Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women

Susan Stefan*
Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women

Susan Stefan

Abstract

The impact of legal decisions concerning the reproductive rights of women who are incarcerated, institutionalized or adjudicated incompetent has never been systematically examined.

KEYWORDS: sexual, egg, rights
strategy or last hope strategy. In the emergency situation — and most of the cases that I am discussing arise in an emergency context — with no information about current law or current medicine, no time to get it, and often no time to appoint counsel for all the parties involved, the likelihood of the judge in effect reallocating decisionmaking to the physician is even greater. The judge often must travel to the hospital to hold a hearing. And it takes a mighty courageous judge to disagree with the doctors because judges, like the rest of us, are intimidated when we are outside of our own setting and in the setting of other professionals.

IV. Conclusion

The hardest kind of case that a judge or anyone else faces is a situation where moral considerations seem to require or permit a particular result but, social considerations seem to dictate an opposite conclusion. Let me give you an example. I have had lots of reasons to think recently about active euthanasia for very ill, elderly persons in a great deal of pain and suffering. I can justify in my mind that in some instances a lethal injection for a competent elderly person who is asking not to have to survive additional painful weeks or months is ethically acceptable. However, I am not prepared to argue that as a matter of public policy, we should permit the use of a lethal injection for that one elderly person or in general. It seems to me that there are social considerations involved in this issue that go beyond the needs of a particular individual. Similarly, it is possible and just as tough to say that society should not coerce women to act in the best interests of their fetuses even if they have a moral obligation to act. Equity and privacy concerns deserve consideration and perhaps greater priority than the fact that, in a particular case, the pregnant woman seems to be doing the morally wrong thing. Thank you.


Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women

Susan Stefan

I. INTRODUCTION

A. Definition of Reproductive Rights
B. Women in Institutions and Prisons

II. JUDICIAL FRAMEWORK: RIGHTS OF INSTITUTIONALIZED AND INCARCERATED PERSONS

III. CHOICES AROUND CONCEPTION

A. Sterilization
B. Rape vs. Voluntary Sexual Activity
   1. Rape
   2. Voluntary Sexual Activity

IV. CHOICES AROUND PREGNANCY

A. Abortion
   1. The Right of Institutionalized Women to Abortion
   2. The Right of Incarcerated Women to Abortion
B. The Right to Carry Pregnanacies to Term
   1. The Right to Adequate Prenatal Care in Prison
   2. The Right Not To Be Committed or Incarcerated Because of Pregnancy

V. CHOICES AROUND CHILDBIRTH

A. Custody and Parental Rights
B. Consent to Adoption and Revocation of Consent

VI. CONCLUSION

* Staff Attorney, Mental Health Law Project, 2021 L Street N.W., Suite 800, Washington, D.C. 20036.
1. Introduction

The impact of legal decisions concerning the reproductive rights of women who are incarcerated, institutionalized or adjudicated incompetent has never been systematically examined. Yet reproductive rights cases decided in the context of state custody or legal guardianship shed a considerable light on courts’ understanding of the underlying meaning of these rights.

The early decisions on reproductive rights resolved cases brought by free women who asked only that the state be uninvolved in their decisions regarding contraception and pregnancy. Later decisions denying poor women reimbursement for abortions merely underscore that the privacy right guarantees government non-intervention rather than realizing reproductive choice. But what do rights premised on the distinction between the public sphere and the private sphere mean to women who live in institutions and jails? How can we speak of freedom from government interference for those who are in state custody? What is choice to women who have been adjudicated unable to choose?

The state has traditionally been involved in regulating the private decisions of incarcerated, institutionalized and incompetent women. Historically and currently it has control over their marriage, sexual relations, pregnancy and childbirth, because they are under the control and protection of the state. How can the language and logic of the law on privacy and abortion apply to these women?

In addition, in our society a deep-seated stigma is associated with persons who are mentally retarded, mentally ill or incarcerated. It is often forgotten that the first reproductive rights decision in this country involved Carrie Buck, a mentally retarded woman who was sterilized after the Supreme Court held that “society can prevent those who are manifestly unfit from continuing their kind.”

The extent to which these women’s special circumstances should be considered in adjudicating their reproductive rights is a very delicate matter. Taking disabilities or incarceration into account may reflect myths and stereotypes rather than an accurate assessment of the strengths, abilities and feelings of the persons in question and may consequently amount to discrimination in violation of their rights. On the other hand, consideration of disabilities or incarceration may also be essential, to recognize real differences in the individual’s situation.

A. Definition of Reproductive Rights

For the purpose of this paper, “reproductive rights” will be taken to mean a woman’s right to decide whether or not to bear children, and by whom, including decisions relating to prevention of conception, whether or not to carry a pregnancy to term and whether or not to keep the children she has chosen to bear. The right to make decisions relating to conception will be taken to include the right not to be raped while in state custody, and the decision to carry a pregnancy to term will encompass the right not to be committed or incarcerated because of pregnancy, and to keep custody of the child unless parental rights-termination standards applicable to all parents are met.

Rape and child custody are not usually included in the concept of reproductive rights. This is because the law has a curiously truncated view of these rights. A continuum we take for granted in “real” life — sexual intercourse, pregnancy, birth and raising children — is artifi-
Stefan: Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Inst

I. Introduction

The impact of legal decisions concerning the reproductive rights of women who are incarcerated, institutionalized or adjudicated incompetent has never been systematically examined. Yet reproductive rights cases decided in the context of state custody or legal guardianship shed a considerable light on courts’ understanding of the underlying meaning of these rights.

The early decisions on reproductive rights resolved cases brought by free women who asked only that the state be uninvolved in their decisions regarding contraception and pregnancy. Later decisions denying poor women reimbursement for abortions merely underscore that the privacy right guarantees government non-intervention rather than realizing reproductive choice. But what do rights premised on the distinction between the public sphere and the private sphere mean to women who live in institutions and jails? How can we speak of freedom from government interference for those who are in state custody? What is choice to women who have been adjudicated unable to choose?

The state has traditionally been involved in regulating the private decisions of incarcerated, institutionalized and incompetent women. Historically and currently it has control over their marriage, conjugal and sexual relations, pregnancy and childbirth, because they are under the control and protection of the state. How can the language and logic of the law on privacy and abortion apply to these women?

In addition, in our society a deep-seated stigma is associated with persons who are mentally retarded, mentally ill or incarcerated. It is often forgotten that the first reproductive rights decision in this country involved Carrie Buck, a mentally retarded woman who was sterilized after the Supreme Court held that “society can prevent those who are manifestly unfit from continuing their kind.”

The extent to which these women’s special circumstances should be considered in adjudicating their reproductive rights is a very delicate matter. Taking disabilities or incarceration into account may reflect myths and stereotypes rather than an accurate assessment of the strengths, abilities and feelings of the persons in question and may consequently amount to discrimination in violation of their rights. On the other hand, consideration of disabilities or incarceration may also be essential, to recognize real differences in the individual’s situation.

A. Definition of Reproductive Rights

For the purpose of this paper, “reproductive rights” will be taken to mean a woman’s right to decide whether or not to bear children, and by whom, including decisions relating to prevention of conception, whether or not to carry a pregnancy to term and whether or not to keep the children she has chosen to bear. The right to make decisions relating to conception will be taken to include the right not to be raped while in state custody, and the decision to carry a pregnancy to term will encompass the right not to be committed or incarcerated because of pregnancy, and to keep custody of the child unless parental rights-termination standards applicable to all parents are met.

Rape and child custody are not usually included in the concept of reproductive rights. This is because the law has a curiously truncated view of these rights. A continuum we take for granted in “real” life—sexual intercourse, pregnancy, birth and raising children—is artifi-

1989] 407

Stefan: Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Inst

Published by NSUWorks, 1999
cally and significantly divided by law. Often, the concept of reproductive freedom is applied only to decisions made post-conception and pre-birth. After that, legal questions around the right to keep the child are referred to under the rubric of "family law." But a woman does not choose to become pregnant or stay pregnant simply for the sake of pregnancy itself; the point of reproductive rights is to ensure that a woman's choice about her pregnancy is honored. If that choice is to have a child, it is surely anomalous to consider the right protected simply by giving birth if the woman loses her child immediately thereafter. While a forced abortion shocks the public conscience, we hear no such outrages when a child is taken from its mother against her will immediately after birth, or when she has done the child no harm.

This article will also discuss commitment or incarceration of a woman simply because she is pregnant for the avowed purpose of protecting the fetus, and the implications of this trend for the right to make procreative decisions without government interference.

Each of these areas—sterilization, rape, abortion, child custody, the right to carry a pregnancy to term—could clearly command its own law review article. But in order to understand the courts' perspectives on reproductive rights for these women, the stated interests and results must be compared across each of these areas to illuminate the overall approach of the courts to the privacy and reproductive rights of incarcerated, institutionalized and incompetent women.

B. Women in Institutions and Prisons Today

Almost three-quarters of a million women are held in institutions, prisons and jails. About 568,753 women were admitted to mental institutions or psychiatric wards in 1980;5 of these, 84 percent were between 18 and 65 years of age.6 Prisons and jails hold more than 50,000 women,8 almost 90 percent of whom are under the age of 40.10 About 37,762 women over the age of 16 live in public institutions for mentally retarded people.11 In general, overall rates of institutionalization have declined in the last 10 years, while rates of incarceration for women have increased.18

No national figures are available concerning rapes, pregnancies, abortions or births in institutions or jails.13 However, state-wide and regional studies, litigation and the medical literature all reflect the existence of these occurrences.14

Sex in institutions occurs frequently, on an ill-defined spectrum between consent and coercion. Some women in institutions are forcibly dividing the total of these numbers by the total of all women admitted to institutions.

6. This occurs even when the mother has a stable home to return to with her child. In re Green, 5 Fam. L. Rep. (BNA) 2173 Oct. 17, 1978 (mentally retarded mother); In re Orlando F., 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976) (mentally retarded mother).


8. Id. Although there is no specific figure on the percentage of women between 18 and 65, it can be derived by adding the number of females admitted in 1980 who were over 65 (54,447) and those admitted in 1980 who were under 18 (38,310) and

18988

1889

Stefan

409

10. Five years ago, 62 percent of women in prisons and jails were under 30; 37 percent were under 40. U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, ADULT FEMALE OPPONENTS AND INSTITUTIONAL PROGRAMS 104 (1984).

11. Conversation with Dr. R. C. Schenkenberger (Oct. 11, 1988) based on figures from NATIONAL SURVEY OF PUBLIC RESIDENTIAL FACILITIES FOR FY 86-87. These figures include mentally retarded living in the 34 mental hospitals with wards for mentally retarded people. They do not include the substantial number of mentally retarded women, some of whom have not been adjudicated incompetent and are under guardianship, who live in the community.


14. One study of 26 of the 135 sizable jails and prisons for women found 260 pregnancies, McMch, Protection of the Rights of Pregnant Women in Prisons and Detention Facilities, 6 NEW ENG. J. PRISON L. 231, 222 n.8 (1980); another article reported a pregnancy rate of 12.8 percent of 51 women in jail in 7 states, Holt, supra note 13, at 524 n.9. These figures appear to be low. Cases brought on behalf of pregnant women in jails and prisons in California show more than 300 pregnant women in one year in jail, a work camp and a prison (see infra Section IV(B)(1)); Wignall & Meredith, Illegitimate Pregnancies in Institutions, 18 ARCHIVES OF GENERAL PSYCHIATRY 580 (May 1968). Musick, supra note 13, studied 180 incidents of sexual assault in institutions. See infra Section III(B).
cially and significantly divided by law. Often, the concept of reproductive freedom is applied only to decisions made post-conception and pre-birth. After that, legal questions around the right to keep the child are referred to under the rubric of "family law." But a woman does not choose to become pregnant or stay pregnant simply for the sake of pregnancy itself; the point of reproductive rights is to ensure that a woman's choice about her pregnancy is honored. If that choice is to have a child, it is surely anomalous to consider the right protected simply by giving birth if the woman loses her child immediately thereafter. While a forced abortion shocks the public conscience, we hear no such outcries when a child is taken from its mother against her will immediately after birth, or when she has done the child no harm.

This article will also discuss commitment or incarceration of a woman simply because she is pregnant for the avowed purpose of protecting the fetus, and the implications of this trend for the right to make procreative decisions without government interference.

Each of these areas — sterilization, rape, abortion, child custody, the right to carry a pregnancy to term — could clearly command its own law review article. But in order to understand the courts' perspectives on reproductive rights for these women, the stated interests and results must be compared across each of these areas to illuminate the overall approach of the courts to the privacy and reproductive rights of incarcerated, institutionalized and incompetent women.

B. Women in Institutions and Prisons Today

Almost three-quarters of a million women are held in institutions, prisons and jails. About 568,753 women were admitted to mental institutions or psychiatric wards in 1980; of these, 84 percent were between 18 and 65 years of age.6 Prisons and jails hold more than 50,000 women, almost 90 percent of whom are under the age of 40. About 37,762 women over the age of 16 live in public institutions for mentally retarded people.11 In general, overall rates of institutionalization have declined in the last 10 years, while rates of incarceration for women have increased.12

No national figures are available concerning rapes, pregnancies, abortions or births in institutions or jails.13 However, state-wide and regional studies, litigation and the medical literature all reflect the existence of these occurrences.14

Sex in institutions occurs frequently, on an ill-defined spectrum between consent and coercion. Some women in institutions are forcibly

dividing the total of these numbers by the total of all women admitted to institutions.

9. On June 30, 1988, there were 30,834 women in prison. BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS (1988) (6-month report). In 1986, the last year for which figures are available, 21,501 women were in jail. BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 1986 (1987).

10. Five years ago, 62 percent of women in prisons and jails were under 30; 87 percent were under 40. U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, ADULT FEMALE OFFENDERS AND INSTITUTIONAL PROGRAMS 104 (1984).

11. Conversation with Dr. R. C. Scherenberger (Oct. 11, 1988) based on figures from NATIONAL SURVEY OF RESIDENTIAL FACILITIES FOR FY 86-87. These figures include mentally retarded living in the 34 mental hospitals with wards for mentally retarded people. They do not include the substantial number of mentally retarded women, some of whom have been adjudicated incompetent and are under guardianship, who live in the community.


13. Holt, Nine Months to Life — The Law and the Pregnant Inmate, 20 J. FAM. L. 523, 524 (1981/82); Musick, Patterns of Institutional Sexual Assault, 7 RESPONSE TO VIOLENCE IN THE FAMILY AND SEXUAL ASSAULT No. 3, 1 (Center for Women Policy Studies May/June 1984), [hereinafter Musick].

14. One study of 26 of the 135 sizable jails and prisons for women found 260 pregnancies, McHugh, Protection of the Rights of Pregnant Women in Prisons and Detention Facilities, 6 NEW ENG. J. PRISON L. 231, 232 n.8 (1980); another article reported a pregnancy rate of 12.8 percent of 51 women in jail in 7 states, Holt, supra note 13, at 524 n.9. These figures appear to be low. Cases brought on behalf of pregnant women in jails and prisons in California show more than 300 pregnant women in one year in jail, a work camp and a prison (see infra Section IV(B)(1)); Wiggall & Meredith, Illegitimate Pregnancies in Institutions, 18 ARCHIVES OF GENERAL PSYCHIATRY 580 (May 1968). Musick, supra note 13, studied 180 incidents of sexual assault in institutions. See infra Section III(B).
rapeed while in restraints or under heavy sedation, 18 some engage in voluntary sex with fellow patients with whom they have ongoing relationships 19 and some engage in prostitution. 17

The potential reproductive rights issues for incarcerated or institutionalized women cover a wide range. Women may become pregnant while in state custody. Some are pregnant on admission; their pregnancies may not be discovered until the final weeks before birth. Some women wish to terminate their pregnancies. Some do not understand the meaning of pregnancy. In some cases the state wishes to terminate the pregnancy; in other cases the woman's guardian or parents wish to do so. Sometimes the prenatal or medical care the woman receives is so substandard that she loses the child. If the woman gives birth to the child, she may wish to retain parental rights. Some institutionalized women who give their children up for adoption change their minds when they are discharged and plead that they were incompetent when they signed the papers.

The choices surrounding conception, pregnancy, childbirth and child custody, and the allocation of power to make those choices, form the crux of the legal issues around reproductive rights of incarcerated, institutionalized and incompetent women.

II. Judicial Framework: Rights of Institutionalized and Incarcerated Persons

Several key Supreme Court cases provide the framework for legal

analysis of the substantive rights of persons who are institutionalized or incarcerated. 18 These decisions reflect a recent and significant transformation of the Court's analysis in cases involving the rights of institutionalized and incarcerated people. Previously, the Supreme Court had examined the record for the true facts behind assertions of benevolent intent by the state 19 and expressed skepticism about the role of treatment professionals in resolving the constitutional rights of patients. 20

By the late seventies and early eighties, the Court accepted at face value the state's accounts of the purpose and character of incarceration and the paper descriptions of programs. 21 In its haste to exit the arena of judicial activism, the Court labeled judicial commitment hearings for children "time-consuming procedural minutiae," 22 and said of problems in America's prisons that they "are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." 23

The most recent Supreme Court pronouncements on the rights of incarcerated and institutionalized people have taken great care to defer to the professional expertise of the people whom patients and prisoners charge with violating their rights. Youngberg v. Romeo, 24 which establishes for institutionalized people a right to freedom from unreasonable restraint, 25 to safety, 26 and to minimal habilitation or treatment necessary to secure the first two rights, 27 also makes it clear that "courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state

17. Diane Cox Leighton, Being Mentally Ill in America: One Female's Experience, in BACHRACH & NADJELSON, TREATING CHRONICALLY MENTALLY ILL WOMEN 69 (1983) ("Although sex was offered by a male patient for a quarter in the laundry room to any female on the ward, I gave him all my quarters just to be left alone"); CARE OF INSTITUTIONALIZED MENTALLY DISABLED PERSONS: JOINT HEARING BEFORE THE SUBCOMMITTEE ON THE HANDICAPPED OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES AND THE SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES EDUCATION, AND RELATED AGENCIES OF THE COMMITTEE ON APPROPRIATIONS OF THE UNITED STATES SENATE, 99th Cong. 1st Sess., Part 2, 22 (April 1-3, 1985) ("State investigators said prostitution in return for minor personal items and amounts of money has occurred").

20. In O'Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975), the Court brusquely dismissed the argument that "the adequacy of treatment is a nonjusticiable question that must be left to the discretion of the psychiatric profession," noting that where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.
25. Id. at 319.
26. Id.
27. Id. at 322.
raped while in restraints or under heavy sedation, some engage in voluntary sex with fellow patients with whom they have ongoing relationships and some engage in prostitution.

The potential reproductive rights issues for incarcerated or institutionalized women cover a wide range. Women may become pregnant while in state custody. Some are pregnant on admission; their pregnancies may not be discovered until the final weeks before birth. Most women wish to terminate their pregnancies. Some do not understand the meaning of pregnancy. In some states the women wish to terminate the pregnancy. Other women’s guardian or parents wish to do so. Sometimes the prenatal or medical care the woman receives is so substandard that she loses the child. If the woman gives birth to the child, she may wish to retain parental rights. Some institutionalized women who give their children up for adoption change their minds when they are discharged and plead that they were incompetent when they signed the papers.

The choices surrounding conception, pregnancy, childbirth and child custody, and the allocation of power to make those choices, form the crux of the legal issues around reproductive rights of incarcerated, institutionalized and incompetent women.

II. Judicial Framework: Rights of Institutionalized and Incarcerated Persons

Several key Supreme Court cases provide the framework for legal analysis of the substantive rights of persons who are institutionalized or incarcerated. These decisions reflect a recent and significant transformation of the Court’s analysis in cases involving the rights of institutionalized and incarcerated people. Previously, the Supreme Court had examined the record for the true facts behind assertions of benevolent intent by the state and expressed skepticism about the role of treatment professionals in resolving the constitutional rights of patients.

By the late seventies and early eighties, the Court accepted at face value the state’s accounts of the purpose and character of incarceration and the paper descriptions of programs. In its haste to exit the arena of judicial activism, the Court labeled judicial commitment hearings for children “time-consuming procedural minutia” and said of problems in America’s prisons that they “are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”

The most recent Supreme Court pronouncements on the rights of incarcerated and institutionalized people have taken great care to defer to the professional expertise of the people whom patients and prisoners charge with violating their rights. Youngberg v. Romeo, which establishes for institutionalized people a right to freedom from unreasonable restraint, safety and to minimal habilitation or treatment necessary to secure the first two rights, also makes it clear that “courts must show deference to the judgment exercised by a qualified professional.” By so limiting judicial review of challenges to conditions in state

17. Diane Cox Leighton, Being Mentally Ill in America: One Female’s Experience, in BACHRACH & NADELSON, TREATING CHRONICALLY MENTALLY ILL WOMEN 69 (1988) (“Although sex was offered by a male patient for a quarter in the laundry room to any female on the ward, I gave him all my quarters just to be left alone”); CARE OF INSTITUTIONALIZED MENTALLY DISABLED PERSONS: JOINT HEARING Before the Subcommittee on the Handicapped of the Committee on Labor and Human Resources and the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations of the United States Senate, 99th Cong. 1st Sess., Part 2, 22 (April 1-3, 1985) (“State investigators said prostitution in return for minor personal items and amounts of money has occurred”).
20. In O’Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975), the Court brusquely dismissed the argument that “the adequacy of treatment is a nonjusticiable question that must be left to the discretion of the psychiatric profession,” noting that “where ‘treatment’ is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.”
25. Id. at 319.
26. Id.
27. Id. at 322.
Institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized."[28]

In the prison context, the Court has also been at great pains to underscore the expertise of prison officials and the primary importance of the goals of prison administration, emphasizing that in the trade-off between exercise of constitutional rights and security concerns, "the choice made by corrections officials — which is, after all, a judgment 'peculiarly within [their] province and professional expertise' — should not be lightly set aside by the courts."[29]

Interestingly, this professional judgment standard, which has blighted much civil rights litigation on behalf of incarcerated and institutionalized people, has barely touched the area of reproductive rights of women in institutions and prisons. At first, this may appear to be a wholly salutary result of the public/private dichotomy the Supreme Court has painstakingly drawn in reproductive rights cases: if the state has no place interfering in private, personal decisions, then the professional judgment standard is irrelevant.

As will be seen, the fact that courts ignore the professional judgment standard in many reproductive rights cases produces mixed results. Many of these cases are decided by reference to a judge's own preconceptions and intuitions, without deference to experts. Occasionally these decisions are characterized by insight and understanding; more often they reflect ignorance and stereotypes which are many years behind current professional knowledge. "Professional judgment," after all, is a dynamic standard: it changes — albeit slowly — to accommodate a growing body of research and experience. And while unfortunately many professionals share the stereotypes themselves, in the inevitable duel of experts, there is sometimes the chance of victory through presenting professionals to educate and persuade the court.

In practice, the absence of reference to the professional judgment standard does not necessarily mean autonomous decisions for the women involved. Often, it means instead that these "private" decisions are left to the woman's family, who may have very different interests and priorities. As will be seen in the discussion of sterilization cases, when courts purport to defer to a woman's right of reproductive choice, they are frequently only assenting to a course already determined by the woman's family. It is therefore ultimately unclear whether these decisions would benefit from application of the recent "professional judgment" standard or not.

The Supreme Court's two decisions on reproductive rights for incompetent, institutionalized or incarcerated women are Buck v. Bell,[30] which upheld the Virginia compulsory sterilization law in 1927, and Stump v. Sparkman.[31] Ironically, for a Court so intent on retreat from "judicial activism," in Stump v. Sparkman the Court decided that a judge could not be held liable for ordering a woman to be sterilized in the absence of an authorizing statute and without providing any procedural protections to the sterilized woman.[32] These decisions will be discussed at greater length below.

III. Choices Around Conception

A. Sterilization

Much has been written about the massive sterilization campaigns undertaken from the beginning of the twentieth century which crested in the 1930s in this country.[33] Between 1900 and 1950, approximately 60,000 women were sterilized.[34] The practice was upheld by the Supreme Court in 1927 in a case involving an allegedly mentally retarded woman in Virginia.[35]

32. The sterilization was approved without formal petition in an ex parte proceeding. There was no notice to the minor, no hearing and a guardian ad litem was not appointed. Id. at 359-60.
35. Buck v. Bell, 274 U.S. 200 (1927). It has been argued that Carrie Buck was not the "imbecile" that Justice Holmes charged she was; in fact, she was an avid...
institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized."

In the prison context, the Court has also been at great pains to underscore the expertise of prison officials and the primary importance of the goals of prison administration, emphasizing that in the trade-off between exercise of constitutional rights and security concerns, "the choice made by corrections officials — which is, after all, a judgment 'peculiarly within [their] province and professional expertise' — should not be lightly set aside by the courts." 29

Interestingly, this professional judgment standard, which has blighted much civil rights litigation on behalf of incarcerated and institutionalized people, has barely touched the area of reproductive rights of women in institutions and prisons. At first, this may appear to be a wholly salutary result of the public/private dichotomy the Supreme Court has painstakingly drawn in reproductive rights cases: if the state has no place interfering in private, personal decisions, then the professional judgment standard is irrelevant.

As will be seen, the fact that courts ignore the professional judgment standard in many reproductive rights cases produces mixed results. Many of these cases are decided by reference to a judge's own preconceptions and intuitions, without deference to experts. Occasionally these decisions are characterized by insight and understanding; more often they reflect ignorance and stereotypes which are many years behind current professional knowledge. "Professional judgment," after all, is a dynamic standard: it changes — albeit slowly — to accommodate a growing body of research and experience. And while unfortunately many professionals share the stereotypes themselves, in the inevitable duel of experts, there is sometimes the chance of victory through presenting professionals to educate and persuade the court.

In practice, the absence of reference to the professional judgment standard does not necessarily mean autonomous decisions for the women involved. Often, it means instead that these "private" decisions are left to the woman's family, who may have very different interests and priorities. As will be seen in the discussion of sterilization cases, when courts purport to defer to a woman's right of reproductive choice, they are frequently only asssenting to a course already determined by the woman's family. It is therefore ultimately unclear whether these decisions would benefit from application of the recent "professional judgment" standard or not.

The Supreme Court's two decisions on reproductive rights for incompetent, institutionalized or incarcerated women are Buck v. Bell, 30 which upheld the Virginia compulsory sterilization law in 1927, and Stump v. Sparkman. 31 Ironically, for a Court so intent on retreat from "judicial activism," in Stump v. Sparkman the Court decided that a judge could not be held liable for ordering a woman to be sterilized in the absence of an authorizing statute and without providing any procedural protections to the sterilized woman. 32 These decisions will be discussed at greater length below.

III. Choices Around Conception

A. Sterilization

Much has been written about the massive sterilization campaigns undertaken from the beginning of the twentieth century which crested in the 1930s in this country. 33 Between 1900 and 1950, approximately 60,000 women were sterilized. 34 The practice was upheld by the Supreme Court in 1927 in a case involving an allegedly mentally retarded woman in Virginia. 35

32. The sterilization was approved without formal petition in an ex parte proceeding. There was no notice to the minor, no hearing and a guardian ad litem was not appointed. Id. at 359-60.
35. Buck v. Bell, 274 U.S. 200 (1927). It has been argued that Carrie Buck was not the "imbecile" that Justice Holmes charged she was; in fact, she was an avid.
Buck v. Bell was three and a half pages long, of which a full page and a half was taken up with a recitation of the procedural history of the case. Counsel for Carrie Buck argued that the law permitting sterilization of his client failed on three different grounds. It failed to provide procedural due process; it denied Carrie Buck equal protection because only institutionalized retarded persons were subjected to sterilization and not mentally retarded persons living in the community; and it violated substantive due process in that the state simply did not have the right to violate Carrie Buck’s constitutional right of bodily integrity.

The arguments on behalf of the institution emphasized the sterilization statute as an appropriate exercise of the state’s police power, noting that the commitment process already deprived women like Carrie Buck of their liberty and that sterilization was simply a prerequisite for restoration of liberty. Institutional counsel also argued that since competent persons could obtain sterilization through exercising their voluntary choice, there must be a method for allowing incompetent persons, who were not legally capable of making decisions for themselves, to be sterilized.

Justice Holmes did not attend a great deal to these arguments. After reciting the procedures to be followed before a person could be sterilized, he concluded that the procedural due process requirements were met. He then proceeded to the substantive due process argument. Carrie Buck’s constitutional interests played no part in Holmes’ analysis at all. The substantive due process argument was swept aside in words which later were to become infamous:“*

reader, and her child (the “third generation” of imbecility) won a place on her school’s honor roll before her death at the age of eight. It has also been brought to light that Carrie Buck’s child was the result of her rape while in foster care, and her institutionalization arose from the embarrassment to the foster family engendered by her rape. Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30, 61 (1985).

36. Evidence has recently been presented that Carrie Buck’s appointed attorney, Irving Whitehead, was in collusion with pro-eugenics forces. He was a former member of the Board of Directors of the institution where Carrie Buck was committed and authorized sterilization requests in that capacity. He was also a close personal friend of opposing counsel and, after Virginia’s highest court affirmed the sterilization order, they both reported to the Board of the institution that “this particular case is in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.” Lombardo, supra note 35, at 30, 50, 56.

37. The movie, Judgment at Nuremberg (United Artists 1961), concerns the criminal trial of a German judge who had ordered involuntary sterilizations of Jewish men and women. In a famous scene from that movie, defense counsel quotes from Buck v. Bell to show that similar acts were approved by the highest court in the United States.

38. Buck, 274 U.S. at 207.
39. Id.
40. Burgdorf & Burgdorf, supra note 33, at 1011 n.114.
41. Lombardo, supra note 35, at 30, 31 n.6.
43. Id. at 536.

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it 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. It is better for all the world, if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. [citation omitted] Three generations of imbeciles are enough.**

The equal protection argument was dismissed with a curt observation that, in effect, the state was doing all it could to sterilize every mentally retarded person, and if persons like Carrie Buck could be released once sterilized, institutions would have more room to admit and sterilize mentally retarded women.*** One of the chief reasons that the campaign to sterilize the “unfit” began to slow was that the eugenics movement, which was responsible for much of the sterilization activity, became discredited by the programs followed by Hitler in Germany, who used as his model a law developed by an American eugenician, Harry Laughlin. Therefore, by 1942, when the Supreme Court invalidated a sterilization program for prisoners who had been convicted of three felonies, the practice was beginning to slow.

In 1942, when Skinner v. Oklahoma was decided, eight of the nine Justices in Buck v. Bell were gone. Only Chief Justice Harlan Stone remained on the Court. In stark contrast to Buck v. Bell, the first two sentences of the opinion underscore the individual interests at stake in the case: “This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring.” Yet in striking down the state of Oklahoma’s Habitual Criminal Sterilization
Buck v. Bell was three and a half pages long, of which a full page and a half was taken up with a recitation of the procedural history of the case. Counsel for Carrie Buck argued that the law permitting sterilization of his client failed on three different grounds. It failed to provide procedural due process; it denied Carrie Buck equal protection because only institutionalized retarded persons were subjected to sterilization and not mentally retarded persons living in the community; and it violated substantive due process in that the state simply did not have the right to violate Carrie Buck’s constitutional right of bodily integrity.

The arguments on behalf of the institution emphasized the sterilization statute as an appropriate exercise of the state’s police power, noting that the commitment process already deprived women like Carrie Buck of their liberty and that sterilization was simply a prerequisite for restoration of liberty. Institution’s counsel also argued that since competent persons could obtain sterilization through exercising their voluntary choice, there must be a method for allowing incompetent persons, who were not legally capable of making decisions for themselves, to be sterilized.

Justice Holmes did not attend a great deal to these arguments. After reciting the procedures to be followed before a person could be sterilized, he concluded that the procedural due process requirements were met. He then proceeded to the substantive due process argument. Carrie Buck’s constitutional interests played no part in Holmes’ analysis at all. The substantive due process argument was swept aside in words which later were to become infamous.

reader, and her child (the “third generation” of imbecility) won a place on her school’s honor roll before her death at the age of eight. It has also been brought to light that Carrie Buck’s child was the result of her rape while in foster care, and her institutionalization arose from the embarrassment to the foster family engendered by her rape.


36. Evidence has recently been presented that Carrie Buck’s appointed attorney, Irving Whitehead, was in collusion with pro-eugenics forces. He was a former member of the Board of Directors of the institution where Carrie Buck was committed and authorized sterilization requests in that capacity. He was also a close personal friend of opposing counsel and, after Virginia’s highest court affirmed the sterilization order, they both reported to the Board of the institution that “this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.” Lombardo, supra note 35, at 30, 50, 56.

37. The movie, Judgment at Nuremberg (United Artists 1961), concerns the criminal trial of a German judge who had ordered involuntary sterilizations of Jewish men and women. In a famous scene from that movie, defense counsel quotes from Buck v. Bell to show that similar acts were approved by the highest court in the United States.

38. Buck, 274 U.S. at 207.

39. Id.

40. Burgdorf & Burgdorf, supra note 33, at 1011 n.114.

41. Lombardo, supra note 35, at 30, 31 n.6.


36. Evidence has recently been presented that Carrie Buck’s appointed attorney, Irving Whitehead, was in collusion with pro-eugenics forces. He was a former member of the Board of Directors of the institution where Carrie Buck was committed and authorized sterilization requests in that capacity. He was also a close personal friend of opposing counsel and, after Virginia’s highest court affirmed the sterilization order, they both reported to the Board of the institution that “this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.” Lombardo, supra note 35, at 30, 50, 56.

37. The movie, Judgment at Nuremberg (United Artists 1961), concerns the criminal trial of a German judge who had ordered involuntary sterilizations of Jewish men and women. In a famous scene from that movie, defense counsel quotes from Buck v. Bell to show that similar acts were approved by the highest court in the United States.

38. Buck, 274 U.S. at 207.

39. Id.

40. Burgdorf & Burgdorf, supra note 33, at 1011 n.114.

41. Lombardo, supra note 35, at 30, 31 n.6.


36. Evidence has recently been presented that Carrie Buck’s appointed attorney, Irving Whitehead, was in collusion with pro-eugenics forces. He was a former member of the Board of Directors of the institution where Carrie Buck was committed and authorized sterilization requests in that capacity. He was also a close personal friend of opposing counsel and, after Virginia’s highest court affirmed the sterilization order, they both reported to the Board of the institution that “this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.” Lombardo, supra note 35, at 30, 50, 56.

37. The movie, Judgment at Nuremberg (United Artists 1961), concerns the criminal trial of a German judge who had ordered involuntary sterilizations of Jewish men and women. In a famous scene from that movie, defense counsel quotes from Buck v. Bell to show that similar acts were approved by the highest court in the United States.

38. Buck, 274 U.S. at 207.

39. Id.

40. Burgdorf & Burgdorf, supra note 33, at 1011 n.114.

41. Lombardo, supra note 35, at 30, 31 n.6.


36. Evidence has recently been presented that Carrie Buck’s appointed attorney, Irving Whitehead, was in collusion with pro-eugenics forces. He was a former member of the Board of Directors of the institution where Carrie Buck was committed and authorized sterilization requests in that capacity. He was also a close personal friend of opposing counsel and, after Virginia’s highest court affirmed the sterilization order, they both reported to the Board of the institution that “this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.” Lombardo, supra note 35, at 30, 50, 56.

37. The movie, Judgment at Nuremberg (United Artists 1961), concerns the criminal trial of a German judge who had ordered involuntary sterilizations of Jewish men and women. In a famous scene from that movie, defense counsel quotes from Buck v. Bell to show that similar acts were approved by the highest court in the United States.

38. Buck, 274 U.S. at 207.
Act, the Court carefully distinguished *Buck v. Bell.* The opinion, and to a greater extent the two concurrences, emphasized the difference between the scientifically accepted fact of the inheritable nature of deficiency from mentally retarded parents and the unprovable and tenuous arguments regarding inheritability of criminal tendencies of habitual criminals. While the Court in effect embraced eugenics by carving out an exception for criminals rather than repudiating the doctrine altogether, it is clear that the Justices were uncomfortable with the implications of sterilization. References to the potential dangers of racial discrimination in sterilization procedures are rife in a case that has nothing to do with race. *Skinner* also makes sweeping statements about marriage and procreation as "a basic liberty," at "basic civil right." Yet while Justice Douglas recognizes that "strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws," the unfortunate women covered by *Buck v. Bell* are not recognized as falling into this category at all.

As support for eugenics dwindled, other state interests were found to justify compulsory sterilization of mentally retarded and mentally ill women. The major reason in the 1960s was the fiscal burden imposed by children of mentally retarded women, who were still seen as promiscuous. By the 1970s, the state interests found to be "compelling" were in preventing the birth of a non-defective child to an unfit parent and, in an echo of *Buck v. Bell*, an interest in preventing the birth of a predictably defective child.

44. *Skinner* held that the Oklahoma statute violated the equal protection clause of the fourteenth amendment since it provided for sterilization of habitual robbers but not habitual embezzlers. The *Skinner* court specifically reiterated Justice Holmes' conclusion in *Buck v. Bell* that because sterilizations permitted the release of mentally retarded persons to the community so that other persons could be admitted to institutions and sterilized, the equal protection clause was not violated. Indeed, this revolving door of sterilization was called a "saving feature" of *Buck v. Bell.* *Skinner,* 316 U.S. at 542.

45. *Id. at 545* (concurrence of Stone, C.J.), 546 (concurrence of Jackson, J.).

46. *Id. at 536, 541, 546.*

47. The Nebraska Supreme Court in 1968 was able to state, without supporting reference, that "[i]t is an established fact that mental deficiency accelerates sexual impulsive and any tendencies toward crime to a harmful degree." *In re Cavitt,* 182 Neb. 712, 157 N.W.2d 171, 177 (1968).

48. In California, developmentally disabled persons are offered "preventive services" if they are "at risk of" parenting a developmentally disabled infant. These "preventive services" include sterilization. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 158, 707 P.2d 760, 770 219 Cal. Rptr. 387, 397 (1985) (en banc). Some forms of mental retardation, most commonly Down Syndrome, are genetically transmitted and carry roughly a 25 percent chance of being passed down to offspring of the person with Down Syndrome. It is interesting to note the contradiction between the position that preventing the birth of such children is a compelling state interest and the current Baby Doe controversy, in which the Governor's attempts to ensure that all such children live is grounded in the articulation that they represent equally valuable lives. See *Bowe v. Am. Hosp. Assoc.*, 476 U.S. 610 (1986).

49. Many women sterilized around this time period were only mildly retarded, and some had already borne and successfully reared children of their own. *In re Cavitt,* 182 Neb. 712, 157 N.W.2d 171, reh'g denied 183 Neb. 243, 245, 159 N.W.2d 566 (1968), *prob. juris. noted sub nom. Cavitt v. Nebraska,* 393 U.S. 1078, vacated as moot 396 U.S. 996 (1969); *Sparks v. McFarlin,* 552 P.2d 172 (7th Cir. 1977), *rev'd sub nom.* *Stump v. Sparkman,* 435 U.S. 349 (1978). In some cases, the women were not mentally retarded at all, but only poor, and were coerced into accepting sterilization by threats that they would lose their welfare benefits if they did not agree to be sterilized, *Relf v. Weinberger,* 372 F. Supp. 1196, 1199 (D.D.C. 1974), vacated as moot, 565 F.2d 722 (D.C. Cir. 1977).


53. See, e.g., *Hudson v. Hudson,* 373 So.2d 310, 312 (Ala. 1979); *Guardianship*
Act, the Court carefully distinguished *Buck v. Bell*. The opinion, and to a greater extent the two concurrences, emphasized the difference between the scientifically accepted fact of the inherited nature of delinquency from mentally retarded parents and the unprovable and tenuous arguments regarding inheritability of criminal tendencies of habitual criminals.

While the Court in effect embraced eugenics by carving out an exception for criminals rather than repudiating the doctrine altogether, it is clear that the Justices were uncomfortable with the implications of sterilization. References to the potential dangers of racial discrimination in sterilization procedures are rife in a case that has nothing to do with race. *Skinner* also makes sweeping statements about marriage and procreation as “a basic liberty,” “a basic civil right.” Yet while Justice Douglas recognizes that “strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws,” the unfortunate women covered by *Buck v. Bell* are not recognized as falling into this category at all.

As support for eugenics dwindled, other state interests were found to justify compulsory sterilization of mentally retarded and mentally ill women. The major reason in the 1960s was the fiscal burden imposed by children of mentally retarded women, who were still seen as promiscuous.

By the 1970s, the state interests found to be “compelling” were in preventing the birth of a non-defective child to an unfit parent and, in an echo of *Buck v. Bell*, an interest in preventing the birth of a predictably defective child.

---

44. *Skinner* held that the Oklahoma statute violated the equal protection clause of the fourteenth amendment since it provided for sterilization of habitual robbers but not habitual embezzlers. The *Skinner* court specifically reiterated Justice Holmes’ conclusion in *Buck v. Bell* that because sterilizations permitted the release of mentally retarded persons to the community so that other persons could be admitted to institutions and sterilized, the equal protection clause was not violated. Indeed, this revolving door of sterilization was called a “saving feature” of *Buck v. Bell*. *Skinner*, 316 U.S. at 542.

45. *Id.* at 545 (concurrency of Stone, C.J.), 546 (concurrency of Jackson, J.).

46. *Id.* at 536, 541, 546.

47. The Nebraska Supreme Court in 1968 was able to state, without supporting reference, that “[i]t is an established fact that mental deficiency accelerates sexual impulses and any tendencies toward crime to a harmful degree.” *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968).

48. In California, developmentally disabled persons are offered “preventive ser-
The Supreme Court, however, in its second decision on reproductive rights for incompetent women, reconfigured the legal framework in which these cases are heard. The Court held in Stump v. Sparkman that a judge could order a sterilization despite the absence of an authorizing statute. The Court of Appeals had found that judicial immunity did not protect a judge who ordered a sterilization in the absence of any statutory authority to do so. In addition, even if Judge Stump could have fashioned a new common law remedy, he still could not claim judicial immunity because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's allegations. . . . The petition and order were never filed in the court.

The Supreme Court reversed, stating that under the doctrine of judicial immunity, Judge Stump was immune from liability despite these grave procedural errors. A judge could only be deprived of immunity and subject to liability if she/he acted in the "clear absence of all jurisdiction." Since Stump v. Sparkman was decided, there has been a major resurgence of sterilization cases. All but one of the recent major cases of Tulley, 83 Cal. App. 698, 146 Cal. Rptr. 266 (1978); In re S.C.E., 378 A.2d 144 (Del. Ch. 1977); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501, 502 (1975), cert. denied, 426 U.S. 936 (1976); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968); In re M.K.R., 515 S.W.2d 467 (Mo. 1974); Frazier v. Levi, 440 S.W.2d 392 (Tenn. Civ. App. 1969).

54. Stump v. Sparkman, 435 U.S. 349 (1978). Although the specific question before the Court was whether judicial immunity protected a judge from civil liability for ordering a sterilization, the Court’s decision was clearly a milestone in sterilization cases, and has been cited in almost every subsequent decision on sterilization.

55. Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977).

56. Stump, 435 U.S. at 357.


permit sterilization of the mentally retarded woman. Courts have now completely reframed the legal issues raised by sterilization. This is a result of the confluence of Stump v. Sparkman and Roe v. Wade.

In the time of Skinner v. Oklahoma and in the late 1960s and early 1970s, the Supreme Court recognized a fundamental right to procreate, and courts, finding that mentally retarded and incompetent people shared this interest, had little trouble striking down compulsory sterilization laws. Roe v. Wade might have complicated the picture by holding that the decision not to procreate was also a fundamental privacy right. However, by the time the impact of Roe v. Wade was beginning to reach the lower courts, many legislatures had repealed their laws authorizing sterilization, and courts avoided the issue by finding that they had no jurisdiction to order sterilization in the absence of an authorizing statute. Stump v. Sparkman laid the jurisdictional issue to rest.

In the 1980s, many courts, beginning with the premise that an incompetent woman does not lose her privacy rights under Roe v. Wade simply because of her incompetence, have concluded that they must permit her to exercise her “right” to sterilization through the substituted judgment of the court or of parents or of a guardian ad litem appointed by the court. Decisions now point out that sterilization is a right of the mentally retarded woman which a court of equity must grant, even in the absence of an authorizing statute. In an uncanny and presumably unwitting echo of the institution’s arguments in Buck v. Bell, courts are finding that denial of sterilization would constitute a violation of equal protection because women who are not mentally retarded are free to seek sterilization.

58. While the Wisconsin Supreme Court concluded that circuit courts had jurisdiction to order sterilization despite the absence of authorizing state law, it directed the lower courts not to exercise this jurisdiction until the Wisconsin legislature had time to consider the question of sterilization of mentally retarded women. Eberhardy, 102 Wis. 2d 539 at , 307 N.W.2d at 881, 899.


60. See supra note 53 and accompanying text.

The Supreme Court, however, in its second decision on reproductive rights for incompetent women, reconfigured the legal framework in which these cases are heard. The Court held in Stump v. Sparkman that a judge could order a sterilization despite the absence of an authorizing statute. The Court of Appeals had found that judicial immunity did not protect a judge who ordered a sterilization in the absence of any statutory authority to do so. In addition, even if Judge Stump could have fashioned a new common law remedy, he still could not claim judicial immunity because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's allegations. . . . The petition and order were never filed in the court.

The Supreme Court reversed, stating that under the doctrine of judicial immunity, Judge Stump was immune from liability despite these grave procedural errors. A judge could only be deprived of immunity and subject to liability if she/he acted in the "clear absence of all jurisdiction." Since Stump v. Sparkman was decided, there has been a major resurgence of sterilization cases. All but one of the recent major cases permit sterilization of the mentally retarded woman. Courts have now completely reframed the legal issues raised by sterilization. This is a result of the confluence of Stump v. Sparkman and Roe v. Wade.

In the time of Skinner v. Oklahoma and in the late 1960s and early 1970s, the Supreme Court recognized a fundamental right to procreate, and courts, finding that mentally retarded and incompetent people shared this interest, had little trouble striking down compulsory sterilization laws. Roe v. Wade might have complicated the picture by holding that the decision not to procreate was also a fundamental privacy right. However, by the time the impact of Roe v. Wade was beginning to reach the lower courts, many legislatures had repealed their laws authorizing sterilization, and courts avoided the issue by finding that they had no jurisdiction to order sterilization in the absence of an authorizing statute. Stump v. Sparkman laid the jurisdictional issue to rest.

In the 1980s, many courts, beginning with the premise that an incompetent woman does not lose her privacy rights under Roe v. Wade simply because of her incompetence, have concluded that they must permit her to exercise her "right" to sterilization through the substituted judgment of the court or of parents or of a guardian ad litem appointed by the court. Decisions now point out that sterilization is a right of the mentally retarded woman which a court of equity must grant, even in the absence of an authorizing statute. In an uncanny and presumably unwitting echo of the institution's arguments in Buck v. Bell, courts are finding that denial of sterilization would constitute a violation of equal protection because women who are not mentally retarded are free to seek sterilization.

58. While the Wisconsin Supreme Court concluded that circuit courts had jurisdiction to order sterilization despite the absence of authorizing state law, it directed the lower courts not to exercise this justification until the Wisconsin legislature had time to consider the question of sterilization of mentally retarded women. Eberhardt, 102 Wis. 2d 539 at . . ., 307 N.W.2d at 881, 899.
60. See supra note 53 and accompanying text.
The reasoning of these courts is markedly different than in earlier cases. Some have refused to recognize any state interest at all in sterilization of mentally retarded women.\(^\text{62}\) The California Supreme Court, faced with the clear mandate of a statute flatly forbidding the sterilization of all conservatives of the state,\(^\text{63}\) struck down the statute as a violation of the mentally retarded woman's rights. The conflict, as framed by these courts, is not between the state's interests in public welfare and the mentally retarded woman's right to privacy, but between the necessarily contradictory liberty interests of the mentally retarded woman in procreation and in refraining from procreation.\(^\text{64}\) The courts recognize that incompetent women retain both of these interests and that being incompetent means being unable to make a meaningful choice between them.

Framing the issues in this way does not foreordain the result. Courts could decide that, because they cannot discern the choice that a woman would make, no intrusion can be approved.\(^\text{65}\) They could analogize an incompetent adult to a child in the care of its parents, and allow the parents to make the decision without judicial intervention, as has been done in at least one abortion case.\(^\text{66}\) They could take it upon themselves to decide what is in the best interests of the woman or to make a substituted judgment on her behalf, as courts have done when petitioned to permit incompetent persons to die,\(^\text{67}\) or when persons who have been adjudicated incompetent refuse psychotropic medication.\(^\text{68}\)

Courts have, for the most part, refused to follow either of the first two alternatives. As to the first — the refusal to approve any intrusion — courts have stated, either without rationale or as a matter of equal protection, that “[t]he inability competently to choose should not result in the loss of a person's constitutional interests.”\(^\text{69}\) Courts also view parental decisionmaking with suspicion. “Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children.”\(^\text{70}\) This skepticism is confirmed by research.\(^\text{71}\)

Instead, courts have either considered the best interests of the mentally retarded woman or attempted to make a substituted judgment on her behalf. In this endeavor, courts have had to articulate what they deem to be the objective factors in favor of and against sterilization.

---

62. A.W., 637 P.2d at 376 (Colo. 1981); Grady, 85 N.J. at 426 A.2d at 481 n.8. Almost all of these cases are brought by the parents of a mentally retarded minor. Cases where the request of sterilization is made by the woman herself are very rare. A comprehensive search turned up only one, Avila v. N.Y.C. Health and Hosp. Corp., 136 Misc. 2d 76, 518 N.Y.S. 2d 574 (Sup. Ct. Bronx City. 1987).

63. CAL. PROB. CODE § 2356 (West 1983). The first judicial exception to this statute was permitted in Maxon v. Superior Court, 135 Cal. App. 3d, 185 Cal. Rptr. 516 (1982), when a hysteroscopy of a pre-cancerous woman was permitted on the grounds that the purpose was not eugenics, but to protect her life.

64. A.W., 637 P.2d at 369; Grady, 426 A.2d at 471.

65. This is the approach favored in several separate opinions in these decisions. Justice Cofey, concurring in the decision of the Wisconsin Supreme Court to order circuit courts to refrain from approving sterilizations, asked whether a group of doctors . . . be allowed to . . . assume complete control over the individual and subordinate her to their own ideas of what is good for her well-being? Does any court ever have direct power over the body of a living person in the absence of a showing that the life of the person is in jeopardy of requiring medical attention? I think not.

66. See text accompanying notes 123-130.
The reasoning of these courts is markedly different than in earlier cases. Some have refused to recognize any state interest at all in sterilization of mentally retarded women. The California Supreme Court, faced with the clear mandate of a statute flatly forbidding the sterilization of all conservates of the state, struck down the statute as a violation of the mentally retarded woman's rights. The conflict, as framed by these courts, is not between the state's interests in public welfare and the mentally retarded woman's right to privacy, but between the necessarily contradictory liberty interests of the mentally retarded woman in procreation and in refraining from procreation. The courts recognize that incompetent women retain both of these interests and that being incompetent means being unable to make a meaningful choice between them.

Framing the issues in this way does not foreordain the result. Courts could decide that, because they cannot discern the choice that a woman would make, no intrusion can be approved. They could analogize an incompetent adult to a child in the care of its parents, and allow the parents to make the decision without judicial intervention, as has been done in at least one abortion case. They could take it upon themselves to decide what is in the best interests of the woman or to make a substituted judgment on her behalf, as courts have done when petitioned to permit incompetent persons to die, or when persons who have been adjudicated incompetent refuse psychotropic medication.

Courts have, for the most part, refused to follow either of the first two alternatives. As to the first — the refusal to approve any intrusion — courts have stated, either without rationale or as a matter of equal protection, that "[t]he inability competently to choose should not result in the loss of a person's constitutional interests." Courts also view parental decisionmaking with suspicion. "Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children." This skepticism is confirmed by research.

Instead, courts have either considered the best interests of the mentally retarded woman or attempted to make a substituted judgment on her behalf. In this endeavor, courts have had to articulate what they deem to be the objective factors in favor of and against sterilization.

67. Rasmussen by Mitchell v. Fleming, 154 Ariz. 2075, 741 P.2d 674, 688-89 (1987) (en banc). The "best interests" standard and the "substituted judgment" standard are two different ways to exercise surrogate decision-making. "Under the substituted judgment standard, the guardian 'attempts to reach the decision that the incapacitated person would make if he or she were able to choose.' [Citation omitted.] This standard best guides a guardian's decision-making when a patient has manifested his or her intent while competent. [Citation omitted.] . . . Where no reliable evidence of a patient's intent exists . . . the substituted judgment standard . . . should be abandoned in favor of the best interests standard. [Citation omitted.] Under the best interests standard, the surrogate decision-maker assesses what medical treatment would be in the patient's best interests as determined by such objective criteria as relief from suffering, preservation or restoration of functioning, and quality [citation omitted] and extent of sustained life." Id.


70. Id. at 370; see also In re Grady, 85 N.J. 235, . . . , 426 A.2d 467, 475, 482 (1981). Compare with the Supreme Court's reasoning in Parham v. J.R., finding a judicial hearing before parents may "voluntarily" commit their children to institutions unnecessary because of "the traditional presumption that parents act in the best interests of their children." 442 U.S. 584 (1979).

71. Passer, Issues in Fertility Control for Mentally Retarded Female Adolescents: Parental Attitudes, 73 Pediatrics 451 (1984). In fact, two studies found that 60 percent and 85.8 percent respectively of parents favored or strongly favored sterilization for their mentally retarded children. Saunders, The Mental Health Professional, the Mentally Retarded, and Sex, 32 J. HOSP. & COMMUNITY PSYCHIATRY 717, 719 (1981). However, their children feel very differently. See infra text accompanying notes 87-92.
The factors used by the courts, those specifically rejected, those tacitly acknowledged and those that are altogether ignored form as fascinating a rendering of society's current picture of mentally retarded people as Justice Holmes' angry vision of incompetence sapping the strength of the state does of his day's attitudes. Based on the language of these rulings, the courts still evince a limited understanding of the population whose lives their rulings affect so greatly.

Most courts cite as weighing against sterilization the history of abuse of sterilization, the permanence of the operation, the possibility that the operation will cause trauma or psychological damage and the availability of less drastic means of contraception.

By contrast, factors almost universally cited in favor of sterilization are the inability of the retarded woman to understand the consequences of sexual activity or to competently choose to be pregnant, her inability to care for her child, the possibility that she will have a handicapped child and the trauma of pregnancy and negative psychological effects on the woman.

These factors are based on assumptions that the courts usually articulate without any supporting authority. Most courts assume that mentally retarded women are unable to resist sexual advances, would not want to be pregnant, are unable to parent, are unable to understand the nature and consequences of sexuality, and would be traumatized by the physical consequences of pregnancy. Further, most courts also make two implicit assumptions: that mentally retarded women will never marry and that they are unlikely to receive any parenting assistance, whether from the state or from spouses or from charitable organizations.

Other factors that are not articulated by the courts clearly play a part in the outcome of these cases. For example, some of these women might be institutionalized but for their parents' willingness to care for them at home. This gives the parents credibility in seeking sterilization and poses a veiled threat for the woman. "It is clear that but for the devotion of S.C.E.'s parents she would be institutionalized." In Buck v. Bell and many of the older cases, sterilization was an explicit condition of discharge from institutions; some recent decisions imply that acceding to the parents' wish for sterilization is the price a mentally retarded woman must pay to prevent admission to institutions. "If she can have a richer and more active life only if the risk of pregnancy is permanently eliminated, then sterilization may be in her best interests . . . it should not be denied to her." Of course, precisely the same was said of Carrie Buck. As an earlier court noted, "In Buck v. Bell [citations omitted] the United States Supreme Court upheld a Virginia sterilization law. Sterilization was considered beneficial to the patient and to society because it allowed people to be discharged from state institutions, to return to the community, and to become self-supporting."

What are we to make of these recent cases? They are the product of courts which, unlike Buck v. Bell, seem genuinely concerned with promoting the well-being of mentally retarded women. But while judicial attitudes have changed, courts' decisions are still founded on ste-
The factors used by the courts, those specifically rejected, those tacitly acknowledged and those that are altogether ignored form as fascinating a rendering of society's current picture of mentally retarded people as Justice Holmes' angry vision of incompetence sapping the strength of the state's does of his day's attitudes. Based on the language of these rulings, the courts still evince a limited understanding of the population whose lives their rulings affect so greatly.

Most courts cite as weighing against sterilization the history of abuse of sterilization, the permanence of the operation, the possibility that the operation will cause trauma or psychological damage and the availability of less drastic means of contraception.

By contrast, factors almost universally cited in favor of sterilization are the inability of the retarded woman to understand the consequences of sexual activity or to competently choose to be pregnant, her inability to care for her child, the possibility that she will have a handicapped child and the trauma of pregnancy and negative psychological effects on the woman.

These factors are based on assumptions that the courts usually articulate without any supporting authority. Most courts assume that mentally retarded women are unable to resist sexual advances, would not want to be pregnant, are unable to parent, are unable to understand the nature and consequences of sexuality, and would be traumatized by the physical consequences of pregnancy. Further, most courts also make two implicit assumptions: that mentally retarded women will never marry and that they are unlikely to receive any parenting assistance, whether from the state or from spouses or from charitable organizations.

Other factors that are not articulated by the courts clearly play a part in the outcome of these cases. For example, some of these women might be institutionalized but for their parents' willingness to care for them at home. This gives the parents credibility in seeking sterilization and poses a veiled threat for the woman. "It is clear that but for the devotion of S.C.E.'s parents she would be institutionalized." In Buck v. Bell and many of the older cases, sterilization was an explicit condition of discharge from institutions; some recent decisions imply that acceding to the parents' wish for sterilization is the price a mentally retarded woman must pay to prevent admission to institutions. "If she can have a richer and more active life only if the risk of pregnancy is permanently eliminated, then sterilization may be in her best interests. If not, she should not be denied to her." Of course, precisely the same was said of Carrie Buck. As an earlier court noted, "In Buck v. Bell [citations omitted] the United States Supreme Court upheld a Virginia sterilization law. Sterilization was considered beneficial to the patient and to society because it allowed people to be discharged from state institutions, to return to the community, and to become self-supporting."

What are we to make of these recent cases? They are the product of courts which, unlike Buck v. Bell, seem genuinely concerned with promoting the well-being of mentally retarded women. But while judicial attitudes have changed, courts' decisions are still founded on ste-
reotypes about mentally retarded women which have not altered significantly since Buck v. Bell, although in the 1980s the issue is framed in the context of women's rights rather than as a matter of eugenics.

While courts claim that the competing interests they must resolve are the woman's right to procreate versus her right to be sterilized, in fact the decisions show clearly that courts are weighing the woman's right to procreate against her interests in liberty and freedom of movement, which they assume must be significantly restricted in the absence of sterilization. The cases typically come before the court framed in this way by the girl's parents. Joan Eberhardy's parents did not want to send their child to camp again unless she was sterilized; Leann Grady's parents were concerned that she could not move out of their house and live in the community unless she was sterilized. The courts have explicitly adopted this dichotomy:

If the state withholds from her the only safe and reliable method of contraception suitable to her condition, it necessarily limits her opportunity for habilitation and thereby her freedom to pursue a fulfilling life. Although specifics are lacking in this record, the impact of the restriction necessarily placed upon sexually mature mentally retarded women in the effort to prevent pregnancy have been described elsewhere.

The conflict between freedom and fertility is not questioned, in part perhaps because these are individual cases and the parents' assumptions have shaped the record before the court. But it is clear that the problem being decided is not whether or not a woman has the right to bear children, but whether sterilization is necessary to prevent conception:

Necessarily implicit in the interest asserted by the state is an assumption that the conservatee may at some future time elect to bear children. While the prohibition of sterilization may be a reasonable means by which to protect some conservatee's right to procreative choice, here it sweeps too broadly for it extends to individuals who cannot make that choice and will not be able to do so in the future. [...]
The right of the conservatee to choose to bear

children has been taken away from her both by nature which has rendered her incapable of making a voluntary choice, and by the state through the powers already conferred upon the conservator.

The right of "choice" protected by these decisions is obviously one-sided. Yet while almost every major decision comments in some way on the paucity of evidence in the record below, each still accepts conclusions regarding the woman's capacity that will have major impact on her life. It is the story of Carrie Buck written over again by courts that authorize sterilizations in a spirit of benevolence.

But in the 1980s, there is far more knowledge available to contradict many of the courts' fundamental assumptions in these cases. For example, as a threshold issue courts are quick to find that a mentally retarded woman lacks capacity to decide whether or not to be sterilized. Contrary to such an assumption, "even severely retarded individuals have often been able to understand the consequences of sterilization and have expressed dismay after being sterilized involuntarily." A survey of persons sterilized between 1931 and 1951 showed that 91 percent of sterilized women opposed and regretted their sterilization.

In addition, these findings are often unsupported by evidence that anyone has made any serious effort to teach the woman about the meaning of sterilization and what alternatives exist. In fact, despite the

86. Valerie N., 40 Cal. 3d at 164-65, 707 P.2d at 774, 219 Cal. Rptr. at 400. In mentioning the fact that "the powers already conferred upon the conservator" have eliminated Valerie's right to procreate, the court is referring to its previous statement that "her conservators may, on Valerie's behalf, elect that she not bear or rear children... they may choose abortion should she become pregnant; they may arrange for any child Valerie might bear to be removed from her custody." Id. at 160, 707 P.2d at 771, 219 Cal. Rptr. at 398. It is clear that Valerie's retained privacy rights may be exercised in only one way — to prevent or end pregnancy.


89. Sanders, The Mental Health Professional, the Mentally Retarded, and Sex, 32 HOPE & COMMUNITY PSYCHIATRY 711, 719 (1981). By contrast, a great many more men who had been sterilized favored the operation.
reotypes about mentally retarded women which have not altered significantly since Buck v. Bell, although in the 1980s the issue is framed in the context of women's rights rather than as a matter of eugenics.

While courts claim that the competing interests they must resolve are the woman's right to procreate versus her right to be sterilized, in fact the decisions show clearly that courts are weighing the woman's right to procreate against her interests in liberty and freedom of movement, which they assume must be significantly restricted in the absence of sterilization. The cases typically come before the court framed in this way by the girl's parents. Joan Eberhardt's parents did not want to send their child to camp again unless she was sterilized; 48 Leann Grady's parents were concerned that she could not move out of their house and live in the community unless she was sterilized. 48 The courts have explicitly adopted this dichotomy:

If the state withdraws from her the only safe and reliable method of contraception suitable to her condition, it necessarily limits her opportunity for habilitation and thereby her freedom to pursue a fulfilling life. Although specific's are lacking in this record, the impact of the restriction necessarily placed upon sexually mature mentally retarded women in the effort to prevent pregnancy have been described elsewhere. 48

The conflict between freedom and fertility is not questioned, in part perhaps because these are individual cases and the parents' assumptions have shaped the record before the court. But it is clear that the problem being decided is not whether or not a woman has the right to bear children, but whether sterilization is necessary to prevent conception:

Necessarily implicit in the interest asserted by the state is an assumption that the conservative may at some future time elect to bear children. While the prohibition of sterilization may be a reasonable means by which to protect some conservatives' right to procreative choice, here it sweeps too broadly for it extends to individuals who cannot make that choice and will not be able to do so in the future. . . . [T]he right of the conservative to choose to bear

83. Eberhardt, 102 Wis. 2d at 803, 307 N.W.2d at 882.

The right of "choice" protected by these decisions is obviously one-sided. Yet while almost every major decision comments in some way on the paucity of evidence in the record below, 89 each still accepts conclusions regarding the woman's capacity that will have major impact on her life. It is the story of Carrie Buck written over again by courts that authorize sterilizations in a spirit of benevolence.

But in the 1980s, there is far more knowledge available to contradict many of the courts' fundamental assumptions in these cases. For example, as a threshold issue courts are quick to find that a mentally retarded woman lacks capacity to decide whether or not to be sterilized. Contrary to such an assumption, "even severely retarded individuals have often been able to understand the consequences of sterilization and have expressed dismay after being sterilized involuntarily." 89 A survey of persons sterilized between 1931 and 1951 showed that 91 percent of sterilized women opposed and regretted their sterilization. 89

In addition, these findings are often unsupported by evidence that anyone has made any serious effort to teach the woman about the meaning of sterilization and what alternatives exist. In fact, despite the
decisions’ almost talmudic citation of I.Q. scores,

IQ level [is] not a limitation to sexual knowledge. [Citation omitted.] Differences in knowledge were related more to the respondent’s sex and place of residence — reflecting differences in experiences, instruction and interest — than to their IQ levels. Moderately and even severely retarded persons . . . can acquire facts and attitudes toward sex that are components of self-sufficient and responsible behavior, but most individuals are poorly prepared.80

Most of the girls in these cases lived all their lives with their parents, who are notoriously reluctant to undertake sex education or recognize the possibility of their handicapped children as sexual beings.81 Mentally retarded people who live with their parents or in institutions are also much more dependent and “child-like” by virtue of their surroundings and the expectations of those with whom they primarily interact. Yet people with the same IQs as the girls in these cases live independently in the community; some work; some are married and have children. In fact, studies show that for mentally retarded people, “marriage is highly valued . . . the retarded view marriage as a way of ‘leaving the label’ and becoming full members of society.”82

Even the concept of mental retardation as a static condition is misplaced. Mentally retarded people can learn and improve their functioning, with a comitant increase in IQ points, so that yesterday’s “moderately” retarded woman may be tomorrow’s “mildly” retarded woman. Sometimes these changes occur as a result of special programs, but in other cases they are simply an artifact of time.83 Even severely retarded people may confound expectations about their limitations and

progress into the next higher and less stigmatizing category of mental retardation.84

While the capacity of mentally retarded mothers to be adequate parents is discussed more fully in Section V(A), the interconnection of all aspects of reproductive rights is obvious. The pervasive stereotype that the children of mentally retarded women will be unplanned and unwanted by mothers who cannot care for them and will drain society’s resources governs decisions concerning sterilization, abortion and child custody. While undoubtedly true in some individual cases, this preconception harms mentally retarded women as a class and, in these days of increasing deinstitutionalization, leaves the door open for a repetition of the widespread sterilizations of the 1930s — but done today in the name of reproductive rights.

B. Rape vs. Voluntary Sexual Activity

Although rape is generally not included in discussions of privacy or reproductive rights,85 I include it here. I do so because I believe the right of choice in procreative decisions should be protected not only after conception, but at conception, and should include the right to prevent unwanted intercourse as well as unwanted conception or pregnancy. If a woman is frequently sexually assaulted, the right to contraception or to abort pregnancies resulting from rape may be important, but it hardly fulfills any right to privacy or autonomy.

The right to decide when and with whom one will have sex has a particular significance for the populations discussed here, both factually and legally. It is factually important because women in institutions are at high risk of sexual assault86 and it is legally significant because the state has a duty to prevent women in its custody from being sexually assaulted.87 While the state is not liable to free women who are the

90. Id. at 720.
92. P. CEGELKA & H. PREIM, supra note 91. See also Edmundson, McCombs & Wish, What Retarded Adults Believe About Sex, 84 AM. J. MENTAL DEFICIENCY 11, 17 (1979).
94. Interview with David Ferleger, Attorney for Nicholas Romeo (October 20, 1988). In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court noted in passing that the plaintiff, Nicholas Romeo, would never be able to live outside an institution, Nicholas Romeo is living in the community today.
96. See infra note 101.
decisions’ almost talismanic citation of I.Q. scores,

IQ level [is] not a limitation to sexual knowledge. [Citation omitted.] Differences in knowledge were related more to the respondent’s sex and place of residence — reflecting differences in experiences, instruction and interest — than to their IQ levels. Moderately and even severely retarded persons . . . can acquire facts and attitudes toward sex that are components of self-sufficient and responsible behavior, but most individuals are poorly prepared.90

Most of the girls in these cases lived all their lives with their parents, who are notoriously reluctant to undertake sex education or recognize the possibility of their handicapped children as sexual beings.91 Mentally retarded people who live with their parents or in institutions are also much more dependent and "child-like" by virtue of their surroundings and the expectations of those with whom they primarily interact. Yet people with the same IQs as the girls in these cases live independently in the community; some work; some are married and have children. In fact, studies show that for mentally retarded people, "marriage is highly valued . . . the retarded view marriage as a way of leaving the label and becoming full members of society."92

Even the concept of mental retardation as a static condition is misplaced. Mentally retarded people can learn and improve their functioning, with a comitment increase in IQ points, so that yesterday’s "moderately" retarded woman may be tomorrow’s "mildly" retarded woman. Sometimes these changes occur as a result of special programs, but in other cases they are simply an artifact of time.93 Even severely retarded people may confound expectations about their limitations and

progress into the next higher and less stigmatizing category of mental retardation.94

While the capacity of mentally retarded mothers to be adequate parents is discussed more fully in Section V(A), the interconnection of all aspects of reproductive rights is obvious. The pervasive stereotype that the children of mentally retarded women will be unplanned and unwanted by mothers who cannot care for them and will drain society’s resources governs decisions concerning sterilization, abortion and child custody. While undoubtedly true in some individual cases, this preconception harms mentally retarded women as a class and, in these days of increasing deinstitutionalization, leaves the door open for a repetition of the widespread sterilizations of the 1930s — but done today in the name of reproductive rights.

B. Rape vs. Voluntary Sexual Activity

Although rape is generally not included in discussions of privacy or reproductive rights,95 I include it here. I do so because I believe the right of choice in procreative decisions should be protected not only after conception, but at conception, and should include the right to prevent unwanted intercourse as well as unwanted conception or pregnancy. If a woman is frequently sexually assaulted, the right to contraception or to abort pregnancies resulting from rape may be important, but it hardly fulfills any right to privacy or autonomy. The right to decide when and with whom one will have sex has a particular significance for the populations discussed here, both factually and legally. It is factually important because women in institutions are at high risk of sexual assault96 and it is legally significant because the state has a duty to prevent women in its custody from being sexually assaulted.97 While the state is not liable to free women who are the

90. Id. at 720.
92. P. Cziglerka & H. Premh, supra note 91. See also Edmondson, McCombs & Wish, WHAT RETARDED ADULTS BELIEVE ABOUT SEX, 84 AM. J. MENTAL DEFICIENCY 11, 17 (1979).
94. Interview with David Ferleger, Attorney for Nicholas Romeo (October 20, 1988). In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court noted in passing that the plaintiff, Nicholas Romeo, would never be able to live outside an institution, Nicholas Romeo is living in the community today.
96. See infra note 101.
victims of violence and sexual assault, when the state holds a woman in custody, an obligation is created to provide her reasonable protection from foreseeable harm. *This right to safety from harm rises to the level of a constitutional right for both incarcerated and institutionalized people.*

1. Rape

Sexual assault of mentally ill and mentally retarded people is a major problem. However, most sexual assaults in institutions go unreported. The woman often remains silent in the face of likely disbelief and possible retribution. If she does report the rape, hospital staff may refuse to believe that the incident took place or that she did not consent to intercourse. And if staff do believe her (or know the accusation to be true), they may attempt to cover up or simply fail to investigate appropriately or in a timely fashion. As one ex-patient recalls:

> There seemed to be a prevailing attitude that all females on the ward were promiscuous. That couldn't have been more wrong about me, as I was very frightened of men...

While I was on the same ward, a psychiatrist assigned to other patients, not me, began flirting with me...I didn't know how to react. If I discouraged him, I was afraid I might make him mad and suffer the consequences. I was afraid he would have me put in lockup or keep me from ever getting out of the hospital. So I would slightly smile at him but I was also afraid to encourage him, knowing I couldn't handle those consequences either and not wanting to...

The day came when I was going home - finally...this psychiatrist came up behind me. He grabbed me by the shoulders, turned me around, said something about my going, and kissed me on the lips...I tried to stand perfectly still and not utter a sound of fear, for this was a doctor. I didn't want to react in any way that might change the minds of the people in charge and have them keep me in the hospital. I didn't tell anyone there what had happened. I just wanted to get away from that man and that place.

Even if staff believes the patient, investigates, and tries to institute civil or criminal proceedings, the institution faces the obstacles of disbelief or indifferent police and District Attorneys, who often will not prosecute even if they believe rape has occurred. Usually legal action of rape or incest.

---

98. In an increasing number of cases, however, courts are beginning to hold police departments liable for failing to take appropriate steps to protect a woman who has complained about domestic violence. See Note, Battered Women and the Equal Protection Clause: Will the Constitution Help Them When Police Won't? 95 YALE L.J. 788 (1986).


100. Youngberg v. Romeo, 457 U.S. at 316; County of Alameda, 239 Cal. Rptr. at 404.

101. Jennings, *A Parent's Survey of Problems Faced by Mentally Ill Daughters*, 38 HOSP. & COMMUNITY PSYCHIATRY 668 (1987); Johnson, A Hidden Nightmare, St. Petersburg Times, March 27, 1988, at 1, col. 1; LeGrand, supra note 99; Muick, Patterns of Institutional Sexual Assault, 7 RESPONSE TO VIOLENCE IN THE FAMILY AND SEXUAL ASSAULT 3 (Center for Women Policy Studies May/June 1984). In one case, a court noted that two expert witnesses had testified about the prevalence of sexual assault in institutions: "Drs. Rogers and Heimbinder know that many institutionalized females are sexually assaulted and the incidence of pregnancies is high." P.S. v. W.S., 452 N.E.2d 969, 972 (Ind. 1983). Recently in Illinois, a legislative task force was created to investigate the quality of care and treatment of patients in institutions after a newborn infant was found dead in the toilet of a state mental hospital, and the pregnancy of a severely mentally retarded woman, presumably the result of rape, was discovered when she was seven and a half months pregnant. See H.R. REP. 1340, May 5, 1988, Illinois. See also CROSSTOCK, EMPOWERMENT: A SYSTEMS APPROACH TO PREVENTING ASSAULTS AGAINST PEOPLE WITH MENTAL RETARDATION AND/OR DEVELOPMENTAL DISABILITIES 10 (1986) (Distributed by the National Assault Prevention Center); Care of Institutionalized Mentally Disabled Persons, 1965: Joint Hearing Before the Subcommittee on the Handicapped of the Committee on Labor and Human Resources and the Subcommittee on Labor, Health, and Human Services, Education, and Related Agencies of the Committee on Appropriations of the United States Senate, 99th Cong., 1st Sess. 2 (1985) [hereinafter Joint Hearing] ("in one California jurisdiction, it is virtually impossible to get the local district attorney to file criminal charges or substantial rape allegations if the rape involved a psychiatric patient."). See also Chamberlain, Issues in Fertility Control for Mentally Retarded Female Adolescents: Sexual Activity, Sexual Abuse, and Contraception, 7 Pediatrics 445 (1984) (one-third of mildly retarded and one-fourth of moderately retarded adolescents victims
victims of violence and sexual assault, when the state holds a woman in custody, an obligation is created to provide her reasonable protection from foreseeable harm. This right to safety from harm rises to the level of a constitutional right for both incarcerated and institutionalized people.  

1. Rape

Sexual assault of mentally ill and mentally retarded people is a major problem. However, most sexual assaults in institutions go unreported. The woman often remains silent in the face of likely disbelief and possible retribution. If she does report the rape, hospital staff may refuse to believe that the incident took place or that she did not consent to intercourse. And if staff do believe her (or know the accusation to be true), they may attempt to cover up or simply fail to investigate appropriately or in a timely fashion. As one ex-patient recalls:

"There seemed to be a prevailing attitude that all females on the ward were promiscuous. That couldn't have been more wrong about me, as I was very frightened of men... While I was on the same ward, a psychiatrist assigned to other patients, not me, began flirting with me... I didn't know how to react. If I discouraged him, I was afraid I might make him mad and suffer the consequences. I was afraid he would have me put in lockup or keep me from ever getting out of the hospital. So I would slightly smile at him but I was also afraid to encourage him, knowing I couldn't handle those consequences either and not wanting to. The day came when I was going home - finally... this psychiatrist came up behind me. He grabbed me by the shoulders, turned me around, said some thing about my going, and kissed me on the lips... I tried to stand perfectly still and not utter a sound of fear, for this was a doctor. I didn't want to react in any way that might change the minds of the people in charge and have them keep me in the hospital. I didn't tell anyone there what had happened. I just wanted to get away from that man and that place."  

Even if staff believes the patient, investigates, and tries to institute civil or criminal proceedings, the institution faces the obstacles of disbelief or indifferent police and District Attorneys, who often will not prosecute even if they believe rape has occurred.  

of rape or incest).
is taken only if the patient has concerned and caring relatives on the outside, or if the staff member is clearly guilty and has been implicated on prior occasions, or if institutional regulations have been obviously violated.

For the most part, the few rape cases that are brought are framed as personal injury suits rather than alleging a violation of constitutional rights. This may be because, despite the clear holding of the Supreme Court that institutionalized persons have a constitutional right to be free from assault, relatively few lawsuits brought under 42 U.S.C. section 1983 for sexual assault in an institution have succeeded. Courts hearing these cases deny the claims for a variety of reasons, many of which tend to minimize the impact of sexual assault on women in general or on mentally ill women in particular. For example, one court held that the claim of a woman who was sexually molested by being forcibly kissed and groped all over her body was "minor and the injury de minimus, not of sufficient degree to rise to the level of an unconstitutional deprivation of civil rights." Some courts have denied claims because they are based on "isolated instances" of rape. These cases leave the clear impression that a woman would have to be raped repeatedly or show that other patients were also being raped before she could vindicate her constitutional right to be free from assault.

2. Voluntary Sexual Activity

The issue of rape in institutions is distinctly different from the question of accommodating patients' voluntary sexual expression. Institutionalized persons do not lose their sexuality when they lose their liberty, yet most institutions do not recognize their patients' right to have personal relationships with each other. Like many rights in institutional settings, it is seen only as a treatment issue to be permitted or forbidden as the staff sees fit. Most often, such relationships are either prohibited outright or subjected to intense staff scrutiny. The guidelines published by one hospital provide: "If you develop a relationship with another patient, staff will get together with you to help decide whether this relationship is beneficial or detrimental to you and whether it would be to your advantage to continue or discontinue the relationship."

Several authors have suggested that "sexual activity between psychiatric inpatients should be strictly prohibited, and when it occurs patients should be isolated . . . and tranquilized if necessary."

Although both therapeutic goals and the patient's right to privacy and dignity support the opportunity for social interaction on a normal basis as possible, institutional staff may feel tension about sexual activities between patients, particularly those seen as incompetent. Is such activity assault, or voluntary sexual behavior? In practice, how-


111. Keitner & Grof, supra note 110, at 193.

112. Binder, supra note 110, at 125.

113. Because of the power differential between patients and staff, all sexual activity between patients and staff should be strictly prohibited and criminally prosecuted when it occurs. The consequences of the power differential even when the woman is not institutionalized is demonstrated by the case of Gutierrez v. Thorne, 537 A.2d 527 (Conn. App. Ct. 1988), where a mentally retarded client living in a supervised apartment was raped by an aide whose job was to visit clients and assist them with budget, banking and shopping problems. The aide was given a key, and sexually assaulted the plaintiff on four occasions. Each time he threatened that if she disclosed what happened, she would lose her benefits. Plaintiff finally moved out of the apartment and informed police. The trial court granted defendant Commissioner’s summary judgment motion on the grounds that rape could not have been a reasonably foreseeable consequence of giving a male aide keys to a female client’s apartments. The appellate court reversed, noting that plaintiff had a "particular vulnerability" because of the "superior power accorded Jones in his relationship with the plaintiff by virtue of their provider-
is taken only if the patient has concerned and caring relatives on the outside, or if the staff member is clearly guilty and has been implicated on prior occasions, or if institutional regulations have been obviously violated.

For the most part, the few rape cases that are brought are framed as personal injury suits rather than alleging a violation of constitutional rights. This may be because, despite the clear holding of the Supreme Court that institutionalized persons have a constitutional right to be free from assault, relatively few lawsuits brought under 42 U.S.C. section 1983 for sexual assault in an institution have succeeded.

Courts hearing these cases deny relief to the claimants for a variety of reasons, many of which tend to minimize the impact of sexual assault on women in general or on mentally ill women in particular. For example, one court held that the claim of a woman who was sexually molested by being forcibly kissed and groped all over her body was "minor and the injury de minimus, not of sufficient degree to rise to the level of an unconstitutional deprivation of civil rights." Some courts have denied claims because they are based on "isolated instances" of rape. These cases leave the clear impression that a woman would have to be raped repeatedly or show that other patients were also being raped before she could vindicate her constitutional right to be free from assault.

2. Voluntary Sexual Activity

The issue of rape in institutions is distinctly different from the question of accommodating patients' voluntary sexual expression. Institutionalized persons do not lose their sexuality when they lose their liberty, yet most institutions do not recognize their patients' right to have personal relationships with each other. Like many rights in institutional settings, it is seen only as a treatment issue to be permitted or forbidden as the staff sees fit. Most often, such relationships are either prohibited outright or subjected to intensive staff scrutiny. The guidelines published by one hospital provide: "If you develop a relationship with another patient, staff will get together with you to help decide whether this relationship is beneficial or detrimental to you and whether it would be to your advantage to continue or discontinue the relationship." Several authors have suggested that "sexual activity between psychiatric inpatients should be strictly prohibited, and when it occurs patients should be isolated . . . and tranquilized if necessary."

Although both therapeutic goals and the patient's right to privacy and dignified support the opportunity for social interaction on as normal a basis as possible, institutional staff may feel tension about sexual activities between patients, particularly those seen as incompetent. Is such activity assault, or voluntary sexual behavior? In practice, how-


ever, the situation is often clear-cut: The woman struggles and screams\textsuperscript{114} or has continually complained to an indifferent staff about harassment by a male patient prior to the rape,\textsuperscript{115} or is assaulted while in restraints.

One of the most interesting cases in this area, Foy v. Greenblatt,\textsuperscript{116} clearly recognized the complexities of competing constitutional rights and state responsibilities in the area of patient sexual activity. In Foy, plaintiff mother and her infant child, who was conceived and born while the mother was a patient in a locked mental health facility, sued the mother's treating physician and the Public Guardian, who had been appointed her guardian. Plaintiffs charged that defendants, although aware of plaintiff's "history of irresponsible sexual behavior," failed to either maintain proper supervision over her to prevent her from having sex or to provide her with contraceptive devices or counseling. Her voluntary sexual activity resulted in pregnancy, which defendants failed to discover until two weeks prior to her delivery. Plaintiff charged that this prevented her guardian from arranging an abortion, resulting in the "wrongful birth" of her son. The infant child also sued for his "wrongful life."

The court rejected the claim of lack of proper supervision. While clearly holding that defendants had a duty to protect patients from sexual assault, the court rejected the duty urged by plaintiffs, i.e., to prevent voluntary sexual relations altogether. The court disagreed with the assumption that "voluntary sexual conduct is an objective harm which plaintiff must be spared."\textsuperscript{117} In fact, plaintiff had a right to engage in voluntary sexual relations as part of her right to "least restrictive conditions," "privacy" and "dignity."

However, the court did deem defendants' failure to provide contraceptive devices and counseling to have deprived plaintiff of her right of reproductive choice, as did their failure to identify her pregnancy. But the court was concerned about plaintiff's automatic presumption that,

---

117. 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983).
118. Id. at 6, 190 Cal. Rptr. at 89.
119. Id. at 9, 190 Cal. Rptr. at 90.
120. Id. at 13, 190 Cal. Rptr. at 92.
121. Id. at 14, 190 Cal. Rptr. at 93. See also Williams v. State, 18 N. Y. 2d 481, 223 N.E. 2d 341, 276 N.Y.S.2d 885 (1966) (rejecting claim for wrongful life after sexual assault on mother in state mental institution on the basis that no legal remedy existed for wrongful life).
122. Ironically, the sterilization case, Conservatorship of Valerie N., 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985), which repeals Foy in spirit, attempts to characterize itself as being in harmony with Foy because "[i]f the state withholds from her the only safe and reliable method of contraception suitable to her condition, it necessarily limits her opportunity for habilitation and thereby her freedom to pursue a fulfilling life." Id. at 156, 707 P.2d at 773, 219 Cal. Rptr. at 400. Foy recognizes that patients may in fact have "a fulfilling life" if they have children, and that the reproductive rights to choosing such an option are to be granted the utmost protection.
ever, the situation is often clear-cut: The woman struggles and screams\textsuperscript{114} or has continually complained to an indifferent staff about harassment by a male patient prior to the rape,\textsuperscript{115} or is assaulted while in restraints.\textsuperscript{116}

One of the most interesting cases in this area, \textit{Foy v. Greenblatt},\textsuperscript{117} clearly recognized the complexities of competing constitutional rights and state responsibilities in the area of patient sexual activity. In \textit{Foy}, plaintiff mother and her infant child, who was conceived and born while the mother was a patient in a locked mental health facility, sued the mother's treating physician and the Public Guardian, who had been appointed her guardian. Plaintiffs charged that defendants, although aware of plaintiff's "history of irresponsible sexual behavior," failed to either maintain proper supervision over her to prevent her from having sex or to provide her with contraceptive devices or counseling. Her voluntary sexual activity resulted in pregnancy, which defendants failed to discover until two weeks prior to her delivery. Plaintiff charged that this prevented her guardian from arranging an abortion, resulting in the "wrongful birth" of her son. The infant child also sued for his "wrongful life."

The court rejected the claim of lack of proper supervision. While clearly holding that defendants had a duty to protect patients from sexual assault, the court rejected the duty urged by plaintiffs, i.e., to prevent voluntary sexual relations altogether. The court disagreed with the assumption that "voluntary sexual conduct is an objective harm which plaintiff must be spared."\textsuperscript{118} In fact, plaintiff had a right to engage in voluntary sexual relations as part of her right to "least restrictive conditions," "privacy" and "dignity."

However, the court did deem defendants' failure to provide contraceptive devices and counseling to have deprived plaintiff of her right of reproductive choice, as did their failure to identify her pregnancy. But the court was concerned about plaintiff's automatic presumption that,

\textsuperscript{114} Alphonse v. Charity Hosp. of New Orleans, 413 So. 2d 982, 984 (La. Ct. App. 1982).
\textsuperscript{116} Musick, supra note 101; Le Grand, supra note 101; Joint Hearing, supra note 101, at 11.
\textsuperscript{117} 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983).
\textsuperscript{118} Id. at 6, 190 Cal. Rptr. at 89.

had her pregnancy been diagnosed in a timely fashion, it would have inevitably been aborted. Noting that "courts have been unwilling to give conservators and other guardians free rein to substitute their own judgment for that of their mentally disabled patients in matters affecting reproductive rights,"\textsuperscript{119} the court cautioned that the plaintiff could not recover damages for the failure to diagnose her pregnancy unless she could "show either that she would have consented to an abortion, or if she lacked capacity to consent, that her conservator would have been able to make to a court the type of extraordinarily strong showing which would permit the court to authorize this surgery."\textsuperscript{120}

Finally, the court dismissed the infant child's claim to wrongful life, since "no reasons are alleged on the basis of which respondents should have discouraged and prevented the pregnancy, other than the fact Virgie [the mother] was adjudicated as incompetent . . . . Our society has repudiated the proposition that mental patients will necessarily beget unhealthy, inferior or otherwise undesirable children if permitted to reproduce."\textsuperscript{121}

\textit{Foy v. Greenblatt} stands as a model exposition of the reproductive rights of institutionalized women. It recognized them as fully human beings whose right to privacy protects their voluntary sexual activities without diminishing the institution's duty to protect them from sexual assault. It also recognizes the institution's duty to maximize a woman's choice by providing her with counseling and offering her contraceptives. It affirms an institutionalized woman's right to choose to be pregnant and to carry her pregnancy to term, and is appropriately suspicious of abortion as the presumptive response to an institutionalized woman's pregnancy.\textsuperscript{122} Finally, it refuses to deem a child a "wrongful life" sim-

\textsuperscript{119} Id. at 9, 190 Cal. Rptr. at 90.
\textsuperscript{120} Id. at 13, 190 Cal. Rptr. at 92.
\textsuperscript{121} Id. at 14, 190 Cal. Rptr. at 93. See also Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (rejecting claim for wrongful life after sexual assault on mother in state mental institution on the basis that no legal remedy existed for wrongful life).
\textsuperscript{122} Ironically, the sterilization case, Conservatorship of Valerie N., 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985), which repels \textit{Foy} in spirit, attempts to characterize itself as being in harmony with \textit{Foy} because "[i]f the state withdraws from her the only safe and reliable method of contraception suitable to her condition, it necessarily limits her opportunity for habituation and thereby her freedom to pursue a fulfilling life." Id. at 156, 707 P.2d at 773, 219 Cal. Rptr. at 400. \textit{Foy} recognizes that patients may in fact have "a fulfilling life" if they have children, and that the reproductive rights to choosing such an option are to be granted the utmost protection.
should look beyond a parent’s consent to determine whether an abortion was actually in the best interests of the woman involved. This argument, made by the woman’s guardian ad litem, was predicated on the “special and fundamental nature” of abortion.128 The court refused to consider whether the abortion was in the woman’s best interests, giving as its reason that such consideration would require that “a Judge should invoke his or her own moral, philosophical, theological and sociological precepts in deciding whether the operation should take place.”129

The Rhode Island Supreme Court, on the other hand, embraced a “substituted judgment” analysis. After noting that a woman’s “absolute and untrammeled constitutional right” to an abortion in the first trimester was retained by incompetent women such as Jane Doe, the court concluded: “Consequently the only question presented by this litigation was the determination of whether Jane Doe would have chosen this medical alternative if she were competent to exercise freedom of choice on her own behalf.”130 The decision is clear that the substituted judgment is to be applied rather than the best interest model, although somewhat contradictory as to the identity of the surrogate decisionmaker.131

As a legal matter, it seems evident that the Rhode Island court’s approach in Jane Doe is preferable to that of the court in New York. Obviously, an abortion is not like any other medical procedure, and the implications of carrying a pregnancy to term are very different from other medical decisions for both the institution and the parents as guardians. The institution may fear liability for the costs of raising a child born because a woman in its custody is raped,132 and the guardian

124. In re Jane Doe, 533 A.2d 523 (R.I. 1987); In re Barbara C., 101 A.D.3d 131, 474 N.Y.S.2d 799 (App. Div. 1984). In South Carolina, the Department of Mental Retardation filed a petition in Family Court seeking an involuntary abortion for a mentally retarded woman. The action was dismissed for lack of subject matter jurisdiction. Letter from Cynthia Stein, South Carolina Protection and Advocacy System for the Handicapped, Inc., to author (October 6, 1988) (on file with the author).
125. See infra text accompanying notes 178-98.
126. Jane Doe, 533 A.2d at 524. In McCandless, 3 A.D.2d 600, 162 N.Y.S.2d 570, the parents expected their daughter to bear her child as well. In another case in Massachusetts, the Department of Mental Retardation prosecuted a petition for abortion over the objection of the woman’s family. Letter from Robert Fleischer, Center for Public Representation, (September 21, 1988) (on file with the author). See also In re Diane, 318 A.2d 629 (Del. Ch. 1974) (16-year-old girl in foster care entitled to abortion over the objection of her father).
127. Although the court cited to statutory authority, the statute only clarifies that each patient has the same reproductive rights as any citizen and does not prescribe the procedure to enforce these rights. See infra text accompanying notes 133-43.
129. Id. at ____, 474 N.Y.S.2d at 801. Obviously, courts in New York make "best interest" decisions all the time involving the judge's subjective evaluation of the facts, most frequently in cases involving child custody, but also in guardianship cases and often in civil commitment cases if the person is alleged to be gravely disabled. The court’s reluctance in Barbara C. thus appears disingenuous at best.
130. Jane Doe, 533 A.2d at 525.
131. In several places, the decision appears to suggest that the trial court itself is the surrogate decision maker: "the trial justice, after careful consideration of the evidence presented, determined that this incompetent young woman, if she had been capable of doing so, would have exercised the option to terminate [this] pregnancy." Id. at 526. The Supreme Court also, however, refers to the trial justice as having "selected the surrogate decision maker." Id. at 527.
Stefan: Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Inst

should look beyond a parent's consent to determine whether an abortion was actually in the best interests of the woman involved. This argument, made by the woman's guardian ad litem, was predicated on the "special and fundamental nature" of abortion.128 The court refused to consider whether the abortion was in the woman's best interests, giving as its reason that such consideration would require that "a Judge should invoke his or her own moral, philosophical, theological and sociological precepts in deciding whether the operation should take place."130

The Rhode Island Supreme Court, on the other hand, embraced a "substituted judgment" analysis. After noting that a woman's "absolute and untrammeled constitutional right" to an abortion in the first trimester was retained by incompetent women such as Jane Doe, the court concluded: "Consequently the only question presented by this litigation was the determination of whether Jane Doe would have chosen this medical alternative if she were competent to exercise freedom of choice on her own behalf."129 The decision is clear that the substituted judgment is to be applied rather than the best interest model, although somewhat contradictory as to the identity of the surrogate decisionmaker.131

As a legal matter, it seems evident that the Rhode Island court's approach in Jane Doe is preferable to that of the court in New York. Obviously, an abortion is not like any other medical procedure, and the implications of carrying a pregnancy to term are very different from other medical decisions for both the institution and the parents as guardians. The institution may fear liability for the costs of raising a child born because a woman in its custody is raped,132 and the guardian...
parents may well be concerned that they will ultimately be responsible for raising the child. As courts in sterilization cases have noted, the parents of a pregnant incompetent woman can have interests that conflict with those of their daughter.\textsuperscript{18} And as this article has emphasized, parents and judges may be making unsupported assumptions about the woman’s capacity to make her own decision in the matter.

Consequently, when abortions for institutionalized women are sought by someone other than the pregnant woman herself, procedural due process requires court review, and capacity should be determined specifically for the purpose of making this decision after the woman is given information in an appropriate manner. If the woman is found incompetent, a guardian \textit{ad litem}, who has no affiliation with the institution or the parents, should be appointed to inform the court and assist it in making a substituted judgment. This process should be placed on an expedited calendar or handled as an emergency to ensure that if an abortion is to take place, it will occur during the first trimester if possible.

Although pregnancy does occur in institutional settings, very few state agencies of hospitals appear to have any written policy regarding abortions. The results of a survey mailed to state Protection and Advocacy agencies\textsuperscript{184} show that even in states where thousands of women are institutionalized, the question of abortion is handled on an informal, \textit{ad hoc} basis.

Only two jurisdictions that responded to the survey\textsuperscript{185} have any written policies on abortion for institutionalized women: the state of New York and the District of Columbia.\textsuperscript{186} New York, by regulation, recognizes that “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.” The District of Columbia policy is to refer all women “presumed to be in need of such services to outside facilities,” which then bear “the responsibility and final decision as to whether an abortion shall be performed.”\textsuperscript{187} Of those states with no written policy, several responses included policies from individual institutions. For example, while the state of Ohio has no policies, directives, or guidelines regarding abortion for institutionalized women,\textsuperscript{188} the Toledo Mental Health Center has developed model guidelines.\textsuperscript{189} Seven states with no written policies (Kentucky,\textsuperscript{190} South Dakota,\textsuperscript{191} South Carolina,\textsuperscript{192} New Jersey,\textsuperscript{193} Iowa,\textsuperscript{194} Massachusetts,\textsuperscript{195} and Delaware\textsuperscript{196}) nevertheless had procedures that they regularly use in practice. South Dakota and South Carolina do not provide any assistance which would involve the expenditure of state funds, but permit patients to go on pass for abortions if they can secure outside assistance. In Delaware, if an institutionalized mentally retarded woman were to become pregnant, the institution would petition for the appointment of a guardian. In Kentucky, the Public Guardian will not consent to abortion desired by his or her wards without court order; in Iowa, recourse to the courts is sought only if the client and the guardian disagree as to the course of action. In Massachusetts it is generally accepted that a client can have an abortion if she is able to give informed consent, but a guardian cannot arrange an abortion without court order. In New Jersey, the woman’s right to decide is respected, as is her right to seek

\begin{footnotesize}
\begin{enumerate}
\item[137.] Saint Elizabeth’s Hospital, District of Columbia, Policy and Procedures Manual, § 3521.2 (1984).
\item[138.] Letter on file with author.
\item[139.] Guidelines on file with author.
\item[140.] Letter from Barbara Kibler, attorney, Protection and Advocacy Division, Department of Public Advocacy, Commonwealth of Kentucky, to author (September 12, 1988).
\item[141.] Letter from Robin Fry, Assistant, Legal Affairs, South Dakota Advocacy Project, Inc., to author (October 3, 1988).
\item[142.] Letter from Cynthia Stein, staff attorney, Region IV office, South Carolina Protection & Advocacy System for the Handicapped, Inc., to author (October 6, 1988).
\item[143.] Letter from Linda Rosenweig, director, Department of Public Advocate, Division of Mental Health Advocacy, State of New Jersey, to author (September 22, 1988).
\item[144.] Letter from Wayne Pelkey, Advocacy Consultant / Investigator, Iowa Protection and Advocacy Services, to author (September 22, 1988).
\item[145.] Letter from Robert Fleischer, Center for Public Representation, Mental Health Protection & Advocacy Project Disability Law Clinic, Commonwealth of Massachusetts, to author (September 21, 1988).
\item[146.] Letter from Sandra Reyes, Community Legal Aid Society, Georgetown, Delaware, to author (October 18, 1988).
\end{enumerate}
\end{footnotesize}
parents may well be concerned that they will ultimately be responsible for raising the child. As courts in sterilization cases have noted, the parents of a pregnant incompetent woman can have interests that conflict with those of their daughter.\textsuperscript{133} And as this article has emphasized, parents and judges may be making unsupported assumptions about the woman’s capacity to make her own decision in the matter.

Consequently, when abortions for institutionalized women are sought by someone other than the pregnant woman herself, procedural due process requires court review, and capacity should be determined specifically for the purpose of making this decision after the woman is given information in an appropriate manner. If the woman is found incompetent, a guardian ad litem, who has no affiliation to the institution or the parents, should be appointed to inform the court and assist it in making a substituted judgment. This process should be placed on an expedited calendar or handled as an emergency to ensure that if an abortion is to take place, it will occur during the first trimester if possible.

Although pregnancy does occur in institutional settings, very few state agencies of hospitals appear to have any written policy regarding abortions. The results of a survey mailed to state Protection and Advocacy agencies\textsuperscript{134} show that even in states where thousands of women are institutionalized, the question of abortion is handled on an informal, \textit{ad hoc} basis.

Only two jurisdictions that responded to the survey\textsuperscript{135} have any written policies on abortion for institutionalized women: the state of New York and the District of Columbia.\textsuperscript{136} New York, by regulation, recognizes that “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.” The District of Columbia policy is to refer all women “presumed to be in need of such services to outside facilities,” which then bear “the responsibility and final decision as to whether an abortion shall be performed.”\textsuperscript{137} Of those states with no written policy, several responses included policies from individual institutions. For example, while the state of Ohio has no policies, directives, or guidelines regarding abortion for institutionalized women,\textsuperscript{138} the Toledo Mental Health Center has developed model guidelines.\textsuperscript{139} Seven states with no written policies (Kentucky,\textsuperscript{140} South Dakota,\textsuperscript{141} South Carolina,\textsuperscript{142} New Jersey,\textsuperscript{143} Iowa,\textsuperscript{144} Massachusetts,\textsuperscript{145} and Delaware)\textsuperscript{146} nevertheless had procedures that they regularly use in practice. South Dakota and South Carolina do not provide any assistance which would involve the expenditure of state funds, but permit patients to go on pass for abortions if they can secure outside assistance. In Delaware, if an institutionalized mentally retarded woman were to become pregnant, the institution would petition for the appointment of a guardian. In Kentucky, the Public Guardian will not consent to abortion desired by his or her wards without court order; in Iowa, recourse to the courts is sought only if the client and the guardian disagree as to the course of action. In Massachusetts it is generally accepted that a client can have an abortion if she is able to give informed consent, but a guardian cannot arrange an abortion without court order. In New Jersey, the woman’s right to decide is respected, as is her right to seek

\begin{footnotes}
\footnote{133. See supra text accompanying notes 61-63.}
\footnote{134. Protection and Advocacy agencies were created to monitor the care provided to developmentally disabled people. See 42 U.S.C. §§ 6041-42 (West 1988 Supp.). In 1986 this protection was extended to institutionalized and recently discharged mentally ill people. 42 U.S.C. § 10800 (West 1988 Supp.).}
\footnote{135. Responses were received from Arizona, Delaware, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Washington, D.C. and Wyoming.}
\footnote{137. \textit{Saint Elizabeths Hospital, District of Columbia, Policy and Procedures Manual}, § 3521.2 (1984).}
\footnote{138. Letter on file with author.}
\footnote{139. Guidelines on file with author.}
\footnote{140. Letter from Barbara Kibler, attorney, Protection and Advocacy Division, Department of Public Advocacy, Commonwealth of Kentucky, to author (September 12, 1988).}
\footnote{141. Letter from Robin Fry, Assistant, Legal Affairs, South Dakota Advocacy Project, Inc., to author (October 3, 1988).}
\footnote{142. Letter from Cynthia Stein, staff attorney, Region IV office, South Carolina Protection & Advocacy System for the Handicapped, Inc., to author (October 6, 1988).}
\footnote{143. Letter from Linda Rosenweig, director, Department of Public Advocate, Division of Mental Health Advocacy, State of New Jersey, to author (September 22, 1988).}
\footnote{144. Letter from Wayne Pelkey, Advocacy Consultant/Investigator, Iowa Protection and Advocacy Services, to author (September 22, 1988).}
\footnote{145. Letter from Robert Fleischner, Center for Public Representation, Mental Health Protection & Advocacy Project Disability Law Clinic, Commonwealth of Massachusetts, to author (September 21, 1988).}
\footnote{146. Letter from Sandra Reyes, Community Legal Aid Society, Georgetown, Delaware, to author (October 18, 1988).}
\end{footnotes}
outside counseling in making the decision. The remaining states had no articulated or informal policy.

2. The Right of Incarcerated Women to Abortion

While institutions seek abortions on behalf of women who have been held incompetent to decide whether or not they actually want abortions, some prisoners who know they want abortions are denied access to them or made to jump through time-consuming procedural hoops. In Monmouth County Correctional Institute Inmates v. Lanzaro, inmates seeking elective abortions challenged the institution's regulation that they must secure court-ordered releases and make all arrangements, including funding, themselves. Although the county arranged for and funded abortions deemed "medically necessary" by prison physicians, the county defendants claimed they had no responsibility to arrange for elective abortions, which they compared to "a facelift or the removal of varicose veins for purely cosmetic reasons." The Third Circuit struck down the requirement that inmates obtain court-ordered releases and ordered the county to "assume responsibility for insuring the availability of funding for all inmate abortions." It found that the court-ordered release requirement infringed inmates' right to privacy under the fourteenth amendment and that failure to arrange funding for these procedures violated both the fourteenth amendment and the eighth amendment right to adequate medical care.

The standard of review in assessing whether a given prison regulation is unconstitutional was recently established by the Supreme Court in Turner v. Safley. A regulation that "impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests." The Court listed four factors to consider in determining if a regulation is reasonably related to valid penological interests:

- There must be a rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.
- The availability of other avenues for exercise of the asserted right.
- The impact of accommodating the right on guards and other inmates, and on the allocation of the prison's resources generally.
- The existence of alternatives to the challenged regulation that would satisfy the prison's concerns.

The Lanzaro court dismissed the correctional institution's claim that its regulation was justified by the administrative and financial burdens resulting from providing inmates with access to elective abortions. The court noted that not all the waste of a penalty interest sufficient to justify a deprivation of constitutional rights, nor is "administrative inconvenience, unattached to any legitimate penological objective such as security" sufficient to outweigh "retained fundamental rights of inmates." Thus, since no "legitimate governmental interest" was advanced, the remaining three Turner factors should not even come into play.

Although the majority rejected the findings of the court below that the county had advanced security concerns as justification for its regulation, it concluded that such concerns were unreasonable under the Turner test. Since all prisoners were subject to the regulation, regardless of the level of security risk they posed, and all prisoners, regardless of security risk, were entitled to abortions that are considered medically necessary, any security interests the county advanced could not be rationally connected to the regulation.

The third Turner consideration involves examining the cost of accommodating the asserted right. The court noted that there was no more cost inherent in providing abortions than in providing for prenatal care, clothing and other needs of a pregnant woman. It distinguished the Supreme Court's line of decisions holding that the state need not pay for the cost of abortions by noting that "[w]hatever the

---


149. Id. at 345.

150. Id. at 351.


152. Id. at 2261.
outside counseling in making the decision. The remaining states had no articulated or informal policy.

2. The Right of Incarcerated Women to Abortion

While institutions seek abortions on behalf of women who have been held incompetent to decide whether or not they actually want abortions, some prisoners who know they want abortions are denied access to them or made to jump through time-consuming procedural hoops.\textsuperscript{147} In Monmouth County Correctional Institute Inmates v. Lancaro,\textsuperscript{148} inmates seeking elective abortions challenged the institution's regulation that they must secure court-ordered releases and make all arrangements, including funding, themselves. Although the county arranged for and funded abortions deemed "medically necessary" by prison physicians, the county defendants claimed they had no responsibility to arrange for elective abortions, which they compared to "a facelift or the removal of varicose veins for purely cosmetic reasons."\textsuperscript{149}

The Third Circuit struck down the requirement that inmates obtain court-ordered releases and ordered the county to "assume responsibility for insuring the availability of funding for all inmate abortions."\textsuperscript{150} It found that the court-ordered release requirement infringed inmates' right to privacy under the fourteenth amendment and that failure to arrange funding for these procedures violated both the fourteenth amendment and the eighth amendment right to adequate medical care.

The standard of review in assessing whether a given prison regulation is unconstitutional was recently established by the Supreme Court in Turner v. Safley.\textsuperscript{151} A regulation that "imposes on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests."\textsuperscript{152} The Court listed four factors to consider in determining if a regulation is reasonably related to valid penological interests:

(1) There must be a rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;
(2) The availability of other avenues for exercise of the asserted right;
(3) The impact of accommodating the right on guards and other inmates, and on the allocation of the prison's resources generally;
(4) The existence of alternatives to the challenged regulation that would satisfy the prison's concerns.\textsuperscript{153}

The Lancaro court dismissed the correctional institution's claim that its regulation was justified by the administrative and financial burdens resulting from providing inmates with access to elective abortions. The court noted that as a matter of law costs are not a legitimate penological interest sufficient to justify a deprivation of constitutional rights, nor is "administrative inconvenience, unattached to any legitimate penological objective such as security" sufficient to outweigh "retained fundamental rights of inmates."\textsuperscript{154} Thus, since no "legitimate governmental interest" was advanced, the remaining three Turner factors should not even come into play.

Although the majority rejected the findings of the court below that the county had advanced security concerns as justification for its regulation, it concluded that such concerns were unreasonable under the Turner test. Since all prisoners were subject to the regulation, regardless of the level of security risk they posed, and all prisoners, regardless of security risk, were entitled to abortions that are considered medically necessary, any security interests the county advanced could not be rationally connected to the regulation.

The third Turner consideration involves examining the cost of accommodating the asserted right. The court noted that there was no more cost inherent in providing abortions than in providing for prenatal care, clothing and other needs of a pregnant woman.\textsuperscript{155} It distinguished the Supreme Court's line of decisions holding that the state need not pay for the cost of abortions\textsuperscript{156} by noting that "[w]hatever the


\textsuperscript{149} Id. at 345.

\textsuperscript{150} Id. at 351.

\textsuperscript{151} 107 S. Ct. 2254 (1987).

\textsuperscript{152} Id. at 2261.

\textsuperscript{153} Id. at 2262.

\textsuperscript{154} Lancaro, 834 F.2d at 337.

\textsuperscript{155} Id. at 341.

government's constitutional obligations to the free world, those obligations often differ radically in the prison context.\textsuperscript{157} The court cited examples of constitutionally mandated prisoners' rights that would not be required or even been unconstitutional in the free world: the right to provision of religious materials and the right to adequate housing, food and medical care. The latter clearly applied to prisoners but not "to the nation's poor and homeless."\textsuperscript{158} In fact, the court noted, the policy of the federal prison system has been to fund inmate abortions.\textsuperscript{159}

The majority also distinguished the state interest involved in cases involving free women: "[a]lthough the Supreme Court has recognized that a state has a legitimate and important interest in encouraging natural childbirth over abortion [citations omitted] . . . we cannot conceive of a legitimate penological interest that would be furthered by its policy so characterized."\textsuperscript{160}

Finally, the \textit{Lanzaro} court held that denial of elective abortions constituted "deliberate indifference to a serious medical need" in violation of the Eighth Amendment.\textsuperscript{161} The regulation evinced deliberate indifference by subjecting inmates, regardless of period of gestation, to burdensome and sometimes dangerous delay. Rejecting the county's argument that abortion was not a serious medical need because pregnancy was not an "abnormal condition," the court found that the effects of denial of an abortion elevated it to the status of "a serious medical need."\textsuperscript{162}

\textsuperscript{157} \textit{Lanzaro}, 834 F.2d at 341.

\textsuperscript{158} Id. The examples cited by the court, as well as much of its reasoning, are similar to the arguments in a law review article cited repeatedly by the court, \textit{Visit Infant Abortions -- The Right to Government Funding Behind the Prison Gates}, 48 FORDHAM L. REV. 550 (1980).

\textsuperscript{159} Lanzaro, 834 F.2d at 334 n.11.

\textsuperscript{160} Id. at 342.


\textsuperscript{162} Lanzaro 834 F.2d at 347 (citing Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980) cert. denied 450 U.S. 1041 (1981); Laaman v. Helgemoe, 437 F. Supp. 269, 312 (D.N.H. 1977); and other cases).

\textbf{B. The Right to Carry Pregnancies to Term}

1. The Right to Adequate Prenatal Care in Prison\textsuperscript{163}

While there are indications that many incarcerated women have been coerced into abortions,\textsuperscript{164} for the most part the right of women in jails and prisons to carry their pregnancies to term raises issues similar to those discussed in the \textit{Lanzaro} case. In \textit{Lanzaro}, the defendants did not prohibit abortions; they raised procedural obstacles that so greatly impeded access as to ensure that many women would never obtain abortions. Likewise, prisons and jails do not have explicit policies preventing women from carrying their pregnancies to term. In practice, however, incarcerated pregnant women lack proper medical and prenatal care and adequate nutrition and are required to engage in the same work activities as other women. These factors and other common prison policies\textsuperscript{165} result in the tragic and completely unavoidable miscarriages and deaths of many infants, to say nothing of the birth of babies who are developmentally delayed or damaged because of the mother's inability to obtain treatment. In one jail in California, the infant mortality rate is 50 times greater than for the state as a whole.\textsuperscript{166}

As in \textit{Lanzaro}, both Eighth and Fourteenth Amendment rights are clearly implicated. A woman's right to adequate medical care during her pregnancy also involves her fundamental right to decide to bear a

\textsuperscript{163} While pregnant women are given psychotropic medication and sometimes electric shock in institutions, there had been no litigation reported on this issue to date, and it is beyond the scope of this article. See Gelenberg, \textit{Psychotropic Drugs and Psychiatric Disorders, 27 PSYCHOSOMATIC 216 (1986),} Nurnberg & Prudic, \textit{Guidelines for Treatment of Psychosis During Pregnancy, 35 Hosp. & COMMUNITY PSYCHIATRY 67, 68-69 (1984);} Wise, Ward, \textit{Case Report of ECT During High Risk Pregnancy, 141 AMERICAN J. PSYCHIATRY 99 (Jan. 1984).}


\textsuperscript{165} For example, many women who are pregnant and addicted to heroin are withdrawn "cold turkey," which is extremely dangerous to the fetus. Many pregnant women who undergo such withdrawal, rather than gradual withdrawal and/or substitution of methadone, suffer miscarriage. McHugh, supra note 161, at 241-43.

\textsuperscript{166} \textit{County Jail Miscarriage Rate 50 Times State Average, YOUTH \& NEWS 4 (November/December 1985). The miscarriage rate was 73 percent after the 20th week of pregnancy. Only one in five pregnant inmates delivered a live baby.}
government's constitutional obligations to the free world, those obligations often differ radically in the prison context."\(^{157}\) The court cited examples of constitutionally mandated prisoners' rights that would not be required or even be found unconstitutional in the free world: the right to provision of religious materials and the right to adequate housing, food and medical care. The latter clearly applied to prisoners but not "to the nation's poor and homeless."\(^{158}\) In fact, the court noted, the policy of the federal prison system has been to fund inmate abortions.\(^{159}\)

The majority also distinguished the state interest involved in cases involving free women: "[a]lthough the Supreme Court has recognized that a state has a legitimate and important interest in encouraging natural childbirth over abortion [citations omitted] . . . we cannot conceive of a legitimate penological interest that would be furthered by its policy so characterized."\(^{160}\)

Finally, the Lanzaro court held that denial of elective abortions constituted "deliberate indifference to a serious medical need" in violation of the Eighth Amendment.\(^{161}\) The regulation evinced deliberate indifference by subjecting inmates, regardless of period of gestation, to burdensome and sometimes dangerous delay. Rejecting the county's argument that abortion was not a serious medical need because pregnancy was not an "abnormal condition," the court found that the effects of denial of an abortion elevated it to the status of "a serious medical need."\(^{162}\)

B. The Right to Carry Pregnancies to Term

1. The Right to Adequate Prenatal Care in Prison\(^{163}\)

While there are indications that many incarcerated women have been coerced into abortions,\(^{164}\) for the most part the right of women in jails and prisons to carry their pregnancies to term raises issues similar to those discussed in the Lanzaro case. In Lanzaro, the defendants did not prohibit abortions; they raised procedural obstacles that so greatly impeded access as to ensure that many women would never obtain abortions. Likewise, prisons and jails do not have explicit policies preventing women from carrying their pregnancies to term. In practice, however, incarcerated pregnant women lack proper medical and prenatal care and adequate nutrition and are required to engage in the same work activities as other women. These factors and other common prison policies\(^{165}\) result in the tragic and completely unavoidable miscarriages and deaths of many infants, to say nothing of the birth of babies who are developmentally delayed or damaged because of the mother's inability to obtain treatment. In one jail in California, the infant mortality rate is 50 times greater than for the state as a whole.\(^{166}\)

As in Lanzaro, both Eight and Fourteenth Amendment rights are clearly implicated. A woman's right to adequate medical care during her pregnancy also involves her fundamental right to decide to bear a

157. Lanzaro, 834 F.2d at 341.
158. Id. The examples cited by the court, as well as much of its reasoning, are similar to the arguments in a law review article cited repeatedly by the court, Vidal, Innate Abortions — The Right to Government Funding Behind the Prison Gates, 48 FORDHAM L. REV. 550 (1980).
159. Lanzaro, 834 F.2d at 334 n.11.
160. Id. at 342.
163. While pregnant women are given psychotropic medication and sometimes electric shock in institutions, there had been no litigation reported on this issue to date, and it is beyond the scope of this article. See Gellenberg, Psychotropic Drugs and Psychiatric Disorders, 27 PSYCHOMATICS 216 (1986); Nurnberg & Prudic, Guidelines for Treatment of Psychosis During Pregnancy, 35 HOSP. & COMMUNITY PSYCHIATRY 67, 68-69 (1984); Wise, Ward, Case Report of ECT During High Risk Pregnancy, 141 AMERICAN J. PSYCHIATRY 99 (Jan. 1984).
165. For example, many women who are pregnant and addicted to heroin are withdrawn "cold turkey," which is extremely dangerous to the fetus. Many pregnant women who undergo such withdrawal, rather than gradual withdrawal and/or substitution of methadone, suffer miscarriage. McHugh, supra note 161, at 241-43.
166. County Jail Miscarriage Rate 50 Times State Average, YOUTH L. NEWS 4 (November/December 1985). The miscarriage rate was 73 percent after the 20th week of pregnancy. Only one in five pregnant inmates delivered a live baby.
child. The denial of care can neither be attributed to nor justified by lack of economic withdrawal. Even when outside experts appeal to prison officials to simply give pregnant prisoners a more nutritious diet and vitamin supplements, these requests are denied.167

The treatment of pregnant women often goes beyond the denial of care to overt actions so blatant as to constitute deliberate attempts to obstruct the fundamental right to bear children. There is substantial evidence of harassment and mistreatment of women explicitly because they are pregnant.168 The reason appears to be resentment of the “special treatment” needed by pregnant women, including less physically difficult work and increased medical care.169 One report cited a pattern assigning pregnant women to work requiring a great deal of exertion and heavy lifting, even when the women had a history of miscarriage.170 Sometimes needed medical care is delayed, resulting in miscarriages and babies born dead, or who die shortly after birth. Inmates have charged that such delay is often deliberate.171

Several class actions have been filed charging systemic deficiencies in prenatal care provided to incarcerated pregnant women. Yeager v. Smith172 alleged violations of the Eighth and Fourteenth Amendment rights of pregnant women in the Kern County jail and work camp. Of eight plaintiffs, three had miscarriages and one gave birth lying on a mat in the jail hallway. The child died shortly thereafter. The remaining four pregnant plaintiffs were, at the time of filing, exposed to hepatitis and measles and were denied vitamins, exercise and needed medical care for serious conditions that threatened their pregnancies. Jones v. Dyer173 charged Alameda County with similar violations. The complaint declared that “[i]ncarceration of a pregnant woman at Santa Rita is a potential death sentence to her unborn child and is dangerous to the woman.”174 Harris v. McCarthy,175 which was settled in April 1987, charged similar violations on behalf of pregnant women incarcerated at the California Institution for Women.

All of these cases charged that conditions to which pregnant women were subjected denied them their right of procreative choice. While Harris, the first lawsuit to be filed, asked only that adequate prenatal and postnatal care be provided, both Yeager and Jones asked the court for an order prohibiting confinement of pregnant and postpartum women at the jails. Instead, the plaintiffs asked the court to order that they be confined in halfway houses created by California legislation specifically to allow incarcerated women to live with their children.176 These cases are still being litigated.177

2. The Right Not To Be Committed or Incarcerated Because of Pregnancy

A component of reproductive rights not often considered by the “free” population is the right to procreation without risking one’s liberty by making the choice. However, judges around the country commit or incarcerate pregnant women in order to protect their fetuses.178 While for the most part these actions are noted anecdotally,179 but not

167. McHugh, supra note 161, at 238.

168. Study after study has reported that “pregnant women in prison are sometimes special targets for harassment from members of the prison staff.” Id. at 235-36 (citing to Colorado Advisory Committee Report to the United States Commission on Civil Rights, Colorado Prison Study, at 81 (1984)); See also Kennedy, Women in Prison, 1 WOMEN'S RTS. L. REV. 55, 57 (Jul/Aug. 1972).

169. McHugh, supra note 161, at 235-36; Kennedy, supra note 165, at 57.

170. Colorado Advisory Committee Report, supra note 165, at 81; Kennedy, supra note 165, at 56-57.


child. The denial of care can neither be attributed to nor justified by lack of economic withdrawal. Even when outside experts appeal to prison officials to simply give pregnant prisoners a more nutritious diet and vitamin supplements, these requests are denied.167

The treatment of pregnant women often goes beyond the denial of care to overt actions so blatant as to constitute deliberate attempts to obstruct the fundamental right to bear children. There is substantial evidence of harassment and mistreatment of women explicitly because they are pregnant.168 The reason appears to be resentment of the “special treatment” needed by pregnant women, including less physically difficult work and increased medical care.169 One report cited a pattern assigning pregnant women to work requiring a great deal of exertion and heavy lifting, even when the women had a history of miscarriage.170 Sometimes needed medical care is delayed, resulting in miscarriages and babies born dead, or who die shortly after birth. Inmates have charged that such delay is often deliberate.171

Several class actions have been filed charging systemic deficiencies in prenatal care provided to incarcerated pregnant women. Yeager v. Smith172 alleged violations of the Eighth and Fourteenth Amendment rights of pregnant women in the Kern County jail and work camp. Of eight plaintiffs, three had miscarriages and one gave birth lying on a mat in the jail hallway. The child died shortly thereafter. The remaining four pregnant plaintiffs were, at the time of filing, exposed to hepatitis and measles and were denied vitamins, exercise and needed medical care for serious conditions that threatened their pregnancies. Jones v. Dyer173 charged Alameda County with similar violations. The complaint declared that “[i]ncarceration of a pregnant woman at Santa

167. McHugh, supra note 161, at 238.
168. Study after study has reported that “pregnant women in prison are sometimes special targets for harassment from members of the prison staff.” Id. at 235-36 (citing to Colorado Advisory Committee Report to the United States Commission on Civil Rights, Colorado Prison Study, at 81 (1984)); See also Kennedy, Women in Prison, 1 WOMEN’S RTS. L. REP 55, 57 (Jul/Aug. 1972).
169. McHugh, supra note 161, at 235-36; Kennedy, supra note 165, at 57.
170. Colorado Advisory Committee Report, supra note 161, at 81; Kennedy, supra note 165, at 56-57.

Rita is a potential death sentence to her unborn child and is dangerous to the woman.”174 Harris v. McCarthy,175 which was settled in April 1987, charged similar violations on behalf of pregnant women incarcerated at the California Institution for Women.

All of these cases charged that conditions to which pregnant women were subjected denied them their right of procreative choice. While Harris, the first lawsuit to be filed, asked only that adequate prenatal and postnatal care be provided, both Yeager and Jones asked the court for an order prohibiting confinement of pregnant and postpartum women at the jails. Instead, the plaintiffs asked the court to order that they be confined in halfway houses created by California legislation specifically to allow incarcerated women to live with their children.176 These cases are still being litigated.177

2. The Right Not To Be Committed or Incarcerated Because of Pregnancy

A component of reproductive rights not often considered by the “free” population is the right to procreation without risking one’s liberty by making the choice. However, judges around the country commit or incarcerate pregnant women in order to protect their fetuses.178 While for the most part these actions are noted anecdotally179 but not

174. Id. at 1.
177. For further information, readers may contact Ellen Barry, Director, Legal Services for prisoners with children, 1535 Mission Street, San Francisco, CA 94103, (415) 522-3150.
178. One of the most ironic aspects of this practice is that medical and prenatal care provided in prisons and jails is often so poor that the fetus would be better off if the mother were freed, or freed with a requirement that she receive prenatal care as a condition of probation. Incarcerating pregnant women to prevent them from having access to drugs “shows an incredible naiveté about the availability of drugs in jails and prisons.” Interview with Ellen Barry, Director, Legal Services for Prisoners with Children, 1317 18th St., San Francisco, CA 74107, September 17, 1988. Interview with Sandra Kay Barnhill, Director, Aid to Imprisoned Mothers, Inc., 957 N. Highland Ave., N.E. Atlanta, GA, 30306, Sept. 12, 1988.
179. See, e.g., Cohen, When a Fetus Has More Rights Than the Mother, Wash. Post, July 28, 1988 (“I’m going to keep her locked up until the baby is born because she tested positive for cocaine when she came before me.” Judge Peter H. Wolf said when sentencing Vaughn. “She’s apparently an addictive personality and I’ll be darned if I’ll have the baby born that way.”); Mrowca, Giving Birth Behind Prison Bars, L.A. Times, Nov. 27, 1987, at 26, cols. 1-4 (“Sometimes, the sentence may be imposed

Published by NSUWorks, 1999
challenged judicially, some cases do document this phenomenon.

For example, in In re Steven S., the California court detained a woman who allegedly did not meet commitment standards in a mental hospital by finding her fetus a "dependent child" under its child protective statutes. The court then gave the county custody over the fetus, enabling it to retain the woman in an institution. The appellate court held that an unborn fetus is not a "person" as defined in the statute but dismissed the case as moot; by then the child had been born and taken from the mother.

Similarly, in a recent commitment case in Montana involving a pregnant woman, a woman was explicitly "committed to the Billings Deaconess Hospital at Billings, Montana, until the birth of her child." When the woman, then in her ninth month of pregnancy, tried to refuse psychotropic medication, she was transferred against her will to a state hospital.

Committing or incarcerating pregnant women can be seen as part of a wider trend to protect a fetus at the expense of the mother's rights. This trend includes forcing women to have Caesarean sections against their will if a court deems it necessary, attempting to hold women criminally responsible for actions that may have damaged their fetuses, and paroling or conditionally releasing women with the condition that they do not become pregnant, (for example, a convicted robber was allowed freedom with the stipulation that she not become pregnant while unmarried.) Several commentators have suggested using commitment or child custody laws to institutionalize or incarcerate a woman whose behavior might be considered threatening to her fetus. Because, in all states, persons can be committed if they are found to be mentally ill and a danger to themselves or to others, some courts have committed a pregnant woman by finding that the "other" she is dangerous to is her own fetus.

These circumstances raise troubling constitutional issues. In the first place, a due process issue arises when the state burdens or penalizes a woman for exercising her right to procreative choice. But for her pregnancy, such a woman would not be committed to the custody of the state. This has been characterized repeatedly as "a massive curtailment of liberty." In the past, the Supreme Court found that mandatory school-leave regulations after the fifth month of pregnancy "penalize a pregnant teacher for deciding to bear a child," and pronounced those regulations "a heavy burden on the exercise of protected freedoms." It is clear that incarceration or institutionalization be...
challenged judicially, some cases do document this phenomenon.

For example, in *In re Steven S.*, a California court detained a woman who concededly did not meet commitment standards in a mental hospital by finding her fetus a “dependent child” under its child protective statutes. The court then gave the county custody over the fetus, enabling it to retain the woman in an institution. The appellate court held that an unborn fetus is not a “person” as defined in the statute but dismissed the case as moot; by then the child had been born and taken from the mother.

Similarly, in a recent commitment case in Montana involving a pregnant woman, a woman was explicitly “committed to the Billings Deaconess Hospital at Billings, Montana, until the birth of her child.” When the woman, then in her ninth month of pregnancy, tried to refuse psychotropic medication, she was transferred against her will to the state hospital.

Committing or incarcerating pregnant women can be seen as part of a wider trend to protect a fetus at the expense of its mother’s rights. This trend includes forcing women to have Caesarean sections against out of concern for the baby, whose imprisoned mother often may be a drug addict.”


181. *Id.*
182. *Id.* at 28-30, 178 Cal. Rptr. at 529.
184. *Id.* Many cases involving child custody reveal that a woman ceased taking psychotropic medication while pregnant. This is an action whose motives are explored and which is held against the mother when her parental rights are challenged. *In re Amie M.*, 180 Cal. App. 3d 668, 225 Cal. Rptr. 645 (1986); *In re M.M.M.*, 485 A.2d 180 (D.C. 1984).

their will if a court deems it necessary, attempting to hold women criminally responsible for actions that may have damaged their fetuses, and paroling or conditionally releasing women with the condition that they do not become pregnant, (for example, a convicted robber was allowed freedom with the stipulation that she not become pregnant while unmarried.) Several commentators have suggested using commitment or child custody laws to institutionalize or incarcerate a woman whose behavior might be considered threatening to her fetus. Because, in all states, persons can be committed if they are found to be mentally ill and a danger to themselves or to others, some courts have committed a pregnant woman by finding that the “other” she is dangerous to is her own fetus.

These circumstances raise troubling constitutional issues. In the first place, a due process issue arises when the state burdens or penalizes a woman for exercising her right to procreative choice. But for her pregnancy, such a woman would not be committed to the custody of the state. This has been characterized repeatedly as “a massive curtailment of liberty.” In the past, the Supreme Court found that mandatory school-leave regulations after the fifth month of pregnancy “penalize a pregnant teacher for deciding to bear a child,” and pronounced those regulations “a heavy burden on the exercise of protected freedoms.” It is clear that incarceration or institutionalization be-

189. See Kaufman & Weeke, *supra* note 176, at 472 (citing several California commitments on this basis, as well as several involuntary holds under child custody law).
192. *Id.* at 640.
cause of pregnancy creates an even heavier burden. Even if the state interest in fetal health were considered sufficient to outweigh the mother’s interest in liberty and privacy, the state would still have to overcome three hurdles: (1) whether a mother’s mental illness in fact created a substantial danger to her child, (2) whether commitment or incarceration are narrowly tailored remedies to accomplish the state’s goal with the least restriction on liberty, and (3) whether the state’s action in taking the woman into custody is rationally related to the goal sought to be achieved.

These requirements would be difficult to meet. The state would presumably have to show that it offered prenatal care and services on a voluntary basis and was turned down, and, even more questionable, that the commitment or incarceration met the state’s goal of better care for the fetus. As has been discussed, the environment of a jail or institution is scarcely conducive to fetal well-being.

When a woman is punished for her pregnancy, she is deprived of her constitutional right to due process. But when the state interferes with the private procreative decisions of a particular group of women — those who are mentally ill — whom Congress has repeatedly recognized as especially subject to abuse and discrimination, an equal protection claim is added. Why deprive these women of their liberty on the basis of concern for the safety of their fetuses, but not low-income women or homeless women or women who live in remote rural areas with no access to medical care? While “the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all,” classification of women who otherwise would not be deprived of liberty must be strictly scrutinized, not because mental illness is a suspect classification.

193. This state interest begins at viability according to Roe v. Wade, 410 U.S. 113, 163 (1973).

194. See supra Section IV(B)(1).


197. Although the Supreme Court has never ruled on this question, its reasoning in City of Cleburne v. Cleburne Living Center strongly suggests that it would not consider mental illness a suspect classification. 473 U.S. 432 (1985).


200. However, a mother’s right to keep and rear her child is not as easily asserted by free women as has been believed. See Chesler, Mothers on Trial (1987).

201. One study of lower-income women showed that “the most alarming barrier to mental health treatment was the fear women expressed that their children would be taken away from them if it became known that [they] had emotional problems . . . . One woman who lost her child after she sought treatment explained: ‘If you’ve had a breakdown, it will follow you faster and further than a prison record.’” D. Belle, Lives in Stress: Women and Depression, 201 (1982).


V. Choices Around Childbirth

A. Custody and Parental Rights

Although a parent’s right to keep and rear her child has been recognized since well before Roe v. Wade, this is the right in which the largest chasm separates the free woman and her sisters who are or who have been in state custody, or who are viewed as incompetent because of retardation or mental illness. Increasingly, incarceration or institutionalization — for however brief a time — means the termination of parental rights and loss of the child forever. This result is unrelated to the woman’s fitness as a parent and often occurs in the absence of any record of maternal abuse or neglect. The Supreme Court has said it has “little doubt that the Due Process Clause would be offended [if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best . . . . interest.” Experience teaches otherwise with regard to many of these mothers.

It is ironic that the great concern to protect patients’ reproductive freedom but because actions depriving a person of total liberty impinge on a fundamental right.
cause of pregnancy creates an even heavier burden. Even if the state interest in fetal health were considered sufficient to outweigh the mother's interest in liberty and privacy,193 the state would still have to overcome three hurdles: (1) whether a mother's mental illness in fact created a substantial danger to her child, (2) whether commitment or incarceration are narrowly tailored remedies to accomplish the state's goal with the least restriction on liberty, and (3) whether the state's action in taking the woman into custody is rationally related to the goal sought to be achieved.

These requirements would be difficult to meet. The state would presumably have to show that it offered prenatal care and services on a voluntary basis and was turned down, and, even more questionable, that the commitment or incarceration met the state's goal of better care for the fetus. As has been discussed,194 the environment of a jail or institution is scarcely conducive to fetal well-being.

When a woman is punished for her pregnancy, she is deprived of her constitutional right to due process. But when the state interferes with the private procreative decisions of a particular group of women — those who are mentally ill — whom Congress has repeatedly recognized as especially subject to abuse and discrimination,195 an equal protection claim is added. Why deprive these women of their liberty on the basis of concern for the safety of their fetuses, but not low-income women or homeless women or women who live in remote rural areas with no access to medical care? While "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all,"196 classification of women who otherwise would not be deprived of liberty must be strictly scrutinized, not because mental illness is a suspect classifica-

193. This state interest begins at viability according to Roe v. Wade, 410 U.S. 113, 163 (1973).
194. See supra Section IV(B)(1).

V. Choices Around Childbirth
A. Custody and Parental Rights

Although a parent's right to keep and rear her child has been recognized since well before Roe v. Wade,197 this is the right in which the largest chasm separates the free woman and her sisters who are or who have been in state custody, or who are viewed as incompetent because of retardation or mental illness.198 Increasingly, incarceration or institutionalization — for however brief a time — means the termination of parental rights and loss of the child forever.199 This result is unrelated to the woman's fitness as a parent and often occurs in the absence of any record of maternal abuse or neglect. The Supreme Court has said it has "little doubt that the Due Process Clause would be offended [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best ... interest."200 Experience teaches otherwise with regard to many of these mothers.

It is ironic that the great concern to protect patients' reproductive
rights from sterilization is ultimately "undermined by the application of ... child protection proceedings ... . Even sterilization could be considered a less drastic invasion into family matters than allowing retarded persons to bear children and then separating the children from their parents." Although some statutes creating irrevocable presumptions that mentally retarded people are unfit parents have been struck down or repealed, even when such statutes are not specifically applied, mentally retarded, mentally ill and incarcerated parents continue to lose their children under fact situations that would rarely constitute grounds for termination with "normal" parents, such as "bad attitude" or sexual promiscuity.

This is possible because of the breadth of discretion granted to judges in cases involving child custody. The "best interests of the child" standard is an invitation for the judge to use his own values and standards as a guide in making the decision of where a child will be placed. It should not be surprising, therefore, that child custody decisions involving members of a stigmatized class mirror the prejudices and biases of society at large. What is surprising is the extent to which the biases and stereotypes about the parenting ability of mentally retarded, mentally ill or incarcerated mothers are shared by experts and social workers, who have to train the judge to know differently. Sometimes a mother loses her rights because of the judge's willingness to defer to "expert" witnesses, whose ignorance or hostility is clearly evident in the decision. In other cases, social workers assigned to the case share the prejudice of society at large. One social worker testified that "the retarded cannot show love and affection as well as can persons of normal intelligence." But even when a mother has experts testifying on her behalf, judges frequently side with the experts who recommend termination. Sometimes parental rights are terminated solely on the basis of the mother's low IQ score.

The individualized nature of decisions involving termination of parental rights operates against these women in some ways. While individualized determinations are supposed to be the watchword of fairness, an individualized determination involving a person belonging to a group subject to myths and stereotypes is an unlikely forum to dispel those stereotypes. It is hard for one mentally ill or incarcerated woman facing a social worker, psychologist and judge to challenge long-held assumptions about mental illness or incarceration. Most women do not have access to good legal help and the attorneys appointed to represent them often share the prejudices of everyone else. Even good attorneys can be stymied by courts that insist on the individualized nature of the hearings. In re C.M., the court refused to accept any evidence that tested that she "was a model prisoner who pursued her education and counseling sessions very seriously" and possessed "character traits which enable change" and was "not likely to become a criminal" lost her child because a psychologist testified that she was unlikely to change sufficiently to provide a healthy environment for her children. The psychologist never met or spoke to the mother and never asked the children, including the "bright, happy" 9-year-old, what their feelings were for their mother. Other testimony showed they loved her very much. Id. at 823. See also in re Nicola T., 520 A.2d 639, 643 (Conn. App. Ct. 1987) (psychologists testifying against mother never met her or saw her with the children).


206. In Ensign v. Illinois, 512 N.E.2d 140 (Ill. App. 3d 1986), cert. denied, 108 S. Ct. 449 (1987), for example, the retarded parents came to the attention of the social services agency because their two-week-old child accidentally slipped out of a car seat and fell. This event set into motion a chain of events which resulted in the eventual loss of their parental rights. It is hard to believe that this would have occurred to upper-middle-class parents.


209. See, e.g., Matter of Moyer, 601 P.2d 821 (Ore. Ct. 1979). A mother who "while in prison ... completed two years of community college classes in preschool education and is currently taking liberal arts classes" and on whose behalf prison offi-
rights from sterilization is ultimately "undermined by the application of . . . child protection proceedings . . . . Even sterilization could be considered a less drastic invasion into family matters than allowing retarded persons to bear children and then separating the children from their parents." Although some statutes creating irrebuttable presumptions that mentally retarded people are unfit parents have been struck down or repealed, even when such statutes are not specifically applied, mentally retarded, mentally ill and incarcerated parents continue to lose their children under fact situations that would rarely constitute grounds for termination with "normal" parents, such as "bad attitude" or sexual promiscuity.

This is possible because of the breadth of discretion granted to judges in cases involving child custody. The "best interests of the child" standard is an invitation for the judge to use his own values and standards as a guide in making the decision of where a child will be placed. It should not be surprising, therefore, that child custody decisions involving members of a stigmatized class mirror the prejudices and biases of society at large. What is surprising is the extent to which the biases and stereotypes about the parenting ability of mentally retarded, mentally ill or incarcerated mothers are shared by experts and social workers, who should have the training to know differently. Sometimes a mother loses her rights because of the judge's willingness to defer to "expert" witnesses, whose ignorance or hostility is clearly evident in the decision. In other cases, social workers assigned to the case share the prejudices of society at large. One social worker testified that "the retarded cannot show love and affection as well as can persons of normal intelligence." But even when a mother has experts testifying on her behalf, judges frequently side with the experts who recommend termination. Sometimes parental rights are terminated solely on the basis of the mother's low IQ score.

The individualized nature of decisions involving termination of parental rights operates against these women in some ways. While individualized determinations are supposed to be the watchword of fairness, an individualized determination involving a person belonging to a group subject to myths and stereotypes is an unlikely forum to dispel those stereotypes. It is hard for one mentally ill or incarcerated woman facing a social worker, psychologist and judge to challenge long-held assumptions about mental illness or incarceration. Most women do not have access to good legal help and the attorneys appointed to represent them often share the prejudices of everyone else. Even good attorneys can be stymied by courts that insist on the individualized nature of the hearings. In In re C.M., the court refused to accept any evidence that the mother was "a model prisoner who pursued her education and counseling session very seriously" and possessed "character traits which enable change" and was "not likely to become a career criminal" lost her child because a psychologist testified that she was unlikely to change sufficiently to provide a healthy environment for her children. The psychologist never met or spoke to the mother and never asked the children, including the "bright, happy" 9-year-old, what their feelings were for their mother. Other testimony showed they loved her very much. Id. at 823. See also In re Nicolina T., 520 A.2d 639, 643 (Conn. App. Ct. 1987) (psychologist testifying against mother never met her or saw her with the children).

In In re C.M., the court refused to accept any evidence that the mother was "a model prisoner who pursued her education and counseling session very seriously" and possessed "character traits which enable change" and was "not likely to become a career criminal" lost her child because a psychologist testified that she was unlikely to change sufficiently to provide a healthy environment for her children. The psychologist never met or spoke to the mother and never asked the children, including the "bright, happy" 9-year-old, what their feelings were for their mother. Other testimony showed they loved her very much. Id. at 823. See also In re Nicolina T., 520 A.2d 639, 643 (Conn. App. Ct. 1987) (psychologist testifying against mother never met her or saw her with the children).


206. In Ensign v. Illinois, 512 N.E. 2d 140 (Ill. App. 3d 1986), cert. denied, 108 S. Ct. 449 (1987), for example, the retarded parents came to the attention of the social services agency because their two-week-old child accidentally slipped out of a car seat and fell. This event set into motion a chain of events which resulted in the eventual loss of their parental rights. It is hard to believe that this would have occurred to upper-middle-class parents.


209. See, e.g., Matter of Moyer, 601 P.2d 821 (Ore. Ct. 1979). A mother who "while in prison . . . completed two years of community college classes in general education and is currently taking liberal arts classes" and on whose behalf prison officials tested that she "was a model prisoner who pursued her education and counseling session very seriously" and possessed "character traits which enable change" and was "not likely to become a career criminal" lost her child because a psychologist testified that she was unlikely to change sufficiently to provide a healthy environment for her children. The psychologist never met or spoke to the mother and never asked the children, including the "bright, happy" 9-year-old, what their feelings were for their mother. Other testimony showed they loved her very much. Id. at 823. See also In re Nicolina T., 520 A.2d 639, 643 (Conn. App. Ct. 1987) (psychologist testifying against mother never met her or saw her with the children).


211. Garibaldi v. Dietz, 23 Ark. App. 136, 742 S.W.2d 771 (1988) (en banc). A doctor, psychologist and directors of the three residential facilities where the mother had lived testified in her favor; two case workers and two doctors testified against her. The mother lost, even though the length of her institutionalization was due to her initial misdiagnosis by hospital staff, which led to prescription of the wrong medication. When given the right medication, the mother improved immediately, and remained stable. However, by then she was perceived as "chronic," and lost her child. Interview with Brian Wolfman, Arkansas Legal Services, attorney for the mother (November 1987).


dence regarding the capacity of mentally retarded parents to adequately rear children, including psychological studies. The court dismissed any benefit it could receive from these studies:

At best, all conclude that, based on the degree of mental retardation and other specified factors, some mental retardates are satisfactory parents. Each is based on its own factual situation. While such studies may be of interest to those engaged in that phase of psychology, they offer no assistance in determining the cases brought under the provisions of the Wyoming statutes and require no further consideration by this court.\textsuperscript{214}

Yet it is necessary for judges to be educated somehow, or else their unwritten assumptions about the potential and capacity of these mothers will continue to govern the outcome of these cases.

Who are the women prisoners and women labeled mentally ill who are losing their children? Although studies vary somewhat depending on the year and the sample, the results reveal a remarkably consistent picture.

Most women in prisons are young\textsuperscript{218} mothers\textsuperscript{217} who are raising their children by themselves.\textsuperscript{218} About half were employed prior to incarceration.\textsuperscript{219} More than half of them are there for the first time.\textsuperscript{218}

215. Id. at 516.
216. U.S. Dept. of Justice, National Institute of Corrections Adult Female Offenders and Institutional Programs 104 (1984) (87 percent of women are 40 and under; 62 percent are 30 and under); BAUGH, WOMEN IN JAIL AND PRISONS 54 (National Council of Churches of Christ 1986) (median age of 28.4); Chesney-Lind & Rodriguez, Women Under Lock and Key: A View from the Inside, 63 PRISON J. 47, 51 (1983) (average age of 27); Haley, Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women, 4 NEW ENG. J. PRISON L. 141, 142, n.5 (1977) (two-thirds of incarcerated women are under 30; the median age of felons is 27).

217. Fifty percent of women in jails and prisons had one or more children dependent on them when they were incarcerated, Haley, supra note 216, at 142 n.5 (average 2.43 children for women incarcerated for felonies). More recently, the percentage of mothers in prison appears to have increased to 75 percent or more, Moyer, Deception and Realities of Life in Women’s Prisons, 64 PRISON J. 45, 54 (1984), with an average of 2.2 children among; Barry, Children of Prisoners: Punishing the Innocent, YOUTH L. NEWS 12 (March/April 1985) (70-75% of incarcerated women are mothers of dependent children under 18).

220. Goetting & Howsen, supra note 219, at 35; Barry, supra note 217.

They are poor\textsuperscript{221} and most are serving time for petty theft, larceny, shoplifting and other property offenses.\textsuperscript{222} Their greatest concern is for their children,\textsuperscript{223} but although they are serving relatively short sentences,\textsuperscript{224} little effort is made to facilitate visitation,\textsuperscript{225} and they often lose their children permanently. And yet, when researchers interviewed a sample of those women, “it was hard to avoid thinking the eliche question, ‘How did a nice girl like you end up in a place like this?’ In fact, the data revealed that in many ways, these women were much like American women everywhere.”\textsuperscript{226}

The situation of women who are labeled mentally ill varies enormously. Many very much want to have children. “When asked to describe the advantages of being pregnant, the women frequently said that being pregnant made a woman happy, that it was a good feeling to have a baby growing inside you.”\textsuperscript{227}

One thing is clear: once a woman is institutionalized, her words and behavior are interpreted in the context of presumed mental illness. For example, in the study cited above, six women were reported as responding to questions about pregnancy with “bizarre or unusual associations,” such as “‘The hormones, how they can change,’ and ‘There is not a good thing about it; you could have a miscarriage and get killed.’”\textsuperscript{228} These associations do not appear very bizarre.

Mentally retarded women appear to suffer most from a conclusive presumption of incapacity to parent. Yet a number of studies show that many mentally retarded people make good parents, particularly if they receive some form of training or assistance, as most new mothers do in

221. Barry, supra note 217.
222. U.S. Dept. of Justice, supra note 216, at x; Moyer, supra note 217; Barry, supra note 217.
223. U.S. Dept. of Justice, supra note 216, at 3; Chesney-Lind & Rodriguez, supra note 218, at 53.
225. Cummins, The Single Mother as Criminal Defendant: A Practitioner’s Guide to the Consequences of Incarceration, 9 GOLDEN GATE U.L. REV. 507, 520 n.89 (1978-79) (“Experience has shown that the more a child is caught up in the public system, the more the mother loses contact and control, sometimes losing track of her child completely as they both are caught in a bureaucratic maze.” Id.)
228. Id.
dence regarding the capacity of mentally retarded parents to ade-
quately rear children, including psychological studies. The court dis-
missed any benefit it could receive from these studies:

At best, all conclude that, based on the degree of mental retarda-
tion and other specified factors, some mental retardates are sat-
sactory parents. Each is based on its own factual situation. While
such studies may be of interest to those engaged in that phase
of psychology, they offer no assistance in determining the cases
brought under the provisions of the Wyoming statutes and require
no further consideration by this court.216

Yet it is necessary for judges to be educated somehow, or else their
unwritten assumptions about the potential and capacity of these
mothers will continue to govern the outcome of these cases.

Who are the women prisoners and women labeled mentally ill who
are losing their children? Although studies vary somewhat depending
on the year and the sample, the results reveal a remarkably consistent
picture.

Most women in prisons are young217 mothers217 who are raising
their children by themselves.217 About half were employed prior to in-
carceration.217 More than half of them are there for the first time.217

215. Id. at 516.
216. U.S. Dept. of Justice, National Institute of Corrections ADULT FEMALE OF-
FENDERS AND INSTITUTIONAL PROGRAMS 104 (1984) (87 percent of women are 40 and
under; 62 percent are 30 and under); BAGG, WOMEN IN JAIL AND PRISONS 54 (Na-
tional Council of Churches of Christ 1986) (median age of 28.8); Chesney-Lind &
Rodriguez, Women Under Lock and Key: A View from the Inside, 63 PRISON J. 47, 51
(1983) (average age of 27); Haley, Mothers Behind Bars: A Look at the Parental
Rights of Incarcerated Women, 4 NEW ENG. J. PRISON L. 141, 142, n.5 (1977) (two-
thirds of incarcerated women are under 30; the median age of felons is 27).

217. Fifty percent of women in jails and prisons had one or more children depen-
dent on them when they were incarcerated, Haley, supra note 216, at 142 n.5 (average
2.43 children for women incarcerated for felonies). More recently, the percentage of
mothers in prison appears to have increased to 75 percent or more, Moye, Deception
and Realities of Life in Women's Prisons, 64 PRISON J. 45, 54 (1984), with an average
of 2-2 children apiece; Barry, Children of Prisoners: Punishing the Innocent, YOUTH L
News 12 (March/April 1985) (70-75% of incarcerated women are mothers of depen-
dent children under 18).

218. Chesney-Lind & Rodriguez, Women Under Lock and Key: A View from the
Inside, 63 PRISON J. 47, 51 (1983); Barry, supra note 217.

219. Gotting & Howsen, Women in Prison: A Profile, 63 PRISON J. 27, 29 (Au-
tumn/Winter 1983).

220. Gotting & Howsen, supra note 219, at 35; Barry, supra note 217.

221. Barry, supra note 217.

222. U.S. Dept. of Justice, supra note 216, at 3; Moye, supra note 217; Barry,
supra note 217.

223. U.S. Dept. of Justice, supra note 216, at 3; Chesney-Lind & Rodriguez,
supra note 218, at 53.


225. Cummings, The Single Mother as Criminal Defendant: A Practitioner’s
Guide to the Consequences of Incarceration, 9 GOLDEN GATE U.L. REV. 507, 520 n.89
(1978-79) (“Experience has shown that the more a child is caught up in the public
system, the more the mother loses contact and control, sometimes losing track of her
child completely as they both are caught in a bureaucratic maze.” Id.)


227. McEvoy, Hatcher, et al., Chronic Schizophrenic Women’s Attitudes To-
ward Sex, Pregnancy, Birth Control and Child-Rearing, 34 HOSP. & COMMUNITY PSY-
CHIATRY 536, 537 (1983).

228. Id.
our society.**29 Perhaps the most compelling study involved

[A] group of 25 children including 13 mentally retarded children from a children's shelter. The researchers... placed the retarded children... into a mental institution in the care of severely retarded adult female residents and left the remaining children in the orphanage. After many months in the care of the women, the retarded children had gained in I.Q. from 7 to 45 points, with a mean gain of 28 points; all the children now had I.Q. scores indicating average to superior intelligence. During this same period of time, I.Q. scores of children who remained in the orphanage steadily declined, falling from average intelligence into the mental retardation range.**30

B. Consent to Adoption and Revocation of Consent

In many states, mentally disabled parents are not even entitled to have hearings on termination of their parental rights. As of 1985, 28 states provided that the child of mentally disabled parents could be adopted without their consent.**31 The number of states permitting adoption of children of mentally disabled parents without the parents' consent has increased by six since 1970.**32 One state permits such adoption if a disabled parent has spent a total of two of the last five years in an institution and is currently institutionalized.**33

A few such statutes have been struck down**34 and some courts have invalidated termination of parental rights solely on the grounds of institutionalization**35 or mental disorder.**36


The article notes that when the children showed "normal" mental development, they were immediately taken out of the care of the mentally retarded women and returned to the orphanage. The emotional cost of this experiment is not discussed.


**32. Id.


But consent to adoption may be obtained under dubious circumstances, and when it is, it is usually upheld. Although the courts in many parental rights and sterilization cases specifically noted the girl's or woman's I.Q. score in concluding that she was unable to parent or incompetent to decide whether or not to be sterilized, women with identical I.Q. scores have been found competent to surrender their children for adoption.**37 And while many courts have focused on a mother's diagnosis and behavior in terminating parental rights, these have not been held to interfere with her competence to agree to relinquish her child.**38

Incarcerated women also "are encouraged to give up for adoption children that are born in prison."**39

VI. Conclusion

For free women, the right to reproductive freedom has long meant the freedom to prevent conception and end unwanted pregnancies. Women have complained that they are seen only as mothers, and they cherish the right of access to contraceptives and abortion because it gives them freedom and power to control and expand their role in society.

But for institutionalized, incarcerated and incompetent women, reproductive rights begin with the freedom to choose to become pregnant, carry the pregnancy to term, and to keep and raise their children. These women are fighting to be seen as mothers in a society that still finds them unfit for any role at all except those arising from their labels.

Therefore, to analyze these women's reproductive rights by examining only cases that fit under the traditional rubric of "reproductive freedom" might lead to the conclusion that institutionalized and incarcerated women are truly held equal under law to their free sisters. They have been found entitled to sterilization and abortion as a fundamental right on the same basis as other women, unhampered by their

---


**298. Kamileh v. Brown, 389 S.W.2d 513 (Tex. Civ. App. 1965) (mother suffering from chronic undifferentiated schizophrenia who was "upset" when she delivered child to agency competent to surrender custody).

**299. Haley, supra note 216, at 152; McHugh, supra note 164, at 237.
our society.\textsuperscript{229} Perhaps the most compelling study involved

\cite{Buld & Greenspan, 1988} a group of 25 children including 13 mentally retarded children from a children's shelter. The researchers placed the retarded children into a mental institution in the care of severely retarded adult female residents and left the remaining children in the orphanage. After many months in the care of the women, the retarded children had gained in I.Q., from 7 to 45 points, with a mean gain of 28 points; all the children now had I.Q. scores indicating average to superior intelligence. During this same period of time, I.Q. scores of children who remained in the orphanage steadily declined, falling from average intelligence into the mental retardation range.\textsuperscript{230}

B. Consent to Adoption and Revocation of Consent

In many states, mentally disabled parents are not even entitled to have hearings on termination of their parental rights. As of 1985, 28 states provided that the child of mentally disabled parents could be adopted without their consent.\textsuperscript{231} The number of states permitting adoption of children of mentally disabled parents without the parents' consent has increased by six since 1970.\textsuperscript{232} One state permits such adoption if a disabled parent has spent a total of two of the last five years in an institution and is currently institutionalized.\textsuperscript{233}

A few such statutes have been struck down\textsuperscript{234} and some courts have invalidated termination of parental rights solely on the grounds of institutionalization\textsuperscript{235} or mental disorder.\textsuperscript{236}

\begin{itemize}
  \item \textsuperscript{229} Buld & Greenspan, Mentally Retarded Mothers, in BEHAVIOR MODIFICATION WITH WOMEN 447 (Bleichman, ed. 1984); Borgman, Intelligence and Maternal Inadequacy, 48 CHILD WELFARE 301 (1969); See also Note, Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy, 31 STAN. L. REV. 785 (1979).
  \item \textsuperscript{230} Note, Retarded Parents in Neglect Proceedings, supra note 226, at 801.
  \item \textsuperscript{231} The article notes that when the children showed "normal" mental development, they were immediately taken out of the care of the mentally retarded women and returned to the orphanage. The emotional cost of this experiment is not discussed.
  \item \textsuperscript{232} \textit{Id.}
  \item \textsuperscript{233} WM. STAT. ANN. § 48-415(3) (West 1981).
  \item \textsuperscript{234} Helvey v. Rednour, 85 Ill. App. 3d 427, 408 N.E.2d 17 (1980).
  \item \textsuperscript{235} Williams v. Mashburn, 602 P.2d 1036 (Okla. 1979).
  \item \textsuperscript{236} State ex rel. E. & B. v. J. T., 758 P.2d 831 (Utah 1978).
\end{itemize}

But consent to adoption may be obtained under dubious circumstances, and when it is, it is usually upheld. Although the courts in many parental rights and sterilization cases specifically noted the girl's or woman's I.Q. score in concluding that she was unable to parent or incompetent to decide whether or not to be sterilized, women with identical I.Q. scores have been found competent to surrender their children for adoption.\textsuperscript{237} And while many courts have focused on a mother's diagnosis and behavior in terminating parental rights, these have not been held to interfere with her competence to agree to relinquish her child.\textsuperscript{238}

Incarcerated women also "are encouraged to give up for adoption children that are born in prison."\textsuperscript{239}

VI. Conclusion

For free women, the right to reproductive freedom has long meant the freedom to prevent conception and end unwanted pregnancies. Women have complained that they are seen only as mothers, and they cherish the right of access to contraceptives and abortion because it gives them freedom and power to control and expand their role in society.

But for institutionalized, incarcerated and incompetent women, reproductive rights begin with the freedom to choose to become pregnant, carry the pregnancy to term, and to keep and raise their children. These women are fighting to be seen as mothers in a society that still finds them unfit for any role at all except those arising from their labels.

Therefore, to analyze these women's reproductive rights by examining only cases that fit under the traditional rubric of "reproductive freedom" might lead to the conclusion that institutionalized and incarcerated women are truly held equal under law to their free sisters. They have been found entitled to sterilization and abortion as a fundamental right on the same basis as other women, unhindered by their

\begin{itemize}
  \item \textsuperscript{237} \textit{In re Surrender of Minor Children, 181 N.E.2d 836 (Mass. 1962)} (Mother with I.Q. of 60 in jail awaiting trial for fornication deemed competent to surrender four minor children for adoption).
  \item \textsuperscript{238} Kamleh v. Brown, 389 S.W.2d 513 (Tex. Civ. App. 1965) (mother suffering from chronic undifferentiated schizophrenia who was "upset" when she delivered child to agency competent to surrender custody).
  \item \textsuperscript{239} Haley, supra note 216, at 152; McHugh, supra note 164, at 237.
\end{itemize}
status. But when the right to bear and keep children is studied, the equality vanishes. In fact, there are systemic barriers to motherhood for these women every step of the way.

As we have seen, mentally retarded women are being sterilized as a "vindication" of their reproductive rights. Institutionalized women cannot have relationships without their doctor's approval. Pregnant women who are free are being incarcerated or institutionalized because they are pregnant. Women in prisons or institutions lose their babies, either before birth because of poor care and conditions or immediately after birth. Often, they subsequently lose all parental rights. Why is it so difficult for these women to bear and keep their children?

First, both incarceration and institutionalization are dehumanizing experiences. A major step in dehumanization, as slave-owners knew, is to deny the right to creation or maintenance of a family. It is impossible to both dehumanize a woman and to fully recognize her as a mother. "For motherhood is the great mesh in which all human relations are entangled," and to recognize a woman as a mother is to risk empathizing with a person whose situation requires objectification. There is a deeper significance beyond the legal remedy in the Yeager and Jones cases to the demand that pregnant women must not be jailed or imprisoned. To remember that many women in institutions or prisons are mothers would make it far more uncomfortable to keep them there. In addition, a key aspect of treatment of mentally ill and mentally retarded women is that they are perceived as genderless. This results in suppression of any recognition of their needs either as women or as mothers.

Second, when these women are recognized as mothers, the clash between the stereotypes and stigma surrounding institutionalization and incarceration and our social vision of motherhood may result in automatic assumptions that they have no capacity to be mothers, or even in a desire to punish them for being mothers. Institutionalized and incarcerated women are perceived as "bad": violent, irresponsible, undependable, and unstable. It is difficult enough for free women to meet the high standards this society sets for motherhood. When society looks upon these stigmatized women and sees them acting as mothers, the overwhelming response is to separate the woman from her child, regardless of her individual situation. Very few people have the wisdom of the California judge who stated:

"The mere fact that she is labeled a schizophrenic really tells us very little about her behavior and its affect [sic] on her children.... . There are innumerable eccentric parents whose behavior on certain occasions may be less then [sic] socially acceptable and yet they are loving and compassionate parents. Conversely, there are parents who always exhibit socially acceptable behavior publicly, but whose children have parent-induced psychological and emotional problems their entire lives."

The research literature supports the judge. This article has skimmed the surface of an abundant body of knowledge which heavily favors allowing most of these mothers to have and keep their children. It is in fact in "the best interests of the child" to help the incarcerated or institutionalized mother and her child survive as a family unit. The most successful rehabilitation programs have been those that permit women to live in halfway houses with their children. This article has also touched on the documented capacity of mentally retarded and mentally ill mothers to be adequate parents. It is not only a woman's right to bear and keep her children, it is good policy to help her do so.

But for the most part, advocacy for these women is missing. Prisoners' rights groups devote little time to women's issues. Nor are women's issues as high priority for disability groups. And mainstream women's organizations focus little of their energy on institutionalized or incarcerated women. "The most serious obstacles to change for the female offender are the lack of a feminist perspective on female criminality and the lack of a comprehensive data base for an accurate analysis of characteristics, needs, and special problems of women in the criminal justice system." One of the key problems is that motherhood is not perceived as a

241. See supra text accompanying note 176.
244. Several excellent programs provide educational, medical, and legal assistance to mothers in prison or on a shoestring budget. See supra notes 177-78.
status. But when the right to bear and keep children is studied, the equality vanishes. In fact, there are systemic barriers to motherhood for these women every step of the way.

As we have seen, mentally retarded women are being sterilized as a “vindication” of their reproductive rights. Institutionalized women cannot have relationships without their doctor’s approval. Pregnant women who are free are being incarcerated or institutionalized because they are pregnant. Women in prisons or institutions lose their babies, either before birth because of poor care and conditions or immediately after birth. Often, they subsequently lose all parental rights. Why is it so difficult for these women to bear and keep their children?

First, both incarceration and institutionalization are dehumanizing experiences. A major step in dehumanization, as slave-owners knew, is to deny the right to creation or maintenance of a family. It is impossible to both dehumanize a woman and to fully recognize her as a mother. “For motherhood is the great mesh in which all human relations are entangled,” and to recognize a woman as a mother is to risk empathizing with a person whose situation requires objectification. There is a deeper significance beyond the legal remedy in the Yeager and Jones cases41 to the demand that pregnant women must not be jailed or imprisoned. To remember that many women in institutions or prisons are mothers would make it far more uncomfortable to keep them there. In addition, a key aspect of treatment of mentally ill and mentally retarded women is that they are perceived as genderless.42 This results in suppression of any recognition of their needs either as women or as mothers.

Second, when these women are recognized as mothers, the clash between the stereotypes and stigma surrounding institutionalization and incarceration and our social vision of motherhood may result in automatic assumptions that they have no capacity to be mothers, or even in a desire to punish them for being mothers. Institutionalized and incarcerated women are perceived as “bad”: violent, irresponsible, undependable, and unstable. It is difficult enough for free women to meet the high standards this society sets for motherhood. When society looks upon these stigmatized women and sees them acting as mothers, the

The overwhelming response is to separate the woman from her child, regardless of her individual situation. Very few people have the wisdom of the California judge who stated:

The mere fact that she is labeled a schizophrenic really tells us very little about her behavior and its effect [sic] on her children... There are innumerable eccentric parents whose behavior on certain occasions may be less than [sic] socially acceptable and yet they are loving and compassionate parents. Conversely, there are parents who always exhibit socially acceptable behavior publicly, but whose children have parent-induced psychological and emotional problems their entire lives.43

The research literature supports the judge. This article has skinned the surface of an abundant body of knowledge which heavily favors allowing most of these mothers to have and keep their children. It is in fact in “the best interests of the child” to help the incarcerated or institutionalized mother and her child survive as a family unit. The most successful rehabilitation programs have been those that permit women to live in halfway houses with their children. This article has also touched on the documented capacity of mentally retarded and mentally ill mothers to be adequate parents. It is not only a woman's right to bear and keep her children, it is good policy to help her do so.

But for the most part,44 advocacy for these women is missing. Prisoners' rights groups devote little time to women's issues.45 Nor are women’s issues as high priority for disability groups. And mainstream women’s organizations focus little of their energy on institutionalized or incarcerated women. “The most serious obstacles to change for the female offender are the lack of a feminist perspective on female criminality and the lack of a comprehensive data base for an accurate analysis of characteristics, needs, and special problems of women in the criminal justice system.”46

241. See supra text accompanying note 176.
244. Several excellent programs provide educational, medical, and legal assistance to mothers in prison or on a shoestring budget. See supra notes 177-78.
reproductive right in the same way as contraception or abortion. Another problem is that the legal issues involved in guaranteeing the right to motherhood for incarcerated, institutionalized and "incompetent" women are named everything but reproductive rights: sterilization, the right to medical treatment in prison, parental rights, the right not to be deprived of liberty simply because of pregnancy. This article has attempted to make the connection between these issues and expose the underlying determination to prevent these women from being mothers and to separate them from their children when they are mothers. There are numerous other areas unexplored by this article which confirm this: the failure to allow women to keep their infants with them in institutions and jails despite research suggesting that it is a preferable alternative to separation; the lack of halfway houses or community residence facilities to enable these women to live with their children.

The days of *Buck v. Bell* are not yet past. The language of the law is less explicit, but the logic remains the same: those whom this society deems unfit must be prevented from reproducing, and must be separated from those children they do bear. And if this can be done in the name of reproductive rights, so much the better. It is time to rename the issues discussed in this article as reproductive rights, and to reclaim reproductive rights for all women. If this is not done, *Roe v. Wade* will, as far as incompetent, institutionalized and incarcerated women are concerned, be no more than the modern-day handmaiden of *Buck v. Bell*.

---

Will *Roe v. Wade* Survive the Rehnquist Court?

Dawn Johnsen* and Marcy Wilder**

Whether the Supreme Court will overrule *Roe v. Wade* has been the subject of a great deal of speculation during the months following the election of George Bush as President of the United States. This sudden and dramatic concern for women's reproductive freedom is well-founded. A few weeks before the opening of the Supreme Court's term last October, Justice Blackmun, author of the decision, issued a dire warning: "The next question is, 'Will Roe v. Wade go down the drain?' I think there's a very distinct possibility that it will — this term. You can count the votes."*

By the beginning of January 1989, the Court had been presented with requests to hear seven abortion cases. Each case was filed as a result of actions by state courts or legislatures seeking to severely restrict women's access to abortion services. The Supreme Court has thus far agreed to hear one of these cases: *Webster v. Reproductive Health Services.* Both the United States Justice Department and the State of Missouri have asked the Court to use *Webster* as a vehicle for overturning *Roe v. Wade*.

What can we expect the Supreme Court to do in *Webster* and other abortion cases? What is the likely future of women's constitutional right to choose abortion? How have we come to the point where women's right to choose is in jeopardy?

The Supreme Court issued its historic decision in *Roe v. Wade* on January 22, 1973. In *Roe*, the Court declared for the first time that the constitutional right of every woman to liberty and privacy includes the right to make the highly personal decision, free from government interference, whether to have an abortion. The Court's recognition of

---


