

COMMENT

SUBSTITUTED JUDGMENT AND BEST INTERESTS ANALYSIS: PROTECTING THE PROCREATIVE MEDICAL RIGHTS OF THE MENTALLY INCOMPETENT IN TEXAS*

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I. INTRODUCTION

Years ago, Justice Holmes wrote that “[t]hree generations of imbeciles are enough” as he reasoned that involuntary sexual sterilization of the mentally disabled was perfectly constitutional.¹ In today’s world, that sentiment no longer receives wide support,² but our laws and policies continue to

1. Buck v. Bell, 274 U.S. 200, 207 (1927).

2. See NORMAN L. CANTOR, MAKING MEDICAL DECISIONS FOR THE PROFOUNDLY MENTALLY DISABLED 137 (2005) (stating that the eugenic theories that once formed the foundation behind involuntary sterilization are now nothing but a “thoroughly discredited relic”); Daniel Pollack, *The Capacity of a Mentally Challenged Person to Consent to*

deprive the mentally disabled of some of their most fundamental constitutionally guaranteed rights.³ Every person has the right to choose whether or not to consent to medical treatment, but this right becomes less clear for people who lack the capacity to consent due to mental incompetence.⁴

This Comment addresses the issue of medical treatment for the mentally incompetent in Texas, specifically focusing on sterilization and abortion—procedures that affect a person’s fundamental procreative rights. Part II provides a historical discussion of medical procedures for the mentally disabled, and Part III discusses the existence of fundamental procreative rights for mentally disabled Americans. Part IV describes the current sterilization and abortion rules for the mentally incompetent in Texas, and Part V points out the many flaws in the current system.

Because current Texas law in relation to sterilization and abortion fails to adequately protect the constitutional rights of mentally incompetent persons by denying them access to these procedures altogether, modification of Texas law is necessary.⁵ Part VI outlines some possible solutions, including the risks and benefits of each. This Comment argues that (a) Texas needs statutes that clearly define how a mentally incompetent person can obtain a sterilization or abortion in Texas, and (b) in the absence of legislative action, Texas courts should apply a substituted judgment and best interests hybrid test in order to authorize sterilizations and abortions for mentally incompetent individuals.

II. HISTORICAL BACKGROUND ON MEDICAL PROCEDURES AND THE MENTALLY DISABLED

Any discussion of medical rights and mentally disabled persons would be incomplete without an account of the dark

Abortion and Sterilization, 30 HEALTH & SOC. WORK 253, 254 (2005) (stating that “wholesale mandatory sterilization . . . is no longer in vogue”).

3. See *infra* Part V.A (discussing the problem of over-protecting the right to procreate in Texas and how that over-protection infringes on fundamental rights).

4. See Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 837 (explaining that the ability to give informed consent requires mental faculties that many mentally disabled persons do not possess). In order for these mentally incompetent persons to have access to medical treatment, states must allow an option other than informed consent, such as substituted consent from relatives or guardians, the “substituted judgment” doctrine, or a “best interest” test. See Pollack, *supra* note 2, at 253 (describing the different methods used by states to authorize medical treatment when the patient is incapable of providing informed consent).

5. See *infra* Part V.A.

historical background caused by the eugenics movement that began in the late nineteenth century.⁶ Although the U.S. Constitution protects the right to make procreative medical decisions in the United States,⁷ that right has not always been adequately protected for the mentally disabled, especially in regard to procedures affecting reproduction.⁸

A. *The Doctrine of Informed Consent*

Generally, no doctor can perform a medical procedure without informed consent.⁹ More specifically, the informed consent doctrine requires doctors to ensure before performing any procedure that the patient consents and “has been informed and understands what will be done, including the risks and benefits of the procedure and the alternative courses of action.”¹⁰ A doctor who performs a procedure without first obtaining informed consent could be guilty of malpractice and could be liable for the tort crime of battery.¹¹ However, during the eugenics movement, many thousands of mentally disabled individuals were sterilized without giving any sort of informed consent.¹²

6. See generally Gloria S. Neuwirth, Phyllis A. Heisler & Kenneth S. Goldrich, *Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded*, 6 COLUM. HUM. RTS. L. REV. 447, 458 (1975) (describing the origins of and theories behind the eugenics movement of the late nineteenth century). The eugenics movement focused on the propagation of desirable qualities and the elimination of undesirable qualities within the human race. MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 67 (1999). In an attempt to eliminate mental retardation during the eugenics movement, a majority of U.S. states forcibly sterilized people who were diagnosed with mental retardation. *Id.*

7. See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that a “statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment”); FIELD & SANCHEZ, *supra* note 6, at 57–58.

8. See Deborah Richards et al., *Sexuality and Human Rights of Persons with Intellectual Disabilities*, in CHALLENGES TO THE HUMAN RIGHTS OF PEOPLE WITH INTELLECTUAL DISABILITIES 184, 184 (Frances Owen & Dorothy Griffiths eds., 2009) (“The history of people with intellectual disabilities and their sexual rights can be described as a combination of neglect, prejudice, disapproval, and misunderstanding.”).

9. See Neuwirth, Heisler & Goldrich, *supra* note 6, at 447 (describing the common law rule that physicians must obtain informed consent from the patient before performing any medical treatment).

10. FIELD & SANCHEZ, *supra* note 6, at 60.

11. *Id.*

12. See Norman L. Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 ANNALS HEALTH L. 37, 52 (2004) (“As many as 60,000 people were involuntarily sterilized during the first half of the twentieth century.”). The exact number of involuntary sterilizations is unknown, but estimates vary from sixty thousand to seventy thousand people. See FIELD & SANCHEZ, *supra* note 6, at 68 (estimating that seventy thousand people were sterilized involuntarily); Voula Marinos

B. The Eugenics Movement and Involuntary Sterilization

The eugenics movement resulted from a growing interest in the study of genetics.¹³ Scientists reasoned that by controlling the procreation of certain types of people, they could improve the quality of future generations.¹⁴ At the time, scientists believed that mental illness was an inherited trait,¹⁵ so they encouraged measures that would restrict the reproduction of people with mental disabilities.¹⁶ The eugenics movement reached its peak in the United States between 1900 and 1930, and before 1940 approximately thirty-two states adopted laws that allowed the involuntary sterilization of mental incompetents.¹⁷

In 1927, the U.S. Supreme Court upheld an involuntary sterilization statute as constitutional in *Buck v. Bell*.¹⁸ In reviewing a Virginia statute, the Court reasoned that the eugenics sterilization statutes were necessary to ensure the welfare of the mentally disabled and the welfare of society in general.¹⁹ Justice Holmes justified the use of involuntary sterilization to improve the gene pool, stating that “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”²⁰ He reasoned that “[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. . . . Three generations of imbeciles are enough.”²¹ Lawmakers interpreted *Buck v. Bell* as an endorsement of eugenics sterilization, and many states

et al., *Legal Rights and Persons with Intellectual Disabilities*, in CHALLENGES TO THE HUMAN RIGHTS OF PEOPLE WITH INTELLECTUAL DISABILITIES, *supra* note 8, at 124, 128. Sterilization refers to “a surgical procedure which renders a person permanently incapable of reproduction.” Neuwirth, Heisler & Goldrich, *supra* note 6, at 447.

13. See Neuwirth, Heisler & Goldrich, *supra* note 6, at 458.

14. See FIELD & SANCHEZ, *supra* note 6, at 67 (describing the theory that inherited deficiencies should be “bred out” of the gene pool to improve hereditary quality in future generations of the human race).

15. See Neuwirth, Heisler & Goldrich, *supra* note 6, at 458.

16. See Cantor, *supra* note 12, at 51 (stating that eugenics advocates caused states to pass laws providing for required or permitted involuntary sterilization of the “feebleminded”).

17. *Id.*

18. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

19. See *id.* (finding that the sterilization of Carrie Buck will promote her welfare as well as the welfare of society in general).

20. See *id.*

21. *Id.*

created or strengthened involuntary sterilization laws after hearing that the Court approved Virginia's statute.²²

Technically, *Buck v. Bell* has yet to be overturned.²³ The U.S. Supreme Court struck down various other states' sterilization statutes as unconstitutional, but each of those decisions cited procedural deficiencies rather than substantive issues as the reason for the unconstitutionality.²⁴ Nevertheless, involuntary sterilization of the mentally disabled is no longer a generally accepted practice.²⁵ In *Skinner v. Oklahoma*, the U.S. Supreme Court struck down a statute allowing involuntary sterilization of criminals because it violated the Equal Protection Clause's prohibition against class discrimination.²⁶ This decision created a "legal quandary" that eventually led to a decrease in involuntary sterilization for individuals with mental illness.²⁷

Advances in science gradually disproved many justifications for the eugenics movement, and eugenics theories began to disappear.²⁸ Eugenics legislation originally relied on the inheritability of mental illness, but scientists eventually disproved the presumption of inheritability.²⁹ In addition, advances in social science disproved the assumption that mentally disabled parents cannot successfully raise children.³⁰ Many statutes allowing involuntary sterilization of the mentally disabled were repealed, expired, or no longer in use by the

22. See Marinos et al., *supra* note 12, at 128 (commenting that *Buck v. Bell* legitimized the use of eugenic sterilization laws "as a whole" and that "dozens of states" added or updated sterilization statutes after they received the *Buck v. Bell* opinion).

23. Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 569 & n.302 (1996) (mentioning that *Skinner v. Oklahoma* did not overturn *Buck v. Bell*).

24. Neuwirth, Heisler & Goldrich, *supra* note 6, at 458–59.

25. See Pollack, *supra* note 2, at 254.

26. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that a strict scrutiny standard of review should be applied, and that involuntary sterilization of criminals is a clear violation of the Equal Protection Clause).

27. See Marinos et al., *supra* note 12, at 128–29.

28. See Cantor, *supra* note 12, at 52 (explaining that the scientific reasoning behind the eugenics movement eventually ended up "in disrepute").

29. See *id.* at 51 (noting that eugenics legislation attempted to prevent disabled offspring by preventing "feebleminded" persons from reproducing); Neuwirth, Heisler & Goldrich, *supra* note 6, at 461–62 (explaining that scientific evidence on the hereditary aspect of mental illness is conflicting, that many scientists are skeptical about the inheritability of mental disease, and that eugenics sterilization was based on erroneous presumptions).

30. See Cantor, *supra* note 12 at 51–52 (noting that eugenics legislation assumed that the mentally disabled could not successfully raise children); Scott, *supra* note 4, at 816 (stating that success as a parent is actually possible for some disabled persons).

1950s.³¹ By 1963, involuntary sterilization statutes were nearly entirely out of use.³² However, as late as 1976, twenty-six states still allowed involuntary sterilization of mentally disabled persons.³³

C. *Lingering Effects of the Eugenics Movement*

The theories behind eugenics are no longer accepted.³⁴ Legal scholars now see the mass involuntary sterilization of mentally disabled persons in the early twentieth century as a crime against human rights, and at least one scholar compares the eugenics movement to the horrors of Nazi Germany.³⁵ Attitudes may have changed, but the fact remains that as many as seventy thousand mentally disabled people were involuntarily sterilized in the United States to promote eugenics.³⁶ This fact understandably affects health policy for the mentally disabled today.³⁷

Due to the dark history behind sterilization of the mentally incompetent, thoughts of sterilization today are met with apprehension.³⁸ Courts are reluctant to authorize sterilization of a mentally disabled person, especially without statutory support.³⁹ In an effort to avoid repeating past mistakes, courts tend to focus on the best interests of the mentally incompetent individual and apply the *parens patriae* doctrine to act “for the good of” the patient.⁴⁰

31. Cantor, *supra* note 12, at 52.

32. Marinos et al., *supra* note 12, at 128.

33. *Id.* It should be noted that although they still allowed involuntary sterilization, some of these states had done away with their sterilization statutes by this point. *See* Neuwirth, Heisler & Goldrich, *supra* note 6, at 458. In 1975, twenty-one states still had statutes requiring or permitting involuntary sterilization of the mentally disabled. *See id.*

34. Scott, *supra* note 4, 809, 811–12 (discussing how the scientific and philosophical theory behind the eugenics movement has been discredited and rejected); *see also* Pollack, *supra* note 2, at 254 (commenting that the “wholesale mandatory sterilization of mentally challenged people is no longer in vogue”).

35. *See* Neuwirth, Heisler & Goldrich, *supra* note 6, at 461 (noting that the eugenics sterilization statutes are “reminiscent of Nazi racist practices”).

36. *See supra* note 12 and accompanying text.

37. *See* Cantor, *supra* note 12, at 51–52 (“Apprehensions about sterilization are most understandable in light of its long and checkered history.”).

38. *See id.* (commenting that the apprehension that accompanies discussions of sterilization is understandable).

39. *See id.* at 52–53 (arguing that courts often rule that they lack authority to authorize sterilizations without express statutory approval because of a “lingering revulsion” toward the historical eugenics movement).

40. *See* FIELD & SANCHEZ, *supra* note 6, at 78–79. The *parens patriae* doctrine allows the court to act “in its capacity as provider of protection for those unable to care for themselves.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

State statutes dealing with sterilization generally focus on procedural requirements that must be met before sterilization can occur, and they do little to allow consent by a mentally incompetent individual who desires sterilization for herself.⁴¹ This historical background must remain in consideration as an important factor when discussing the procreative medical rights of the mentally disabled today.

III. THE CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY

The right to make medical decisions is a fundamental one in the United States.⁴² Every person has a right to control what happens to his body and to accept or refuse medical treatment.⁴³ In addition to being a fundamental right at common law,⁴⁴ this right to medical decisionmaking is protected by the Fourteenth Amendment's Due Process Clause as well as the penumbral right of privacy that arises from the Bill of Rights.⁴⁵

Although the Supreme Court first recognized the fundamental right of procreation in 1942,⁴⁶ reproductive rights have been a dynamic area of constitutional law in recent decades.⁴⁷ The U.S. Supreme Court has found that the right to privacy expands to cover reproductive decisions such as contraceptive use, abortion, and sterilization.⁴⁸ In sum, the U.S. Constitution fundamentally protects reproductive rights, including rights to abortion and contraception, and the right to privacy prevents undue restrictions on the exercise of reproductive autonomy.⁴⁹

41. See Neuwirth, Heisler & Goldrich, *supra* note 6, at 458.

42. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *In re Conroy*, 486 A.2d 1209, 1221–22 (N.J. 1985).

43. *Cruzan*, 497 U.S. at 269–270; *In re Conroy*, 486 A.2d at 1222; *In re Quinlan*, 335 A.2d 647, 663 (N.J. 1976).

44. *In re Conroy*, 486 A.2d at 1221.

45. See *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965) (discussing the fundamental constitutional guarantees that combine to form a constitutional right to privacy); *Cantor*, *supra* note 12, at 37 (recognizing a “Fourteenth Amendment liberty right” of medical decisionmaking).

46. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

47. See *Scott*, *supra* note 4, at 812 & n.19.

48. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (extending the right to privacy to cover abortion decisions); *Griswold*, 381 U.S. at 485 (extending the right to privacy to cover contraception decisions); *Ponter v. Ponter*, 342 A.2d 574, 577–78 (N.J. Super. Ct. Ch. Div. 1975) (extending the right to privacy to cover sterilization decisions).

49. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

A. Contraception

In 1965, the U.S. Supreme Court recognized a fundamental right to contraceptive autonomy for married couples in *Griswold v. Connecticut*.⁵⁰ *Griswold* struck down a Connecticut statute that made it illegal to use a drug for the purposes of preventing conception or to assist someone in using such a drug.⁵¹

Following *Griswold*, the Court determined that the right to contraceptive autonomy extends to unmarried couples as well in *Eisenstadt v. Baird*.⁵² In *Eisenstadt*, the Court held that a per se prohibition on contraception violated the rights of unmarried people under the Equal Protection Clause.⁵³ The right to contraceptive autonomy found further support in *Carey v. Population Services International*, which struck down restrictions on the marketing and sale of contraceptives.⁵⁴ According to *Carey*, regulation of contraceptives is allowable only when it is justified by a “compelling state interest.”⁵⁵

B. Abortion

In 1973, *Roe v. Wade* extended the right to privacy to also cover the decision of whether to terminate a pregnancy.⁵⁶ In *Roe*, the Supreme Court established a trimester framework, holding that in the first trimester of a pregnancy, the pregnant patient has a right to “an abortion free of interference by the State.”⁵⁷ Starting at the end of the first trimester, the state can constitutionally regulate abortion procedures to the extent necessary to protect the health of the mother.⁵⁸ Once the fetus has reached the point of viability, the state’s interest in protecting potential life justifies the prohibition of abortion entirely.⁵⁹

50. See *Griswold*, 381 U.S. at 485 (finding that the decisions about contraceptive use within marital relationships are included in the zone of privacy and protected by the Constitution).

51. *Id.* at 480, 485.

52. *Eisenstadt*, 405 U.S. at 453 (stating that the rights must be the same for married and single individuals and extending the *Griswold* decision to unmarried couples).

53. *Id.* at 443.

54. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 681–82 (1977).

55. *Id.* at 688.

56. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

57. *Id.* at 163.

58. *Id.*

59. *Id.* at 163–64; see also *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1304 (1980) (outlining the stages of pregnancy and describing when the state has a sufficient interest to restrict the pregnant woman’s

Following *Roe*, the U.S. Supreme Court extended the right to decide whether to terminate a pregnancy to minors as well.⁶⁰ *Planned Parenthood of Central Missouri v. Danforth* struck down a statute that required the consent of a parent for an unmarried minor's abortion.⁶¹ The Court held that the state cannot "give a third party an absolute, and possibly arbitrary, veto over the decision . . . to terminate the patient's pregnancy."⁶²

In *Bellotti v. Baird*, the Court went one step further and set out two ways in which minors must be able to obtain authorization for an abortion without the consent of their parents.⁶³ The first of these methods allows the minor to show in a judicial proceeding that she "is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes."⁶⁴ The second method allows a court to authorize an abortion even if the minor is not "mature," as long as the desired abortion is in her best interests.⁶⁵

C. Sterilization

In *Skinner v. Oklahoma*, the Supreme Court found that an Oklahoma statute authorizing compulsory sterilization of repeat criminals violated the Equal Protection Clause.⁶⁶ The Court described procreation as "one of the basic civil rights of man" and determined that the Oklahoma statute unconstitutionally infringed upon that right.⁶⁷

Although the U.S. Supreme Court has never expressly addressed the issue of *voluntary* sterilization,⁶⁸ sterilization is generally considered as part of the right to contraceptive and procreative autonomy.⁶⁹ Lower courts recognize a protected

constitutional rights). An exception to this framework occurs when an abortion is necessary "to preserve the life or health of the mother." *Roe*, 410 U.S. at 163–64. In these situations, an abortion can be obtained at any time. *See id.*

60. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

61. *Id.*

62. *Id.*

63. *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

64. *Id.* at 643. This method of obtaining an abortion through court approval without parental notice has come to be known as the "mature-minor doctrine." BLACK'S LAW DICTIONARY, *supra* note 40, at 1068.

65. *Bellotti*, 443 U.S. at 643–44.

66. *Skinner v. Oklahoma*, 316 U.S. 535, 536–37, 541 (1942).

67. *Id.* at 541.

68. *Developments in the Law—The Constitution and the Family*, *supra* note 59, at 1307.

69. *See* Neuwirth, Heisler & Goldrich, *supra* note 6, at 451 ("Sterilization is an exercise of the right not to procreate."); Scott, *supra* note 4, at 806 (referring to

right to sterilization as part of the fundamental right to privacy.⁷⁰

In *Ponter v. Ponter*, the plaintiff wanted a sterilization operation, but her doctors would not perform one without the consent of her husband, who refused to agree.⁷¹ The Superior Court of New Jersey found that the wife had a constitutional right to a sterilization operation without her husband's consent.⁷² An Oklahoma court reached a similar decision in *Murray v. Vandevander*, in which a husband sued a doctor and hospital for performing a hysterectomy on his wife without his consent.⁷³ The court found that the "natural right of a married woman to her health is not qualified by requiring that she have the consent of her husband."⁷⁴ Lower court cases like *Ponter* and *Murray* can be combined with Supreme Court opinions on contraception to reach the conclusion that sterilization is also a fundamentally protected right.⁷⁵

D. Decisionmaking Rights of the Mentally Incompetent

Although the Constitution protects procreative decisionmaking, mentally incompetent individuals lack the legal ability to make informed decisions about medical procedures such as abortion and sterilization.⁷⁶ Despite this inability, it is generally believed that mentally incompetent persons should "enjoy the same right of reproductive privacy as normal people."⁷⁷

sterilization as a "simple, safe, and effective means of avoiding unwanted pregnancy" and "one of the most frequently chosen forms of contraception in the world").

70. See, e.g., *Ponter v. Ponter*, 342 A.2d 574, 577–78 (N.J. Super. Ct. Ch. Div. 1975) (holding that the female plaintiff had a constitutional right to sterilization without her husband's consent); *Murray v. Vandevander*, 522 P.2d 302, 303 (Okla. Civ. App. 1974) (holding that the right to sterilization is not conditioned on a spouse's consent).

71. *Ponter*, 342 A.2d at 575.

72. *Id.* at 577–78.

73. *Murray*, 522 P.2d at 303.

74. *Id.*

75. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (using a broad interpretation of *Griswold* to reach a holding that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State"). Because sterilization is a decision in a childbearing matter, it can be considered a fundamental right. See *id.* Lower courts have already indicated that sterilization fits within the *Carey* framework. See *In re A.W.*, 637 P.2d 366, 369 (Colo. 1981) (interpreting *Carey* to provide the "freedom to make one's choice permanent by voluntarily undergoing sterilization"); *Ponter*, 342 A.2d at 577 (holding that the female plaintiff had a constitutional right to sterilization without her husband's consent); *Murray*, 522 P.2d at 303 (holding that the right to sterilization is not conditioned on a spouse's consent). Legal scholars agree that sterilization should be treated as a form of contraception. See, e.g., Neuwirth, Heisler & Goldrich, *supra* note 6, at 451; Scott, *supra* note 4, at 806.

76. See Pollack, *supra* note 2, at 253–54.

77. Scott, *supra* note 4, at 813.

The U.S. Supreme Court determined in *City of Cleburne v. Cleburne Living Center* that the mentally incompetent “have and retain their substantive constitutional rights” as well as their rights under the Equal Protection Clause.⁷⁸

One scholar subdivides the right to make medical decisions into three parts: self-determination, well-being, and bodily integrity.⁷⁹ Although mentally incompetent patients cannot effectively exercise the right to the first part (self-determination), they nevertheless have a protected liberty interest in well-being and bodily integrity.⁸⁰ To exercise this interest, a court or guardian can act as a surrogate decisionmaker for the mentally incompetent patient.⁸¹

Some courts describe the rights of the mentally incompetent person as the “same panoply of rights and choices” provided for competent persons.⁸² Because mentally incompetent people have the same “dignity and worth” as competent people, the recognition of fundamental rights must extend to both.⁸³ Courts outside of Texas have extended the right to decisions about abortion and sterilization, as well as other medical procedures, to mentally incompetent individuals through surrogate decisionmaking.⁸⁴

In a highly publicized decision that introduced surrogate decisionmaking, a New Jersey court authorized the use of a surrogate decisionmaker to exercise an incompetent woman’s right to decline or accept life-sustaining medical treatment in *In re Quinlan*.⁸⁵ In *Quinlan*, the court allowed a father to make the

78. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985).

79. *See Cantor*, *supra* note 12, at 43–44.

80. *Id.* at 44.

81. *Id.* at 41–42, 44.

82. *Foody v. Manchester Mem’l Hosp.*, 482 A.2d 713, 718 (Conn. Super. Ct. 1984) (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 428 (Mass. 1977)).

83. *Saikewicz*, 370 N.E.2d at 427–28; *see James W. Ellis, Decisions by and for People with Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 VILL. L. REV. 1779, 1804 (1992) (stating that mentally disabled people have the same “substantial liberty interests” as all other individuals, and those interests must be given “full legal protection” regardless of mental health).

84. *See, e.g., In re Moe*, 579 N.E.2d 682, 685–86 (Mass. App. Ct. 1991) (requiring courts to employ the doctrine of substituted judgment on behalf of mentally incompetent individuals in order to protect their right to abortion); *In re Grady*, 426 A.2d 467, 475 (N.J. 1981) (stating that a court should ensure the exercise of the “right to choose among procreation, sterilization and other methods of contraception” on behalf of incompetent individuals).

85. *In re Quinlan*, 355 A.2d 647, 671 (N.J. 1976) (authorizing the incompetent patient’s family to decide whether or not to withdraw the life-support system that kept her alive); *see Saikewicz*, 370 N.E.2d at 428–29 (referring to *Quinlan* as a “well publicized” case).

decision in place of his daughter, who was in a “persistent vegetative state.”⁸⁶

After *Quinlan*, courts began to apply the surrogate decisionmaker approach to sterilization for the mentally incompetent.⁸⁷ The Supreme Court of Washington held in *In re Hayes* that the court has jurisdiction to authorize the sterilization of a mentally incompetent person if that sterilization is in the best interest of the incompetent individual.⁸⁸ The mother of the incompetent minor in *Hayes* failed to show that sterilization would be in her daughter’s best interest, but the court left open the door for authorization in future cases.⁸⁹

The Supreme Court of New Jersey reached a similar conclusion in *In re Grady*, holding that a court could substitute its own judgment for the incompetent’s consent.⁹⁰ According to *Grady*, courts are to apply a best interests analysis when determining whether to authorize the sterilization of the incompetent person.⁹¹ Maryland’s Court of Appeals followed suit in 1982 with *Wentzel v. Montgomery General Hospital Inc.*, which held that courts have the authority to allow a guardian to consent to sterilization if they find that sterilization is in the incompetent person’s best interests.⁹²

In conclusion, a constitutionally protected right to medical decisionmaking and reproductive autonomy exists and encompasses decisions regarding contraception, abortion, and sterilization.⁹³ Although mentally incompetent individuals cannot

86. See *Quinlan*, 355 A.2d at 651, 655, 664 (internal quotations marks omitted) (describing Karen Ann Quinlan’s physical state and holding that her right to medical decisionmaking “may be asserted in her behalf . . . by her guardian”). New Jersey later refined the *Quinlan* holding with *In re Conroy*, which allows a surrogate decisionmaker to withdraw life-sustaining treatment only if (1) there is “trustworthy evidence that the patient would have refused the treatment” and it is clear that the burdens of life with the treatment outweigh the benefits; or (2) in the absence of trustworthy evidence, there is a finding that the net burdens of the patient’s life with treatment “clearly and markedly outweigh” the benefits that the patient receives from life. *In re Conroy*, 486 A.2d 1209, 1231–32 (N.J. 1985).

87. Cantor, *supra* note 12, at 38–39 (recognizing analogous lines of cases that used surrogate choice to preserve a mentally incapacitated person’s right of medical choice).

88. *In re Guardianship of Hayes*, 608 P.2d 635, 637 (Wash. 1980).

89. *Id.* at 636, 641–42.

90. *In re Grady*, 426 A.2d 467, 475 (N.J. 1981).

91. *Id.* The court must have clear and convincing proof that sterilization is in the incompetent person’s best interests before authorizing a sterilization procedure. *Id.* at 483.

92. *Wentzel v. Montgomery Gen. Hosp., Inc.*, 447 A.2d 1244, 1253 (Md. 1982). The court established this power to authorize sterilization by drawing from the court’s inherent *parens patriae* authority. *Id.*

93. See *supra* Parts III.A–C (addressing the constitutional right to make decisions about contraception, abortion, and sterilization).

exercise these rights in the same way as the average person, society and government must nevertheless protect their rights.⁹⁴ Mentally incompetent persons have the “same panoply of rights and choices” as competent individuals,⁹⁵ and they can exercise those rights by allowing a court or guardian to use substituted judgment in place of the incompetent person’s informed consent.⁹⁶

IV. STERILIZATION AND ABORTION FOR THE MENTALLY INCOMPETENT IN TEXAS

Unfortunately, Texas state law on abortion and sterilization is less than straightforward and does not adequately protect the rights of the mentally incompetent. Some elements of medical decisionmaking, such as the doctrine of informed consent and the basic constitutional rights of persons with mental illness, seem to be spelled out quite clearly in Texas law. However, little law exists to explain what courts or guardians can do when a non-medically necessary abortion or sterilization procedure might be in the best interests of a mentally incompetent individual.

A. *Statutory Basics: Informed Consent, Constitutional Rights, and Capacity to Consent*

Certain issues in the discussion of abortion and sterilization for the mentally incompetent are clearly codified by Texas statutes.⁹⁷ For example, the common law doctrine of informed consent exists statutorily in Texas.⁹⁸ Physicians and health care providers must “adequately disclose the risks and hazards involved in the medical care or surgical procedure” so their patients can make an informed decision.⁹⁹ For abortion, the requirement of informed consent is even more clearly stated: “A

94. See Cantor, *supra* note 12, at 49 (stating that a mentally incapacitated person “retains important constitutionally grounded interests (such as well-being and dignity) that deserve respect even if the disabled person cannot decide how to advance those interests”).

95. *Foody v. Manchester Mem'l Hosp.*, 482 A.2d 713, 718 (Conn. Super. Ct. 1984) (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 428 (Mass. 1977)).

96. See *supra* note 87 and accompanying text (discussing the utilization of surrogate decisionmaking to allow the incompetent person to exercise the constitutional right to sterilization).

97. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 74.101 (West 2011) (addressing informed consent); TEX. HEALTH & SAFETY CODE ANN. §§ 171.011, 576.001(a), 592.011(a) (West 2010) (addressing informed consent for abortion and constitutional rights for mentally disabled Texans).

98. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.101 (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010).

99. TEX. CIV. PRAC. & REM. CODE ANN. § 74.101 (West 2011).

person may not perform an abortion without the voluntary and informed consent of the woman on whom the abortion is to be performed.”¹⁰⁰

Similarly, Texas statutes clearly dictate that mentally ill Texans are entitled to the same constitutional rights and privileges as mentally healthy individuals.¹⁰¹ The Texas Health and Safety Code clearly states that “[e]ach person with mental retardation in this state has the rights, benefits, and privileges guaranteed by the constitution and laws of the United States and this state.”¹⁰² The Health and Safety Code reiterates this important provision in another chapter as well, stating that “[a] person with mental illness in this state has the rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws of the United States and this state.”¹⁰³ These statutes make it clear that mental disability does not alter the constitutional rights of Texas’s citizens.

The Texas Health and Safety Code also clearly defines capacity to consent to medical treatment.¹⁰⁴ Although Texas law initially presumes that every person is mentally competent, that presumption is rebuttable.¹⁰⁵ In Texas, a person lacks decisionmaking capacity if he does not possess “the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment and the ability to reach an informed decision in the matter.”¹⁰⁶ Similarly, a person is “incapacitated” if he lacks “the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to any proposed treatment decision.”¹⁰⁷ Additionally, any person who is subject to a guardianship is deemed to lack legal competence.¹⁰⁸

100. TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010).

101. See TEX. HEALTH & SAFETY CODE ANN. §§ 576.001(a), 592.011(a) (West 2010).

102. TEX. HEALTH & SAFETY CODE ANN. § 592.011(a) (West 2010).

103. TEX. HEALTH & SAFETY CODE ANN. § 576.001(a) (West 2010).

104. See TEX. HEALTH & SAFETY CODE ANN. § 313.002(3), (5) (West 2010) (defining “[i]ncapacitated” and “[d]ecision-making capacity”).

105. TEX. HEALTH & SAFETY CODE ANN. § 576.002(b) (West 2010).

106. TEX. HEALTH & SAFETY CODE ANN. § 313.002(3) (West 2010).

107. TEX. HEALTH & SAFETY CODE ANN. § 313.002(5) (West 2010).

108. See Scott, *supra* note 4, at 835 (stating that mentally disabled persons are not presumed to be incompetent unless they have been given a guardian); TEX. PROB. CODE ANN. §§ 693, 696(b) (West 2003 & Supp. 2012).

B. Guardianship

Like many other states, Texas law provides a process by which a court can declare a mentally disabled person to be legally incompetent.¹⁰⁹ In such a proceeding, the court appoints a guardian to exercise the rights of the disabled person by making medical decisions for the ward, establishing the ward's legal domicile, and providing for the ward's care and basic needs.¹¹⁰

In addition, Texas case law provides that a guardianship is the same thing as a managing conservatorship.¹¹¹ A guardian in Texas should have the same rights, privileges, duties, and powers as a nonparent managing conservator of a child.¹¹² In most situations, legally incompetent persons can adequately provide consent for medical procedures through their guardians.¹¹³ However, for sterilization procedures, only the person to be sterilized can consent to the sterilization.¹¹⁴ This means that a legal guardian cannot give adequate consent to sterilization for a mentally incompetent person.¹¹⁵

C. Surrogate Decisionmaking

When an individual lacks the capacity to consent to medical treatment and does not have a guardian, Texas law allows adult family members to give consent in place of the incapacitated patient.¹¹⁶ This process is referred to as "surrogate decisionmaking."¹¹⁷ However, the laws behind surrogate decisionmaking specifically exclude abortion and sterilization, among other

109. See TEX. PROB. CODE ANN. §§ 602, 603(b) (West 2003) (providing that a court can appoint a guardian over an incapacitated person and stating that "incompetent," "legally incompetent," and "incapacitated" all have the same meaning).

110. TEX. PROB. CODE ANN. §§ 677(a), 767(a) (West 2003 & Supp. 2011).

111. See *In re Guardianship of Henson*, 551 S.W.2d 136, 139 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) ("[G]uardianship of the person is simply a managing conservatorship.").

112. See *In re Henson*, 551 S.W.2d at 139–40 (defining the rights, privileges, and duties of a nonparent managing conservator). These rights include the right to make medical decisions for the child or ward. TEX. FAM. CODE ANN. § 153.371 (West 2008).

113. See TEX. PROB. CODE ANN. § 767(a)(4) (West Supp. 2011) (granting a guardian of the person the power to consent to medical or surgical treatment for the ward).

114. DISABILITY RIGHTS TEX., GUARDIANSHIP FOR TEXANS WITH DISABILITIES 12 (13th ed. 2011), http://www.disabilityrightstx.org/files/Guardianship_for_Texans_with_Disabilities.pdf; see *Frazier v. Levi*, 440 S.W.2d 393, 394–95 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (holding that Texas courts cannot authorize a sterilization and rejecting the guardian's application for sterilization of the ward).

115. See *Frazier*, 440 S.W.2d at 394–95.

116. TEX. HEALTH & SAFETY CODE ANN. § 597.041(a) (West 2010).

117. TEX. HEALTH & SAFETY CODE ANN. § 597.041 (West 2010).

things.¹¹⁸ Abortion and sterilization are treated differently than other medical procedures for the purposes of consent by a surrogate decisionmaker.¹¹⁹

D. Abortion for Minors

Legal incompetence can be caused by (1) temporary or permanent mental disability, or (2) being under the age of majority.¹²⁰ For minors who lack legal competence due to their age, parents can give consent for medical treatment in place of their minor children.¹²¹ With abortion, however, the laws of consent are less clear.¹²² If a minor desires an abortion, either her physician must give forty-eight hours' notice to the minor's parent or guardian, or the patient must apply for a court order allowing her to consent on her own without parental notification.¹²³

If a minor's parent or guardian is supportive of the abortion, the parent can waive the forty-eight hour period, and the physician can perform the abortion without delay.¹²⁴ Even if the parent is not supportive of the abortion, the minor can obtain court approval if (1) she is "mature and sufficiently well informed," or (2) parental notification would not be in the minor's best interests.¹²⁵ For mentally incompetent adults, these options do not exist.¹²⁶

E. Lack of Law on Abortion for the Mentally Incompetent

Although plenty of law exists to explain when a female minor can and cannot adequately consent to an abortion, similar

118. See TEX. HEALTH & SAFETY CODE ANN. § 597.003(a) (West 2010) (stating that chapter 597 of the Texas Health and Safety Code does not apply to decisions for abortion and sterilization).

119. *Id.* This difference in treatment exists for a variety of reasons, including (1) the non-medically necessary nature of abortion and sterilization, and (2) the permanence and irreversibility of abortion and sterilization. See *Frazier*, 440 S.W.2d at 393 ("There is no medical or physical necessity for the operation sought by the guardian."); see also *Pollack*, *supra* note 2, at 254 (describing the irreversibility of sterilization).

120. See TEX. PROB. CODE ANN. §§ 601, 603(b) (West 2003) (defining "incapacitated person" as a minor or someone with a mental condition who is substantially unable to provide food, clothing, or shelter for himself); *FIELD & SANCHEZ*, *supra* note 6, at 162–63 (comparing the treatment of legally incompetent minors to that of legally incompetent mentally disabled persons).

121. TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2008).

122. See *FIELD & SANCHEZ*, *supra* note 6, at 139.

123. TEX. FAM. CODE ANN. § 33.002(a) (West 2008).

124. TEX. FAM. CODE ANN. § 33.002(c) (West 2008).

125. TEX. FAM. CODE ANN. § 33.003(i) (West 2008 & Supp. 2011).

126. See *FIELD & SANCHEZ*, *supra* note 6, at 162–63 (comparing abortion for minors to abortion for mentally incompetent adults).

law does not exist for mentally incompetent females.¹²⁷ The law is clear that a physician cannot perform an abortion without informed consent,¹²⁸ but it is unclear whether a guardian can effectively give informed consent for abortion in place of a mentally incompetent woman.¹²⁹ Although Texas law provides a way for female minors to petition a court for an abortion without parental notification when it would be in the minor's best interests, no similar statute or case law can be found for mentally incompetent women.¹³⁰ This lack of law probably exists not because the situation never occurs, but because abortions are somehow obtained without court approval whenever necessary.¹³¹

F. Frazier v. Levi: Texas Courts Are Not Authorized to Approve Sterilization

In *Frazier v. Levi*, a rare Texas case on procreative rights for the mentally disabled, a mother and legal guardian of a mentally disabled daughter asked for a court order authorizing a sterilization operation.¹³² In this case of first impression in Texas, the court had to decide whether authorization of sterilization was within its powers.¹³³ In *Frazier*, the ward in question was thirty-four years old, but she had the mental ability of a six year old.¹³⁴ She was sexually promiscuous and had already given birth to two mentally disabled children.¹³⁵ The ward's mother and father cared for their daughter and their two grandchildren physically and

127. See *id.* at 162–63.

128. TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010).

129. See TEX. PROB. CODE ANN. § 767(a)(4) (West Supp. 2011) (authorizing guardians to consent to medical treatment for their wards); *Frazier v. Levi*, 440 S.W.2d 393, 393–95 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (rejecting a mother's application for an order of sterilization for her mentally incompetent daughter). The Texas Probate Code states that guardians have the power to consent to “medical treatment” and “surgical treatment.” TEX. PROB. CODE ANN. § 767(a)(4) (West Supp. 2011). However, this power apparently does not extend to sterilization procedures, so it is unclear whether it extends to abortion. See *Frazier*, 440 S.W.2d at 393–95 (ruling on the authorization of a sterilization procedure for a mentally incompetent woman whose mother could not consent without court approval).

130. See TEX. FAM. CODE ANN. § 33.003 (West 2008 & Supp. 2011) (allowing for abortion for a minor without parental notice); FIELD & SANCHEZ, *supra* note 6, at 162 (comparing abortion for minors to abortion for mentally incompetent adults).

131. See FIELD & SANCHEZ, *supra* note 6, at 139 (suggesting that the lack of litigation on abortion for mentally retarded females likely exists because abortions are simply taking place without court involvement).

132. *Frazier v. Levi*, 440 S.W.2d 393, 393–94 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

133. *Id.* at 393.

134. *Id.* at 394.

135. *Id.*

financially.¹³⁶ No medical necessity for a sterilization operation existed, but the ward's parents were becoming old and unable to care for any more children, so they believed sterilization would be in everyone's best interests.¹³⁷

The court refused to grant the application, holding that it lacked the statutory or constitutional authority needed to make such a ruling.¹³⁸ Neither the *parens patriae* authority, the general jurisdictional authority granted by statute, nor any other provision provides authority for a Texas court to approve the non-medically necessary sterilization of a mentally incompetent person.¹³⁹ Effectively, this holding means that sterilization is simply unavailable in Texas to anyone who lacks the legal competence to give informed consent.¹⁴⁰

G. Substituted Judgment and Best Interests Analysis

Similar to *Frazier*, *In re Guardianship of Neal* involved a decision made by a guardian in place of its mentally incompetent ward, also known as "substituted judgment."¹⁴¹ In *Neal*, the guardian wanted to make a large cash gift of the elderly ward's money for the purpose of avoiding estate taxes upon the ward's death.¹⁴² Although there was plenty of evidence that the ward would have chosen to make the gift had she been mentally competent, the court refused to authorize it, saying that courts have no power to authorize such a gift because no statute expressly allows it.¹⁴³ Courts and law practitioners interpret *Neal* to mean that substituted judgment is not allowed in Texas.¹⁴⁴ However, this interpretation was rejected by *Little v. Little*, which clarified that the *Neal* prohibition on substituted judgment in Texas

136. *Id.*

137. *See id.* at 393–94.

138. *Id.* at 394–95.

139. *Id.* The court refrained from addressing the question of whether a medically necessary sterilization of an incompetent person could be authorized by a Texas court. *See id.* at 394 (noting that in this case, there was no medical reason for the ward's sexual sterilization); DISABILITY RIGHTS TEX., *supra* note 114, at 12 (noting that Texas courts have not decided whether a guardian can authorize a medically necessary procedure which results in sterilization).

140. *See* FIELD & SANCHEZ, *supra* note 6, at 87.

141. *In re Guardianship of Neal*, 406 S.W.2d 496, 497, 502 (Tex. Civ. App.—Houston 1966), *writ ref'd n.r.e.*, 407 S.W.2d 770.

142. *Id.* at 497.

143. *Id.* at 498–99.

144. *See Little v. Little*, 576 S.W.2d 493, 498 (Tex. Civ. App.—San Antonio 1979, no writ) (describing *Neal* as "the case which is frequently referred to as rejecting the substituted judgment doctrine in Texas").

applies only when the desired action would provide no benefit to the ward during the ward's lifetime.¹⁴⁵

In *Little*, the court authorized a kidney donation operation for Anne, a mentally incompetent girl with a brother who needed a kidney transplant.¹⁴⁶ The court noted that organ donation was not within the definition of "medical treatment" authorized by the Probate Code but allowed the operation anyway because: (1) the procedure would involve few risks for Anne; (2) Anne's relationship with her brother brought her significant benefits, and the loss of her brother would cause her unhappiness; and (3) Anne had not been pressured by her family, and she had expressed a willingness to donate the kidney.¹⁴⁷ The court found that in Texas, a guardian's action can be authorized "where the ward, if competent, would so act, and such action would result in benefits to the ward which he would enjoy during his lifetime."¹⁴⁸ Effectively, the court allowed the use of the substituted judgment doctrine in conjunction with a best interests analysis.¹⁴⁹

H. Guardianship Standards: Differences Between the Texas and National Versions

To guide guardians through the often-confusing Texas law, the Texas Guardianship Certification Board provides a set of "minimum standards" that describes what guardians can and should do, but the document fails to address the question of consent for abortion and sterilization.¹⁵⁰ In contrast, the National Guardianship Association's equivalent document states in Standard 14 that a guardian "shall not authorize extraordinary procedures without prior authorization from the court."¹⁵¹ Extraordinary procedures are defined to include both sterilization and abortion.¹⁵²

145. *See id.*

146. *See id.* at 494, 500.

147. *See id.* at 495, 498–500 (discussing the definition of "treatment" and outlining the circumstances of Anne's case).

148. *Id.* at 498.

149. *See id.* at 498–500 (discussing substituted judgment and acknowledging the psychological benefits Anne would receive from donating a kidney to her brother).

150. *See* TEX. GUARDIANSHIP CERTIFICATION BD., MINIMUM STANDARDS FOR THE PROVISION OF GUARDIANSHIP SERVICES 9 (2011), <http://www.courts.state.tx.us/gcb/pdf/MinimumStandards.pdf> (addressing medical decisionmaking but including no mention of abortion or sterilization).

151. NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE 12 (3d ed. 2007), http://www.guardianship.org/documents/Standards_of_Practice.pdf.

152. *Id.*

The Texas version states in its Preamble that the “form of the [Texas] Minimum Standards generally follows that of the NGA Standards of Practice,” but points out that for some of the standards, “the Board adopted different language . . . to be consistent with Texas law and Texas experience.”¹⁵³ The Preamble specifically mentions that Standard 14, the section addressing decisionmaking for medical treatment, has been “substantially modified” from the national version.¹⁵⁴ Texas’s Standard 14 omits entirely the section about “extraordinary procedures” that exists in the national version, thus leaving guardians in Texas with no guidance on what to do when abortion or sterilization may be beneficial to the ward.¹⁵⁵

V. PROBLEMS WITH TEXAS LAW ON STERILIZATION AND ABORTION FOR THE MENTALLY INCOMPETENT

Unfortunately, Texas law is absent or unclear in many areas related to sterilization and abortion for mentally incompetent individuals. This causes a variety of problems, including over-protection of the right to procreate, confusion among guardians of mentally incompetent individuals, and a lack of symmetry with relevant abortion law for minors.

A. *Over-Protection of the Right to Procreate*

Although Texas never passed sterilization statutes during the eugenics movement,¹⁵⁶ the fear of repeating other states’ mistakes led to a strong attitude against allowing sterilization or abortion for mentally incompetent Texans.¹⁵⁷ Thanks to *Frazier*, there is no possible way for a mentally incompetent Texan to obtain a court-authorized sterilization procedure.¹⁵⁸ Texas law does not even clearly allow sterilization when it is necessary to

153. TEX. GUARDIANSHIP CERTIFICATION BD., *supra* note 150, at 1.

154. *Id.*

155. *See id.* at 9 (addressing medical decisionmaking but not mentioning extraordinary procedures).

156. *See* JULIUS PAUL, WALTER REED ARMY INST. OF RESEARCH “. . . THREE GENERATIONS OF IMBECILES ARE ENOUGH . . .”: STATE EUGENIC STERILIZATION LAWS IN AMERICAN THOUGHT AND PRACTICE 648 (1965), <http://buckvbell.com/pdf/JPaulmss.pdf>.

157. *See Frazier v. Levi*, 440 S.W.2d 393, 395 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (refusing to authorize sterilization without a statute that specifically grants that power to the courts); *see also supra* Part II.C (discussing how the eugenics movement affects today’s laws and attitudes).

158. *See Frazier*, 440 S.W.2d at 395 (holding that Texas courts do not have the power to authorize sterilization for a mentally incompetent individual unless the legislature grants that power).

protect the incompetent person's life or health.¹⁵⁹ It is true that governments must take care to protect the procreative rights of the mentally incompetent,¹⁶⁰ but Texas has gone so far in protecting the right to procreate that it now infringes upon the right *not* to procreate.¹⁶¹ A complete ban on sterilization does not protect the rights of the mentally incompetent; instead, it "belittle[s]" them.¹⁶²

Although a *Frazier* equivalent does not exist for abortion, the informed consent statute for abortion in Texas makes it clear that an abortion should never take place without the informed consent of the patient.¹⁶³ Because mentally incompetent individuals are incapable of giving informed consent, they are effectively barred from ever obtaining an abortion.¹⁶⁴ Mentally incompetent individuals in Texas are guaranteed all constitutional rights, including the rights to medical procedures affecting reproduction and procreation, yet they are *never* able to obtain a sterilization or abortion.¹⁶⁵ This contradiction is a shameful denial of constitutional rights.¹⁶⁶

B. Courts Waiting for Express Statutory Authority

If Texas courts should protect those who cannot protect themselves under the *parens patriae* doctrine, then they should not stand idly by while the rights of the mentally incompetent

159. See *id.* at 394 (noting that in this case, there was no medical reason for the ward's sexual sterilization, and thus clarifying that the holding applies only to non-medically necessary sterilizations); see also DISABILITY RIGHTS TEX., *supra* note 114, at 12 (noting that Texas courts have not decided how to authorize a medically necessary procedure which results in sterilization).

160. See *supra* Part III.D (discussing the existence and importance of reproductive rights for the mentally disabled).

161. See Scott, *supra* note 4, at 806–07, 824 (stating that when the system "places the interest in procreation above all other interests, including the interest in avoiding pregnancy," the law protects the right to procreate by "unnecessarily burdening the reciprocal right not to procreate").

162. FIELD & SANCHEZ, *supra* note 6, at 81.

163. See TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010) (prohibiting a physician from performing an abortion without the "informed consent of the woman on whom the abortion is to be performed").

164. See *id.* (barring abortion without informed consent of the pregnant woman on which it is to be performed); *Frazier*, 440 S.W.2d at 394.

165. See TEX. HEALTH & SAFETY CODE ANN. §§ 576.001(a), 592.011(a) (West 2010) (declaring that mentally ill Texans have the same constitutional rights as all other Texans); TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010) (barring abortion without informed consent); see also *Frazier*, 440 S.W.2d at 395 (holding that Texas courts do not have the power to authorize sterilization for a mentally incompetent individual).

166. See Cantor, *supra* note 12, at 45 (stating that the "categorical exclusion of surrogate choice jeopardizes a profoundly disabled person's human dignity interests").

are impossible to exercise.¹⁶⁷ Currently, Texas courts will not authorize sterilization (or, presumably, abortion) without a statute granting them that power.¹⁶⁸ However, creating statutory law on this issue is a daunting task, one that lawmakers are keen to steer clear of to avoid making difficult decisions.¹⁶⁹ Unfortunately, lawmakers may never get around to creating law on this issue, and without action from the courts, the mentally incompetent will continue to have no access to medical procedures that are fundamentally protected by the Constitution.¹⁷⁰

Courts in many other states authorize sterilizations and abortions despite a lack of statutory authority.¹⁷¹ In Texas, authorization of organ donation appears to be possible even though no statute explicitly allows it.¹⁷² In addition, the U.S. Supreme Court declared in *Stump v. Sparkman* that judges who authorize sterilizations in the absence of express statutory authority are not acting in the absence of all jurisdiction and are protected by judicial immunity from damages resulting from the authorization of sterilization.¹⁷³

Even with abortion, Texas courts could allow abortion for some mentally incompetent women despite the statutory

167. See *Frazier*, 440 S.W.2d at 394 (describing the state as *parens patriae*); *In re C.D.M.*, 627 P.2d 607, 609, 611 (Alaska 1981) (reasoning that “to ignore this well-settled doctrine [*parens patriae*] in favor of the so-called majority rule [(inaction without statutory authority)] would amount to nothing less than an abdication of our judicial responsibilities” and would unacceptably leave the mentally incompetent and their families with no means of recourse).

168. See *Frazier*, 440 S.W.2d at 395.

169. FIELD & SANCHEZ, *supra* note 6, at 139.

170. See *id.*; see also *supra* Part V.A (discussing the lack of access to sterilization and abortion for mentally incompetent individuals in Texas).

171. See, e.g., *In re Romero*, 790 P.2d 819, 820–21 (Colo. 1990) (confirming that Colorado’s district courts can act on petitions for sterilization without a statute because of their inherent *parens patriae* power); *Wentzel v. Montgomery Gen. Hosp., Inc.*, 447 A.2d 1244, 1252–53 (Md. 1982) (holding that Maryland courts have jurisdiction to consent to sterilization due to their *parens patriae* authority, even though no statute explicitly authorizes it); *In re A.W.*, 637 P.2d 366, 371–72, 375 (Colo. 1981) (holding that Colorado courts can authorize sterilizations of mentally incompetent minors despite the lack of express statutory authority); *In re Grady*, 426 A.2d 467, 479 (N.J. 1981) (holding that New Jersey courts can authorize sterilizations even in the absence of an applicable statute due to their *parens patriae* power); *In re Estate of D.W.*, 481 N.E.2d 355, 355–57 (Ill. App. Ct. 1985) (allowing Illinois courts to let a guardian consent to abortion for a ward despite the lack of statutory authority expressly mentioning abortion).

172. See *Little v. Little*, 576 S.W.2d 493, 500 (Tex. Civ. App.—San Antonio 1979, no writ) (approving an organ-donation operation for a mentally incompetent child because the operation was in her best interests).

173. See *Stump v. Sparkman*, 435 U.S. 349, 357, 359–60 (1978) (disagreeing with the appellate court that there was a “clear absence of all jurisdiction” and holding that the judge did have judicial immunity).

requirement of informed consent.¹⁷⁴ A Massachusetts court allowed the sterilization of an incompetent person despite a statutory informed consent requirement, stating that allowing sterilization is necessary to protect the dignity and rights of the disabled person.¹⁷⁵ Like the courts of many other states, Texas courts could choose to begin authorizing sterilizations and abortions when they are necessary or beneficial for mentally incompetent persons, but instead they choose to wait, hoping for a legislative green light that may never come.¹⁷⁶

C. *Ambiguity Caused by Little v. Little*

Little v. Little brings Texas courts one step closer to allowing sterilization or abortion when it is in the best interests of a mentally disabled person.¹⁷⁷ Organ donation, like sterilization and abortion, is not within the definition of “medical treatment,” and therefore is not something a guardian can normally consent to for a ward.¹⁷⁸ However, *Little* allows the procedure to occur despite the lack of statutory authorization.¹⁷⁹

Prior to *Little*, there was no way for a mentally incompetent person to obtain any non-necessary medical procedure.¹⁸⁰ After *Little*, the law established by *Frazier* is much less clear; it seems that courts have the authority to allow *some* non-necessary procedures without a statute, but not others.¹⁸¹

D. *Lack of Symmetry with Abortion for Minors*

In addition to the contradiction between *Frazier* and *Little*, another contradiction exists in Texas law between abortion for

174. See *In re Moe*, 432 N.E.2d 712, 715, 719–20 (Mass. 1982) (explaining why sterilization must be allowed for mentally incompetent individuals despite the existence of a statute requiring “knowledgeable consent” and allowing sterilization despite the statutory informed consent requirement).

175. *Id.* at 719–20.

176. See *Hardeman v. Judge*, 931 S.W.2d 716, 717–18 (Tex. App.—Fort Worth 1996, writ denied) (refusing to follow the *Frazier* rule with regard to real estate transactions, but leaving the rule intact for sterilization decisions); *Frazier v. Levi*, 440 S.W.2d 393, 395 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

177. See *Little*, 576 S.W.2d at 500 (authorizing an organ-donation operation for a mentally incompetent individual because it was in her best interests to donate a kidney to her brother).

178. See *id.* at 495 (explaining the definition of “treatment” and excluding from that definition anything that is not necessary for curing an injury or disease).

179. *Id.* at 495, 500.

180. See *Frazier*, 440 S.W.2d at 393–95.

181. Compare *Little*, 576 S.W.2d at 494–95, 500 (allowing organ donation despite the lack of statutory authority granting courts that power), with *Frazier*, 440 S.W.2d at 395 (refusing to authorize a sterilization due to lack of statutory authority).

minors and abortion for mentally incompetent adults. Although guardians are supposed to be equivalent to nonparent managing conservators,¹⁸² the two positions contrast sharply when an abortion is needed for the child or ward.¹⁸³ A minor with a consenting parent can obtain an abortion without any difficulty and without court approval, but a ward with a consenting guardian probably cannot obtain an abortion even if the guardian asks a court to authorize it.¹⁸⁴

Although both minors and wards are legally incompetent, their access to abortion is starkly different.¹⁸⁵ Additionally, a vast amount of case law dealing with minors and abortion exists, but the issue of mentally incompetent adults and abortion is strangely absent from the courts.¹⁸⁶ This difference reveals that Texas treats persons with mental retardation unlike all other persons, and that even children are given more procreative rights than mentally incompetent adults.¹⁸⁷

E. Other Problems

In addition to the previously mentioned problems, other issues exist. Because the Texas Minimum Standards for the Provision of Guardianship Services and Texas courts avoid dealing with issues surrounding abortion or sterilization, guardians and doctors have no guidance when they find themselves in a situation where abortion or sterilization, or both, may be beneficial for a ward.¹⁸⁸ Because of this confusion, guardians may skip contacting the court altogether and go straight to a doctor to obtain the desired procedure.¹⁸⁹

Additionally, the *Frazier* refusal to allow substituted judgment places Texas in a shrinking minority compared to the

182. See *In re Guardianship of Henson*, 551 S.W.2d 136, 139 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (explaining that “guardianship of the person is simply a managing conservatorship”).

183. See FIELD & SANCHEZ, *supra* note 6, at 162 (outlining the differences between minors and mentally retarded persons in regard to reproductive decisionmaking).

184. See *id.*; DISABILITY RIGHTS TEX., *supra* note 120, at 4.

185. See FIELD & SANCHEZ, *supra* note 6, at 162 (outlining the differences between minors and mentally retarded persons in regard to reproductive decisionmaking).

186. *Id.* at 163.

187. See *id.* at 164; *Powers v. Floyd*, 904 S.W.2d 713, 714–18 (Tex. App.—Waco 1995, writ denied).

188. See *supra* Parts IV.E, H (discussing the lack of law on abortion for the mentally incompetent in Texas and the differences between the national and Texas guardianship standards).

189. See FIELD & SANCHEZ, *supra* note 6, at 139 (suggesting that abortions are taking place without court involvement).

other forty-nine states.¹⁹⁰ The vast majority of states now allow a third party to consent in place of a mentally incompetent adult for sterilization.¹⁹¹ Texas law on abortion and sterilization is confusing and ambiguous, and mentally incompetent Texans could be better protected if Texas were to switch to the majority rule.

VI. POSSIBLE SOLUTIONS

Currently, Texas law does not adequately protect the human rights of its mentally incompetent citizens.¹⁹² By categorically excluding abortion and sterilization, Texas law deprives the mentally incompetent of their constitutionally protected procreative rights.¹⁹³ To fix this problem, three main options are available: consent by guardians without court approval, substituted judgment, and best interests analysis.

A. *Consent by Guardians Without Court Approval*

One possible approach allows guardians to provide consent in place of their wards, just as parents provide consent in place of their minor children, without court approval. This approach is best illustrated by *In re Barbara C.*, in which the court allowed a father to consent to an abortion for his mentally disabled daughter.¹⁹⁴ Barbara was a pregnant twenty-five-year-old woman with a mental age of less than two years.¹⁹⁵ Mental disabilities made her incapable of giving consent to an abortion procedure, and her father sought to obtain an abortion for Barbara.¹⁹⁶ Without any analysis on whether or not abortion would be the most beneficial option for Barbara, the court allowed her father to provide his consent in place of hers.¹⁹⁷ The court simply

190. See Cantor, *supra* note 12, at 53 (“[M]ost of the states that had refused in the 1970s to find inherent jurisdiction to authorize sterilization of a mentally disabled person have changed their law . . .”).

191. FIELD & SANCHEZ, *supra* note 6, at 87 (suggesting that abortions are taking place without court involvement).

192. See *supra* Part V.A (explaining how Texas law destroys the right *not* to procreate for the mentally incompetent by overprotecting the right to procreate).

193. See *supra* Part V.A.

194. *In re Barbara C.*, 474 N.Y.S.2d 799, 801 (N.Y. App. Div. 1984) (holding that consent of a parent without court approval can be used for an abortion if the patient lacks the ability to consent).

195. *Id.* at 800.

196. See *id.* at 800–01 (reasoning that Barbara’s father could consent because Barbara was incapable of doing so herself).

197. See *id.* (rejecting the Mental Health Information Service’s “best interests” argument in favor of simple substituted consent by a guardian).

reasoned that because Barbara lacked the ability to consent, the legal right to consent automatically belonged to her next of kin.¹⁹⁸

Although this approach is attractive because of its simplicity and would work perfectly in a world where all guardians constantly act in their wards' best interests, the potential for abuse is too great to make it a truly ideal approach.¹⁹⁹ Guardians (usually parents) and their mentally incompetent adult wards do not always share the same interests.²⁰⁰ Parents may be in favor of sterilization because they do not want to raise their children's accidental offspring or because they no longer want to deal with the challenges of feminine hygiene for a menstruating ward.²⁰¹

Additionally, guardians may make their decision with "prejudice and stereotypical views of the quality of a disabled person's life."²⁰² A Houston probate court judge witnessed this sort of prejudice during a hearing to determine whether a mentally retarded young man should have a "do not resuscitate" order.²⁰³ The man, who suffered from a mental disorder as well as a congenital medical defect that caused him to repeatedly contract pneumonia, had suffered from several bouts of pneumonia in the last year.²⁰⁴ His physician sought permission to deny antibiotics the next time the young man was diagnosed with pneumonia.²⁰⁵ The physician reasoned that the mentally disabled man had an "insufficient quality of life to justify further treatment."²⁰⁶ The judge denied the physician's application, noting that the entire incident reminded him of something from Germany's Third Reich.²⁰⁷ Due to incidents like this one, authorizing guardians to give consent without court approval is probably not a prudent choice.

198. *Id.*

199. *See* Pollack, *supra* note 2, at 255 (acknowledging that parental consent for sterilization procedures has historically been abused).

200. Neuwirth, Heisler & Goldrich, *supra* note 6, at 455.

201. *See id.* (discussing the possibility that parents want to avoid raising their mentally incompetent child's children); Scott, *supra* note 4, at 821–22 (mentioning the parents' interest in avoiding the challenges brought by menstrual hygiene).

202. Cantor, *supra* note 12, at 43.

203. *See* Rory R. Olsen, *Who Woke the Sleeping Firefighter?*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 275, 290 (2010) (describing a situation in his courtroom involving a young mentally disabled ward).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 290–91.

B. Substituted Judgment

A second option, the substituted judgment doctrine, carries a significantly smaller risk of abuse.²⁰⁸ Substituted judgment requires the court to rule “in the same manner as the incompetent would if he were competent.”²⁰⁹ Under substituted judgment, the court does not need to make the best decision or the decision that will most benefit the incompetent person.²¹⁰ Instead, the court must strive to determine what the incompetent person’s preferences would be and act according to them.²¹¹

Many cases exist that utilize the substituted judgment doctrine,²¹² but the analysis is particularly clear in *In re Doe*.²¹³ In *Doe*, the Supreme Court of Rhode Island employed the substituted judgment doctrine to authorize an abortion for a mentally incompetent young woman.²¹⁴ Jane Doe was a “profoundly retarded” woman who also suffered from a seizure disorder and cerebral palsy.²¹⁵ She had a mental age of less than three years, and she became pregnant as a result of a sexual assault at her group home.²¹⁶ In deciding whether to authorize an abortion for Jane, the court questioned whether Jane herself would have chosen to have an abortion if she were competent enough to make such a decision.²¹⁷ The court found that because pregnancy would be confusing, painful, and traumatic for Jane, and because her baby was at high risk for birth defects, Jane would choose to terminate her pregnancy if

208. See Pollack, *supra* note 2, at 253 (describing substituted judgment as a doctrine that directs judges to consider the needs of the ward). Because a court, rather than a guardian or parent, normally applies the substituted judgment doctrine, conflicting interests between the parent-guardian and the incompetent child will not affect the decision. See *id.* (describing how judges use substituted judgment).

209. Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 ISSUES L. & MED. 131, 135 (1985).

210. *In re Moe*, 432 N.E.2d 712, 720 (Mass. 1982); Pollack, *supra* note 2, at 253.

211. See *In re Doe*, 533 A.2d 523, 525 (R.I. 1987) (stating that the court must seek to determine “whether Jane Doe would have chosen this medical alternative if she were competent to exercise freedom of choice in her own behalf”).

212. See, e.g., *In re Moe*, 432 N.E.2d at 720 (applying the substituted judgment doctrine to authorize sterilization); *In re Jane A.*, 629 N.E.2d 1337, 1340–41 (Mass. App. Ct. 1994) (applying the substituted judgment doctrine to authorize abortion); *In re Moe*, 579 N.E.2d 682, 687 (Mass. App. Ct. 1991) (holding that the court must give weight to the ward’s preferences when using substituted judgment to decide whether to authorize an abortion and sterilization).

213. See *In re Doe*, 533 A.2d at 524–25 (applying the substituted judgment doctrine).

214. See *id.* at 524.

215. *Id.*

216. *Id.*

217. *Id.* at 525.

she were competent enough to do so.²¹⁸ The court allowed her abortion.²¹⁹

Although the substituted judgment doctrine succeeds at protecting the incompetent person's rights, it seems to be a bit nonsensical.²²⁰ How can a court decipher what an incompetent person would want when that person has been declared legally incapable of making such a decision?²²¹ Substituted judgment creates a sort of "fictional competency" and gives mentally incompetent people decisionmaking powers that, according to the definition of mental incompetency, cannot possibly exist.²²² The substituted judgment doctrine theoretically protects the rights of mental incompetents quite well, but in practice it causes confusion for the courts.²²³

C. Best Interests Analysis

A third option available to courts is the best interests analysis. When making a best interests judgment, a court decides for itself which option is best for the mentally incompetent person.²²⁴ The goal is to maximize the ward's interest and choose the available option that provides the greatest benefit to the ward.²²⁵ Many courts have utilized this analysis.²²⁶

218. *Id.* at 525–26.

219. *Id.* at 527.

220. *See* Weber, *supra* note 209, at 136, 138 (stating that preservation of rights has been offered as a rationale for the substituted judgment doctrine and identifying the paradox that occurs when attempting to use the substituted judgment doctrine for people who by definition lack the capacity to make decisions).

221. *See* Cantor, *supra* note 12, at 42 (explaining that most courts find substituted judgment as applied to an incompetent adult an "impossible task"); Weber, *supra* note 209, at 138 (describing this problem as a "paradoxical notion").

222. Weber, *supra* note 209, at 141. Of course, this paradox does not occur when the mentally incompetent person was previously competent and made some sort of statement regarding what he would prefer to do in a similar situation. *See id.* at 142 (describing the assumption that what a person would have previously decided corresponds to what the person would currently decide). Unfortunately, most cases do not involve such prior statements, and courts usually have little evidence to assist them in deciding what the ward would want. *See id.* (stating that solemn prior statements rarely exist in these cases).

223. *See id.* at 144 (describing the quest to determine what an incompetent person would choose if capable as an "awkward and perplexing position of attempting to speculate").

224. Weber, *supra* note 209, at 138.

225. CANTOR, *supra* note 2, at 127.

226. *See, e.g., In re Susan S.*, No. 7764, 1996 WL 75343, at *1 (Del. Ch. Feb. 8, 1996) (using a best interests analysis to decide whether to grant sterilization for a mentally incompetent individual); *In re Wirsing*, 573 N.W.2d 51, 55 (Mich. 1998) (allowing sterilization of the ward because the procedure was in the ward's best interests); *Estate of C.W.*, 640 A.2d 427, 439 (Pa. Super. Ct. 1994) (allowing sterilization because the best interests of the ward require it).

In *In re Grady*, the parents of Lee Ann Grady sought to obtain a sterilization procedure for their daughter, who was “seriously afflicted” with Down syndrome.²²⁷ The parents planned to place Lee Ann in a group home for disabled adults, and they felt that sterilization would be in her best interests once she left their constant supervision and transitioned into the group home in order to prevent an unwanted pregnancy.²²⁸ The court applied a best interests analysis, reasoning that sterilization should be approved only when the court is “persuaded by clear and convincing proof that sterilization is in the incompetent person’s best interests.”²²⁹ The court seemed supportive of sterilization for Lee Ann but remanded the case to ensure that it would be in her best interests to undergo sterilization now rather than in the future.²³⁰

The best interests analysis succeeds in protecting the mentally incompetent individual from invasions of privacy that are not beneficial, but it lacks the decisionmaking autonomy that is more present with the doctrine of substituted judgment.²³¹

D. A Hybrid of Substituted Judgment and Best Interests Analysis

In addition to the three possible solutions mentioned above, a fourth option can be derived by combining the doctrine of substituted judgment and the best interests analysis. This hybrid approach was applied by an Illinois court in *In re Estate of K.E.J.*²³² When using the hybrid approach to make a decision regarding sterilization or abortion for a mentally incompetent person, the court must first attempt to apply a substituted judgment standard.²³³ If clear and convincing evidence exists to show that the incompetent ward would have chosen a certain

227. *In re Grady*, 426 A.2d 467, 469–70 (N.J. 1981).

228. *Id.* at 470.

229. *Id.* at 483 (emphasis omitted).

230. *See id.* at 485–86 (describing the reasons why Lee Ann would benefit from sterilization and suggesting that the trial court should examine whether immediate sterilization would be premature).

231. *Compare id.* at 483 (explaining that the best interests analysis requires clear and convincing evidence that the desired action is in the incompetent’s best interests), with Weber, *supra* note 209, at 135 (defining substituted judgment, which follows what the incompetent person would want).

232. *In re Estate of K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008) (describing a “dual standard” approach that uses both the substituted judgment doctrine and a best interests analysis).

233. *See id.* at 720 (describing the first part of the dual standard as an “attempt to discern what the ward would have wished”). A more complete discussion of the substituted judgment doctrine can be found in *supra* Part VI.B.

option if competent, then the court should make its decision according to the ward's wishes.²³⁴ However, if no clear and convincing evidence exists to assist the court in making a substituted judgment, the court should abandon the substituted judgment standard and instead make its decision by using a best interests analysis, in which courts choose the option that furthers the best interests of the ward.²³⁵ By employing this hybrid approach, courts can ensure autonomous choice for an incompetent person to the maximum extent possible while still protecting against surrogate decisionmaking that would not benefit the ward.²³⁶

The dual-standard hybrid test retains the benefits of both substituted judgment and best interests, but it eliminates the disadvantages of each individual test. When used alone, substituted judgment results in a confusing paradox when courts attempt to discern what the patient would choose even though the patient is incapable of making choices.²³⁷ By using substituted judgment only when evidence of the patient's wishes exists, the hybrid test avoids the paradox while still ensuring that the patient's wishes, when present, receive the utmost consideration.²³⁸

When applied individually, best interests analysis receives criticism for taking the right to medical decisionmaking away from the patient and placing it in the hands of others.²³⁹ The hybrid test ensures that this will occur only when the patient has no ability to exercise the right on her own at all, and it transfers the decisionmaking right along with an obligation to act in the patient's best interests.²⁴⁰

234. *In re K.E.J.*, 887 N.E.2d at 720.

235. *Id.* A more complete discussion of the best interests analysis can be found in *supra* Part VI.C.

236. *See supra* Parts VI.B–C (describing substituted judgment, which acts according to the ward's wishes when possible, and best interests, which protects the incompetent person from non-beneficial decisions made by others).

237. *See Weber, supra* note 209, at 138.

238. *See id.* at 136 (stating that preservation of the mentally incompetent person's rights has been offered as a rationale for the substituted judgment doctrine).

239. *See id.* at 138 (stating that when using a best interests analysis, the court makes the decision based on its own evaluation of the mentally incompetent person's best interests). Some courts prefer the substituted judgment doctrine because, unlike a best interests analysis, it maximizes the importance of the incompetent person's desires. *See In re Doe*, 533 A.2d 523, 525 (R.I. 1987) (stating that the court must seek to determine "whether Jane Doe would have chosen this medical alternative if she were competent to exercise freedom of choice in her own behalf").

240. *See In re K.E.J.*, 887 N.E.2d 704, 720 (describing the dual-standard test of both substituted judgment and best interests).

VII. CONCLUSION

Texans with mental disabilities are entitled to the same constitutional rights as any other person.²⁴¹ These rights include the right to privacy, which the Supreme Court found to include the right to procreative autonomy.²⁴² Procreative autonomy requires the ability to choose if and when to have an abortion or sterilization procedure.²⁴³ The current situation in Texas denies mentally incompetent individuals this ability.²⁴⁴

A. *The Need for Statutory Law*

Although courts can act to improve this issue without any change in statutory law,²⁴⁵ the best solution would be legislative action resulting in statutes that clearly define how a mentally incompetent person can obtain an abortion or sterilization procedure.²⁴⁶ Without statutory authority, the mentally incompetent and their families will be faced with difficulty when a sterilization or abortion procedure is desired.²⁴⁷ When a statute exists, doctors and courts are more comfortable and willing to exercise the mentally incompetent individual's right to abortion or sterilization.²⁴⁸

B. *The Substituted Judgment and Best Interests Hybrid*

With or without accompanying legislative action, Texas courts should adopt a substituted judgment and best interests hybrid test and use it to authorize sterilization or abortion for mentally incompetent persons. By adopting a test similar to the one used in *In re Estate of K.E.J.*, courts can utilize the best

241. See TEX. HEALTH & SAFETY CODE ANN. §§ 576.001(a), 592.011(a) (West 2010).

242. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

243. See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (establishing a constitutional right to abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing a constitutional right to contraception).

244. See TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010) (barring abortion without informed consent); Frazier v. Levi, 440 S.W.2d 393, 395 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (holding that Texas courts do not have the power to authorize sterilization for a mentally incompetent individual without a statute that expressly grants that power to the courts).

245. See *supra* note 171.

246. See Little v. Little, 576 S.W.2d 493, 500 (Tex. Civ. App.—San Antonio 1979, no writ) (explaining why legislative action is the most effective solution); Neuwirth, Heisler & Goldrich, *supra* note 6, at 457 (stating that without express statutory authorization, mentally incompetent persons and their families are faced with “great difficulty”).

247. See Neuwirth, Heisler & Goldrich, *supra* note 6, at 457–58.

248. See *id.* at 462 (asserting that doctors and courts are reluctant to agree to sterilization without a statute).

aspects of both the substituted judgment doctrine and best interests analysis.²⁴⁹ The substituted judgment component of the test would ensure that the incompetent's wishes, when known, would be followed above all else.²⁵⁰ This guarantees that mentally incompetent individuals retain autonomy to the greatest extent possible.²⁵¹ The best interests component of the suggested hybrid test ensures that no decision made by another for a mentally incompetent person will be detrimental to the incompetent individual.²⁵² By authorizing a surrogate decision in favor of sterilization or abortion only when it is actually in the incompetent's best interests, courts can ensure that the mistakes of the eugenics movement do not resurface in Texas.²⁵³ This two-prong hybrid test will allow Texas courts to assist mentally incompetent persons in exercising their fundamental rights while still protecting their dignity and humanity.

Currently, Texas law provides no channel through which a mentally incompetent individual can obtain a sterilization or abortion.²⁵⁴ Mentally incompetent persons possess constitutional rights to these types of medical procedures, and the current Texas system unconstitutionally restricts those rights.²⁵⁵ A hybrid approach using both the doctrine of substituted judgment and a best interests analysis would allow mentally incompetent persons in Texas to exercise their constitutionally protected rights while still protecting them from abuse.

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249. See *In re Estate of K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008).

250. See *id.* Although a Texas case exists that appears to prohibit the use of substituted judgment alone, this case can be distinguished from the discussion of sterilization and abortion because it involves financial decisions rather than medical decisions. See *In re Guardianship of Neal*, 406 S.W.2d 496, 497–99 (Tex. Civ. App.—Houston 1966) (discussing the desired cash gift and refusing to authorize it), *writ ref'd n.r.e.*, 407 S.W.2d 770. Additionally, *Little v. Little* reinterprets *Neal* to apply only when the desired action has no benefit to the ward during his lifetime. See *Little v. Little*, 576 S.W.2d 493, 498 (Tex. Civ. App.—San Antonio 1979, no writ).

251. See *In re K.E.J.*, 887 N.E.2d at 720.

252. See *id.* (stating that when using best interests analysis, the decisionmaker should act “to further the ward’s best interests”).

253. See *In re Grady*, 426 A.2d 467, 483 (N.J. 1981) (explaining that best interests analysis approves only actions that have been shown by clear convincing evidence to be in the incompetent person’s best interests).

254. See TEX. HEALTH & SAFETY CODE ANN. § 171.011 (West 2010) (barring abortion without informed consent); *Frazier v. Levi*, 440 S.W.2d 393, 395 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (holding that Texas courts do not have the power to authorize sterilization for a mentally incompetent individual).

255. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.011, 576.001(a), 592.001(a) (West 2010) (barring abortion without informed consent and declaring that mentally ill Texans have the same constitutional rights as all other Texans); *Frazier*, 440 S.W.2d at 395.