NONCONSENSUAL STERILIZATION OF THE MENTALLY RETARDED—ANALYSIS OF STANDARDS FOR JUDICIAL DETERMINATIONS

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COMMENT

NONCONSENSUAL STERILIZATION OF THE MENTALLY RETARDED—ANALYSIS OF STANDARDS FOR JUDICIAL DETERMINATIONS

I. INTRODUCTION

It is a mere fiction that sterilization "does no harm ... other than to eliminate [an individual's] capacity to procreate." The harm of restricting reproduction lies not in the physical consequences of the procedure but in the danger of abusing an individual's basic human rights. Sterilization of mentally retarded persons raises a multitude of complex legal issues. This comment will analyze judicial standards within the area of nonconsensual sterilization. A brief examination of various types of sterilization will create a framework for discussion of these judicial standards. Sterilization takes three forms: Compulsory, voluntary, and nonconsensual.

Compulsory sterilization of certain mental defectives is accomplished primarily through legislation. The legislation applies regardless of an individual's competency. The compulsory statutes originated in the eugenics movement, which began in the late nineteenth century and peaked during the 1920's. Eugenics was based on the notion that, since human defects are hereditary, defective individuals must be sterilized to preserve and improve the human race. The validity of compulsory sterilization statutes was recognized judicially in 1907. In Buck v. Bell the Supreme Court upheld eugenic sterilization laws as a proper exercise of state police power. Justice Holmes' infamous statement embodies the Court's

2. "Sterilization" throughout this comment refers to any medical or surgical operation or procedure that permanently destroys an individual's ability to reproduce.
3. See notes 15 & 16 infra and accompanying text.
5. 274 U.S. 200 (1927).
reasoning: "[t]hree generations of imbeciles are enough."\textsuperscript{6} Since that time, compulsory sterilization legislation has been declared unconstitutional on procedural due process\textsuperscript{7} and equal protection\textsuperscript{8} grounds. In recent years, the theoretical foundation for eugenic sterilization has been rejected overwhelmingly by courts and commentators.\textsuperscript{9} The substantive question decided in \textit{Buck}, however, has not been reexamined by the Supreme Court. While compulsory sterilization statutes still exist,\textsuperscript{10} they are subject to a strict constitutional analysis in which a compelling state interest must be shown.\textsuperscript{11}

Voluntary sterilization is the self-imposed choice of an individual to eliminate his or her ability to bear children. While an individual's decision regarding sterilization may be based on eugenics,\textsuperscript{12} more often it is one of family planning. A woman's voluntary sterilization decision is regarded by modern society as an accepted contraceptive technique\textsuperscript{13} and has been granted the same constitutional protection as a decision to have an abortion.\textsuperscript{14} A mentally retarded individual's choice of sterilization is afforded no less protection. To ensure that the procedure is voluntary and not imposed solely for the convenience of parents, guardians, or institutional supervisors, however, the decision must be scrutinized closely. A voluntary decision assumes an exercise of free will, absent coercion.

\textsuperscript{6} Id. at 207.
\textsuperscript{7} See, e.g., \textit{In re Hendrickson}, 12 Wash. 2d 600, 123 P.2d 322 (1942).
or force. Additionally, the individual making the decision must have adequate information at his or her disposal as well as the mental competence to appreciate the decision's significance.\(^\text{15}\) Thus, a person who is mentally incompetent cannot voluntarily consent to a sterilization procedure.\(^\text{16}\)

Nonconsensual sterilization occurs whenever an individual, incapable of valid consent, is subjected to a sterilization procedure.\(^\text{17}\) The individual's inability either to give or to withhold consent distinguishes this category from that of compulsory or voluntary sterilization.\(^\text{18}\) The importance of the incompetency determination is accentuated when it is understood as a prerequisite to any nonconsensual sterilization.\(^\text{19}\) The determination of incompetency, especially in the case of a mentally retarded individual, must be done on a case-by-case basis. Decisions based upon the facts particular to each case justly reflect the reality that mental retardation is not synonymous with incompetency.\(^\text{20}\) The mentally retarded are far from a homogeneous group, and incompetency cannot be generally assumed.\(^\text{21}\) “An individual suffering from a defect may be able, in


\(^{17}\) Sterilization proceedings for both minors and adults are initiated by a third party, usually a parent, guardian, or state officer. E.g., In re Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976) (petitioner was the mother of a twenty-two-year-old female); In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980) (petitioner was the Department of Social Services); In re Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc) (petitioner was the mother of a sixteen-year-old female).


\(^{19}\) See note 101 infra.


\(^{21}\) In re Grady, No. A-23, slip op. at 43 (N.J. Feb. 18, 1981); Murdock, supra note 20, at 3.
spite of that defect, to knowingly and understandingly withhold or give consent."\(^{22}\)

Authority for nonconsensual sterilization is derived from either the legislatures or the courts. State legislatures most commonly grant the authority. State statutes often empower various parties as decisionmakers. Statutory authority either to review or to determine the sterilization decision may rest with a state agency or an administrative board.\(^ {23}\) Parents or guardians also may be granted control by statute to authorize a nonconsensual sterilization. This exercise often is characterized as power of substituted consent.\(^ {24}\) Yet, some statutes mandate judicial review and require the court to make the final determination whether sterilization is warranted.\(^ {25}\)

The power of courts to order nonconsensual sterilization absent specific statutory authority has been the subject of jurisdic-

\(^{22}\) Comment, supra note 17, at 187-88.

\(^{23}\) E.g., ARK. STAT. ANN. § 59-502 (1971). The category of compulsory sterilization is all-inclusive. Thus, pertinent nonconsensual sterilization situations can be included within the compulsory category.

\(^{24}\) See VT. STAT. ANN. tit. 18, § 8702(4)(C)&(D) (1968) (although the term "substituted consent" is not specifically mentioned within the Vermont provision, it is implicit from the statutory language); see, e.g., Ruby v. Massey, 452 F. Supp. 361, 366, 371-72 (D. Conn. 1978). The issue of whether a decision for sterilization can be consented to by a third party for a mentally retarded individual who is unable to consent has received much attention. A federal court has held that consent of a representative cannot impute voluntariness to the individual actually undergoing irreversible sterilization, Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974), vacated & remanded, on remand sub nom. Relf v. Matthews, 403 F. Supp 1235 (D.D.C. 1975), vacated as moot, 565 F.2d 722 (D.C. Cir. 1977). The role of a parent or guardian with respect to a sterilization decision is less clear, however. Historically, parents have been afforded broad authority over their children in the area of medical care and treatment, for example, due to the recognition that "natural bonds of affection lead parents to act in the best interest of their children." Parham v. J.R., 442 U.S. 584, 602 (1979). In light of the potential conflict of interest and the nature of the rights at stake, however, great doubt has been cast upon the effectiveness of substituted consent by parents or guardians for the incompetent, absent review. See, e.g., In re Hayes, 93 Wash. 2d 228, 236-37, 608 P.2d 635, 640-41 (1980) (en banc); Murdock, supra note 20; Comment, supra note 20; Comment, Sterilization and Parental Authority, 1978 B.Y. L. Rev. 380. Consent that is given by a parent or guardian on behalf of a mental incompetent can be subject to either administrative or judicial review. E.g., Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) (judicial review to grant sterilization on mentally incompetent children of consenting parents); ARK. STAT. ANN. § 59-502 (1971) (petitions are reviewed by a licensed hospital sterilization committee). The scope of review may be limited to the appropriateness of allowing the parent or guardian to give consent. The review, therefore, would not extend to the actual decision made. The validity of such a narrow judicial review, however, recently has been questioned. See discussion at note 98 infra.

tional debate. Recently, several courts found sufficient authority to entertain and act upon a petition for sterilization despite the absence of specific legislation. Once the question of jurisdiction is approbatively resolved, the court's role within the judicial sterilization proceeding can vary in form. Court action may consist of either reviewing the substituted consent of a parent or guardian or determining whether the sterilization procedure should be ordered. The significant difference between the two situations is that in the latter the court is the ultimate decisionmaker.

26. In Stump v. Sparkman, 435 U.S. 349, rehearing denied, 436 U.S. 951 (1978), the United States Supreme Court examined whether a state judge who had granted an ex parte order, requested by a mother for sterilization of her minor daughter, was entitled to judicial immunity. The Court held that where no law prohibited a court of general jurisdiction from considering a sterilization petition, the judge had the power to act even if such action would have been legally improper. See In re Eberhardy, 97 Wis. 2d 654, 667, 294 N.W.2d 540, 546-47 (1980); Comment, supra note 24, at 384 n.28, 385-86. A number of state court decisions have precluded judicial action absent statutory authority. See, e.g., Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979); In re Tulley v. Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978); In re M.K.R., 515 S.W.2d 467 (Mo. 1974); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969); In re Eberhardy, 97 Wis. 2d 654, 294 N.W.2d 540 (1980).

27. In re Grady, No. A-23, slip op. at 36 (N.J. Feb. 18, 1981); In re Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976); In re Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc). When courts lacked statutory authority, jurisdiction was predicated upon three principal grounds: parens patriae power; substituted judgment; and a broad interpretation of existing general statutory law. Note, Courts—Scope of Authority—Sterilization of Mental Incompetents, 44 TENN. L. REV. 789, 882 (1977). 

The parens patriae power of the court was relied on in the cases of In re Grady, No. A-23, slip op. at 36 (N.J. Feb. 18, 1981), and In re Sallmaier, 85 Misc. 2d 295, 297, 378 N.Y.S.2d 989, 991 (1976). Sallmaier, however, has been criticized as based on questionable authority. See Comment, supra note 24, at 384 n.31. In re Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc), based jurisdiction on the broad grant of judicial power found within the Washington State Constitution. Id. at 234, 608 P.2d at 639.


29. E.g., In re Grady, No. A-23 (N.J. Feb. 18, 1981); In re Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).

30. Under the parens patriae power, the court takes action appropriate with the best interest of the incompetent. See In re Eberhardy, 97 Wis. 2d 654, 659 n.6, 294 N.W.2d 540, 543 n.6 (1980). While such action may consist of authorizing parents or guardians to make a substituted judgment for the incompetent, the finding of inherent judicial power enables a court to determine and order a sterilization petition. For example, the Supreme Court of New Jersey recently held "that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment, and not just the parent's good faith decision, that substitutes for the incompetent's consent." In re Grady, No. A-23 slip op. at 19 (N.J. Feb. 18, 1981). See also In re Sallmaier, 85 Misc.
In the area of nonconsensual sterilization, where courts are the ultimate decisionmakers, they often have been "forced either to exercise [their] power in a standardless vacuum or to create standards for decisions in this delicate area without the benefit of legislative guidance."31 This comment seeks to clarify the judicial role by focusing on the substantive standards and evidentiary standard of proof used by the courts to ascertain when nonconsensual sterilization of a mentally retarded individual is appropriate.

II. FUNDAMENTAL RIGHTS OF THE MENTALLY RETARDED INDIVIDUAL

Mentally retarded individuals share the same constitutional protections surrounding procreation as nonretarded persons.32 In the area of reproduction, two fundamental rights have been recognized: The right to bear children and the privacy right to make procreation decisions free from governmental intrusion.

The right to bear children was declared a fundamental one in *Skinner v. Oklahoma.*33 The United States Supreme Court deemed procreation "one of the basic civil rights of man"34 and stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race."35

The establishment of the right to procreate as fundamental was clear as to its affirmative meaning: Freedom to reproduce. With the emergence of a population-conscious society, courts were forced to view procreation rights in a different light. Judicial attention was drawn to the issue of whether persons had a constitutionally protected right to make private decisions36 regarding whether

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31. *In re* Eberhardy, 97 Wis. 2d 654, 665, 294 N.W.2d 540, 545 (1980). This situation primarily exists when courts exercise their power in the absence of legislative authority. The necessity for judicially formulated standards, however, may also arise when courts are given power to act through legislation without standards and statutory definitions. *See In re* Penny N., 414 A.2d 541, 543 (N.H. 1980); *In re* Johnson, 45 N.C. App. 649, 653, 263 S.E.2d 805, 808 (1980).


33. 316 U.S. 535 (1942).

34. *Id.* at 541.

35. *Id.*

36. Procreation decisions refer to voluntary decisions by individuals capable of consent. *See* text accompanying note 15 *supra.* An incompetent individual is unable to make a meaningful decision on whether to procreate. Such a decision is incident to a person's right of privacy and "should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice." *In re* Grady, No. A-23,
or not to bear children. Consequently, in Griswold v. Connecticut the right to free choice regarding procreation within the marital relationship was found to be protected by the zone of privacy created through various constitutional guarantees. This protection later was extended to unmarried individuals in Eisenstadt v. Baird. "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Nonconsensual sterilization constitutes a serious invasion of this privacy right and extinguishes the protected right of procreation. Therefore, the standards employed by a court to resolve a sterilization question necessarily must reflect the constitutional limitations upon the infringement of a mentally retarded individual's fundamental rights.

III. The Best Interest of The Individual as the Basis for Nonconsensual Sterilization

Although fundamental rights are recognized as deserving the utmost protection, they are not absolute. State deprivation of fundamental rights must withstand strict scrutiny. This analysis demands that interests served by the infringement must be sufficiently compelling to outweigh the constitutionally afforded protection. Further, the deprivation will not be permitted if the interest

37. 381 U.S. 479 (1965).
38. Id. at 484-85.
40. Id. at 453. Further, the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), found that the right to privacy encompasses decisions made both before and after conception. This privacy protection is afforded irrespective of age and thus covers minors. See Carey v. Population Serv's. Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
41. As early as 1942 the potential dangers of unrestrained sterilization were realized: "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." 316 U.S. at 541.
43. The reasons stated by a third party, either the parents or the state, will be considered "state interests" for the purposes of this comment. Parents may seek sterilization of their mentally retarded children for reasons other than the child's well-being. They may wish to avoid the economic and social costs of caring for grandchildren, or the possible social stigma, or they simply may seek peace of mind. See note 24 supra. Parents may also assert the state interests that follow in text.
can be achieved by less drastic means.\textsuperscript{44} When an individual is unable to consent to sterilization, two interests may be advanced to override his or her right to procreate. The asserted justifications may be the state's interest either in the health and welfare of potential offspring or in the best interest of the individual.\textsuperscript{45}

A. Health and Welfare of Potential Offspring

Regard for possible progeny focuses on the harm resulting from a defective genetic heritage and an inadequate family environment.\textsuperscript{46} The concern surrounding inheritable deficiencies rarely is justified and therefore is suspect. In most instances, children born to mentally retarded individuals will not have genetic defects.\textsuperscript{47} When an individual is suffering from mental retardation due to an identifiable genetic mechanism, it is likely that the individual also may be sterile.\textsuperscript{48} This professed societal interest in benefiting the unborn child unmistakably smacks of eugenics, that is, purity of the human race, and is equally unacceptable.

Society's concern that environmental factors may have a damaging impact on the possible offspring of mentally retarded persons has scientific support. A recent theory asserts the proposition that "a child who was normal when born could be seriously retarded by the inadequate environment provided by his mentally defective parents."\textsuperscript{49} The environmental theory of retardation is valid only if buttressed by specific facts and circumstances surrounding a particular sterilization decision. Otherwise, many retarded persons who possess the capability of being or becoming good parents\textsuperscript{50} unjustifiably would be denied the opportunity to raise a family. Additionally, sterilizations based on a broad application of the environmental theory ultimately may serve a public in-

\textsuperscript{44} E.g., Roe v. Wade, 410 U.S. 113, 155 (1973).
\textsuperscript{45} See, e.g., id.; In re Moore, 289 N.C. 95, 102-03, 221 S.E.2d 307, 312 (1976); In re Hayes, 93 Wash. 2d 228, 237, 608 P.2d 635, 641 (1980) (en banc).
\textsuperscript{47} In re Hayes, 93 Wash. 2d 228, 235-36, 608 P.2d 635, 639-40 (1980) (en banc). See also note 9 supra.
\textsuperscript{48} As of 1961, for example, only seven cases of Down's Syndrome women with children had been reported, and there are no reported cases involving a Down's Syndrome father. Forssman, Lehmann & Thysell, Reproduction in Mongolism, 65 AM. J. MENT. DEFIC. 495, 495 (1961).
\textsuperscript{50} See note 60 infra.
interest associated not with the health of the child but with the burden that the child may impose on society.\textsuperscript{51} When an incompetent parent is unable to supply adequate child care, state intervention in order to protect the child may be necessary. Removal of children from inadequate homes or publicly assisted family support services inevitably would create a financial burden on the state.\textsuperscript{52} A fundamental right, however, should not be deprived on the basis of the increased costs that its exercise may cause.\textsuperscript{53}

B. \textit{In the Best Interest of the Individual}

Nonconsensual sterilization also may be justified when it is in the best interest of the individual.\textsuperscript{54} The fundamental right to procreate should not be violated unless contraception is shown to be necessary to the individual's well-being. Sterilization can fulfill this contraceptive need; but, due to the drastic nature of this irreversible procedure and its long lasting and possibly detrimental emotional effects,\textsuperscript{55} it remains an extreme method of birth control.

To ensure that the person's fundamental right to private choice is not abridged unnecessarily, the court must be sure that the individual does not have the potential to make his or her own decision concerning sterilization. Age and educability of the mentally deficient are key indicators of this potential.\textsuperscript{56} In the case of a minor incompetent, special attention should be paid to whether the individual might possibly develop the facilities necessary to make an informed decision.\textsuperscript{57} Unless the incompetency is permanent, judicial intervention is not warranted.

\begin{itemize}
\item \textsuperscript{51} See, e.g., \textit{In re} Moore, 289 N.C. 95, 103, 221 S.E.2d 307, 312 (1976).
\item \textsuperscript{52} See Comment, \textit{supra} note 4, at 357.
\item \textsuperscript{53} Cf. \textit{Frontiero v. Richardson}, 411 U.S. 677, 690 (1973) (equal protection case). Note that even when strict judicial scrutiny is not the required test for evaluating a state asserted interest, administrative costs alone are not a sufficient reason to deprive an individual of constitutionally protected rights. See \textit{Mathews v. Eldridge}, 424 U.S. 319, 348 (1976).
\item \textsuperscript{55} See \textit{Kindregan, supra} note 4, at 139-40.
\item \textsuperscript{56} \textit{In re} Hayes, 93 Wash. 2d 228, 237, 608 P.2d 635, 640 (1980) (en banc). As many as 25\% of the residents of institutions for the mentally retarded may be suffering from correctible emotional or physical disabilities. \textit{Bayles, Sterilization of the Retarded: In Whose Interest?}, \textit{The Legal Precedents}, 8 HASTINGS CENTER REP. 37, 41 (1978).
\item \textsuperscript{57} \textit{In re} Grady, No. A-23, slip op. at 42 (N.J. Feb. 18, 1981); \textit{In re} Hayes, 93 Wash. 2d 228, 239, 608 P.2d 635, 641 (1980) (en banc).
\end{itemize}
Factors that most readily indicate a need for sterilization include: Danger to health, inability to parent, and absence of a less restrictive alternative.\(^{58}\) When procreation would endanger the life or severely impair the health of the mentally retarded person, sterilization may be required for medical reasons. Such situations stand apart from the instant issue of providing sterilization as a non-therapeutic contraceptive technique.

Consideration of a mentally retarded person's ability to parent entails examination, from the individual's perspective, of his or her capability to shoulder the burdens of child rearing.\(^{59}\) Mental retardation does not in itself suggest parental inadequacy.\(^{60}\) Empirical research has revealed that mentally retarded parents can provide the skills traditionally associated with adequate parenting. Those skills include bestowing love and affection, performing housekeeping tasks, meeting a child's physical needs, and providing intellectual stimulation.\(^{61}\) It is important to note that the court would not have to find that the parenting skills exceed the level of adequacy.\(^{62}\) The court's inquiry should not be whether a parent is superior to all others but whether the parent can satisfactorily provide care to a child.\(^{63}\) Some mentally retarded persons who are able to function and meet their own needs may be unable to sustain the burden of family responsibilities.\(^{64}\) Evidence that any children born to the retarded individual probably will suffer from a purely genetic or an environmentally caused defect\(^{65}\) would surely be a factor in determining a person's capacity to meet the demands of parenthood.

Permanent mental incompetence also has raised serious doubts about parental ability. This belief primarily rests on two grounds. The first is that a correlation exists between inability to consent to a sterilization and capability to parent.\(^{66}\)

\(^{58}\) *In re Hayes*, 93 Wash. 2d 228, 237, 608 P.2d 635, 640-41 (1980) (*en banc*).
\(^{61}\) Note, *supra* note 49, at 797.
\(^{62}\) *See text accompanying notes 83-84 infra.*
\(^{63}\) *Cf. Note, supra* note 49, at 797 (neglect proceedings).
\(^{65}\) *See note 47 supra* and accompanying text.
\(^{66}\) *Bayles, supra* note 56, at 40-41.
A person who cannot comprehend the consequences of, and alternatives to, sterilization often lacks the basic capacity to understand long-range interests. A parent must consider and make judgments concerning a child's medical welfare. If a person is incapable of making such judgments for herself, then she is surely incapable of making them for others.67

Second, if an individual is unable to provide for self-needs, she or he likewise will be incapable of caring for the needs of a child.68 Generally, these assumptions are well founded; broad acceptance, however, leaves room for abuse. Creating a per se category of parental incompetents eases the burden of those resolving the sterilization issue. This directly conflicts with the desire to protects individuals from unwarranted sterilizations. Application of these assumptions within the context of each individual case offers safeguards to the incompetent.

Factors demonstrating the need for sterilization must be consistent with the constitutional doctrine of least restrictive alternatives.69 That is, intrusion by the state must have minimal impact upon an individual's fundamental rights. This doctrine primarily demands that the contraceptive measure approved by the court entails the least physical invasion to the body. Less drastic forms of birth control such as IUD's, antifertility drugs, or sex education must be considered infeasible before an individual is irreversibly deprived of his or her capacity to procreate.

In the context of parenting, the least restrictive alternatives doctrine mandates an inquiry into whether an individual incapable of providing adequate care alone would be able to parent competently with assistance.70 Parental assistance may take the form of practical training focusing on child health care and child rearing skills. Alternatively, support and supervision by others may be provided to increase the individual's ability to parent.71 Steriliza-
tion cannot be authorized if the ability to parent can be realized with outside assistance or if less drastic forms of contraception are available.

C. Inappropriateness of State Interest in Potential Life as Basis for Nonconsensual Sterilization

Although the state interest in potential life\textsuperscript{72} may legitimately justify the deprivation of the right to procreate, it should not be used in the nonconsensual sterilization setting.\textsuperscript{73} Three factors exist which lend support to this conclusion: The right to privacy surrounding procreation decisions; the incorporation of the potential life interest within the best interest of the individual; and the doctrine of least restrictive alternatives.

Judicial determinations within the nonconsensual sterilization category are made when persons are unable to exercise their right to make private decisions regarding procreation. The necessity of judicial intervention does not diminish a person's constitutional right to reproductive autonomy.\textsuperscript{74} Thus, a court's judgment should be "consistent with the relative weights of the respective interests involved. . . ."\textsuperscript{75}

Court-ordered sterilization may be supported by two interests that arise from the state's concern with the impact of the sterilization decision upon society and upon the individual. Society's interest lies in preventing the birth of genetically defective children and in avoiding the burdens that neglected children place upon the community at large.\textsuperscript{76} Concern for the individual similarly involves a consideration of potential life. A decision that sterilization is in the best interests of an individual necessarily includes an examination of the person's ability to parent. As previously discussed,\textsuperscript{77} the consequences of bearing a defective child are intrinsic to this analysis.

Although both justifications share a concern for potential life, a determination founded on the best interest of the individual signifi-

\begin{itemize}
\item \textsuperscript{72} See text accompanying notes 46-53 supra.
\item \textsuperscript{73} In re Grady, No. A-23, slip op. at 37 n.8, 37-38 (N.J. Feb. 18, 1981).
\item \textsuperscript{74} Id. at 36.
\item \textsuperscript{75} Roe v. Wade, 410 U.S. 113, 165 (1973). In Roe v. Wade, the Supreme Court struck a balance between the state interest in potential life and a woman's right to privacy concerning an abortion decision.
\item \textsuperscript{76} See text accompanying notes 46-53 supra.
\item \textsuperscript{77} See text accompanying notes 58-64 supra.
\end{itemize}
cantly differs from one that embraces society’s interest. A decision that reflects the best interests of an individual is “designed to further the same interests she might pursue had she the ability to decide herself” and thereby affords maximum protection to an incompetent’s privacy right to make reproduction choices. On the other hand, a decision from the perspective of society inherently conflicts with the privacy notion that procreation decisions are to be free from governmental intrusion. Thus, judicial intervention based exclusively on the best interest of the individual incorporates a concern for potential life and ensures that an incompetent’s privacy rights are amply protected.

Consideration of an independent societal interest in potential life also would undercut the protection provided by the least restrictive alternatives doctrine. A clear example of this exists within North Carolina. Under that state’s statutory scheme, a district court judge can order a nonconsensual sterilization when a mentally retarded individual “would probably be unable to care for a child or children.” The statute’s purpose was clear: To prevent the birth of a child who cannot be cared for by his or her parent(s). The legislature, however, was not clear in defining what conditions would demonstrate an inability to provide proper care. The North Carolina Court of Appeals, in *In re Johnson*, attempted to clarify the standard. The court instructed the trial judges to determine an individual’s parental ability by appraising whether a minimum standard of care could be established. A person’s ability to provide minimum care would be shown when it was probable that a “reasonable domestic environment for the child” would be maintained.

The court’s definition stressed the need to balance both the individual’s fundamental rights and the concerns of the state. It is in-

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79. While this comment’s focus is upon judicial action absent legislative guidance, an examination of North Carolina’s statutory scheme, N.C. GEN. STAT. § 35-43 (1976), provides insight into the conflict between the least restrictive alternative doctrine and consideration of society’s concern for potential life.
80. *Id.* The statute additionally provides for sterilization when procreation would likely lead to the birth of a defective child. *Id.*
81. *In re Johnson*, 45 N.C. App. 649, 653, 263 S.E.2d 805, 808 (1980). The societal concern underlying the statute is twofold: the state is interested in both the best interest of the individual and the burden that un cared for children impose on society. *In re Moore*, 289 N.C. 95, 103-04, 221 S.E.2d 307, 312-13 (1976).
82. 45 N.C. App. 649, 263 S.E.2d 805 (1980).
83. *Id.* at 653, 263 S.E.2d at 809.
84. *Id.*
adequate because it stems from the belief that the state has a separate and valid societal interest in preventing the birth of children who will be a burden on the state. The definition fails to provide sufficient protection for mentally retarded individuals because it does not include a least restrictive alternatives test. Johnson directs the district judge to inquire whether a reasonable family environment would exist. There is no requirement, however, that the judge consider whether the parent's ability to care for a child would be adequate if assistance were provided. Thus, while minimal protection is afforded, the mentally retarded persons subject to North Carolina law do not receive protection commensurate with the nature of their fundamental rights.

In order to provide the utmost protection to individuals who face the possibility of nonconsensual sterilization, the court should make its decision solely on the basis of the best interest of the individual. A nonconsensual sterilization determination predicated upon the person's best interest preserves the individual's right to make private reproduction decisions, maximizes constitutional safeguards by assimilating the use of the least restrictive alternatives doctrine, and satisfactorily takes into account the only legitimate societal interest: The health of possible offspring.

IV. STANDARDS GOVERNING A NONCONSENSUAL STERILIZATION DETERMINATION

To ensure that the personal rights implicated in nonconsensual sterilization decisions are given proper consideration, guidelines must be promulgated that incorporate constitutional restraints and set forth permissible grounds for authorizing the procedure. The contents of substantive standards are far from consistent among the courts. Several have attempted to fashion a framework in which nonconsensual sterilization may be ordered. While similar procedural safeguards have been prescribed, formulation of substantive


requirements have been far from uniform and, in some instances, inadequate.

An extreme example of inadequate substantive protection is illustrated by a New York decision. In *In re Salmaier* the New York court authorized sterilization for a twenty-two-year-old severely retarded incompetent female after concluding that the procedure would be in her best interest. The court reached this decision after consulting psychiatric experts and receiving testimony by the guardian *ad litem*. No standards of any kind were articulated by the court to govern present or future nonconsensual sterilization decisions.

A New Hampshire court's effort to create sufficient standards yielded a result similar to that reached in New York. Under a New Hampshire law the probate court was designated to be the proper decisionmaker in sterilization cases. The statute, however, was silent as to when and under what conditions a probate judge may exercise his or her power. "[T]he absence of standards and statutory definitions requires that the courts construe and apply the statutory provisions to the evidence in each case so as to adequately protect the respondent's fundamental rights." The New Hampshire Supreme Court, in *In re Penny N.* attempted to resolve this problem by delineating a framework within which the probate judge must determine whether sterilization approval is warranted. In *Penny*, a probate judge was petitioned to authorize a fourteen-year-old girl's parents to consent to her sterilization. The supreme court held that the probate court could "permit a sterilization after making specific written findings . . . that it is in the best interest of the incapacitated ward, rather than the parents' or the public's convenience, to do so." The specific requirements established by the court for a judge to follow in making a sterilization decision rested upon those developed by the New Jersey trial court in *In re Grady*. Specifically, a judge must be satisfied "that the applicants have demonstrated their good faith and that their concern is for the best interests of the ward."

88. *Id.* at 297-98, 378 N.Y.S.2d at 991.
89. *Id.*
92. 414 A.2d 541 (N.H. 1980).
93. *Id.* at 542.
94. *Id.* at 543.
96. 414 A.2d at 543. In addition, the court required that:
The New Hampshire court's reliance on Grady stemmed primarily from the factual similarities between the two cases. This dependence on Grady's reasoning resulted in the adoption of standards that conflict with the New Hampshire statute's purpose. The guidelines articulated in Grady assess the appropriateness of parents as decisionmakers. The New Hampshire law provides: “no guardian may give consent for ... sterilization ... unless the procedure is first approved by order of the probate court.” Although this statute directed the probate court to make an independent assessment, the guidelines accepted by the supreme court in Penny did not indicate when sterilization would be in the best interest of the individual. Instead, the standards only seek to as-

[the court] must first appoint an independent guardian ad litem to act as counsel for the “incapacitated” ward, with full opportunity to present proofs and cross-examine witnesses. At a hearing, medical testimony and all other relevant testimony and records must be presented to the court. The court must be satisfied that the ward is “incapacitated” within the meaning of RSA 464-A:2, XI ... ld. (emphasis in original).

97. In both cases parents brought sterilization petitions for their minor daughters who suffered from Down's Syndrome. 414 A.2d at 542; 170 N.J. Super. at 101, 405 A.2d at 852.

98. In In re Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), the court under its parens patriae power examined the appropriateness of the parents' substituted consent for the sterilization of their minor daughter. This determination rested upon court-created standards of review. ld. at 125-27, 405 A.2d at 865. The Grady court's main inquiry hinged on whether the interests of the parents were congruent with those of the child, that is, whether the parents were acting in the child's best interest:

[it is not for this court to substitute its judgment for the informed consent of Lee Ann Grady nor, as has been suggested, to weigh the relative advantages and risks of other methods of contraception. It is, instead, appropriate under these circumstances, having set forth and followed all appropriate procedural safeguards, to authorize and empower her parents as general guardians to decide as they deem she would were she capable of informed judgment. This may include, in their sound discretion, the exercise of their substituted consent to any method of temporary or permanent contraception ... ld. at 126-27, 405 A.2d at 865-66. See also Note, Sterilization, 18 J. Fam. L. 648 (1980).

The New Jersey Supreme Court has subsequently vacated that part of the trial court's holding that gave parents or guardians full discretion with regard to consent decisions. In re Grady, No. A-23, slip op. at 9 (N.J. Feb. 18, 1981). This recent reversal rested on the belief that the substance of consent for sterilization must come from the court, not from the parents: “[i]ndependent judicial decisionmaking is the best way to protect the rights and interests of the incompetent and to avoid abuses of the decision to sterilize.” ld. at 21.

sure that the parents' or guardians' interests are not controlling. The failure to determine what constitutes the best interest of the incapacitated person leaves the New Hampshire probate courts without the necessary guidelines to fulfill their statutory duty to approve sterilization procedures.

One court, without any legislative authority or guidance, took the initiative to develop comprehensive standards governing non-consensual sterilization proceedings. In In re Hayes the Supreme Court of Washington established an array of procedural and substantive standards that must be met prior to any sterilization order. The decision can be made only in a proceeding that contains the following procedural safeguards: "(1) The incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual." 

Within this framework the judge must find that the evidence indicates a need for contraception. This need is indicated if the court finds that the individual is:

(1) physically capable of procreation, and
(2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and . . .
(3) the nature and extent of the individual's disability as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

Finally, there must be no alternative to sterilization. The judge must find: "(1) All less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, and (2) the proposed method of sterilization entails

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100. 93 Wash. 2d 228, 608 P.2d 635 (1980) (en banc).
101. Inability to consent must be determined first. The Hayes court set the following framework for determination of the ability to consent: "the judge must find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future." Id. at 238, 608 P.2d at 641.
102. Id.
103. Id.
the least invasion to the body of the individual."\textsuperscript{104} The court further stated that the proponent must show by clear, cogent, and convincing evidence that current scientific and medical knowledge does not suggest either that a reversible sterilization procedure or other less drastic method will be available in the near future or that "science is on the threshold of an advance in the treatment of the individual's disability."\textsuperscript{105}

The court concluded by emphasizing:

[t]here is a heavy presumption against sterilization of an individual incapable of informed consent that must be overcome by the person or entity requesting sterilization. This burden will be even harder to overcome in the case of a minor incompetent, whose youth may make it difficult or impossible to prove by clear, cogent and convincing evidence that he or she will never be capable of making an informed judgment about sterilization or of caring for a child.\textsuperscript{106}

While the standards promulgated by the court seek to protect those most susceptible to abuse, such as minors, requiring evidence of scientific and medical advancements may undercut the court's recognition that sterilization is warranted in some instances.\textsuperscript{107} This speculative standard may unduly frustrate a petitioner's goals irrespective of the incompetent's age.

The \textit{Hayes} court, however, was the first to confront directly the problem of compiling substantive guidelines that sufficiently protect the rights of noninstitutionalized mentally retarded individuals. The court's reliance on the best interest of the individual as the only acceptable state interest led it to develop standards that not only shield an individual from erroneous sterilization but that also provide a framework in which the legitimate desire of a petitioner can be effectuated.

The New Jersey Supreme Court recently followed \textit{Hayes}' direction by ruling that it is a court's responsibility to determine an incompetent individual's need for sterilization based solely on an examination of his or her best interest.\textsuperscript{108} \textit{In re Grady}\textsuperscript{109} reflects

\textsuperscript{104} \textit{Id.} at 238-39, 608 P.2d at 641.
\textsuperscript{105} \textit{Id.} at 239, 608 P.2d at 641.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} at 242, 608 P.2d at 643 (concurring opinion).
\textsuperscript{108} \textit{In re Grady}, No. A-23, slip op. at 21, 39-41 (N.J. Feb. 18, 1981). This decision explicitly rejected the trial court's holding that parents and guardians alone should determine and substitute consent. \textit{Id.} at 19. \textit{See also} note 98 \textit{supra} for a discussion regarding the trial court decision.
the duty of a court to preserve an individual's privacy right to reproductive autonomy as well as an "overriding concern to prevent any abuse of judicial authority. . . ." Pursuant to these beliefs, the Grady court produced rigid procedural and substantive standards that would enable courts "to protect the human rights of people least able to protect themselves."

The substantive standards developed by the court to provide guidance in determining when sterilization is in an individual's best interest parallel those set in Hayes. Moreover, the New Jersey Supreme Court expanded the Hayes guidelines to include three additional factors:

- The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.
- The advisability of sterilization at the time of the application rather than in the future. While sterilization should not be postponed until unwanted pregnancy occurs, the court should be cautious not to authorize sterilization before it clearly has become an advisable procedure.
- A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.

The major distinction among the criteria established in the two cases rests on a consideration of the individual's ability to parent. While both courts evinced a concern for whether an individual was permanently incapable of caring for a child even with assistance, they differed on the nature of proof required for such a determination. The Grady court stated that a trial judge must consider "[t]he ability of the incompetent person to care for a child, or the possi-

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110. The court stated:
[t]he right to choose among procreation, sterilization and other methods of contraception is an important privacy right of all individuals. Our court must preserve that right. Where an incompetent person lacks the mental capacity to make that choice, a court should ensure the exercise of that right on behalf of the incompetent in a manner that reflects his or her best interests.

Id. at 21.

111. Id. at 39.

112. The procedural safeguards and the guidelines governing the prerequisite finding of incompetency are analogous to those set by the Hayes court. Id. at 40-42.

113. Id. at 54.

114. Compare id. at 43-44 with text accompanying notes 103-105 supra.

115. No. A-23, slip op. at 43-44.
bility that the incompetent may at some future date be able to marry and, with a spouse, care for a child."\textsuperscript{116} This standard, unlike that found in \textit{Hayes},\textsuperscript{117} did not mandate the use of empirical evidence. Further, the \textit{Hayes} court demanded a more searching inquiry into whether a parent's ability to provide child care would increase with "reasonable assistance."\textsuperscript{118} This factor is substantially broader than consideration of what support a spouse can provide.\textsuperscript{119}

Despite this difference, the safeguards evolved by both courts demonstrate a common regard for the protection of the rights and interests of incompetent individuals subject to sterilization. Their development of comprehensive substantive standards predicated on the best interest of the individual may hail a commendable trend toward closer examination of the constitutional rights implicated in sterilization proceedings.

V. Pertinent Evidentiary Standard of Proof: Evaluation Necessary

The amount of protection a fundamental right receives can vary not only with the nature of applicable procedural and substantive standards but also with the requisite burden of proof.\textsuperscript{120} Traditionally, courts have employed three levels of proof.\textsuperscript{121} In a civil case between private parties for monetary damages, "society has a minimal concern with the outcome of such private suits,"\textsuperscript{122} so the burden of proof is a preponderance of the evidence.\textsuperscript{123} In a criminal case, "where one party has at stake an interest of transcending value—as a criminal defendant his liberty,"\textsuperscript{124} due process requires that the state prove the guilt of an accused beyond a reasonable doubt.\textsuperscript{125} The intermediate standard of proof requires

\textsuperscript{116} Id. at 44.
\textsuperscript{117} See text accompanying note 103 supra.
\textsuperscript{118} Id.
\textsuperscript{119} See note 71 supra and accompanying text.
\textsuperscript{120} See \textit{Addington v. Texas}, 441 U.S. 418 (1979), in which Chief Justice Burger stated with regard to involuntary commitment proceedings: "[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitments will be ordered." Id. at 427.
\textsuperscript{121} See C. \textsc{McCormick}, \textsc{Evidence} § 339, at 793 (2d ed. 1972).
\textsuperscript{124} Id. at 364.
\textsuperscript{125} Id.
clear, cogent, and convincing evidence and has been used to protect particularly important individual interests, such as reputation or citizenship, in various civil cases.\footnote{126}

The appropriate standard of proof in any judicial proceeding depends upon the seriousness of the consequences of an erroneous judgment.\footnote{127} As the importance of the individual interest at stake increases, a proportionately higher standard of proof is required to reduce the risk of error. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."\footnote{128} The clear and convincing standard has been applied uniformly in sterilization determinations, usually without comment.\footnote{129} For example, one court, absent any analysis, rejected the preponderance of the evidence standard as insufficient protection and the beyond a reasonable doubt standard as overprotective of the individual interest at stake.\footnote{130}

The courts' silent treatment of the pertinent standard of proof may be explained in light of \textit{Addington v. Texas}.\footnote{131} In \textit{Addington} the Supreme Court confronted the question of what standard of proof should be used in an involuntary commitment proceeding.\footnote{132} The Court, refusing to require the beyond a reasonable doubt standard, held that clear and convincing evidence was sufficient to guarantee due process.\footnote{133} Since \textit{Addington} involved fundamental rights of a magnitude similar to those implicated in a sterilization decision, the courts may have believed it unnecessary to address the proof issue.\footnote{134} A closer look at \textit{Addington} precludes such a cur-

\footnotetext{126}{Addington v. Texas, 441 U.S. 418, 424 (1979).}
\footnotetext{127}{\textit{In re Winship}, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). \textit{See also note 145 infra and accompanying text.}}
\footnotetext{128}{Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).}
\footnotetext{129}{\textit{See, e.g., In re Hayes}, 93 Wash. 2d at 237, 608 P.2d at 641; \textit{In re Penny N.}, 414 A.2d at 543.}
\footnotetext{130}{414 A.2d at 543.}
\footnotetext{131}{441 U.S. 418 (1979).}
\footnotetext{132}{Appellant's lengthy history of emotional difficulties began in 1969. In 1975, after an arrest for threatening to assault his mother, appellant's mother filed a petition for his indefinite commitment. \textit{Id.} at 421. At trial appellant claimed that there was no substantial basis for a conclusion that he was probably dangerous either to himself or to others. The jury found against appellant. On appeal, appellant argued that any standard of proof less than beyond a reasonable doubt violated his procedural due process rights. \textit{Id.}}
\footnotetext{133}{\textit{Id.} at 431.}
\footnotetext{134}{\textit{See} 170 N.J. Super. at 125-26 n.20, 405 A.2d at 865 n. 20. Both \textit{Addington} and the nonconsensual sterilization cases involve important individual liberty inter-
sory analysis. While the Court staunchly denied the need for the reasonable doubt standard, it left the states free to choose between the clear and convincing evidence and reasonable doubt standards.\textsuperscript{135} State courts, when faced with the task of creating guidelines to govern a proceeding involving such fundamental rights,\textsuperscript{136} should carefully examine the \textit{Addington} rationale in conjunction with a balancing of the individual and state interests.\textsuperscript{137}

In \textit{Addington} the Court advanced three major distinctions between civil and criminal proceedings. It used these distinctions to reject the beyond a reasonable doubt standard in civil commitments.\textsuperscript{138} The Court first recognized that the beyond a reasonable doubt standard historically has been limited to criminal cases.\textsuperscript{139} Allocating standards of proof according to a superficial categorization such as civil or criminal fails to provide the evaluation of underlying interests and rights that is required by due process. In prior decisions involving the due process requirements of juvenile proceedings, the Court explicitly rejected the civil-criminal labels.\textsuperscript{140} The nature of the deprivation rather than the nature of the proceeding determined what level of protection was afforded.\textsuperscript{141} The \textit{Addington} Court "took great pains to delineate the 'civil' aspect of the involuntary commitment proceeding"\textsuperscript{142} in order to distinguish it from a criminal case and a juvenile proceeding that has "criminal overtones."\textsuperscript{143} Despite this effort, the Court did not foreclose the use of a reasonable doubt standard in civil cases but merely warned that courts "should hesitate to apply it too broadly or casually in noncriminal cases."\textsuperscript{144}

\begin{itemize}
  \item In \textit{Addington}, the Court recognized that commitment constituted a significant deprivation of liberty as well as creating "adverse social consequences" that can have "a very significant impact on the individual." 441 U.S. at 426. Likewise, sterilization deprives individuals of the fundamental right to reproduce and may intrude upon the individual's right to privacy. \textit{See} notes 32-41 \textit{supra} and accompanying text. Additionally, sterilization can have "long lasting detrimental emotional effects." 93 Wash. 2d at 228, 608 P.2d at 635. \textit{See also} note 55 \textit{supra}. It may also pose a social barrier to those persons who are able to and desire to have families.
  \item \textsuperscript{135} 441 U.S. at 427.
  \item \textsuperscript{136} \textit{See} text accompanying notes 32-40 \textit{supra}.
  \item \textsuperscript{137} \textit{Cf.} \textit{In re} Nelson, 408 A.2d 1233, 1237 (D.C. 1979).
  \item \textsuperscript{138} 441 U.S. at 428-31.
  \item \textsuperscript{139} \textit{Id.} at 428.
  \item \textsuperscript{140} \textit{In re} Winship, 397 U.S. 358, 365-66 (1970); \textit{In re} Gault, 387 U.S. 1, 50 (1967).
  \item \textsuperscript{141} \textit{In re} Gault, 387 U.S. 1, 50 (1967).
  \item \textsuperscript{142} Markey v. Wachtel, 264 S.E.2d 437, 443 (W. Va. 1979).
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} 441 U.S. at 428.
\end{itemize}
The second difference between civil and criminal proceedings asserted by the Court related to the respective risk and impact of an erroneous decision. The beyond a reasonable doubt standard has its roots in the belief that in criminal cases it is better to allow a guilty person to go without punishment than for an innocent person to be deprived of his or her liberty.

A greater degree of caution in coming to a conclusion should be practiced to guard life or liberty against the consequences of a mistake always painful, and possibly irreparable, than is necessary in civil cases, where the issue must be settled in accordance with one view or the other, and the verdict is followed with positive results to one party or the other but not of so serious a nature.

In civil commitments, the consequences of an erroneous decision were perceived differently. Civil confinement was viewed as a treatment measure in which the state had a legitimate interest. It was reasoned, therefore, that it was not “better for a mentally ill person to ‘go free’ than for a mentally normal person to be committed” because those who genuinely require treatment would suffer the detriment of not receiving care. Further, an erroneous confinement, while undesired, is different from a criminal sentence in that “the layers of professional review and observation of the patient’s condition . . . and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.” This rationale does not apply in sterilization situations. Sterilization is an irreversible deprivation, the finality of which “is as predictable as the execution of one sentenced to capital punishment.” The use of substantive standards that allow sterilization when in the person’s best interest assures that sterilization will be prescribed only when a genuine need exists. Moreover, a person does not suffer from a lack of treatment if

146. 441 U.S. at 428.
147. Ellis v. Buzzell, 60 Me. 209, 213 (1872).
148. 441 U.S. at 426.
149. Id. at 429.
150. Id. at 428-29.
151. In re Flannery, 6 Fam. L. Rep. (BNA) 2345 (Montgomery County Md. Cir. Ct. 1980). "There is no redemption for the individual [sterilized] . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.” 316 U.S. at 541.
nontherapeutic sterilization is denied. To the contrary, a nonconsensual sterilization denial leaves the individual’s physical integrity intact.\footnote{152 See notes 54-56 supra and accompanying text.}

Finally, the practical problems of proof beyond a reasonable doubt were offered by the Court as justifying the use of the lower standard. The decisionmaker’s reliance upon fallible and uncertain psychiatric testimony raised “a serious question as to whether a state could ever prove beyond a reasonable doubt” that an individual should be committed.\footnote{153 Id. at 429.} A civil commitment proceeding involves a subjective determination of the person’s mental condition and the likelihood that he or she will be dangerous in the future.\footnote{154 Id.} This determination was characterized by the Court as dependent upon the “subtleties and nuances of psychiatric diagnosis.”\footnote{155 Id. at 430.} It was contended that the focus on the inquiry in a criminal proceeding, unlike a civil commitment, is upon straightforward and objective factual questions.\footnote{156 Id. at 429-30.} Since psychiatric testimony plays a central role in determining the need for confined therapy, the Court precluded the use of a standard that demands certainty.\footnote{157 Id.}

Criminal cases, however, cannot accurately be described as free from subjective inquiries. State of mind often arises as a chief issue, especially when insanity is raised as a defense. In a criminal case, once the insanity defense is raised the evidentiary burden shifts to the state to prove beyond a reasonable doubt that the accused was sane at the time of the alleged crime.\footnote{158 D. Robinson, Psychology And Law 65-67 (1980).} One commentator has described this burden on the state as “practically impossible”\footnote{159 Id. at 68. The author emphasized this point by stating: [the state] must find an “expert” willing to testify that there is (or was!) nothing wrong with the defendant’s mind that could possibly have diminished his ability to conform his behavior to the requirements of law; [and] that the defendant labors under neither delusions nor hallucinations; that the defendant unquestionably knew the nature and consequences of his actions and judged these to be legally and morally, or least morally, right. Can any of this ever be proved beyond a reasonable doubt? Id. (emphasis in original). See also United States v. McGraw, 515 F.2d 758, 761 (9th Cir. 1975).} to surmount.

The distinction raised in Addington, even if taken at face
value, does not apply with equal force to sterilization proceedings. The testimony of psychiatrists and mental health workers is important in resolving sterilization questions, but the decisionmaker's reliance upon such testimony is not of the same degree as it is in commitment hearings. The capabilities of a mentally retarded incompetent are more easily ascertained than the degrees of mental illness. Additionally, the trier of fact will be well acquainted with the skills and qualities required of parents\textsuperscript{160} and will not be dependent on the analysis and expertise of psychiatrists. The question of competency for consent purposes is subject to the practical proof problems raised in Addington. Such a determination necessarily involves a subjective inquiry into the individual's mental state.\textsuperscript{161} The competency question is, however, a prerequisite to the central issue concerning whether sterilization is in the best interest of the individual. The use of a different standard for these two separate questions does not appear unworkable.

The differences between civil commitments and sterilization determinations may or may not be sufficient to constitutionally mandate use of the beyond a reasonable doubt standard, a standard traditionally reserved for criminal cases. The differences demonstrate that selecting which standard to apply requires an assessment of the underlying rights and social policies that a civil-criminal categorization does not provide. Unfortunately, the uniform acceptance of the clear and convincing evidence standard in nonconsensual sterilization proceedings has occurred without this evaluation.

VI. CONCLUSION

Nonconsensual sterilization has far-reaching implications for both society and the individual. Sterilization of mentally retarded individuals involves the value placed upon the individual's rights by society and the decisions and fears society has for its own evolution. Absent legislative guidance, courts that have faced these complex issues must choose either to act in a standardless environment or to generate their own guidelines. Unless courts create standards that recognize the full panoply of rights inherent in nonconsensual sterilization determinations, there is a great likelihood that abuse of an incompetent person's rights will occur.

\textsuperscript{160} See notes 60-64 supra and accompanying text.
\textsuperscript{161} See text accompanying note 15 supra.
The traditional role of the judiciary as the protector of individual rights encompasses the responsibility to develop a decision-making framework that reflects an individual's right to procedural and substantive due process. Comprehensive substantive standards must exist that incorporate action congruent with the best interest of the individual. An evaluation of both the individual and societal concerns compels a rejection of any other basis for judicial intervention. The recognition of this basis for sterilization determinations by the Washington and New Jersey Supreme Courts may indicate a trend toward greater scrutiny of the mentally retarded person's constitutional rights.

Courts must also evaluate what standard of proof is required by due process in light of the fundamental interests involved. While the Supreme Court in *Addington* squarely faced the issue of what evidentiary standard is constitutionally mandated in cases of civil commitments, that decision, which found the clear and convincing standard sufficient, merely represents a starting point for future analysis in other areas. An assessment of the underlying rights and policies implicit in sterilization is necessary to avoid the unjust results of a mechanical civil-criminal proof categorization.

The greatest danger that standardless ordering of sterilization may have upon the mentally retarded is that their liberty may be forsaken by those who profess paternalistic and benevolent motives. The development of legal safeguards will protect the retarded either from being coerced or unknowingly subjected to an unwarranted and irreversible sterilization procedure.

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