PRESERVING THE SEED: WHY PARENTS SHOULD HAVE A SAY IN WHETHER THEIR MENTALLY HANDICAPPED CHILD SHOULD BE STERELIZED

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In 1927, Babe Ruth became the highest paid baseball player, earning $70,000 per year; Charles Lindbergh successfully crossed the Atlantic; Lois Delander won the Miss. America pageant; and, Carrie Buck was sterilized against her will by surgeon John Bell.\(^1\) Sterilization is the most frequently chosen methods of contraception in the United States for women over 35 and the most common method among black and Hispanic women at all ages.\(^2\) Sterilization is considered a safe and effective method of avoiding pregnancy.\(^3\) However, for women who are considered mentally handicapped, access to sterilization as a contraceptive method has been extremely limited by courts in an effort to protect the woman’s right to procreate.

This article discusses the history of the eugenics movement and addresses whether a parent should have standing to compel the sterilization of their mentally handicapped minor child.\(^4\) Additionally, this note asserts that independent factors such as parental rights, family interest, degree of incompetence and a woman’s interest in procreation should all be considerations under the best interest analysis before courts grant a sterilization petition.

Currently, many courts have enacted statues that limit a mentally incompetent persons’ access to sterilization as a method of contraception. However, when states previously authorized sterilization, they justified it by relying on two assumptions.\(^5\) First, the courts assumed that mentally impaired persons were unable to effectively parent; therefore, a large financial burden would be placed on the state in order to assist in rearing the children.\(^6\) The financial inability of their children to support offspring was largely why parents of mentally disabled individuals seek


\(^6\) Id.
court ordered sterilization.\textsuperscript{7} The second assumption was that society benefits by preventing the births of children with disabilities, thus the court may authorize sterilization in order to prevent the passing of undesirable genetic traits to future generations.\textsuperscript{8}

**The Eugenics Movement**

In 1865, the eugenics movement gained recognition when British eugenicists Francis Galton, a white, middle-upper class man, suggested implementing the science of eugenics to make social improvements by controlling breeding to help insure the passing of desirable character traits.\textsuperscript{9} Galton advanced the theory that heredity was responsible for one’s physical and mental characteristics, asserting that “pauperism, criminality, and inferior mental ability” were inherited traits.\textsuperscript{10} The eugenics movement found its way to the United States in 1877 when Richard Dugdale, a social Darwinist, genetically linked a group of criminals and prostitutes to one set of parents in New York.\textsuperscript{11} Soon thereafter, the United States implemented compulsory sterilization programs for the purpose of eugenics. During the rise of the eugenics movement, it became justifiable to forcibly sterilize a certain class of persons.\textsuperscript{12} In contrast, voluntary sterilization as a method of birth control was highly frowned upon and viewed as “a sin against God.”\textsuperscript{13}

The targets of the eugenics movement were mentally retarded and mentally ill persons; however, the deaf, blind, physically deformed, and persons with epilepsy were also at risk.\textsuperscript{14} Proponents of the movement believed that all genetic defects were irreversible and that being

\textsuperscript{7} *Id.*  
\textsuperscript{8} *Id.*  
\textsuperscript{10} *Id.*  
\textsuperscript{11} *Id.* at 113.  
\textsuperscript{13} *Id.*  
\textsuperscript{14} Rachel Iredale, *Eugenics and its Relevance to Contemporary Health Care*, Nursing Ethics 3 (2007).
poor or engaging in acts of moral turpitude could deform a person’s future children.\textsuperscript{15} Indiana passed the first eugenic sterilization statute in 1907, allowing the state to mandate sterilization of “confirmed criminals, idiots, rapists, and imbeciles.”\textsuperscript{16} Soon thereafter, many states followed Indiana in enacting sterilization statutes. In 1924, Virginia adopted a sterilization statute aimed at furthering the eugenics movement by allowing for the sterilization of institutionalized persons to promote the “health of the patient and the welfare of society.”\textsuperscript{17}

\textbf{The Constitutionality of Sterilization Statutes}

The Supreme Court first addressed the constitutionality of mandatory sterilization in \textit{Buck v. Bell}.\textsuperscript{18} Here, petitioner Carrie Buck was deemed a “feeble-minded” woman, who, as a result, was involuntarily confined to a state mental institution in Virginia where her mother was also detained.\textsuperscript{19} It was believed that the three previous generations of Bucks all suffered from feeble-mindedness. Carrie Buck gave birth at the age of 18; thereafter, the institution decided to sterilize her to prevent her from producing future feeble-minded offspring. Ms. Buck challenged the Virginal law permitting the sterilization of patients confined to the State Colony for Epileptics and Feeble Minded based on their status as mentally incompetent as violating of her due process and equal protection rights under the Fourteenth Amendment.\textsuperscript{20}

Ultimately, in an 8-1 decision, the Court held that the statute did not violate Ms. Buck’s due process rights because there was a rational basis behind the selection of those to be sterilized.\textsuperscript{21} The superintendent of the institution chose patients to sterilize based on a

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\item[\textsuperscript{16}] See Huberfeld, \textit{supra} note 9, at 116.
\item[\textsuperscript{17}] Id.
\item[\textsuperscript{18}] \textit{Buck v. Bell}, 274 U.S. 200 (1927).
\item[\textsuperscript{19}] Id. at 205.
\item[\textsuperscript{20}] See Huberfeld, \textit{supra} note 9, at 117.
\item[\textsuperscript{21}] See Huberfeld, \textit{supra} note 9, at 118.
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particularized process; therefore, allowing for “ample” due process.²² The Court found that “Carrie Buck is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization.”²³ Justice Holmes concluded by stating that “Three generations of imbeciles are enough.”²⁴ Furthermore, the Court held that the statute did not violate the equal protection requirement because it was permissible to sterilize a particular class of persons whose children would financially burden the state.²⁵

**The Truth: Buck v. Bell**

The Virginia Colony for Epileptics and Feeble Minded (Virginia Colony) was founded in 1912 and expanded in 1916 to take in patients who were considered feeble-minded.²⁶ In 1920, Emma Buck, Carrie Buck’s mother, was widowed and left to rear three children. Having no alternative, she resorted to supporting her family through prostitution.²⁷ Authorities suspected that Emma Buck was engaged in prostitution and ordered her confinement at the Virginia Colony.²⁸ Carrie Buck was sent to live with the Dobbs family at the age of 3.²⁹ The Dobbs removed Carrie from school at 8 so she could do housework instead of finishing her education.³⁰ The Dobbs were happy with the arrangement until Carrie turned 17 and was raped by the Dobbs’ son and became pregnant with his child.³¹ As a result of her pregnancy, the Dobbs persuaded their doctor to testify that Carrie was feeble-minded and morally delinquent; she was committed

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²² *Id.*
²³ *See Buck v. Bell, supra* note 18 at 207.
²⁴ *See Buck v. Bell, supra* note 18, at 207.
²⁵ Cepko, *supra* note 5, at 127.
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
to the Virginia Colony directly after her daughter’s birth. The Dobbs took Carrie’s child as their own.\(^{32}\)

At Carrie Buck’s trial, several witnesses testified as to the mental defects she was thought to have inherited from her mother. The Virginia Colony superintendent stated that Emma Buck had a “record of immorality, prostitution, untruthfulness and syphilis” and that the Buck family belonged to the “ignorant, and worthless class of anti-social whites of the South.”\(^{33}\) However, recent scholarship has shown that Carrie Buck’s sterilization was facilitated by a false “diagnosis” and a defense attorney who conspired with the Virginia Colony to insure the sterilization law would be upheld.\(^{34}\) Carrie Buck was released from the institution after her sterilization and lived until her 70s; however, Emma Buck was less fortunate and died in the Virginia Colony in 1944, having spent after 24 years in the institution.\(^{35}\) Carrie’s younger sister was also sterilized after being told she was getting routine appendicitis surgery. She was unaware of the sterilization until she was in her late 60s.\(^{36}\)

Although the holding in *Buck v. Bell* was tainted by inaccurate information and conspiracy, it provided the legal precedent necessary for the sterilization of approximately 8,300 Virginia citizens.\(^{37}\) Once the Supreme Court found Virginia’s sterilization statute constitutional, the statute acted as a model for drafting similar laws in 30 states, ultimately resulting in the sterilization of 50,000 citizens without their consent.\(^{38}\) Furthermore, during the Nuremberg War

\(^{32}\) Id.


\(^{34}\) Id.

\(^{35}\) Id.


Trials, Nazi lawyers relied on the legal precedent established in *Buck v. Bell* to justify the sterilization of 2 million people in their race hygiene program.\(^{39}\)

In light of the *Buck v. Bell* precedent, courts continued to allow involuntary sterilizations, and thirteen states passed statutes authorizing the sterilization of certain classes of criminals, including those who committed sexual offenses.\(^{40}\) These statues allowed were seen as both punitive and helpful in furthering the eugenic movement.\(^{41}\) *Skinner v. Oklahoma* was the first to test the constitutionality of the Oklahoma statute allowing for criminal sterilizations. Petitioner, Jack Skinner, was convicted of the crime of stealing chickens and twice convicted of robbery with a firearm.\(^{42}\) These were considered crimes of moral turpitude, thus it was mandated that Skinner undergo sterilization pursuant to Oklahoma’s Habitual Criminal Sterilization Act. Skinner challenged the Act as unconstitutional under the Fourteenth Amendment. During trial, the court instructed the jury that Skinner was convicted of crimes of moral turpitude, and that the only issue at hand was whether a vasectomy could be performed without jeopardizing his health.\(^{43}\) The Supreme Court of Oklahoma upheld the lower courts decisions by a 5-4 decision, finding that a vasectomy could be performed without petitioner’s consent because his health would not be endangered.

The US Supreme Court reviewed the constitutionality of the Act and found that it failed to meet the requirements of the Equal Protection Clause under the Fourteenth Amendment.\(^{44}\) The Court held that it was a denial of equal protection to allow the sterilization of persons convicted two or more times of felonies involving moral turpitude when persons who committed felonies

\(^{39}\) Id.

\(^{40}\) See Pitts, *supra*, note 12, at 359.

\(^{41}\) See Pitts, *supra*, note 12, at 359, see n. 32.


\(^{43}\) Id. at 537.

\(^{44}\) Id.
stemming from white-collar crime, such as embezzlement or political crimes, were excluded from mandatory sterilization under the Act.\textsuperscript{45} \textit{Skinner} has come to stand for the presence of a “substantive Due Process right to procreation.”\textsuperscript{46} Despite the Supreme Court’s holding in \textit{Skinner}, the sterilization of criminals has not been completely abolished. Instead, the Court ruled that if a state shows a compelling interest in the contemplated sterilization, then, under the substantive due process analysis, the sterilization may be upheld.\textsuperscript{47}

\textbf{Sterilization Laws undergo Sweeping Change}

Sterilization laws have undergone a judicial reform movement as evidenced in numerous judicial opinions written after 1980.\textsuperscript{48} First, in cases such as \textit{Griswold v. Connecticut} and \textit{Eisenstaedt v. Baird}, the Supreme Court began to recognize a person’s constitutional right to privacy, including the right to privacy in making contraceptive decisions and procreative choice. As a result, the right of adults, and some minors, to avoid unwanted pregnancy through abortion, contraception and sterilization is recognized in one’s right to privacy.\textsuperscript{49}

The laws have evolved differently when addressing a mentally handicapped persons’ reproductive autonomy.\textsuperscript{50} While states no longer participate in arbitrary involuntary sterilization, most reform laws allow states to authorize sterilization under the doctrine of \textit{parens patriae}.\textsuperscript{51} \textit{Parens patriae} is a legal doctrine allowing the state to take the role of a guardian to protect

\textsuperscript{45} See Pitts, supra note 2, at 360.
\textsuperscript{46} See Ziegler, supra note 15, at 324.
\textsuperscript{47} See Pitts, supra note 2, at 361.
\textsuperscript{49} Id. at 813.
\textsuperscript{50} Id. at 807.
\textsuperscript{51} Id. at 817.
persons who are legally unable to act on their own behalf.\textsuperscript{52} This doctrine is generally applicable when the state makes decisions regarding the health, comfort, or welfare of children and mentally incompetent persons.\textsuperscript{53} States do not have unlimited \textit{parens patriae} authority and are required to meet specific criteria before they are allowed to make any determinations. When exercising \textit{parens patriae} authority in relation to the sterilization of a mentally incompetent person, the states generally follow the model fashioned after \textit{In re Guardianship of Hayes}.\textsuperscript{54} In \textit{Hayes}, the mother of a mentally handicapped girl petitioned the court for an order appointing her guardian and specifically authorizing the sterilization procedure on the minor.\textsuperscript{55} The superior court dismissed the petition, believing it lacked authority to issue such an order. The mother appealed. The Supreme Court of Washington held that (1) the superior court had the authority to act upon a petition for an order authorizing sterilization of an incompetent minor, and (2) the mother of the minor failed to show by clear and convincing evidence that sterilization was in the best interest of her child.\textsuperscript{56}

\textit{Hayes} confirmed the court’s authority to authorize the sterilization of an incompetent minor provided the parent or guardian of such person can show the procedure would be in the best interest of the child.\textsuperscript{57} The court addressed the significant problem posed when weighing the parental request for sterilization against the needs of the child. Generally, under normal circumstances, parents are authorized to consent to necessary medical procedures for their minor children because it is presumed the parents are acting in the best needs of the child. However, the

\textsuperscript{52} The Free Dictionary, \url{http://legal-dictionary.thefreedictionary.com/Parens+Patriae} (last visited 4/10/11).
\textsuperscript{54} Scott, supra note 3, at 817.
\textsuperscript{55} \textit{In re Guardianship of Hayes}, 93 Wash. 2d 228 (1980).
\textsuperscript{56} \textit{Id}.
\textsuperscript{57} \textit{Id}.
problem of parental consent in sterilization is that the consent is inadequate because the interests of the parents cannot be presumed to be the interest of their child.58

In order to justify parental consent to authorize sterilization procedures of incompetent minors, Hayes set forth a rigorous test. First, the incompetent individual must be represented by a guardian ad litem, and the court must receive independent advice based upon a comprehensive medical, psychological and social evaluation of the individual. Additionally, a 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) is unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future. Next, the petitioner must prove that there is a need for contraception by showing the person is (1) physically capable of procreation; (2) likely to engage in sexual activity that could result in pregnancy; and (3) the nature and extent of the individual's disability makes him or her permanently incapable of rearing a child. Finally, there can be no alternative to sterilization. All less drastic contraceptive methods must prove unworkable.59 The Hayes decision also requires the petitioner to prove by clear and convincing evidence that medical science is not on the verge of finding a cure for the disability or that a reversible sterilization procedure or other less drastic contraceptive method will not soon be available.60

Most states that have enacted similar procedural and substantive requirements as mandated in Hayes have also adopted the presumption against sterilization; therefore, parents must overcome the presumption in order to make headway in their petition for sterilization.61 Many states have added to the Hayes test by requiring the court to assess the individual’s ability to properly care

58 Id. at 236.
59 Id. at 238-39. (referencing entire preceding paragraph).
60 Id. at 242.
61 Scott, supra note 3, at 818.
for a child. Additionally, some states may require a showing that sterilization is medically necessary to preserve the life or health of the person, and the court may inquire into the person’s understanding of reproductive functions and sexual relations. Moreover, some laws request that the court consider the psychological trauma that could result if the individual either became pregnant or was sterilized.

When evaluating sterilization petitions, courts base their decision-making process on one of four standards. The Hayes opinion has adopted the “mandatory criteria” standard, meaning sterilization can be authorized only when all specific findings are made. Other courts have used the “discretionary best interest” standard, where courts evaluate the certain criteria to determine if sterilization is in the best interest of the person. The “substituted judgment” standard allows the court to make the decision they believe the incompetent person would have chosen. Finally, some courts rely on statutes that prohibit sterilization unless the person can provide informed consent.

North Carolina’s involuntary sterilization law remained in effect until April 2003, when Senator Easley signed legislation to strike down the law. Currently, North Carolina General Statute § 35A-1245 is the only NC statute that addresses the sterilization of a mentally ill or handicapped person. The statute allows the sterilization such persons only in cases of medical necessity. The statute requires that a guardian be appointed to represent the incompetent person

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62 Id. at 820.
63 Id.
64 Id.
65 Id. at 822.
67 National Report, Google books, available at http://books.google.com/books?id=5rUDAAAAMBAJ&pg=PA8&lpg=PA8&dq=easley+nc+strikes+down+sterilization+law&source=bl&ots=t3weAl4NQ7T&sig=FkV3BkevTRbb2s_r7f9eGmXDEUg&hl=en&ei=XKvTY2WOIfKgQfXvd7Cw&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCUQ6AEwAg#v=onepage&q&f=false (last visited 4/20/11).
whenever a medical procedure that would result in sterilization is recommended by a physician. The petition for the medical procedure shall contain a sworn statement from the physician who determined the procedure is medically necessary and a sworn statement from a psychiatrist who examined the individual in an attempt to learn whether he/she was able to comprehend the nature of the proposed procedure. Thereafter, the clerk can authorize the medical procedure only if he finds the individual was capable of comprehending the procedure and consented or, if the individual is incapable of consent, the clerk may authorize the procedure if it is medically necessary and not solely for the purpose of “hygiene or convenience.” As a result, parents of mentally challenge minors in North Carolina are barred from petitioning the court for a minor’s sterilization unless the sterilization would result from a medically necessary procedure.

**Hayes: The Dissent**

The majority in *Hayes* imposed a strong burden of proof as a condition precedent upon persons who advocate for a social need for sterilization, thus hoping to protect the personal fundamental rights involved. Proponents of the process believe that setting a high burden is justified and necessary given the irreversibility of the procedure and the recognition of the abuse during the eugenics movement. However, Justice Rosellini did not agree with the majority opinion in *Hayes*. In fact, he drafted a dissenting opinion questioning the majority’s conclusion that the court had jurisdiction to hear and decide such a case. He asserted that the court acted without statutory authority on which to base its opinion, and, in essence, enacted its own statute providing for the sterilization of children upon the petition of parents. In doing so, the court encroached on the legislature’s role of drafting laws that will best serve the public welfare. He

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68 N.C.G.S. § 35A-1245.
69 *Hayes*, 93 Wash. 2d at 240.
70 *Id.* at 243.
71 *Id.*
stated that the majority has allowed the court the “power to grant relief in any case that comes before it, whether or not that relief is authorized by constitution, statute, or principle of common law.”

Justice Tafford offered alternative reasons for his dissent, while agreeing with the majority that the judiciary had constitutional jurisdiction over both the subject matter and the parties in *Hayes*. He noted that having authority to act does not mean the court must exercise its power, especially in certain circumstances. Justice Tafford recognized that those who seek sterilization of an incompetent minor most likely have good intentions, such as promoting social good and protecting personal well-being. Therefore, the issues involved become matters of complex public policy and should be deferred to the legislature so that it may have the opportunity to review and properly decide when compulsory sterilizations should be permitted and under what circumstances. Justice Tafford was concerned that *Hayes* provided the forum for persons to petition the court for a sterilization procedure on behalf of a mentally incompetent person; however, it made the burden of proof “so impossible of accomplishment that the forum cannot be used.”

As a result, an adversarial atmosphere is present in any sterilization petition because the petitioner must meet impossibly high standards in order to have their child sterilized. The requirement that each petitioner must show that no medical breakthrough will be available in the foreseeable future is unreasonable because the petitioner does not have knowledge of future

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72 Id.
73 Id. at 240.
74 Id. at 240-41.
75 Id. at 241.
76 Id. at 242.
77 Id.
medical advancements and the judiciary cannot be expected to litigate such “nebulous eventualities of science.”

**Parental Rights**

The court’s concern in preserving a woman’s right to procreate may actually limit her other rights, such as the right to engage in sexual relations without fear of pregnancy and the right to be free from the pain. A severely disabled person would likely be incapable of choosing to procreate and would have no interest and understanding of conception, birth and childrearing. Additionally, sterilization, “the contraceptive choice of many normal persons,” is unavailable to mentally handicapped persons because of the ridged tests petitioners must meet. Therefore, the courts have failed to provide equal protection under the law by essentially making this frequently chosen contraceptive method unavailable to persons with mental disabilities.

Because each person is presumed to have a protectable interest in procreation, parental consent for undergoing a sterilization procedure is not viewed as an adequate substitute for the child’s informed consent. Excluding parental and family interests from this decision-making process is a way to ensure that the minor has the right to make her own reproductive choices. However, eliminating parental and family interest in the decision-making process is unfair to both the family members and the incompetent person. Parents who have severely disabled children have a lot of added stress and accounting for parental interest in convenience, reduced anxiety, and family stability should be factors in the decision-making process. Instead, by
failing to recognize the importance of family stability in a severely handicapped person’s life, the court may ultimately be failing to act in the child’s best interest.  

The law presumes that parents make choices in the best interest of their children, and the Fourteenth Amendment’s Due Process Clause provides for heightened protection against government interference with certain fundamental rights and liberty interests, including parents’ fundamental right to make decisions concerning the “care, custody, and control of their children.” As such, parents are afforded the right to make medical decisions on behalf of their minor children. Some states require parental consent for minors to obtain an abortion, thus rendering the parent the ultimate decision-maker of whether their minor child becomes a parent. However, when making the choice to sterilize their severely incapacitated child, parents are almost completely stripped of their authority.

Interestingly, the courts have frequently deferred to a family’s judgment in cases involving the termination of life support of a person who is unable to consent. In *In re Jobes*, the New Jersey court stated that it was unable to decide whether a patient be taken off of life support; however, it found the decision could be deferred to the family’s substituted judgment. The court stated that “Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they who provide for the patient’s comfort, care, and best interest, and they who treat the patient as a person, rather than a symbol of a cause.” Here, the court recognizes the value of having a family member use his substituted judgment in making a life or death decision for a loved one. In following the court’s reasoning in life support cases, states should recognize the value of surrogate decision-makers to help guard

85 Id.
89 Id. at 416, 445.
the rights of those who will never have the capacity to make constitutionally protected decisions.\textsuperscript{90} In allowing for such, the surrogate-decision maker, preferably a parent or guardian, would be able to substitute his/her judgment for the incapacitated person when necessary.

**The Ashley Treatment: An Exception to the Hayes?**

The “Ashley Treatment” case captured nationwide attention in 2006, provoking much ethical debate. Ashley was a profoundly disabled 6 year old whose mental development was at the level of an infant. She was unable to move, speak or eat without a feeding tube, and doctors concurred that no further cognitive development could be expected.\textsuperscript{91} Ashley’s parents were her primary caretakers, which required them to facilitate all of her movement and bodily functions.\textsuperscript{92} The parents became concerned when she showed signs of early puberty and accelerated growth because they needed Ashley to remain small in order for them to continue in-home care. They recognized that if they could no longer move Ashley without assistance, she would need to be placed in an institution.\textsuperscript{93}

Doctors recommended a growth attenuation treatment, accompanied by a hysterectomy and breast bud removal to help stunt Ashley’s growth.\textsuperscript{94} The therapy was expected to “achieve a forty percent reduction in expected weight and a twenty percent reduction in expected height.”\textsuperscript{95} The primary reason for the hysterectomy was to avoid menstrual pain, but secondary benefits included eliminating pregnancy due to sexual assaults and avoiding uterine cancer.\textsuperscript{96}

Ashley’s parents met with the Children’s Hospital Ethics Committee prior to the treatment. The committee determined that the treatment was in Ashley’s best interest because it

\textsuperscript{90} Kornblatt, supra note 67, at 784-85.
\textsuperscript{91} Kornblatt, supra note 67, at 774.
\textsuperscript{92} Id. at 775.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 776.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
would improve her quality of life by allowing her to stay at home and avoid institutionalization.\textsuperscript{97} Additionally, Ashley’s parents met with an attorney to get legal advice on whether the hysterectomy complied with the Washington state requirements for sterilization. While Washington followed the legal precedent set forth in \textit{Hayes}, the attorney nonetheless advised that, because the procedure was not being performed primarily for the purpose of sterilization, a court order was not needed for the treatment.\textsuperscript{98}

In order to educate the public and explain their treatment decisions, Ashley’s parents started a blog and named the procedure the “Ashley Treatment.”\textsuperscript{99} As publicity of the treatment grew, numerous people questioned whether Ashley’s parents’ loving motive transformed what would otherwise be considered grave abuse into a legitimate, ethical procedure?\textsuperscript{100} Ashley’s parents informed Larry King that, as of January 12, 2007, they had received over 3,600 private messages, 90\% of which supported their treatment decision.\textsuperscript{101} Eventually the Washington Protection and Advocacy System (WPAS) learned of the treatment and investigated the legality of the sterilization procedure. WPAS found that performing the hysterectomy violated Washington law because it was performed without a court proceeding and without an appointed guardian ad litem to protect Ashley’s constitutional rights.\textsuperscript{102} Additionally, WPAS concluded that the breast bud removal and growth attenuation therapy were invasive and irreversible procedures that should not have been performed without a court order.\textsuperscript{103}

\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 777.
\textsuperscript{101} Kornblatt, \textit{supra} note 67, at 777-78.
\textsuperscript{102} \textit{Id.} at 778.
\textsuperscript{103} \textit{Id.} at 778-79.
In response, the family’s attorney asserted that *Hayes* and *In re Guardianship of K.M.*, the Washington Supreme Court case upholding *Hayes*, were distinguishable from the circumstances in Ashley’s case because of the differences in mental ability of the girls involved and the purpose of the procedure.\(^{104}\) He concluded that the Washington state law must allow sterilization when it is the result of a surgery performed for other compelling reasons.\(^{105}\) Nevertheless, WPAS found that the cases were controlling and an that the treatment violated Ashley’s Fourteenth Amendment rights.\(^{106}\)

It is unlikely that Ashley’s parents would have been granted a court order allowing for the hysterectomy because her parents would have had to satisfy the mandatory criteria set out in *Hayes* before going forward with the treatment. Under *Hayes*, one of the requirements is to show the individual has a need for contraception, which includes findings that she is capable of procreation, likely to engage in sexual activity that could lead to pregnancy in the near future, and is permanently incapable of caring for a child, even with reasonable assistance.\(^{107}\) Ashley’s parents would be unable to prove that she is likely to engage in sexual activity in the near future as Ashley would never be capable of voluntary sexual intercourse and was 6 at the time.\(^{108}\)

Those who support the Ashley’s parent’s decision to consent to the invasive medical treatment on behalf of their daughter assert that the *Hayes* standard is inappropriate in certain cases.\(^{109}\) The girls in *Hayes* and *KM* were differently situated than Ashley and other females with “profound neurologic and cognitive disabilities” because they were able to walk, talk, vaguely understand the idea of parenting, and were teenagers whose parents believed them to be sexually

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\(^{104}\) *Id.* at 778; *See In re Guardianship of K.M.*, 816 P.2d 71 (Wash. Ct. App. 1991).


\(^{106}\) Kornblatt, *supra* note 64, at 778.

\(^{107}\) *Id.* at 781.

\(^{108}\) *Id.* at 788.

\(^{109}\) *Id.*
active.\textsuperscript{110} Therefore, the parents of Hayes and KM were requesting the procedure to prevent pregnancy, which is not the primary reason Ashley’s parents requested the procedure.\textsuperscript{111} Supporters note that the only way that those with profound neurologic disabilities could procreate would be through sexual assault.\textsuperscript{112} By focusing on the fundamental right to procreate, the current law protects an interest that these children will never be capable of understanding; therefore, this right should come second to the children’s other fundamental rights, including the right to “dignity, freedom from pain, and life.”\textsuperscript{113}

Additionally, if the requirements in \textit{Hayes} were enacted by statute, the statute would be invalid because it would not be “narrowly tailored to the state’s interests, as is required of a statute affecting individuals’ fundamental rights.”\textsuperscript{114} The \textit{Hayes} standard would be under conclusive because it focuses solely on one aspect of treatment, the sterilization, and over inclusive because it analyzes all medical procedures resulting in sterilization by one standard and fails to distinguish between persons with varying levels of disabilities.\textsuperscript{115} People have varying degrees of incompetence, and creating a strong presumption against all sterilizations fails to account for individual interests.

Critics of the Ashley Treatment cite the possibility of abuse in administering such treatments, including the possibility that parents may seek similar treatments in order to control children’s behavioral issues.\textsuperscript{116} Some believe that the Ashley Treatment is a form of eugenics because sterilizing Ashley without her consent is a method of ensuring her genes are not passed

\begin{thebibliography}{9}
\bibitem{110} \textit{id}.
\bibitem{111} \textit{id} at 788-89.
\bibitem{112} \textit{id} 789.
\bibitem{113} \textit{id} at 789.
\bibitem{114} \textit{id}.
\bibitem{115} \textit{id}.
\bibitem{116} \textit{id} at 793.
\end{thebibliography}
to future generations. Dr. Gunther, who originally administered the treatment to Ashley, responded to the concerns of abuse, stating that “The argument that a beneficial treatment should not be used because it might be misused is itself a slippery slope. If we did not use therapies available because they could be misused, we’d be practicing very little medicine.”

**Alternative Methods of Addressing the Needs of Incompetent Individuals**

Before concluding that all medical treatments resulting in the sterilization are automatically subject to rigid standards and a strong presumption against the procedure, courts should more fully investigate whether the treatment is in the individual’s best interests. To do so, courts must consider numerous factors, not just the person’s right to procreate. Instead, the person’s current condition, prognosis, and the concerns of her family and caregivers should all be taken into account. As a result, the extent to which the procedure infringes upon a woman’s right to procreate would become one aspect of a multi-level analysis instead of the sole focus.

Professor Elizabeth Scott suggests that the analysis in sterilization cases should “center around three inquiries about the incompetent individual: (1) whether the incompetent person has a substantive interest in producing children, or (2) whether there is a substantive interest in avoiding pregnancy, and (3) whether the child is capable of exercising meaningful reproductive choice.” Scott believes that an individual only possesses a substantive interest in procreation if she has the ability to assume a parental capacity, meaning she is able to perform basic child-rearing tasks. Should it be determined that the woman is unable to meet minimum requirements to establish parental capacity, protecting her fundamental right to procreate would

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117 Id.
120 Id.
121 Id. at 319-20.
122 Id. at 320.
no longer hold more weight than protecting her other basic rights.\textsuperscript{123} This approach assumes that profoundly incompetent individuals likely do not have the same interest in procreation as those will less severe disabilities.\textsuperscript{124}

**Conclusion**

Society must continue to protect and advocate for handicapped persons’ rights; however, it is necessary not to lose sight of the individual who is being protected. Each situation is markedly different in regards to severity of incapacitation. Determining the person’s best interest requires careful review of multiple dynamics, and families are often the best substitute voice for a handicapped individual.\textsuperscript{125} Ashley’s parents, and the many other parents in similar situations, truly are advocates for what they believe is in their child’s best interests. Their opinions should be valued.

Unfortunately, courts have yet to recognize how varying levels of incompetence may alter one’s liberty interest in the right to procreation. The right to procreate is designed to protect choice—the choice of when, and if, to have children and the choice of whether to use various contraceptive methods. While courts strive for equal protection under the laws, they have limited the right procreation simply by denying access to the procedure or by imposing an impossibly high burden of proof so that all mentally incompetent women cannot access one of the most widely sought contraceptive methods in the United States. As a result, the laws forbidding sterilization may be almost as outrageous as the forced sterilization laws they replaced.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id. at 323.
  \item \textsuperscript{126} Id.
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