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Limitations on Choice: Abortion for Women with Diminished Capacity

*Elizabeth Ann McCaman**

In October 2011, a thirty-two-year-old mentally ill woman in Massachusetts, referred to as “Mary Moe,” learned she was pregnant.¹ Mary’s parents, who were already caring for her five-year old son due to her schizophrenia and bipolar disorder, sought court permission for an abortion.² In a December hearing, the Department of Mental Health applied for temporary guardianship of Mary Moe on behalf of Mary’s parents, which would allow her parents to consent to an abortion for their daughter.³ In January 2012, Norfolk County Probate and Family Court Judge Christina L. Harms approved the guardianship and ordered Mary Moe be “coaxed, bribed, or even enticed . . . by ruse” to abort her pregnancy *and* undergo sterilization.⁴ Judge Harms abruptly retired following her controversial decision.⁵

An appellate panel subsequently overturned the orders, stating, “In ordering sterilization *sua sponte* and without notice, the probate judge failed to provide the basic due process that is constitutionally required.”⁶ The panel also remanded the abortion order back to the lower court, concerned that Judge Harms essentially ignored a court-commissioned report that found Mary would decide against an abortion if she had the

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1. John Zaremba, *Parents' Petition To Force Ill Daughter's Abortion Withdrawn*, BOSTON HERALD (Feb. 1, 2012), <http://www.bostonherald.com/news/regional/view.bg?articleid=1400264&srvc=rss>.

2. *Id.*

3. John Zaremba et al., *Decision Blasts Judge's Order To Force Abortion*, BOSTON HERALD (Jan. 18, 2012), http://bostonherald.com/news/regional/view/20220118decision_blasts_judges_order_to_force_abortion_ruling_to_coax_mentally_ill_woman_sparks_outrage.

4. Daniel J. Flynn, *Mass Sterilization*, THE AM. SPECTATOR (Jan. 31, 2012, 6:09 AM), <http://spectator.org/archives/2012/01/31/mass-sterilization>.

5. *Id.*

6. *Id.*

capacity.⁷ During the remand proceedings, and after significant press, Mary's parents withdrew their court petition.⁸

This real-life scenario highlights the issues presented when a woman with diminished capacity⁹ or her court-appointed guardian¹⁰ seeks an abortion. If she cannot give informed consent, the usual prerequisite for performing an abortion, should her guardian be able to give the informed consent? Should a court? What if she does not have a court-appointed guardian? Who should make that decision? Should she be forced to carry the pregnancy to term? This paper will address those questions. It will argue that women with diminished capacity¹¹ should have access to abortion, provided there are statutory or case law protections to avoid abuse. Great deference should be given to "substituted judgment," with a "best interests" standard used only when the woman's intent cannot be discerned from her or her guardian.

Despite a long and storied history of abuse of eugenics programs targeting the disabled,¹² there are many public policy reasons why states

7. Zaremba, *supra* note 1.

8. *Id.*

9. Capacity is the mental ability to understand the nature and effect of one's acts. BLACK'S LAW DICTIONARY 235 (9th ed. 2009). Diminished capacity is an impaired mental condition, short of insanity, that prevents a person from having the mental state necessary to be held responsible for his or her actions. *Id.* Capacity is often confused with competency, which is vaguely defined by *Black's Law Dictionary* as "the mental ability to understand problems and make decisions." *Id.* at 322. Capacity is a medical term that assesses an individual's abilities at a specific moment in time. Alec Buchanan, *Mental Capacity, Legal Competency and Consent to Treatment*, 97 J. ROYAL SOC'Y MED. 415, 415 (Sept. 2004). Competence is a legal term that has implications beyond the specific moment in time, because it prevents an incompetent person from making any treatment decisions until subsequently adjudged competent. *Id.* A judge determines competency, while a doctor determines capacity. *Id.*

10. There are many ways in which a third party may gain legal authority over another's healthcare decisions. The most common are guardianship, conservatorship, surrogacy, and advanced directives. Surrogacy and advanced directives are generally used for people who once had capacity but are now incapacitated, for example due to illness or an accident. Guardianship is the typical term used to describe a person court-appointed to represent, in different forms depending on the individual ward, a permanently incapacitated person. In California the term used is conservatorship. Unless discussing California, this paper will use the term guardianship. This paper will focus on court-appointed representation (i.e., guardianships and conservatorships), and does not address abortion for women with surrogates or advanced directives.

11. For the purposes of this paper, "diminished capacity" refers to a woman who is medically and legally unable to give informed consent to abortion.

12. The specific examples of diminished capacity in this paper feature women with intellectual disabilities and women with mental illness. Nonetheless, these terms should not be confused. Mental illness can, but is not always, a fluctuating state of mind, not related to intelligence in any way. E-mail from Melissa Nau, Med. Dir., Psychiatric Emergency Servs., S.F. Gen. Hosp., Assistant Clinical Professor, Univ. Cal., S.F. (Sept. 16, 2012, 01:45 PST) (on file with author). Intellectual disability is generally a consistent and permanent state of mind clearly related to IQ. *Id.* For both groups of women, her state of mind at the time of the incident or procedure in question determines whether or not she has diminished capacity and cannot give informed consent to an abortion. *Id.*

should support access to abortion for women with diminished capacity. In *In re D.W.*, a severely intellectually disabled¹³ woman's guardian was not authorized to consent to abortion on behalf of the ward, and so sought court authority.¹⁴ The woman's doctors testified that in their medical opinions, abortion was the best option.¹⁵ Because of her diminished capacity, D.W. was unable to understand the dynamics of being pregnant, including the importance of diet and exercise, as well as the need to avoid physical injury.¹⁶ Her doctors also hypothesized that should she be forced to continue the pregnancy, D.W. would likely be unable to understand any of the baby's needs once it was born.¹⁷ While an abortion was not medically necessary (i.e., the pregnancy did not pose a risk to her physical health), the doctors hypothesized pregnancy would be extremely damaging to D.W.'s emotional health.¹⁸ Additionally, because of the limitations of diminished capacity, taking regular birth control may be unfeasible, making access to abortion even more critical.¹⁹ Cases dealing with mental capacity are very fact specific; however, these same limitations can be imputed to many cases of pregnant women with diminished capacity.²⁰

This paper will begin by exploring what the term "informed consent" really means and why it is not possible for some women with limited capacity to give informed consent to medical health care treatment, including abortion. It will also explore if such a woman's intentions can be discerned despite the fact that she does not meet the standard for informed consent. It will then discuss the history of sterilization and abortion abuse as well as sexual abuse for intellectually disabled women, hypothesizing that some political advocates and judges may be opposed to abortion for these women under any circumstance because of the potential for misuse.

Next this paper will move into the actual practices of three states with regard to women with diminished capacity and reproductive rights. Florida, New York, and California were chosen for their diversity in approach. Florida has a well-established court process to allow women with diminished capacity to terminate their pregnancies. New York allows a parent or guardian to consent on behalf of a woman with diminished capacity who is using the services of the Department of Mental Hygiene without involving the court. In California, if a woman with diminished capacity has a conservator, the conservator may consent to surgical

13. In this case the court used the term "mentally retarded." *In re D.W.*, 481 N.E.2d 355, 355 (Ill. App. Ct. 1985). For clarity, this paper will use the term "intellectually disabled," regardless of court or statutory language.

14. *Id.*

15. *Id.* at 356.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Conservatorship of Valerie N.*, 707 P.2d 760, 773 (Cal. 1985).

20. *Id.*

procedures and general medical treatment on her behalf if she does not object, although some statutes suggest petitioning the court may be prudent. This paper will conclude by making policy recommendations based on the findings and analyses of all three state approaches.

I. INFORMED CONSENT AND SUBSTITUTED JUDGMENT STANDARD

Informed consent is a medical and legal concept that establishes the rules regarding patient medical decision-making.²¹ In this context, informed consent is defined as “[a] patient’s knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure.”²² The rule of informed consent rejects a paternalistic model of patient decision-making in which the physician alone decides what is in the best interest of the patient.²³ Instead, the informed consent model recognizes that cognizant adults have the capacity to make their own medical treatment decisions.²⁴ However, patients who are unaware of or incapable of understanding the risks, benefits, and alternatives to a particular treatment cannot give informed consent.²⁵ The standards governing the ability to give consent are usually determined by the severity of the incapacity.²⁶ Doctors consider whether the patient is able to weigh the risks, benefits, and alternatives to the proposed treatment.²⁷ Does she understand the procedure? Can she articulate the risks, benefits, and alternatives to the procedure?²⁸ Can she manipulate this information rationally?²⁹ Can she communicate a clear and consistent choice?³⁰ This paper is directed at women with diminished capacity who cannot fully understand the abortion procedure and do not have the requisite mental capacity to give informed consent.

In making medical treatment decisions for patients with diminished capacity, guardians and courts use either a substituted judgment or best

21. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 235 (2009).

22. BLACK’S LAW DICTIONARY 346 (9th ed. 2009).

23. Manian, *supra* note 21.

24. *Id.*

25. *Id.* at 237.

26. Daniel Pollack et al., *The Capacity of a Mentally Retarded Person to Consent: An American and Jewish Legal Perspective*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 197, 198 (2000).

27. E-mail from Melissa Nau, *supra*, note 12.

28. *Id.*

29. *Id.*

30. *Id.*

interests standard.³¹ A substituted judgment standard asks the question: “What would the woman decide if she had capacity?”³² A best interests standard asks the question: “What decision best serves the woman’s interests?”³³ Which standard to use is decided on a case-by-case basis, usually dependent on the statutory scheme or relevant case law.³⁴ In addition, substituted judgment itself sometimes includes within it a best interests standard.³⁵ A guardian or court’s judgment is likely to be formed, at least in part, by what is felt to be best for the woman in its charge.³⁶

For women who never had capacity, it is difficult to use substituted judgment because there is little to no indication of preference, which could guide a guardian in making the decision.³⁷ When possible, best interests should also take into account the communicated preferences of the woman, enhancing her autonomy.³⁸ Even in cases of women determined permanently incompetent or women who never had capacity, it is possible for them to express their opinions, even regarding such complicated issues as pregnancy. In *In re Moe*, a pregnant woman with intellectual disabilities addressed the court and clearly stated her desire to have an abortion.³⁹ Having had three previous abortions and currently having a two-year-old child, she articulated familiarity with the procedure and a desire to not have any more children.⁴⁰ In *Lefebvre v. North Broward Hospital District*, a woman stopped taking her antipsychotic medication in an effort not to hurt her fetus.⁴¹ This may be an indication that she did not want to terminate the pregnancy. If a woman with diminished capacity, however, gives conflicting statements, it may not be possible to use any remnant of substituted judgment and instead the legal authority can rely only on the best interests standard.

II. HISTORY OF STERILIZATION AND ABUSE FOR WOMEN WITH INTELLECTUAL DISABILITIES

In *Washington v. Glucksberg*, an assisted suicide case, the Supreme Court declared that states have an interest in protecting vulnerable groups, including the poor, elderly, and disabled, from abuse, neglect, and

31. Catherine M. French, Note, *Protecting the “Right” To Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments Against Fetal Representation*, 56 CASE W. RES. L. REV. 511, 519 (2005).

32. *Id.*

33. French, *supra* note 31.

34. Pollack et al., *supra* note 26, at 200.

35. Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155, 159–60 (2005).

36. *Id.*

37. French, *supra* note 31, at 519.

38. *Id.*

39. *In re Moe*, 579 N.E.2d 682, 685 (Mass. App. Ct. 1991).

40. *Id.* at 684–85.

41. *Lefebvre v. N. Broward Hosp. Dist.*, 566 So. 2d 568, 570 (Fla. Dist. Ct. App. 1990).

mistakes.⁴² It recognized the real risk of subtle coercion and undue influence to which these vulnerable groups are most susceptible.⁴³ However, the United States has not always upheld that ideal.

During the first half of the twentieth century, many states enacted laws authorizing the sterilization of intellectually disabled people believed to be societal burdens.⁴⁴ These laws were based on the theory of eugenics, positing that intelligence is genetically and racially based and therefore “predictably inherited by children from their parents.”⁴⁵ Eugenics seeks to remedy the continuation of low-intelligence, and thereby protect and improve society, by preventing reproduction by those who might produce defective offspring.⁴⁶

In 1927, the Court upheld a Virginia sterilization law for the “feeble-minded” as constitutional.⁴⁷ Justice Holmes famously wrote, in an opinion validating eugenics:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.⁴⁸

While this opinion seems insensitive and appalling now, it reflects the societal understanding at the time of the intellectually disabled population's best interest.

Near the second half of the twentieth century, science and society began to reject eugenics.⁴⁹ Courts and legislatures developed a heightened awareness of reproductive privacy in general, including for the intellectually disabled.⁵⁰ A movement developed toward deinstitutionalization and normalization, preferring independence and respect for autonomy.⁵¹ Society slowly grew more comfortable with sexual expression and activity by intellectually disabled adults. World War II also played a role in discrediting eugenics. Reports of widespread sterilization in Nazi Germany led to increased criticism of similar practices in the United States.⁵² In 1942, the court held the sterilization of habitual criminals

42. *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

43. *Id.* at 732.

44. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809.

45. *Id.*

46. *Id.* at 809–10.

47. *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

48. *Id.* at 207.

49. French, *supra* note 31, at 527.

50. *Id.* at 528.

51. *Id.*

52. Scott, *supra* note 44, at 811.

violated the equal protection clause of the Fourteenth Amendment.⁵³ By the 1960s, involuntary sterilization was generally understood to be an unjustified intrusion by the state on liberty and privacy.⁵⁴ As a result, many states passed laws setting out strict guidelines for sterilization of the intellectually disabled in order to guard against possible abuses.⁵⁵ Notably absent from many of these provisions were guidelines on abortion for intellectually disabled women, or guidelines for women who may not be intellectually disabled but have diminished capacity nonetheless.

The intellectually disabled population is also uniquely vulnerable to sexual abuse.⁵⁶ Rape is a widely accepted justification for abortion for women with full capacity, rationalizing that women should not be forced to carry a constant reminder of their traumatic assault. Similarly, women with intellectual disabilities should not be forced into pregnancy because of the criminal actions of others. It is therefore important that this population of women have access to safe and legal abortion.⁵⁷

III. FLORIDA

Florida has an enumerated statutory policy establishing the rights and legal limitations for intellectually disabled persons, in addition to a well-established court process to permit women with diminished capacity to terminate their pregnancies.

Florida has an explicit right of privacy written into its state constitution.⁵⁸ Florida statutes also specifically state that a person with intellectual disabilities retains the right to privacy.⁵⁹ An intellectually disabled person retains the right to be treated humanely, with dignity and respect, protected against abuse and neglect, to be properly educated, and to be free from discrimination because of his or her incapacity.⁶⁰ Florida embraces the “normalization” principle.⁶¹ This means the intellectually disabled obtain an existence as close to normal as possible, making available patterns and conditions of everyday life that resemble the typical

53. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

54. Scott, *supra* note 44, at 811.

55. CAL. PROB. CODE § 1958 (West 2012).

56. *See, e.g., In re Guardianship of J.D.S.*, 864 So. 2d 534, 536 (Fla. Dist. Ct. App. 2004); Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 316.

57. If society is uncomfortable with abortion for this population, one of the best ways to reduce its prevalence is to provide greater protections from sexual abuse for these vulnerable women. However, abuse is not the only reason intellectually disabled women need access to abortion. It is the position of this paper that people with intellectual disabilities retain a right to sexual autonomy. The freedom to have sex necessarily encompasses the freedom to exercise full reproductive options, including abortion.

58. FLA. CONST. art. I, § 23.

59. FLA. STAT. ANN. § 393.13 (West 2010).

60. *Id.*

61. *State Dept. of Health & Rehabilitative Servs. v. Lee*, 665 So. 2d 304, 306 (Fla. Dist. Ct. App. 1995).

patterns of mainstream society.⁶² Presumably, this includes reproductive privacy.⁶³ The intent behind this legislation is to prioritize services “that will enable individuals with [intellectual] disabilities to achieve their greatest potential for independent and productive living.”⁶⁴

While there is no explicit right to reproductive freedom retained by an incapacitated person, Florida defines the right of education to include education in sex, marriage, and family planning.⁶⁵ A person determined incapacitated also retains the right to marry, which implies consummation.⁶⁶ If the person has been deemed incapable of contracting, this right is subject to court approval but may not be delegated to a guardian.⁶⁷ Florida takes a similar stance of seeking court approval for reproductive rights to sterilization and abortion.⁶⁸

Florida law explicitly references abortion for women with diminished capacity and the court mechanism for obtaining such an abortion. In 1989, Florida enacted two statutes which state that a guardian may not consent on behalf of the ward to the performance of a sterilization or abortion procedure without first obtaining specific court authority.⁶⁹ The legislature enacted these laws with the purpose of promoting a public welfare system that permits incapacitated persons to participate as fully as possible in all decisions affecting them, assists such persons in maintaining their physical health and safety, protects their rights, and interferes the least with the legal capacity of a person to act on his or her own behalf.⁷⁰ Under the statutes, court procedure after receiving a petition for an abortion is very specific.⁷¹ First, the court must appoint an independent attorney to act on the woman's behalf.⁷² The attorney must meet with the woman and have the opportunity to present evidence and cross-examine witnesses at any relevant court hearing.⁷³ Second, there must be an independent medical, psychological, and social evaluation of the woman by a competent professional, which serves as evidence for the court.⁷⁴ Third, the court must personally meet with the woman to obtain its own impression of her capacity, so as to afford her full opportunity to express her personal views or desires regarding the possible abortion (reminiscent of substituted judgment).⁷⁵

62. FLA. STAT. ANN. § 393.063 (West 2010).

63. *Id.*

64. *Id.*

65. *Id.* § 393.13.

66. *Id.* § 744.3215(2)(a).

67. *Id.*

68. *Id.* §§ 744.3215, 744.3725.

69. *Id.*; see also 1989 Fla. Sess. Law Serv. 89-96 (West).

70. FLA. STAT. ANN. § 744.1012; 1989 Fla. Sess. Law Serv. 89-96 (West).

71. FLA. STAT. ANN. § 744.3725.

72. *Id.* § 744.3725(1).

73. *Id.*

74. *Id.* § 744.3725(2).

75. *Id.* § 744.3725(3).

Fourth, the court must find by clear and convincing evidence that she in fact lacks the capacity to give informed consent to an abortion, and that capacity is not likely to change in the foreseeable future.⁷⁶ Finally, the court must be persuaded by clear and convincing evidence that the abortion would be in her best interest.⁷⁷ Once the woman's guardian obtains court authority, he or she must give written informed consent to the abortion provider.⁷⁸

Florida has applied its statutory scheme in two major cases. The first is the case of Denise Lefebvre, a woman who had a history of mental illness and suffered from manic depression and psychosis.⁷⁹ She was prescribed the medication lithium to control her illness, but she stopped taking the medication when she suspected she might be pregnant.⁸⁰ In July 1990, Ms. Lefebvre was admitted to the hospital for severe psychosis.⁸¹ Subsequently, the hospital filed a petition with the court seeking authority to terminate Ms. Lefebvre's pregnancy.⁸² The hospital alleged that without the use of lithium Ms. Lefebvre was violent, abusive, aggressive and uncontrollable, but it could not administer any lithium because of the harmful effects to the fetus.⁸³ It felt an abortion would be in the best interests of both Ms. Lefebvre and the fetus.⁸⁴ Ms. Lefebvre's father, who the court appointed her guardian advocate during earlier involuntary placement proceedings, supported the court petition.⁸⁵

The court heard testimony that despite her erratic behavior without the lithium, such as attempting to place pieces of plaster in her vagina and eat her feces, Ms. Lefebvre did not want any medication to hurt the baby she intended to keep.⁸⁶ Nonetheless, the trial court judge approved the petition for termination of the pregnancy without personally meeting with Ms. Lefebvre, claiming the abortion was in her and the fetus' best interests.⁸⁷

On appeal, the appellate court chastised the trial court for not following the clearly delineated procedures laid out in statute.⁸⁸ First, the court did not meet with Ms. Lefebvre personally, the aspect of the statute designed to protect substituted judgment.⁸⁹ Under these facts, substituted judgment shows Ms. Lefebvre, if she had capacity, may not have chosen an

76. FLA. STAT. ANN. § 744.3725(4).

77. *Id.* § 744.3725(5).

78. *Id.* § 390.0111(3).

79. *Lefebvre v. N. Broward Hosp. Dist.*, 566 So. 2d 565, 569 (Fla. Dist. Ct. App. 1990).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 569–70.

86. *Id.*

87. *Id.* at 570–71.

88. *Id.* at 571.

89. *Id.* at 571.

abortion.⁹⁰ The appellate court, however, contrary to the legislative intent, concluded that substituted judgment was not applicable in this case.⁹¹ Past substituted judgment cases had involved patients suffering from immediately life-threatening, terminal, or incurable medical conditions, conditions not present in this case.⁹² Nonetheless, the failure of the trial court to follow specific procedure was enough to overturn the prior court approval.⁹³ The appellate court stated that in order for such a proceeding to be approved in the future, Ms. Lefebvre must be adjudicated incapacitated, a guardian must be specifically appointed due to this incapacitation, and the guardian then could attempt to obtain court authority for an abortion following proper statutory procedure.⁹⁴

Another prominent Florida case that addresses this issue is *In re Guardianship of J.D.S.*⁹⁵ J.D.S. was a twenty-two-year-old pregnant woman suffering from severe intellectual disability, cerebral palsy, autism and seizure disorder, and she was unable to adequately provide for her own care and protection.⁹⁶ Like Ms. Lefebvre, J.D.S. was on numerous medications that could be detrimental to her fetus.⁹⁷ The Florida Department of Children and Family Services (DCF) filed a petition with the court requesting appointment of a guardian *ad litem*⁹⁸ for J.D.S. and a separate guardian for the fetus, oddly suggesting an adversarial legal relationship between a mother and fetus.⁹⁹ Following proper statutory procedure in regard to J.D.S., the court appointed an attorney for J.D.S. and appointed a committee to determine if J.D.S. was incapacitated.¹⁰⁰ It

90. *Lefebvre*, 566 So. 2d at 569–70. Nonetheless, the court opinion does not provide enough information for an independent doctor to determine *post hoc* the extent of Ms. Lefebvre's diminished capacity. E-mail from Melissa Nau, *supra*, note 12. She does not automatically lack capacity simply because she is having a manic episode. *Id.* A doctor would need to know more about her beliefs in the moment about her pregnancy and abortion. E-mail from Melissa Nau, *supra*, note 12. People in acutely decompensated psychiatric states can still be found to have capacity in some situations. *Id.* Additionally, it is unclear exactly why she stopped taking her medication. *Id.* The case hypothesizes that she did so in order to protect her fetus, but it could have been because of some other psychotic belief (e.g., the fetus is an alien growing inside of her that would enlighten her). *Id.* All of these facts should be considered in determining how much weight to give her decision to terminate medication.

91. *Lefebvre*, 566 So. 2d at 571.

92. *Id.*

93. *Id.*

94. *Id.*

95. *In re Guardianship of J.D.S.*, 864 So. 2d 534, 534 (Fla. Dist. Ct. App. 2004).

96. *Id.* at 536.

97. *Id.*

98. A guardian *ad litem* has no affiliation with an institution or the parents or guardian, but is appointed independently by a court to assist it in making a judgment. Susan Stefan, *Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 436 (1989).

99. *Id.*

100. *Id.*

declined to appoint an emergency temporary guardian for J.D.S. or her fetus at that time, stating J.D.S. was not then in danger.¹⁰¹

The main issue involved in this case was fetal guardianship.¹⁰² In an unusual petition, Jennifer Wixtrom, wife of a Florida state attorney and of no relation to J.D.S. or her family, subsequently requested to be appointed guardian of J.D.S.'s fetus, alleging that appointment was essential because J.D.S. lacked the mental capacity to provide proper prenatal care.¹⁰³ Wixtrom also expressed concern that J.D.S.'s guardian, who was under fiduciary duty to J.D.S. but not the fetus, might choose to initiate abortion proceedings.¹⁰⁴ The State of Florida and DCF filed an amicus brief in support of Wixtrom's petition, indicating Florida seeks to discourage abortion for women with diminished capacity, despite specifically allowing for it in statute.¹⁰⁵ Nonetheless, the court denied the petition, concluding that fetal guardianship was improper.¹⁰⁶ The court noted that Florida law provides safeguards to ensure that a guardian does not act capriciously or cavalierly when considering the health of pregnant woman with diminished capacity and her fetus.¹⁰⁷ Fetal guardianship to protect against abortion was unnecessary and repetitive considering the extremely high standard that must be met in order for a woman such as J.D.S. to have an abortion.¹⁰⁸

The benefit of a statutory scheme such as Florida's is in its clarity. The process is laid out in specific detail in statutes and is further explicated by case law. The downside of the court process is its complication. As illustrated in *Lefebvre*, one small deviation from the long list underlying the process may be grounds for reversal of authorization for abortion. Additionally, the Florida process seems timeconsuming and expensive. The court has to meet with the woman, hear testimony from witnesses, and hire an expert for the woman's independent assessment. While abortion is a safe procedure, it is the safest the earlier in a pregnancy it is performed.¹⁰⁹ Florida needs to implement an expedited process to hear such petitions to ensure this process is not placing a substantial obstacle in the path of a woman seeking an abortion.¹¹⁰

101. Stefan, *supra* note 98, at 436.

102. *Id.*

103. *J.D.S.*, 864 So. 2d at 536, 543 n.4 (Pleus, J. dissenting).

104. *Id.* at 539.

105. *Id.* at 535 n.1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 339 (3d Cir. 1987).

110. Under *Planned Parenthood of Se. Pa. v. Casey*, if a state abortion scheme places a substantial obstacle in the path of a woman seeking an abortion, it is unconstitutional as infringing on a woman's liberty interest under the Due Process Clause of the Fourteenth Amendment. 505 U.S 833, 834, 837 (1992).

IV. NEW YORK

Like Florida, New York also has layers of regulations, dating from the 1970s, explicitly addressing the reproductive rights of the intellectually disabled, including the right to abortion.¹¹¹ The consent provisions do not explicitly include abortion, but the court has interpreted the “surgery and major medical treatment” provision to cover abortion.¹¹² Unlike Florida, New York allows a parent or guardian to consent on behalf of a woman with intellectual disabilities without involving the court. However, New York’s provisions only apply to women receiving services for intellectual disability and do not address women who have diminished capacity for another reason.

New York adopted regulations regarding the quality of care and treatment for patients in mental health facilities.¹¹³ They were intended to promote patients’ rights to an individual program “which maximizes their abilities to cope with their environment, will foster social and vocational competence and will enable them to live as independently as possible.”¹¹⁴ The regulations also promote patients’ rights to a maximum amount of privacy.¹¹⁵ Facilities governed by the Department of Mental Hygiene, including hospitals and schools, must provide family planning education and services for all patients.¹¹⁶ Contraception is available upon request to any patient who is sixteen or older, is the parent of a child, or is married.¹¹⁷ Contraception is available to a patient under sixteen at the discretion of the facility and the patient’s guardian.¹¹⁸ Information about contraception is available to all patients no matter their age.¹¹⁹ Sterilization is more strictly regulated, likely because of its permanency.¹²⁰ No sterilization shall be performed until reviewed and approved by a medical review board independent of the facility appointed by the regional director.¹²¹ In regard to pregnancy, “each patient has the same right to carry a pregnancy to term as any other citizen. Moreover, each patient has the same right to abortion as any other citizen.”¹²²

111. N.Y. COMP. CODES R. & REGS. tit. 14, § 27.6, 27.8, 27.9 (2012).

112. *In re Barbara C.*, 101 A.D.2d 137, 138 (N.Y. 1984).

113. N.Y. COMP. CODES R. & REGS. tit. 14, § 27.2(a)–(b). These regulations apply to any person receiving services for the intellectually disabled at any facility, including a school, in which services for the intellectually disabled are provided. *Id.* This covers nonresidential and residential facilities, including residence at a school. *Id.*

114. *Id.* § 27.1(b).

115. *Id.* § 27.1(e).

116. *Id.* §§ 27.2(a), 27.6(a).

117. *Id.* § 27.6(a)(2).

118. *Id.* § 27.6(a)(3).

119. *Id.* § 27.6(a)(1).

120. *Id.* § 27.6(b).

121. *Id.*

122. *Id.*

New York has a clearly delineated regulatory and statutory process to obtain consent for an abortion, falling under the category of surgery or major medical treatment.¹²³ The process gives wide discretion to family members to exercise judgment on the woman's behalf.¹²⁴ If the patient is under eighteen, she must obtain consent from her parents or legal guardian.¹²⁵ If parental or guardian consent is unavailable, the medical director may not initiate the abortion procedure without court authorization, except in emergency situations where there is significant danger to life or limb of the patient if the procedure is delayed.¹²⁶ If the patient is eighteen or older, she must obtain authorization from her spouse, a parent, an adult child, or a court of competent jurisdiction.¹²⁷ Again, this does not apply to emergency situations.¹²⁸ If a patient's mental capacity is unclear, an independent opinion must be obtained from a qualified consultant who is not an employee of the facility.¹²⁹ All patients also retain the right of objection and appeal to the procedure, no matter their mental capacity or age.¹³⁰

In *In re Barbara C.*, a mental health facility petitioned the court to perform an abortion on Barbara C., a twenty-five-year-old patient with the mental age of two.¹³¹ After a hearing, the Special Term court concluded that Barbara C. was incapable of giving informed consent to the procedure and relied upon the consent of her father.¹³² The patient's guardian *ad litem* filed an appeal on behalf of Barbara C., even though the abortion had already been performed. He argued that the court erred in relying solely on the consent of her father and should have instead determined whether an abortion would be in her best interest.¹³³ Mental Health Information Service also argued the court should determine what Barbara C. herself would have done if she had capacity (substituted judgment).¹³⁴ The court

123. N.Y. COMP. CODES R. & REGS. tit. 14, § 27.9; N.Y. MENTAL HYG. LAW § 33.03 (McKinney 2011).

124. N.Y. COMP. CODES R. & REGS. tit. 14, § 27.9.

125. *Id.* § 27.9(a).

126. *Id.*

127. *Id.* § 27.9(b).

128. *Id.*

129. *Id.* § 27.9(c).

130. *Id.* § 27.8. New York institutions also provide an outlet for religious preference of patients. Patients held on involuntary status may not be given treatment over their religious objection, if the objection is based on an assertion that the treatment is in conflict with a religious belief of the patient, unless there is a court order. *Id.* § 27.8(b)(3)(ii). This could limit unwanted abortion for patients whose religion opposes abortion. This procedure validates substituted judgment and protects against abortion abuse by guardians and mental health professionals. It also fulfills the regulatory intent to acknowledge and respect a patient's cultural identity, although it may raise separate First Amendment issues as to what a *bona fide* religious objection requires. *Id.* § 27.1(d).

131. *In re Barbara C.*, 101 A.D.2d 137, 137–38 (N.Y. 1984).

132. *Id.* at 138.

133. *Id.*

134. *Id.* at 138–39.

rejected this argument and stood by the regulations, maintaining that parental consent was the sole necessary factor in approving the abortion.¹³⁵ The Court found it improper for a judge to invoke his or her own moral, philosophical, theological, and sociological precepts in deciding whether the operation should take place.¹³⁶ The only role of the court is to resolve any dispute that may arise concerning the patient's capacity to give consent.¹³⁷

The New York approach is extremely efficient. A guardian does not have to waste time by petitioning the court. This allows for an expedited process and does not run the risk of the legal system impermissibly delaying abortion. It also recognizes the importance of family to the intellectually disabled patient.¹³⁸ The woman's family should know her preferences and values and is, therefore, in the best position to effectuate the woman's right to reproductive privacy.¹³⁹ However, the family may have conflicting interests in deciding whether or not to authorize the procedure.¹⁴⁰ If Barbara C. had given birth, the child would almost certainly not have remained in her custody. Likely, the responsibility of raising the child would fall to her parents, which may have influenced her father's decision to terminate the pregnancy.¹⁴¹ Given that conflict, some judicial safeguard seems appropriate, including the appointment of an impartial and independent guardian *ad litem* for the intellectually disabled woman.

Additionally, the New York regulations only apply to women receiving services from facilities governed by the Department of Mental Hygiene. For intellectually disabled women in New York who are independent enough to function without state treatment services but who are not capable of making all legal and medical decisions, it is unclear how to proceed. It is also unclear how to proceed for women who have diminished capacity for a reason other than intellectual disability. Women like Mary Moe or Ms. Lefebvre, for example, would have no avenue for an abortion under New York law. New York would benefit from a more comprehensive statute or a further explication through case law.

V. CALIFORNIA

California does not have any statutes explicitly addressing consent to abortion for women with diminished capacity, instead relying on general

135. *Barbara C.*, 101 A.D.2d at 139.

136. *Id.*

137. *Id.*

138. Elaine B. Krasik, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. PITT. L. REV. 539, 573 (1987).

139. *Id.*

140. Stefan, *supra* note 98, at 435-36.

141. *Id.*

statutes authorizing consent by conservators.¹⁴² California also lacks case law specific to consent for abortion, but guidance can be discerned from sterilization case law, which presents similar arguments regarding the extent of a woman's reproductive rights if she has diminished capacity.¹⁴³ Given that California law does not explicitly reference abortion, it is not clear whether the general medical treatment provisions, or the more specific sterilization provisions, are intended to provide conservators the right to authorize abortion on a conservatee's behalf.

California Probate Code Division 4 defines generally conservatorship and guardianship (for juveniles). A conservator may be appointed by the court in three situations.¹⁴⁴ First, one may be appointed if the adult is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.¹⁴⁵ Second, a conservator may be appointed if a person is substantially unable to manage his or her own financial resources or resist fraud or undue influence.¹⁴⁶ Finally, intellectually disabled adults may be appointed limited conservators. The appointment of limited conservators is appropriate in situations where an adult is able to take care of his or her own basic needs, but needs guidance on specific matters for which the limited conservator is appointed, such as healthcare decisions or financial management.¹⁴⁷

The Legislature codified its intentions behind Division 4 in Probate Code section 1950, recognizing the fundamental right of disabled persons to exercise choice over matters of procreation.¹⁴⁸ Section 1950 specifically acknowledges that some persons with intellectual disabilities are capable of engaging in consensual sexual activity but incapable of giving "informed, voluntary consent necessary to their fully exercising the right to procreative choice, which includes the right to choose sterilization."¹⁴⁹

This intent appears facially to be in direct conflict with Probate Code section 4652, which states that absent a medical emergency, the Health Care Decisions Law does not authorize consent to commitment to or placement in a mental health treatment facility, convulsive treatment,

142. In California, conservatorship is the typical term used to describe a person court-appointed to represent, in different forms depending on the individual conservatee, a person with diminished capacity.

143. It is important to keep in mind that sterilization is a permanent procedure and therefore not completely analogous to abortion. *Tubal Ligation Definition*, MAYO CLINIC (Dec. 2, 2011), <http://www.mayoclinic.com/health/tubal-ligation/MY01000>. Abortion, when performed correctly, does not prevent a woman from becoming pregnant in the future. Roger W. Harms, M.D., *Abortion: Does It Affect Subsequent Pregnancies?* MAYO CLINIC (Aug. 6, 2011), <http://www.mayoclinic.com/health/abortion/AN00633>.

144. CAL. PROB. CODE § 1801 (West 2012).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* § 1950.

149. *Id.*

psychosurgery, *sterilization*, or *abortion* on behalf of a patient (emphasis added).¹⁵⁰ While this statute is not located in the conservatorship section of the law, it still casts doubt on whether a conservator can authorize an abortion for his or her conservatee. Additionally, even if this statute is not intended to prohibit conservator authorization, its mere existence may chill a woman's right to reproductive freedom.

In order to understand the context and meaning of Probate Code section 4652, it is necessary to look at the Probate Code more broadly. The code deals with mental incapacity and healthcare decisions in Division 4: Guardianship, Conservatorship, & Other Proceedings, and Division 4.7: Health Care Decisions. Division 4.7 primarily concerns the creation, form, and revocation of advance healthcare directives.¹⁵¹ Given that Probate Code section 4652 appears in Division 4.7, not Division 4, it will likely be interpreted as not authorizing an *agent or surrogate* to order a principal or patient to obtain an abortion.¹⁵² Nonetheless, without specific statutory guidance, it is unclear how a woman and her conservator should go about obtaining the procedure.

Probate Code section 2354 states that a conservator may consent to medical treatment if the conservatee does not object.¹⁵³ Additionally, "the conservator may require the conservatee to receive medical treatment, whether or not the conservatee consents to the treatment, if a court order specifically authorizing the medical treatment has been obtained."¹⁵⁴ Section 2357 repeats the need for the court, stating that if a conservatee requires unauthorized medical treatment and the conservatee is unable to give informed consent, the conservator may petition the court.¹⁵⁵ The California Welfare & Institutions Code, governing all mental health facilities, also suggests in the case of an abortion that it would be appropriate for a court to intervene.¹⁵⁶ Section 5358 states that no surgery shall be performed upon a conservatee without the conservatee's prior consent or a specific court order authorization, except in emergency cases.¹⁵⁷ Section 5358.2 repeats the Probate Code's assertion that if a conservatee requires medical treatment and the conservator has not been specifically authorized to require the conservatee to receive the medical treatment, the conservator shall obtain a court order.¹⁵⁸ Despite the legislature's expression that a court is an improper venue for healthcare

150. CAL. PROB. CODE § 4652 (West 2012).

151. *Id.*

152. *Id.*

153. *Id.* § 2354.

154. *Id.*

155. *Id.* § 2357.

156. CAL. WELF. & INST. CODE §§ 5358–5358.2 (West 2012).

157. *Id.* § 5358.

158. *Id.* § 5358.2.

decisions,¹⁵⁹ these statutes suggest that if the woman objects to an abortion, or possibly even if she does not but the conservator has doubts about his or her medical authority, petitioning the court may be prudent. Additionally, if a woman with diminished capacity does not have a court-appointed conservator, petitioning the court may be the only option. It is unclear in that case whether the court would appoint a conservator for the limited purpose of consenting to the abortion, or if the court would simply authorize the abortion itself.

Despite these implications, there are no cases in which a woman with diminished capacity or her conservator has petitioned the court to obtain authorization for an abortion. Perhaps this is because the system works well, or perhaps this is because this area of law has not yet been challenged in California court. However, there have been similar cases in which women or their conservators have petitioned for authorization for sterilization.

In 1991, the Legislature added Probate Code section 1958.¹⁶⁰ This statute sets out factors to be established beyond a reasonable doubt that, once established, allow a court to authorize a conservator to consent to sterilization for a conservatee.¹⁶¹ This represents a clear legislative intent to allow sterilization for women with diminished capacity without the urgency of a medical necessity.¹⁶² In *In re Conservatorship of Angela D.*, the parents and co-conservators of a severely intellectually disabled woman petitioned the court for authorization to have their daughter sterilized under section 1958.¹⁶³ The conservatee's independent legal advocate argued the conservators had not sufficiently proven one of the elements of section 1958, that the conservatee was likely to engage in sexual activity, in light of section 1959.¹⁶⁴ Section 1959 does not allow the conservatee's vulnerability to sexual abuse to count as proof that the conservatee is likely to engage in sexual activity. It states that:

The fact that, due to the nature or severity of his or her disability, a person for whom an authorization for sterilization is sought may be vulnerable to sexual conduct by others that would be deemed unlawful, shall not be considered by the court in determining whether sterilization is to be authorized.¹⁶⁵

The court determined that section 1959 could not be applied to deny the conservators the authorization to consent to the conservatee's sterilization, noting that the court should consider the best interests of the

159. CAL. PROB. CODE § 1950 (West 2012).

160. CAL. PROB. CODE § 1958 (West 2012).

161. *Id.*

162. *Id.*

163. *In re Conservatorship of Angela D.*, 70 Cal. App. 4th 1410 (Ct. App. 1999).

164. *Id.* at 1416; CAL. PROB. CODE § 1959 (West 2012).

165. CAL. PROB. CODE § 1959 (West 2012).

conservatee.¹⁶⁶ While the court should be mindful of past abuses of sterilization, “ultimately it is the conservatee who must be served by the statute.”¹⁶⁷ The court authorized the sterilization because the facts of the case were so compelling.¹⁶⁸ This same individualized approach should be used to determine when a court in California should authorize an incapacitated woman’s abortion. While there are no codified factors to establish for the court, as there are for sterilization, a court should consider the best interests and personal preferences, if discernable, of the woman.¹⁶⁹

California recognizes the importance of having a judicial safeguard in place when it comes to abortion for women with diminished capacity. Multiple statutes suggest that petitioning through the court is proper, certainly if a conservatee objects.¹⁷⁰ In addition, declining to separate abortion from other medical procedures may be seen as giving it more validity. Under the California system, abortion is considered the same as any other medical surgery, despite its political unpopularity. Unfortunately, the benefits of the California system are outweighed by its vagueness. If a woman does not have a court-appointed conservator, the law gives no guidance for obtaining her abortion. Without an explicit statute governing this area, or an illustration through case law, a woman’s right to abortion may be chilled or denied.

VI. CONCLUSION: POLICY RECOMMENDATION

In developing proper safeguards, it is important to balance the desire for reproductive freedom against the need for protection from abuse. Women with diminished capacity should enjoy “the same legal rights and responsibilities guaranteed all other persons,” one such fundamental right being a woman’s right to choose whether to bear children.¹⁷¹ Yet, the United States has a history of abuse when it comes to vulnerable populations.¹⁷² In the past, many women with intellectual disabilities underwent forced sterilization under a eugenics theory.¹⁷³ As a result, “courts have been unwilling to give conservators and other guardians free rein to substitute their own judgment for that of [intellectually] disabled patients in matters affecting reproductive rights.”¹⁷⁴ Nonetheless, this fear of abuse is not substantial enough to justify depriving women with diminished capacity the right to reproductive choice.¹⁷⁵

166. *Angela D.*, 70 Cal. App. 4th at 1424, 1428.

167. *Id.* at 1428.

168. *Id.*

169. CAL. PROB. CODE § 1958 (West 2012).

170. *Id.* §§ 1958, 2354, 2357; CAL. WELF. & INST. CODE §§ 5358–5358.2 (West 2012).

171. *Foy v. Greenblott*, 141 Cal. App. 3d 1, 9 (Ct. App. 1983).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 12.

Looking at the actual practices of three states, there is very little consistency. Florida has a very specific, complex court procedure in place to authorize abortion, favoring a best interests model. In New York, abortion can be performed under the Department of Mental Hygiene with the consent of a parent or guardian. In California, conservators can consent to surgery and medical treatment on behalf of the conservatee if he or she does not object, but it is not clear whether this is meant to apply to abortion.

Ideally, a state policy will be mindful of the goals of clarity, individualization, expediency, and oversight. All states need to implement a clear procedure that allows for access to abortion for women with diminished capacity. Without an express mechanism, either from statutes or from case law, this effectively denies incapacitated women an integral aspect of their reproductive rights. It may be useful for each state to model its policy after any existing guidelines for sterilization, which most states already have in place, bearing in mind that abortion is very time sensitive while sterilization is often not. An enumerated and accessible policy is necessary to avoid vagueness. Without an explicit statute governing this area, or an illustration through case law, a woman's right to abortion may be chilled or even denied.

Additionally, an individualized approach should be used to determine when a court should or should not authorize an abortion. There should be no codified factors to establish for the court, as there are for sterilization, except perhaps as guidelines. As evidenced in *Angela D.*, codified factors may create too much rigidity and not allow enough judicial discretion. A court should be able to consider the best interests and personal preferences, if discernable, of the woman. Ultimately it is the woman who must be served. Great deference should be given to "substituted judgment," with a "best interests" standard used only when the woman's intent cannot be discerned from her, her guardian, or her family.

Expedition is also necessary for any court or administrative procedures put in place for seeking an abortion. The Supreme Court recognized the need for expediency with regard to judicial bypass¹⁷⁶ procedures and

176. The judicial bypass procedure is directly analogous to a procedure for a woman with diminished capacity seeking an abortion. For such a woman, if her guardian cannot or will not give consent for an abortion, or she does not have a court-appointed guardian, but she still exhibits a desire to have the procedure and it is adjudged to be in her best interest, a court should authorize the abortion. One potential difficulty is the extent of the woman's mental incapacity. For minors seeking an abortion using judicial bypass, it is guaranteed that the woman, even if twelve years old, has reached the age of puberty. The minor may not fully understand the scope of her decisions, even if she is mature and informed, but she may still be permitted to terminate the pregnancy. Some women with diminished capacity, on the other hand, especially those with intellectual disabilities, have fully mature bodies but have not reached the mental age of puberty. There is no doubt that abortion for these women is tricky. Nonetheless, like the best interests provision for minors using judicial

appeals for minors seeking abortion.¹⁷⁷ Delays can deny the minor an effective opportunity to obtain the abortion.¹⁷⁸ Using judicial bypass as an established model, policies for incapacitated women's access to abortion can be developed that are mindful of expediency. Because a court order will often be necessary, the courts should hear the petitions *ex parte* as soon as possible and do all evaluations necessary with efficiency in mind to avoid problematic delays to the procedure. Additionally, states should consider the practical effects of their abortion schemes to avoid *de facto* bans. Women with diminished capacity seeking an abortion should be assisted in making transportation and other arrangements for the procedure if a guardian cannot.¹⁷⁹ If funding is nonexistent, the state should assume the cost of her abortion.¹⁸⁰ Without this basic assistance, abortion for these women may be possible in theory but impossible in practice.

Finally, some level of court oversight is necessary to prevent a guardian from solely using his or her own judgment without accounting for any of the ward's preferences.¹⁸¹ For a pregnant woman with diminished capacity and her guardian, there may be a conflict of interest. Likely, the responsibility of raising the child would fall to her guardian, which may influence the guardian's decision to terminate the pregnancy.¹⁸² Given that conflict, some judicial safeguard is appropriate, including the appointment of an impartial and independent guardian *ad litem*.¹⁸³ A court petition and hearing process would also provide an avenue for women with diminished capacity but no court-appointed guardian to obtain an abortion. The court could appoint an impartial and independent guardian *ad litem* specifically for the purpose of authorizing the woman's abortion, the court could appoint a permanent guardian, or the court itself could evaluate the evidence and decide whether or not to authorize the abortion.

Keeping these factors in mind, it is both possible and necessary to design a statutory and regulatory scheme so that women with diminished capacity can have abortions safely and expeditiously. For women with guardians, the guardian should be able to directly exercise the right to abortion on behalf of the woman or do so after court permission, depending on the jurisdiction, so long as the process is clearly laid out in statutes, regulations, and/or case law.¹⁸⁴ For women without guardians, a court

bypass, it may sometimes be best for these women and their potential children to allow an abortion, so long as it is within the scope of an enumerated and accessible policy.

177. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990).

178. *Id.*

179. *Monmouth Cnty. Corr. Inst. Inmates v. Lonzo*, 834 F.2d 326, 351-52 (3d Cir. 1987).

180. *Id.* at 351.

181. French, *supra* note 31, at 524.

182. Stefan, *supra* note 98, at 435-36.

183. *Id.*

184. French, *supra* note 31, at 524.

should be able to appoint a guardian for the purpose of consenting to the abortion or the court should be able to authorize the abortion of its own accord, again provided the process is clear, comprehensive, and efficient. Abortion is an important aspect of female liberty and autonomy that should not be infringed solely because a woman cannot fully express self-determination.¹⁸⁵

185. French, *supra* note 31, at 524.
