capable of understanding the act, its nature and possible consequences. Such intelligence may exist with an impaired or feeble intellect or it may not.").

246. State v. Ortega-Martinez, 881 P.2d 231, 237 (Wash. 1994) (citing People v. Easley, 364 N.E.2d 1328 (1977)).

has the capacity to consent.[247] In order to have a meaningful understanding of sex, it is necessary to appreciate many ramifications: emotional intimacy between partners, pregnancy, possible disease, and death.[248] It is not necessary to understand all of these concepts in order to establish that the mentally retarded person had the capacity to consent, but they are elements used to determine whether the person had a meaningful understanding of the nature and consequences of sexual intercourse.[249] This appraisal also encompasses an inquiry into the moral quality of the act—"the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral."[250] Therefore, a basic understanding of the mechanics of sexual intercourse alone is not equated with the understanding of the nature and consequences of sex.[251]

One court found that a mentally retarded girl who may have the ability to understand the concept of sex was not prepared for the consequences of sexual activity since she had been so sheltered throughout her life.[252] Since she did not have the information concerning the consequences of sex, she could not make an informed decision.[253] The fact finder cannot infer from proof of general mental . . . retardation or an IQ range or mental age that a victim is prevented or unable to understand the nature and consequences of a sexual act, unless the evidence proves that the victim lacks the ability to comprehend or appreciate either the distinguishing characteristics or physical qualities of the sexual act or the future natural behavioral or societal results of effects which may flow from the sexual act.[254]

Capacity cannot be implied by the fact that the mentally retarded person had prior sexual encounters with others.[255] In *Commonwealth v. Thomson*,[256] a mentally retarded patient who was impregnated by another person was held

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247. *See* State v. Ortega-Martinez, 881 P.2d 231, 236-37 (Wash. 1994) (citing RCW 9A.44.010(4)).

248. *See id.* at 237.

249. *See id.*

250. People v. Easley, 364 N.E.2d 1328, 1332-33 (NY 1977).

251. *See id.* (citing State v. Summers, 853 P.2d 953 (Wash. Ct. App. 1993), *review denied*, 866 P.2d 40 (Wash. 1993)).

252. *See* In the Matter of Sechler, No. 96-T-5575, 1997 WL 585928, at 4 (Ohio App. 11 Dist. Ct.).

253. *See id.*

254. White v. Commonwealth, 478 S.E.2d 713, 715 (Va. Ct. App. 1996).

255. *See* Commonwealth v. Thomson, 673 A.2d 357 (Pa. Super. Ct. 1996) (finding that the new evidence of the victim's pregnancy was not sufficient to prove that the victim consented to sex with the defendant).

256. *See id.*

not to be capable of consent.[257] Consent is not necessary to become pregnant, nor does the pregnancy prove that the person can give consent.[258] "A person is able to become pregnant without having the capacity to give consent to sexual intercourse. . . . The fact that the victim had sexual intercourse with another individual does not render her capable of giving consent during that encounter nor during the encounter with appellant."[259]

III. JEWISH LAW

Jewish law distinguishes itself in its dealings with the mentally disabled in two fundamental ways. First, in determining the care for an individual who is mentally disabled, Halacha does not technically recognize a formal transfer of decision-making power to another individual. This remains true regardless of whether the guardian would be a friend or relative, or even the court itself. This derives primarily from Jewish law's understanding that human beings are not property and thus, cannot be owned by another or, for that matter, even by the individual himself. Rather, each individual is responsible for living his or her life in accord with a higher ideal as defined by God through the halachic system. This responsibility does not remain an individual one, but expands into a communal one as well. "Kol yisrael arevim ze lazeh," or "each individual is bound to the other" places upon each Jewish individual the responsibility to support his peer in the attempt to live in accordance with this higher ideal. Therefore, intervention on behalf of the mentally disabled individual is not so much a transfer of power as an intensification of a previously existing responsibility of one towards the other. As such, the incompetent individual will maintain her independence and any decisions will be rendered using solely best-interest criteria, as we will see below.

Second, whereas United States law appears to employ a binary approach to establishing the competence of individuals, Halacha employs a multi-tiered matrix to establishing the status of the individual. In United States law, it is necessary to establish the comprehension and competence of the individual. Once it is determined that the individual is indeed unable to make the necessary decisions to provide for himself, he is declared incompetent. One could say that "competent decision-making" and "lack of capacity" (to decide) are mutually exclusive terms. Halacha certainly uses

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257. *See id.* at 361.

258. *See id.*

259. *See id.*

mental competence as the criterion for declaring an individual a *shoteh* (mentally incompetent) and, as a result of such a decision, will render the individual absolved from the responsibility of fulfilling mitzvot. However, Jewish law's definition of *da'at*, or the ability to consent in a legally binding manner, does not necessarily depend on the same criteria as declaring an individual a *shoteh*. As such, an individual may be declared a *shoteh*, or incompetent, and still be capable of consenting to a business deal or of divorcing his wife.

The all-encompassing nature of the Jewish person's commitment to Halacha creates a circumstance where we will find that an individual will be declared incompetent more easily in Jewish law than in general law. The Halachic system places demands on every aspect of the person's life. The Rabbis determined, then, that where this was not a reasonable expectation, the person is not obligated, although certainly encouraged to participate, in Jewish ritual observance. However, the individual, as we will see, still maintains independence and responsibility. Therefore, we will find that an individual might be deemed mentally incompetent in one particular area alone and continue to maintain his independence in other areas. There is a clear compartmentalization of categories which is characteristic of the way Halacha deals with mental incompetence. We will clarify some of the discussion as to the decision-making capacity of various types of individuals below.

We will begin by comparing the custodial categories defined in United States law with those categories as set forth in Halacha. We will then show how Halacha defines the mentally incompetent individual, followed by a discussion of the requirements of consent in the Jewish legal system. Finally, we will compare some of the specific examples mentioned above with similar situations as seen from within the Halachic framework.

A. Definition of Terms

The halachic term for a mentally dysfunctional individual is a *shoteh*. The Talmud briefly describes the *shoteh* using three examples: "Who is defined as a *shoteh*? One who steps out alone at night, one who rests in a cemetery and one who rips his clothing."[260] A second beraita adds: "One who loses what is given to him."[261]

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260. *See Tosefta Terumot* 3:1; *Hagiga* 3b.

261. *See Hagiga* 4a.

The interpretive challenge in reading this Tannaitic statement is to determine the scope of these "signs" in ascribing the status of *shoteh* to a particular individual. It is clear that one need not display these specific attributes to be declared incompetent. An individual who, through thorough lack of understanding and incompetent decision-making, can be judged by a court to be a *shoteh gamur*, or completely incompetent, need not display these particular symptoms.[262] Rather, as we have mentioned above, Halacha will categorize someone as mentally incompetent even if it is not completely pervasive in the individual's personality. These statements attempt to define incompetence even should it not be entirely pervasive but, rather, compartmentalized. For example, R. Moshe Feinstein describes an individual who thought he was the Messiah and as such exhibited odd behavior. At times, he would climb trees and preach to passers by, or demand as the Messiah to lead services or read from the Torah in synagogue. At times, he even resorted to grabbing the Torah in synagogue and walking away with it, or walking naked through the streets. This behavior clearly exhibited serious discord with his surroundings. In other matters, however, he was lucid and showed proper understanding of his surroundings.[263] In such a circumstance, the Talmudic categories become useful in determining whether such an individual is declared incompetent according to Halacha.

Amoraim debated whether one should be deemed a *shoteh*, provided one exhibited all three aberrant behaviors described in the Beraita (Rav Huna), or any one of these practices would qualify the individual as a *shoteh* (Rav Yochanan). Both opinions agree on the need for the individual to display aberrant behavior on a regular basis. Their disagreement revolves around the need to show the penetration of such behavior into the total personality, or a singular behavior recurring a number of times would also warrant declaring the person a *shoteh*.[264] Halacha states that even one such characteristic can establish the person as a *shoteh*, in accordance with the opinion of Rav Yochanan.[265]

What remained unclear, however, was the scope of these examples. Since the legal code specified these particular examples, R. Simcha of Speyer[266] and R. Avigdor Katz[267] suggested that only these symptoms define

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262. *See Divrei Hayyim, Responsa* 53.

263. *See Igrot Moshe, E"H* 120.

264. *Kesef Mishnah, Hil. Eidut* 9:9, *quoted in Shach Y:D* 1:23. *See also Tevuot Shor Y:D* 1:46.

265. *Rosh to Hullin* 1:4, *Y:D* 1:5.

266. *See Teshuvot Maharam Ben Barukh*, 455.

267. *See Maharik, Responsum* 19.

one as mentally incompetent in circumstances where all other behaviors seem intact. Following this theory, the man who thought he was Messiah would not be considered a *shoteh,* being that he did not exhibit the particular characteristics defined in the Talmud. Rambam, however, disagrees:

> The *shoteh* is an invalid witness being that he is not obligated in Mitzvot. Not just the *shoteh* who walks naked, breaks dishes, and throws stones, rather anyone whose mental capacity has left him and is found to be confused in a particular matter on a regular basis, although he speaks and responds to the point in all other matters, he is invalid, and considered in the category of shotim.[268]

Rambam clearly states that the categories described in the Talmud are not exhaustive. Any characteristics that reflect the appropriate degree of incompetence as determined by a knowledgeable authority would be considered a *shoteh.* The Rambam must answer for the need for the particular examples in the Talmud. If, in fact, there are other comparable behaviors, why create this insufficient list? R. Hayyim Soloveichik suggested that the Talmud, here, generated broad categories of mental dysfunction as reflected in the specific examples. An individual who places himself in the company of the dead, or who is willing to place himself in danger by traveling alone at night, is portraying depressive behavior. One who tears his clothing indiscriminately is an example of manic behavior. In other words, the Talmud uses examples to suggest broad categories into which many other contemporary examples could be included as well.[269]

Following Rambam, we may assume that the man who thought he was Messiah, could be deemed mentally incompetent. There remain two ways to understand the grounding of such a declaration. The language of the Rambam ("considered in the category of shotim") suggests that it is fair to assume that the disability influences other areas beyond the particular manifestation and, as such, the individual's decision-making capacity is thoroughly impaired.[270] Tosfot, however, presents the matter differently: "since he is a *shoteh* in one [category], it is certainly correct to assume (*lehakhaziko*) him a *shoteh* in all matters."[271] The implication in the words of Tosfot is that we need *assume* that the person is a *shoteh.* If, however, it

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268. *See* Rambam, *Hilkhot Eidut* 9:9.

269. *Quoted in* R. Yechezkel Abramsky, OTZAR HAPOSKIM, VOL. 2, endnotes, p.22.

270. *See Sm"a H.M.* 35:21.

271. *Hagiga* 3b, *s.v. derech.*

was verifiable that the person is lucid in a particular matter, we could in fact separate the issues and declare the person *shoteh* in specific circumstances and competent in others. We will return to this debate later.

Having briefly defined the category, we can begin to discuss the practical issues of caring for the mentally disabled. Given that the individual is in need of supportive care and aid in the decision-making processes of life, what role do friends, relatives, and the government play in this situation? We will be concerned with the conceptual grounding as well as the practical allowances for intervention by various individuals in the care of the individual.

B. Custodial Categories

We have seen that United States law balances between four variables, depending on the particular state, to transfer the right of decision to a competent second party when the mentally disabled person is deemed unable to consent: 1) *parens patriae,* or the "parental" right of the state to limit the powers of the individual; 2) relatives or a guardian exercising the right of decision on the person's behalf; 3) substitution, or the attempt to assess the wishes and preferences of the person and decide based on what the person *would have* decided;[272] and 4) the best interest principle which would assess the best interest of the individual regardless of the preference of the person herself or the relative or guardian. Judaism places the freedom to choose at the center of its value system, essentially as the manifestation of the human being as *tzelem elokim*, created in the image of God. Can Halacha recognize the transfer of the power of decision to another at all?

C. Parens Patriae

The freedom of the human being is deemed an inalienable right according to Jewish law. Each person is considered master of his or her own destiny, thus protecting his or her decision-making capacity. This principle is a foundational element in biblical law. Immediately following the

272. This decision would, of course, be assessed by either the court, parent, or guardian, but nonetheless should be distinguished from the above to the degree that options 1) and 2) could simply reflect the right or power of the court, relative, or guardian to decide. That natural or granted right to decide should be distinguished from the category of substitution or of the best interests principle which simply declares the state, relative, or guardian *wise enough* to make the decision on the person's behalf.

revelation on Mount Sinai, God secures this right by declaring the unique value of the human being and legally distinguishing her from property, unable to be treated as possession. In the Ancient Near East, people did have the status of property. The code of Hammurabi contains a number of such cases. For example, if a worker errs and the roof of his client's house falls on the son of the homeowner, the punishment for the worker is the death of his son.[273] This law reflects the treatment of each human being as possessing comparable value, and the Jewish community had difficulty adjusting to this new value system. Scripture describes people being taken as collateral on loans, to the dismay of the prophets and leaders of the day.[274] The Book of the Covenant[275] takes issue with this value system in four separate areas: 1.) Criminal Law—The Torah demands capital punishment for a murderer and prohibits a monetary payment in such a situation;[276] 2.) Loans—The Torah prohibits taking human beings as payment or collateral for loans even in a working capacity;[277] 3.) Slavery—Jewish law prohibits the purchase and sale of another Jew. This is a result of the impossibility of ownership of another Jew. The Torah allows for the hire of a worker alone;[278] and 4.) Parenthood—Biblical law emphasizes that children are not considered the property of their parents.[279]

Biblical belief in the human being as a *Tzelem Elokim* demands that the uniqueness of each individual be placed at the forefront of its value system. This guarantees the independence of the individual over and against the interest of parents, relatives, or the government in matters that are of

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273. *See Code of Hammurabi*, pars. 116, 210, 230.

274. *See Kings II*, 4:1-2; *Nehemiah* 5:1-12.

275. *Exodus* 21-23.

276. *Exodus* 21:12, 28-30; *Genesis* 9:5-6; *Numbers* 35:31-32; *see also* the remarks of Moshe Greenberg, SOME POSTULATES OF BIBLICAL CRIMINAL LAW IN IDEM, STUDIES IN THE BIBLE AND JEWISH THOUGHT, JEWISH PUBLICATION SOCIETY 30-34 (1995).

277. *See Exodus* 22:24-26; *Deuteronomy* 24:10-13; *Nehemiah* 5:1-12;Menachem Elon, *Freedom of the Individual in Debt Collection in Jewish Law* (Hebrew), Jerusalem, 1964.

278. *See Exodus* 21:2-11; *Leviticus* 25:39-44.

279. *See Exodus* 21:31. In the case of the goring ox of a negligent owner which results in the death of the victim, the law declares the guilt of the owner and demands the death penalty as in other cases of murder. In this case alone, as a result of the indirect involvement of the owner, the law permits a monetary payment (kofer) in lieu of capital punishment. Verse 31 emphasizes that the law is the same regardless of whether the victim is an adult or a minor. The need for such an emphasis lies in the contrast of this law with the prevailing understanding as depicted, for example, in the Code of Hammurabi. In the Code, a worker whose negligence results in the death of the child of the homeowner, is subject to the loss of his own son as punishment. Biblical law, in turn, emphasizes the unique human quality of each person, whether adult or child, and, as such bothers to clarify the concept in this verse.

purely personal consequence to the individual. As such, the concept of *parens patriae* is one that is foreign to the halachic system. This is not to say that the state may never interfere in the decision-making process of the individual. It will, however, limit both the rationale for interference, as well as the degree to which the state may interfere.

There are essentially two categories that permit the interference of others into the life of an individual: 1) where the actions of the individual create a danger for the surrounding community; or 2) where the actions of the individual endanger the individual himself. Each of these categories, in turn, has two components.

D. Endangering Others

Where there is concern that the mentally disabled person might endanger the life of another person, Halacha grants the right, and even the obligation, to interfere, as is true regarding mentally healthy individuals as well. Standing idly by while another person is endangered by natural or human force is considered a crime of omission.[280] The aggressor in such a situation is considered a *rodef* and must be stopped. This is true despite the absence of a conscious decision to harm another.[281] If the mentally handicapped person is deemed dangerous to those around him, it is the responsibility of the community to intervene.

If an individual causes damage to the property of another, and certainly physical harm to another person (albeit without the fear of fatal results), it is the right of the victim to protect her property or herself—even resorting to violence, provided it is the minimal violence necessary. Rosh absolves the victim of any damage suffered by the aggressor as a result of the subsequent exchange.[282] Prevention of such damage is cause for limiting the powers of a mentally disabled person.[283]

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280. *See Leviticus* 19:17; *Rashi ad loc., Sanhedrin* 73a.

281. *See Sanhedrin* 72b (regarding a foetus); *cf. Maimonides, Hilchot Rotzeach* 1:9, *Hiddushei R. Hayyim Halevi ad loc.*

282. *See Mishna, B.K.* 33a; *Rosh ad loc.* 3:13.

283. As to the anticipatory nature of this interference (as opposed to the above-mentioned texts where the perpetrator is already involved in the act), see the comments of Magid Mishnah, *Hilkhot Shabbat* 2:14 where he justifies *hillul shabbat* on such anticipatory grounds. This interpretation of the Magid Mishna differs from that of R. Elchanan Wasserman in *Kovetz He'arot* 18:5 and R. Ovadia Yosef in *Yechave Da'at*, Vol. 4:30. *See* R. Moshe Mordechai Farbshtein, *Mishptei Da'at*, at 199-200.

E. Personal Welfare

If a person can not or does not provide for his or her own physical well-being, thereby causing danger to him or herself, the community is obligated to intervene. The degree to which there is autonomy in medical decision-making has been debated of late.[284] Nevertheless, it may be safely stated that any medical procedure which is considered to grant basic sustenance, such as food and oxygen, or a more complex procedure that is statistically shown to succeed, may, in most cases, be administered without the formal consent of the individual.[285] A person is obligated to prevent the financial loss of his friend. The obligation of Hashavat Aveida demands that a person invest the time and, if necessary, provide financial resources to save a friend from loss. This is not dependent on the consent of the individual and is automatically assumed to be to the benefit of the individual.

In the spiritual realm, this communal responsibility stands true as well. The Talmud obligates the courts to interfere in the spiritual welfare of an individual who refuses to perform Mitzvot.[286] Furthermore, where negative prohibitions are concerned, even individual citizens may interfere in order to prevent a transgression on the part of another person.[287]

The infringement on the rights of the individual in all of these cases is not grounded in the power of others to limit the individual's rights, but in the responsibilities of the individual to the surrounding community and to him or herself. In the case of medical concerns or restoring the potential financial loss, it is grounded in the responsibility of others to care for her friend's needs. In effect, the independence of the mentally disabled person is maintained along the same standards as the independent rights of any other member of Jewish society. No person has the right to intervene in the decisions of another person regardless of the technical intelligence of the individual. On the contrary, the status of the mentally handicapped person as a member of the society is maintained in the sense that the selfsame categories that are applied to any Jew are applied to him or her as well. These categories have fairly objective criteria as well and will not necessarily involve the subjective decision making of the intervening party (we will

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284. *See infra*, notes 319-320 and accompanying text.

285. *See Mor U'Ketzia* 328.

286. *See Ketubot* 86a-b.

287. *See Bava Kamma* 28a; *Rashi & Yam Shel Shlomo ad loc.*: *Rambam Hilkhot Avadim* 3:5. As to the right of individual citizens to involve themselves with others who refuse to fulfill positive commandments, *see Ketzot Hachoshen Choshen Mishpat* 3:1; *Netivot Hamishpat* 3:1.

discuss daily care and decision making below). It is to be assumed that the need for such intervention might arise more regularly regarding the mentally handicapped individual and, as such, the responsibilities might be practically expanded. However, nothing suggesting a type of transfer of decision-making rights to the state exists in the Halachic system.

F. Best Interest Test

In providing for the welfare of children in custody situations, Halacha has clearly opted for such a best interest test to determine the best home for the child. Rashba clearly states that in circumstances where the residence of the child is in dispute, that which is in the best interest of the child prevails.[288] In the case of a mentally disabled adult, in line with the desire to maintain the independence of the individual unless he is in violation of one of the above-mentioned categories, decisions need be made in accordance with what is in the best interests of the adult. No individual or political body has the power to make these decisions. There is, however, a need to establish a system to define who has the capacity to assess and determine the best interests of the mentally disabled individual.

G. Relatives and Guardians

Nurture, care, and education are best provided by parents when possible, so long as there is no proof that it is detrimental to the person to remain with her parents. Both mother and father are assumed to provide complementary elements of the person's needs for a stable and nurturing environment.[289] In the absence of parents, however, do relatives maintain any prior status to others as guardians of the mentally handicapped person?

Comparing our situation once again to the circumstance of child custody disputes, we find some tension as to whether a relative has a presumptive right to guardianship. The Talmud expresses reservation with appointing relatives as guardians for concerns of financial misappropriations

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288. *See Teshuvot HaRashba* attributed to *Ramban*, 38; *Radbaz quoted in Pitchei T'shuva E"H* 82:7. For a complete survey of custody literature which is beyond the scope of this chapter, *see* Eliav Shochatman, ESSENTIAL PRINCIPLES OF CHILD CUSTODY IN JEWISH LAW, 5 SHENATON LEMISHPAT HAIVRI 285 (5738), Ronald Warburg, *Child Custody: A Comparative Analysis*, 14 ISRAEL L. REV. 480-503 (1978); Benzion Schereschewsky, *Dinei Mishpakha*, 505 n. 2 (1984).

289. *See Ketubot* 65b, *Rashi ad loc.*; 102b, *Rashi ad loc. s.v. zot omeret*; *Rosh ad loc. & Responsa* 82:2.

based on competing inheritance claims and the like.[290] On the other hand, Chelkat Mekhokek seems to assume a natural right of a grandmother to assume custody of the grandchild barring any other difficulties.[291] It is, in fact, precisely in such a circumstance that the Rashba declared his best interest principle and it is codified as such in Shulchan Aruch.[292] According to R. Yosef Karo, it is the responsibility of the court to appoint the most fitting guardian for the child regardless of relationship. If the two candidates are equal, then the relative has priority. Extending the existing debate regarding child custody, we find that the application is appropriate for the mentally disabled person as well. Guardianship would be established using the best interest principle as well.[293]

H. Substitution

Does the presumed will of the mentally ill individual impact on the decision-making process according to Halacha? Should the court or guardian ask, "what would the subject have wanted" in a circumstance where the individual himself is unable to express his desire? The Talmud[294] describes a case where a father passes away, leaving sons and a daughter. The sons are living on their own with the inheritance money. The daughter is relying on sustenance from her brothers but would benefit from living with her mother for the nurture and stability that would provide. The Talmud declares that the daughter remains with the mother and the brothers must support her nonetheless, albeit from a distance. Rashi[295] comments that the Talmud

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290. *See Bava Metzia* 39a, *Rashi ad loc. s.v. velo karov, Shulkhan Arukh Choshen Mishpat* 285:6-8.

291. *See Even Ha'ezer* 82:7; *Chelkat Mechokek* 82:11.

292. *Choshen Mishpat* 290:2 quoting *Rashba, Mordechai & Maharam Padua. See Dinei Mishpacha* 543 n. 19.

293. *See Farbshtein, Mishptei Da'at* at 193, where he suggests that relatives maintain primary status based on Rosh in *Bava Kamma* 3:13. Rosh assumes that relatives may protect each other from physical harm at the hands of an attacker based on the principle of "avid inish dina l'nafshei," taking the law into one's own hands. However, Rosh understands that the right of an unrelated bystander to intervene to protect one from harm is grounded in a different principle of "Afrushei me'issura," the spiritual welfare of the attacker. In an attempt to explain the need for two different sources for the two circumstances, R. Farbshtein suggests that relatives have primary status in the care of family members through assumed agency. This interpretation of the Rosh is not necessarily what the Rosh had in mind. *See Yam Shel Shlomo* 3:27 for a more plausible interpretation grounded in instinctive protective reactions of relatives during instances of danger.

294. *Ketubot* 102b.

295. *S.v. zot omeret.*

states that the brothers cannot force her to live with them. The implication is that if she should choose to live with the brothers, it is acceptable. Indeed, Beit Shmuel[296] posits, based on Rashi, that a child's wishes are adhered to where possible, even if contrary to the regularly prescribed option. Oftentimes, the preference of the child might be at odds with the best interests of the child as determined by the adults with the broader vision and experience to analyze such questions. Under such circumstances, the best interests of the child will take precedence, following the great principle of Rashba.[297]

In the situation of a mentally disabled individual who is unable to express a personal preference, the court or guardian should establish its decision based on the best interest principle. The principle of substitution does not play a primary role. In sum, Halacha views the individual as Tzelem Elokim and, as such, the right of outside intervention is limited to generally objectively defined best interest criteria.

I. Capacity to Consent

In Halacha, the capacity to consent is referred to as *da'at.* We will presently define *da'at*, evaluate when a person is deemed to have such capacity, and clarify whether a mentally disabled individual has decision-making ability and, if he does, to what degree. These issues relate to the obligation to fulfill mitzvot, make independent financial decisions, marry and divorce, as well as consent to medical treatment or sexual acts.

In defining *da'at*, the general assumption is that the status of is in direct contrast with the notion of *da'at*. Following this line of thinking, Rashi comments on the Talmud's question, "Who is a *shoteh*?": "To be absolved from obligation in mitzvot and punishment, whose purchase is no purchase and sale, no sale."[298] Once the individual has been deemed a *shoteh*, he is defined as incapable of any form of responsible decision-making. However, there is a strong trend towards compartmentalizing this status to particular elements and circumstances.

We mentioned above that, following the opinion of R. Yochanan, one who lacks capacity in one category is defined as *shoteh* in all categories. Tosfot suggests this is true based upon an assumption that once we cannot guarantee the understanding of the individual, we should question his ability

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296. *Even Ha'Ezer* 82:9.

297. *See* Schereschewsky, *supra* note 288 at 515.

298. *Hagiga* 3b.

to decide in all cases. According to Tosfot, if a responsible authority would evaluate the individual and conclude that he comprehends in some cases, the individual could be deemed incapable of decision-making in one scenario and able in another. Thus, our Messiah might have severe borderline issues, yet be capable of taking care of his own finances, marrying and divorcing, and other such issues.[299]

Rambam seemingly rejects the compartmentalization of the *shoteh.* In Hilkhot Eidut, Rambam states that once the status of *shoteh* is in place, the individual maintains that status in all circumstances. Yet the interpretation of Rambam remains unclear. The difficulty in interpreting Rambam derives from two questions in Rambam's formulation: 1) Why did the Rambam choose to define the *shoteh* in Hilkhot Eidut, towards the end of Mishneh Torah, when he had numerous other possibilities earlier in his work to do so? and 2) Why did the Rambam base the individual's inability to testify on his being absolved from commandments when, logically, both of these issues are grounded in a third issue, namely the individual's lack of competence?[300]

These questions point to Rambam's attempt to compartmentalize the issues. For Rambam, the example of testimony possesses unique characteristics. Since testimony impacts on others and demands full understanding of a given situation in order to incriminate others, one cannot compartmentalize the issues. As such, once the individual is seen to lack capacity in one instance, he is not reliable for testimony in court. Precisely for this reason, such an individual is not obligated in Mitzvot. The obligation to fulfill commandments may not be compartmentalized—either the responsibility is appropriate for the individual or not. This reasoning is not due to the individual's general lack of capacity, but rather to the particularly all-encompassing requirements of these two issues of mitzvot and testimony. Therefore, the Rambam links the reasons for these cases to each other and chooses the Laws of Testimony as the place to define the category. However, in all other matters, such as financial, medical, or spousal decisions, the individual should be evaluated in a case by case manner.[301]

Following this model, both Rambam and Tosfot agree that despite the fact that one is declared incompetent in Halacha, he does not forfeit *da'at*, or the ability to make decisions entirely. The incompetent individual still maintains independence in the particular areas where it is warranted. In other words, despite the fact that the notion of is in direct conflict with

299. *Ig'M E:H* 120 interprets Tosfot in this manner.

300. *See* Kesef Mishnah, Ei*dut ad loc., Ig"M loc. cit.*

301. *See* Noda Bi'Yehuda, *Or HaYashar #30, Ig"M loc. cit.* (based on *Maharit E"H,* 16; R. Yosef Steinhart, *Or HaYashar* no. 11.

having *da'at*, these opinions maintain that the individual can, in part, be considered competent and, in part, incompetent.

J. Definitions of Da'at

Our discussion until this point has assumed a particular model of *da'at*, i.e., having the capacity to decide. In fact there are two distinct models of understanding what elements must be present in order to be capable of responsible decision-making. Does *da'at* demand the ability to be aware of and understand one's actions, or is one required to understand the consequences of one's actions as well? For example, if a seemingly incompetent individual stands on the corner and hands out five dollar bills to every person that passes him by, is that transaction binding? To resolve the issue, we would need to determine if the individual had the capacity to perform such a transaction. If we asked the person what he was doing, he could describe precisely that he was giving five dollars to every passer-by in an attempt to be a friendly neighbor. Clearly, in a short while, the individual would wipe out his bank account. Has the individual performed the transaction with *da'at* or not? He is aware of the action, but does not understand the consequences of his actions.

Rabbi Yehezkel Landau maintained that understanding of the particular action was all that was necessary for the transaction to be valid.[302] As such, the above transaction would be valid. R. Landau suggested this interpretation in responding to the Rabbis of Frankfort in the famed "get" of Cleves.[303] In that case, the husband appeared to be lucid regarding most matters with the exception of his apparently irrational concern that people were about to take his life. The husband divorced his wife days after they had married each other. Many were concerned that he had not been competent to grant the divorce at the time of its execution.[304] Although R. Landau believed that the husband was lucid, he argued that even if he was considered a *shoteh*, the "get"would be valid because he was fully aware of his actions. This would be the case regardless of whether he was in a position to understand the long-term consequences of his actions. This opinion would allow for significantly more decision-making on the part of

302. *See Or HaYashar, Responsa* 30.

303. R. Landau bases his interpretation on *MGittin* 22b. *Tosfot s.v. veha* implies that when explanation is available to the *shoteh*, we may assume that he appropriately fulfills the obligation, barring others issues. He also relies heavily on *Yerushalmi, Terumot* 1:1.

304. *See* the letter of the Rabbis of Frankfort in *Or HaYashar*.

many mentally disabled individuals. However, the Noda BiY'huda's opinion did not gain widespread acceptance.

K. Practical Applications

1. Medical Cases

Our discussion of transferring decision-making powers is grounded in the need for consent and autonomy, and the lack thereof regarding an individual who is mentally disabled. From the Halachic vantage point, we need to assess to what degree autonomous decisions are indeed central to the performance of medical procedures. In routine cases, Halacha does not recognize the need for consent.[305] As such, where a doctor deems it necessary to perform a routine procedure to guarantee the health of the individual, it is done as per the obligation of the doctor to heal and the individual to take care of herself. Recent literature, however, has reflected at least a degree of autonomy in the area of medical treatment, which demands the consent of the patient and raises the question of how to decide whether to perform a particular procedure or not. R. Ya̧'akov Emden understood coercion as appropriate only in the circumstance of a *refuah beduka*, where the benefits of said procedure were beyond doubt. However, where the risk/benefit ratios significantly changed, the individual has the right to forego the treatment.[306] Experimental treatment, dangerous or life-threatening procedures, and treatment that could result in trauma[307] cannot be declared as obligatory forms of medical care. Under such circumstances, consent is necessary before the doctor proceeds.[308] As discussed above, such decisions are assessed using best-interest principles with no need to resort to any transfer of power.

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305. *See Responsa Radbaz* 3:485; 4:1139 (regarding the piety of the Tosafist R. Yitzhak ben Asher (Riva)). *See also Magen Avraham O.H.* 328:6. For a survey of the literature on this topic, *see* D. Sinclair, *The Status of Medical Treatment Against the Will of the Patient*, 18-19 SHENATON HAMISHPAT HAIVRI, 265-294 (Hebrew) (1992-94).

306. *See Mor U'Ketzia* 328.

307. *See* Sinclair, *supra* note 308 at 289.

308. For further discussion on the risk/benefit categories, *see Iggerot Moshe, Y.D.* 2:58 3:36; J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS II 82-83 (1983).

2. Sexual Consent

The nature of consent in sexual matters as required by Halacha is subject to dispute. The Talmud states that a married woman who willfully commits adultery is prohibited from remaining with her husband.[309] If, however, the adulterous act was coerced, the woman is permitted to remain with her husband as her act is not rendered a technically adulterous act. The Talmud explores the nature of the required consent by using a consenting minor as an example. The Talmud states that a married minor that is seduced and consents to sex with another is permitted to remain with her husband.[310] Clearly, the nature of her consent is somewhat lacking and, thus, cannot generate the necessary rebellious status. The point is subject to debate. The Jerusalem Talmud seems to understand the matter differently. In that text, it appears that the consent of the minor is adequate and she may not remain with her husband.[311] Although the dispute has been explained in different ways,[312] one possible interpretation responds directly to our issue. The woman in question clearly understood the circumstances and was not physically coerced into committing this act. In one sense, she most certainly did agree to an illicit sexual act. The concern, however, is that despite the fact that she understood the act and agreed to it, it is certainly questionable as to whether she understood the consequences of her action. This case goes to the heart of the nature of consent in Halacha. The Bavli demands an understanding of the consequences of the act as well as of the act itself. The minor is not capable of that and is thus permitted to return to her husband. The Yerushalmi accepts the lucid decision on the part of the minor as acceptable consent in this regard.[313]

Later sources reflect precisely the same debate regarding a mentally disabled woman who consents to having sex with a man. If the woman is shown to have been lucid enough to have understood the nature of the act, does her consent allow the gentleman to engage in sexual activity or should a court doubt the validity of such consent? Chochmat Adam allows a mentally disabled married woman who is involved in an adulterous relationship to remain with her husband on the grounds that her consent is

309. *See Ketubot, supra* note 86.

310. *See Yevamot* 33b, 61b; *Rabad Hil. Sotah* 2:4.

311. *See Talmud Yerushalmi, Rambam Hil. Sotah* 2:4; *Yeshuot ya'akov E:H* 121:4.

312. *See e.g. Responsa Hatam Sofer E:H* 2:4.

313. *See Yeshuot Ya'akov supra* note 313. This interpretation directly parallels that of *Noda BiY'huda supra* notes 304-307. These two authorities describe the two Talmuds as disagreeing on the fundamental issue of the nature of consent in Halakha.

not reflective of willful action. Since she does not truly understand the consequences of her action, her consent does not reflect *da'at*. In the discussion, the Chochmat Adam rejects an alternate proposition. M'kom Shmuel had argued that a such consent would most certainly prohibit the woman from returning to her husband on the grounds that so long as she was aware of her decision and performed the action willfully, her consent is valid.[314] As most Halachic authorities demand an understanding of the consequences of the action as well, the woman's consent under such circumstances is not considered valid.

3. Adoption

As discussed above, parents do not maintain any type of ownership rights over their children in the Halachic system. As such, the concept of adoption requires clarification within this Halachic system. Children of Jewish families may be given for adoption in two possible ways. First, parents who are responsible for providing for their children might feel themselves incapable of doing so and, therefore, search for a more secure home for their children. Under these circumstances, the parents are essentially signing an agreement to allow others to raise their children in accordance with all of the elements stipulated in the agreement. Second, a court can establish that the home of the parents is no longer a safe and viable environment for the child and, for reasons of security, the court will decide to find a more appropriate home for the child.

In discussing the adoption of the child of a mentally disabled individual, we return to our previously elucidated categories. Cases of the first type require consent as would any transaction. Most authorities would render the *shoteh* incapable of making such decisions without an understanding of the long term consequences of the act. It should be noted, however, that some of the nuanced definitions of *shoteh* (i.e., *l'davar echad*) might allow for a compartmentalization of issues, thus allowing a Halachic *shoteh* to perform such a transaction.

Regarding cases of the second type, we have clarified above that categories such as substitution and *parens patriae* do not play a role in Halachic decisions. The best interest rule will ultimately settle the issue—in this case, the best interests of the child serving as the deciding factor.

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314. *See Binat Adam, Sha'ar Bet HaNashim*, 35. On the acceptability of the comparison between a minor and a mentally disabled individual, see *Pitchei Teshuvah E"H* 68:6 and *R. Akiva Eger E"H* 178:3.

L. Conclusion

As we have demonstrated, there is much evidence in Halachic law that issues concerning consent and the mentally disabled are analyzed similarly to issues concerning children. Obviously, children are capable of forming informed decisions about certain circumstances in their lives while they may lack the capacity in others. Likewise, Jewish law is prepared to evaluate various decisions made by the mentally impaired on a case-by-case basis, rather than categorizing the person as generally incompetent.

While Halachic and American law diverge in providing rationales for when and why a surrogate needs to substitute judgment regarding consent on behalf of a mentally disabled person, it is clear that a basic tenet in Jewish law—as well as a driving force in American law and policy—is the protection of the mentally disabled and the desire to act in the person's best interest.