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Commentary on *Conservatorship of Valerie N.*

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INTRODUCTION

In *Conservatorship of Valerie N.*,[1] the California Supreme Court was asked to resolve the question of whether, and when, it is appropriate for a guardian to consent to the non-therapeutic sterilization of a woman deemed incompetent to make such a choice for herself. Valerie N. was a twenty-nine-year-old woman with Down's syndrome. In seeking her sterilization, Valerie N.'s mother and step-father challenged a California statute that prohibited conservators from authorizing the non-therapeutic sterilization of their conservatees. The majority concluded that, by absolutely prohibiting sterilization, California's statutory scheme violated the privacy and liberty rights of "developmentally disabled persons" under the state and federal constitutions. However, it affirmed the Probate Court's denial of the parents' sterilization petition (without prejudice for a renewed petition) because the record failed to establish that "less intrusive means to prevent conception" were unavailable for Valerie N.

Reading the 1985 case today, it is important to consider how sterilization fit into the broader context of the struggle for women's rights and the rights of people with disabilities in the 1980s. While the court recognized the liberty interests at stake in the categorical prohibition on sterilization of conservatees, it simultaneously failed to grapple adequately with the potential for coercion when conservators and the state impose such a decision in a woman's "best interests," without consideration of her own desires and capacity to arrive at her own decision with necessary support.

The feminist concurring opinion by Professor Doriane Lambelet Coleman, writing as Justice Coleman, does well to value and infer Valerie's personal

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[1] 707 P.2d 760 (Cal. 1985).

hierarchy of liberties and, in this way, inches toward a more autonomy-affirming substituted judgment approach than that used in the original opinion. However, like her colleagues and predecessors, Coleman simultaneously posits a "best interests" standard that fundamentally assumes Valerie can play no greater decision-making role than the one defined for her by others. Since 1985, changing attitudes about the sexuality, procreation, and parenting potential of people with disabilities, and an evolving understanding of their legal capacity, have created unique opportunities to reenvision the proper legal response to sterilization decisions involving women with disabilities. An opinion not shackled by the norms of the times would work harder to identify Valerie's capacities and how they might have been supported to enable her to make her own procreative choices.

BACKGROUND

In the 1970s and 1980s, the legal struggle for women's reproductive rights predominately focused on the experiences of upper-middle class, white, "non-disabled" women who sought to prevent the state from taking away their right to avoid, or end, a pregnancy. This activism challenged criminal laws prohibiting contraception and abortion.[2] In addition to reflecting essentialist attitudes about women's role as child-bearers, these laws can also be understood as attempts to reinforce traditional gender roles and control women's sexuality.

By the time *Valerie N.* was decided in 1985, the US Supreme Court had recognized in *Roe v. Wade*[3] that the decision about whether to have a child or not is a constitutionally protected privacy right. The original *Valerie N.* majority decision's conclusion that the absolute denial of the choice of sterilization violated Valerie N's privacy and liberty rights reflected growing judicial awareness of the role that reproductive decision-making – including in the context of sterilization – could play in a woman's ability to define her own life and destiny. However, as discussed below, the majority ignored the threat that abusive sterilization policies posed to women whose procreation was discouraged or devalued, particularly women with disabilities (like Valerie N.), women receiving public assistance, and women of color.

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[2] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to contraception to single people); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the constitution protected the right to contraception for married people).

[3] 410 U.S. 113 (1973).

Sterilization Laws Leading up to Valerie N.

Throughout US history, states regulated the sexuality of individuals with intellectual disabilities by forcing sterilization, segregating them within institutions by sex,[4] and prohibiting marriage.[5] Part of a global eugenics movement that began in earnest between 1890 and 1920 and targeted women with intellectual disabilities well into the twentieth century,[6] such policies were based on a medical model that viewed intellectual disability as a hereditary, incurable disease that rendered its victims burdensome and immoral.[7] Accordingly, state policies aimed to contain the "defective strain" that allegedly gave "rise to feeblemindedness and sexual promiscuity."[8] States coupled ableist stereotypes with a paternalistic intent to "rescue women from becoming victims of men's lust and their own 'weakness of self-control'"[9] – a theme that underpinned the majority decision in *Valerie N.*, as Justice Grodin supported the efforts of Valerie's parents to protect her from her own "aggressive sexual advances toward men" through sterilization.[10]

States were initially cautious about the constitutionality of compulsory sterilization, but the US Supreme Court's 1927 decision in *Buck v. Bell*,[11] upholding Virginia's forced sterilization statute, ultimately emboldened over thirty states to adopt similar laws.[12] As Coleman recognizes in her feminist judgment, Justice Oliver Wendell Holmes, bolstered by a baseless portrayal of Carrie Buck as a parent unfit due to "feeble mindedness," infamously justified Buck's forced sterilization with the conclusion that "[t]hree generations of imbeciles are enough."[13] Tens of thousands of people with mental disabilities were sterilized on similar grounds.[14]

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[4] In the nineteenth and first half of the twentieth century, individuals with intellectual disabilities were commonly institutionalized. Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 104 (2012).

[5] *See* Natalie M. Chin, *Group Homes as Sex Police and the Role of the* Olmstead *Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 393 (2018).

[6] *Id.*

[7] Booth Glen, *supra* note 4.

[8] PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES 5 (2008).

[9] JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 103 (1994).

[10] Conservatorship of Valerie N., 707 P.2d 760, 763 (Cal. 1985).

[11] 274 U.S. 200 (1927).

[12] Chin, *supra* note 5.

[13] *Buck*, 274 U.S. at 207.

[14] Booth Glen, *supra* note 4.

The US Supreme Court has never directly overturned *Buck v. Bell*.[15] However, by the 1960s and 1970s, most states had repealed their compulsory sterilization laws.[16] These statutory reforms were the product of various factors, including scientific challenges to eugenics on the basis of increased understanding of mental illness, widespread association of eugenics with the Nazis, judicial abuse of sterilization practices, and monumental US Supreme Court decisions declaring constitutional protections for reproductive rights.[17]

Even once compulsory state sterilization for eugenic purposes was no longer acceptable in most states, the government continued to use sterilization as a method to police certain families, prevent illegitimacy and what was perceived as unfit motherhood, decrease the welfare rolls, and control population growth.[18] As noted in Bird's dissent in the original *Valerie N.* opinion, in 1980 the North Carolina Court of Appeals had upheld an order sought by the state Department of Social Services for the involuntary sterilization of a woman described as "mildly retarded."[19] Notably, the governing statute, which was not repealed until 2003, permitted involuntary sterilization both for eugenic reasons ("the respondent would be likely to procreate a child … who would probably have serious mental deficiencies"), and for reasons of parental unfitness ("the respondent because of mental deficiency would probably be unfit to care for a child").[20] The North Carolina court upheld the sterilization order on evidence of parental unfitness, which established "emotional immaturity, the absence of a sense of responsibility, a lack of patience with children, and continuous nightly adventures with boyfriends … ."[21]

Beyond the fact that certain states continued to authorize involuntary sterilization by statute after the 1970s, women who relied on government benefits and health care services faced coercion at the hands of government employees and health care workers who internalized ableist and racist attitudes about their fitness as parents and the desirability of their having

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[15] Chin, *supra* note 5, at 394.

[16] Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 870 (2004).

[17] Rima Kundnani, *Protecting the Right to Procreate for Mentally Ill Women*, 23 S. CAL. REV. L. & SOC. JUST. 59, 64–66 (2013).

[18] Alexandra Minna Stern, *Sterilized in the Name of Public Health*, 95 AM. J. PUB. HEALTH 1128, 1132 (2005); Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 472 (2019).

[19] Conservatorship of Valerie N., 707 P.2d 760, 783 (Cal. 1985) (citing Matter of Johnson, 263 S.E.2d 805 (N.C. Ct. App. 1980)).

[20] *Matter of Johnson*, 263 S.E.2d at 808.

[21] *Id.* at 809.

children. In 1975, plaintiffs in California brought *Madrigal v. Quilligan*,[22] a class action against Los Angeles County General Hospital based on the hospital's practice of pressuring working-class women of Mexican origin into agreeing to sterilization while they gave birth. The women were not properly informed about the nature of the procedure and in some cases did not sign consent forms.[23] While the *Madrigal* case involved Mexican women, similar abuse occurred in Puerto Rican, African American, and indigenous communities with misinformation and coercive practices often tied to the threat of withholding public benefits.[24]

Because many instances of coerced sterilization were paid for with federal funds, in 1978, the Department of Health and Human Services adopted regulations that prohibited the use of federal funds to sterilize individuals who were adjudicated incompetent or institutionalized. They also promulgated informed consent requirements to prevent coercion and ensure that individuals were adequately informed about the procedure and told that withholding consent would not result in the loss of benefits.[25] In 1979, California not only repealed its compulsory sterilization statute, but it also categorically prohibited the non-therapeutic sterilization of conservatees.[26] Accordingly, in *Valerie N.*, it was for the California Supreme Court to determine whether Valerie's parents might sterilize her despite this prohibition and against the backdrop of longstanding sterilization abuses.[27]

Guardianship Laws Leading up to Valerie N.

In addition to restricting procreation, in the late nineteenth and early twentieth century, states created legal processes for adjudicating competence that denied civil rights to individuals with intellectual disabilities.[28] When a judge determined that a person was "incompetent" – as a California probate judge declared Valerie N. in 1980[29] – she lost to a surrogate decision-maker, such as a guardian or conservator, her "legal capacity" to exercise a broad array of

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[22] CV-75-2057-EC (C.D. Cal. June 7, 1978).

[23] Stern, *supra* note 18, at 1134.

[24] *See* Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated by* 565 F.2d 722 (D.Cir. 1977) (stating that "an indefinite number of poor people" were threated that their welfare benefits would be withdrawn unless they accepted sterilization); Bridges, *supra* note 18, at 469.

[25] 42 C.F.R. §§ 441.253–254, 441.257–258 (2020).

[26] 707 P.2d at 762, 764–767.

[27] *Id.* at 762.

[28] Booth Glen, *supra* note 4, at 105.

[29] 707 P.2d at 763.

rights, including those related to procreation and sexual expression.[30] A determination of "incompetence" assumed a medical status of "permanent, unchangeable defect" and gave the surrogate "virtually total control over the ['incompetent'] person's life."[31] Moreover, early statutes sometimes imposed a "best interests" standard on the surrogate's decision-making power; accordingly, the 1969 Uniform Probate Code compared the decision-making power of guardians to that of parents over minor children.[32] Former New York Judge Kristin Booth Glen has described confronting this medical, rights-depriving paradigm of guardianship in her courtroom in 1986.[33] The same paradigm operated, unquestioned, in the background of the *Valerie N.* decision, even as it complicated Valerie N.'s access to sterilization.

Just a couple of years after the *Valerie N.* decision, reform efforts had begun to shift capacity assessment toward greater individual autonomy – away from a focus on medical diagnosis, plenary guardianship, and best interests decision-making, and toward individual preferences, limited guardianship, and substituted judgment.[34] Substituted judgment is thought to promote greater autonomy than a best interests analysis because it requires the guardian to make a "best guess as to what the person under guardianship herself would have chosen under the circumstances."[35]

ORIGINAL OPINION

In *Valerie N.*, the issue before the California Supreme Court was whether the Probate Court properly denied a petition brought by Valerie N.'s mother and step-father, as co-conservators, to sterilize Valerie N. for purposes of "habilitation."[36] According to the court, Valerie, who was twenty-nine years old when the case was decided, had Down's syndrome and was "severely retarded" with an estimated IQ of 30.[37] The Probate Court held that it lacked jurisdiction to grant the petition because section 2356(d) of the Probate Code prohibited conservators from consenting to non-therapeutic sterilization.[38]

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[30] Booth Glen, *supra* note 4, at 105.

[31] *Id.*

[32] *Id.* at 116.

[33] *Id.* at 105–106.

[34] *Id.* at 109, 115.

[35] *Id.* at 116.

[36] Conservatorship of Valerie N., 707 P.2d 760, 762 (Cal. 1985).

[37] *Id.* at 762–773.

[38] That section stated that "[n]o ward or conservatee may be sterilized under the provision of this division." *Id.* at 762 n.2.

Writing for the majority, Justice Grodin found section 2356(d) "constitutionally overbroad" because it precluded conservators from choosing sterilization on behalf of the conservatee.[39] However, because the factual record was insufficient to support sterilization, the court affirmed denial of the petition without prejudice for a renewed application with additional supporting evidence, and invited the legislature to amend the law and establish criteria and procedural protections for sterilization petitions.[40] Three of the justices disagreed that section 2356(d) was unconstitutional, with two justices concurring in the affirmance but dissenting from the court's analysis, and Chief Justice Bird dissenting.[41]

Justice Grodin's Majority Decision

The majority decision in *Valerie N.* emphasized the contemporary struggles of the mainstream women's rights movement and the formal equality of women with disabilities. Accordingly, the decision stressed that Valerie was entitled to the same rights as other adult women,[42] but it failed to recognize societal attitudes toward women with intellectual disabilities that may have influenced the court's assessment of Valerie's capabilities and best interests, and legal barriers in the form of guardianship laws that prevented Valerie from actually making her own constitutionally protected choices.

Grodin's majority decision found that the sterilization ban violated the privacy and liberty rights of individuals who are "developmentally disabled."[43] Grodin focused on Valerie's liberty interest in reproductive choice and the right of women with disabilities to have the same range of choices as others. He described the right at issue as "the right of every citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level."[44] He argued that, by foreclosing the option of sterilization, the state "necessarily limits [Valerie's] opportunity for habilitation and thereby her freedom to pursue a fulfilling life."[45]

In contrast with Bird's dissent (discussed below), Grodin's opinion recognized that Valerie had important dignity interests in preserving a full range of

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[39] *Id.* at 777.
[40] *Id.*
[41] *Id.* at 778, 781.
[42] *Id.* at 772.
[43] *Id.* at 771–772.
[44] *Id.* at 773.
[45] *Id.*

choices to enable her to further her personal well-being.[46] However, even as the decision focused on abolishing restrictions that limited the range of her reproductive choices, it ignored the other realities in Valerie's life. In particular, it did not confront stereotypes about the capabilities and desires of women with intellectual disabilities and failed to grapple with guardianship laws that effectively took from her the ability to make autonomous decisions about her body and reproductive capacity.

Failure to Recognize Reproductive Oppression Experienced by Women with Disabilities

While Grodin appeared to value Valerie's aspirations beyond procreation, the majority opinion failed to recognize the unique barriers women with disabilities face in making autonomous reproductive choices. The decision recounted California's history of forced sterilization in government institutions, but it did not address more recent forms of coercive sterilization experienced by women with disabilities, poor women, and women of color.

Further, the decision fell into stereotypical assumptions about pregnancy, parenting and women with disabilities. It did not question the lack of specific evidence to support the conclusions of Valerie's pediatrician and counselor that pregnancy would impose "psychiatric harm" and "severe psychologically damaging consequences" on Valerie. Grodin also gave short shrift to Valerie's interest in the potential to become pregnant and bodily autonomy interests in avoiding an irreversible surgical procedure. And in articulating factors courts must consider before authorizing that a woman be sterilized, the majority did not include whether sterilization or the loss of the ability to become pregnant would be traumatic for the individual woman.[47]

Perhaps most troubling, while arguing that Valerie should have the same range of constitutional choices as non-disabled women, Grodin ignored the fact that, without changes to the guardianship law, Valerie would not be able to exercise these choices. Instead, he accepted that her constitutional right was limited to having decisions made for her,[48] rather than inquiring

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[46] *See* Norman L. Cantor, *The Relationship between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 ANNALS HEALTH L. 37, 45 (2004) (stating and that "never-competent persons have important potential interests . . . in [sterilization] options").

[47] *See In re* Estate of K.E.J., 887 N.E.2d 704, 719 (Ill. App. Ct. 2008); Matter of Terwilliger, 450 A.2d 1376, 1383–1384 (Pa. Super. Ct. 1982) (considering the possibility of trauma or psychological damage both from pregnancy and birth and from a sterilization operation).

[48] *Valerie N.*, 707 P.2d at 771.

whether enabling conditions or supports might have helped her to realize her rights more independently. The court's comfort in giving this power to Valerie's parents sits within a history of laws privileging the judgment and interests of doctors, parents, and spouses over those of women and girls in reproductive decision-making. Prior to *Roe v. Wade*, women often had to obtain consent from hospital boards before obtaining an abortion, and laws requiring spousal consent for abortion were not held unconstitutional until 1976.[49] The Supreme Court has permitted parental consent requirements for minors to obtain an abortion as long as the state provides an alternative judicial consent procedure for minors who are unable or unwilling to obtain parental consent.[50]

Imposition of an Autonomy-Stripping "Best Interests" Standard

Grodin purported to be enlightened about the potential for people with intellectual disabilities to "lead self-sufficient, fulfilling lives, and become loving, competent, and caring marriage partners and parents."[51] However, in discussing Valerie, he did not manage to avoid perpetuating stereotypes about the limitations of individuals (particularly women) with intellectual disabilities. Indeed, he compromised Valerie's autonomy by presuming her wholesale incapacity, viewing capacity as an all-or-nothing fixed state, and imposing on her a "best interests" standard – all features of the traditional paradigm that underpinned historical efforts to restrict the autonomy of individuals with intellectual disabilities.

Valerie was described – as a "victim" of Down's syndrome, as "severely retarded," as making "aggressive sexual advances toward men"[52] – but she was not consulted or viewed as capable of being consulted. Grodin concluded: "The sad but irrefragable truth, however, is that Valerie is not now nor will she ever be competent to choose between bearing or not bearing children, or among methods of contraception."[53] He appeared to make this determination on the basis of a limited probate hearing record to which Valerie's counsel made no evidentiary contribution.[54]

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[49] Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Rickie Solinger, Reproductive Politics 13 (Oxford University Press 2013).

[50] Belloti v. Baird, 443 U.S. 622 (1979).

[51] *Valerie* N., 707 P.2d at 767.

[52] *Id.* at 762–763.

[53] *Id.* at 771.

[54] *Id.* at 763–764.

Grodin wrote:

> after review of a court investigator's report which stated that Valerie had no comprehension of the proceedings, could not complete an affidavit of voter registration, and gave no pertinent response when asked if she objected to being disqualified from voting, the probate court granted the petition insofar as it sought appointment of appellants as coconservators.[55]

Based on Valerie's alleged inability to comprehend court proceedings and the voting process, the court treated her as lacking all capacity, including over her sexual life, even while acknowledging that she had the ability to express certain wishes (e.g., "she has expressed her wish to continue to have her parents care for her").[56] Moreover, to the extent the probate record did reflect on Valerie's capacity to choose contraception in particular, it included information that Valerie "rejected" birth control pills in her "early teens,"[57] suggesting both that she may well have been capable of expressing an opinion about contraception and that her preferences as a woman well into her twenties warranted reexamination.

Grodin ruled that Valerie's conservators should use a "best interests" standard to make profound decisions about Valerie's life. Assuming that Valerie fully lacked capacity to make decisions about procreation, Grodin asked whether she had a constitutional right "to have these decisions made for her, in this case by her parents as conservators."[58] He implicitly applied a "best interests" standard to her parents' surrogate decision-making, lamenting that they had the power to choose an abortion for Valerie or to remove a child from Valerie's custody, but that they did not have the right to choose sterilization – "the one choice that may be *best* for her."[59] Grodin also explicitly stated that a "conservator is permitted to exercise his or her own judgment as to the *best interests* of the conservatee" in matters of abortion, contraception (other than sterilization), and the right to bear children.[60]

In referencing courts that shared the view that sterilization may not be denied to incompetent women "when necessary to their habilitation" and with the proper safeguards,[61] Grodin identified a decision in which the Massachusetts Supreme Court chose substituted judgment over a "best

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[55] *Id.* at 763.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 771.

[59] *Id.* (emphasis added).

[60] *Id.* at 774 (emphasis added).

[61] *Id.* at 775.

interests" standard to advance the individual's personal rights and integrity rather than impose a solution based on external criteria.[62] At one point, Grodin even declared that "[t]rue protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator."[63] However, he did not seem to really mean it. Grodin instructed probate courts to follow the approach in *In Matter of Guardianship of Hayes*, which he described as using a "best interests" standard to determine whether a conservatee should be sterilized, albeit with some attention to "the view of the incompetent individual."[64]

Thus, as far as the majority was concerned, Valerie had no capacity to make any choices about her life. Moreover, her parents were to be allowed to impose on her personhood through a decision-making standard that empowered them to determine what was "best" for Valerie without making a significant, if any, effort to consider what she may have wanted for herself or how they might have figured that out. Making matters worse, the California Supreme Court steered probate courts to handle all similar sterilization applications in this manner.[65]

Chief Justice Bird's Dissent

Bird's opinion began with a discussion of the shameful history of involuntary sterilization of "incompetent, developmentally disabled individuals" and recognition that involuntary sterilization continued to occur in the 1980s, though the rationale for sterilization had shifted in the 1970s from eugenics to breaking the cycle of welfare dependency and preventing "unfit" individuals from becoming parents.[66] She also recognized that sterilization abuse was not limited to compulsory sterilization initiated by the state and could take other forms such as coerced or third-party consent.[67] Recognizing the level of discretion given to Valerie's guardians and the court, Bird expressed concern that "[t]he majority opinion opens the door to abusive sterilization practices which will serve the convenience of conservators, parents, and service providers rather than incompetent conservatees."[68]

Bird would have upheld the sterilization ban based on the state's compelling interest in protecting Valerie's ability to procreate. Assuming Valerie's

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[62] *Id.* at 776 (citing Matter of Moe, 432 N.E.2d 712, 720 (Mass. 1982)).

[63] *Id.* at 777.

[64] *Id.* at 775–776 (citing Matter of Guardianship of Hayes, 608 P.2d 635, 640–641 (Wash. 1980)).

[65] *Id.* at 777.

[66] *Id.* at 782–784 (Bird, C.J., dissenting).

[67] *Id.* at 784.

[68] *Id.* at 782.

wholesale incapacity to make her own reproductive decisions, Bird concluded that "the right to procreate" which is "more primal" with "roots that go deeper than and do not depend upon a capacity for rational choice"[69] was paramount to the right to choose sterilization, which Valerie could not exercise on her own behalf. Part of Bird's dissent can be read as an important recognition of Valerie's interest in bodily autonomy and the risks of coerced sterilization,[70] but in prioritizing procreation over the choice not to procreate, Bird's reasoning veered dangerously close to an essentialist view of women. She justified the sterilization ban as necessary to protect the "natural function" of procreation, which she appeared to value over other aspects of Valerie's personhood, stating that procreation "can and often does occur without the exercise of a rational or knowing choice."[71]

Further, Bird's dissent failed to acknowledge that banning sterilization in all circumstances would result in a state-imposed choice for all women with intellectual disabilities. In doing so, she rejected the notion that Valerie may have had a hierarchy of interests that placed other liberties and attainments above the potential to have children. While Bird correctly criticized the majority for assuming that sterilization was required to avoid placing severe restrictions on Valerie, in upholding the ban, she would have permitted the state to decide for Valerie, and for all other "developmentally disabled, incompetent conservatee[s]," that any "unavoidable adverse impact of the sterilization ban on [her] liberty interests [was] insufficient to justify the permanent deprivation of her right to procreate."[72] In her view, the "state ha[d] a compelling interest in protecting the fundamental right of its citizens to bear children,"[73] regardless of whether the citizen desired to bear children. And, the procreative capacity of an "incompetent, severely disabled woman" "require[d] even greater protection due to her legally dependent status and limited capacity to defend her own rights."[74]

FEMINIST JUDGMENT

Justice Coleman's concurrence aptly recognizes that the *Valerie N.* opinions read like a debate about women's reproductive capacities played out over

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[69] *Id.* at 785.

[70] Bird states that the right to procreate has roots that "are *constitutional* in the physical sense, implicating the individual's rights to physical integrity and to retention of the biological capabilities with which he or she was born into this world." *Id.* at 786.

[71] *Id.*

[72] *Id.* at 787.

[73] *Id.* at 782.

[74] *Id.* at 786.

Valerie's body. Justice Coleman critiques the majority and dissent for losing "sight of the particular disabled woman who stands before us." She exhorts us to "see Valerie herself" and seeks to do so by inquiring into the "details of [Valerie's] disability and her own hierarchy of liberties."

Unlike the majority and dissenting opinions, Justice Coleman recognizes that Valerie's liberty interests extend beyond her reproductive capacities and decisions, and include "rights to society or sexual intimacy without regard to procreation, and to physical autonomy, including autonomy regarding medical decisions." She argues that those liberties may be more important to Valerie than the right to procreation or to reproductive choice.

To determine Valerie's hierarchy of liberties, Justice Coleman seeks to provide us with particulars about Valerie and to inquire into "the capacities and incapacities" that matter most to Valerie. This recognition of human complexity and the nuances of capacity takes a significant step forward from Grodin's use of the traditional, all-or-nothing capacity paradigm. While accepting that Valerie's intellectual disability is "most severe" and renders her "childlike" in her ability to communicate, care for herself and understand social boundaries, Coleman finds that Valerie is not childlike in her sexual maturity and "seeks social relations and intimacy." This recognition and normalization of Valerie's sexuality is a welcome departure from the majority opinion, which problematizes Valerie's sexuality as an imposition on others (noting that "behavior modification" therapy was "not successful in eliminating her aggressive sexual advances toward men")[75] rather than recognizing it as part of her identity. Similarly, while Coleman assumes on the record at hand that "for Valerie, preservation of her rights to procreate and to make decisions about reproduction over time is likely as important as the preservation of her right to learn to read the Bible in German," she does require further evidence that Valerie does not want to bear children before approving sterilization.

Coleman's decision is animated by the value many feminists place on sexual and reproductive self-determination.[76] Yet, it is also limited by its unquestioning acceptance of the "best interests" standard. Coleman declares that "decision-makers acting on behalf of those who have always been legal incompetents are bound to take decisions in their incompetent's best interests." This rationale is emblematic of the traditional capacity paradigm, and perhaps even logical, but it need not be taken for granted.

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[75] *Id.* at 763.

[76] Mary Ziegler, *The (Non-)Right to Sex*, 69 U. Miami L. Rev. 631, 642–645 (2015) (describing the history of feminist movements for sexual liberty and their connection to reproductive self-determination).

A common misconception, reflected by Coleman's concurrence and Bird's dissent, is that substituted judgment requires looking to a conservatee's past capacity to determine what she wants once she lacks capacity (such as one might do for a person newly experiencing psychosis) and that substituted judgment is therefore inapplicable to a person with an intellectual disability since birth.[77] However, there is more than one way to substitute judgment. In fact, Coleman intuits this by actively working to identify and consider Valerie's desires on the basis of her actions, in the absence of other forms of expression on the record. Coleman might have therefore legitimately identified her approach to surrogate decision-making as the more autonomy-granting "substituted judgment." Bird's assertion that "substituted consent" is but a mere "legal fiction" of procreative choice is true if, like the majority, she uses this term interchangeably with the "best interests" standard.[78] If she, instead, refers authentically to the method of surrogate decision-making designed to surmise what the conservatee would want, then her skepticism rests on the stereotype that people with intellectual disabilities do not have their own desires or that those desires cannot possibly be ascertained.

DEVELOPMENTS AFTER *VALERIE N.*

Toward Reproductive Justice

While grounded in the then-current guardianship paradigms, Coleman's decision anticipates the Supreme Court's growing recognition of liberty rights that include intimate decisions about family, relationships, bodily integrity and autonomy. Seven years after *Valerie* N., the Supreme Court upheld the constitutional right to abortion in *Planned Parenthood v. Casey*,[79] and the Court's emphasis shifted from the right to privacy to liberty, recognizing that reproductive decision-making implicates personal dignity and autonomy and that rights to bodily autonomy and integrity and to make choices about one's identity and future "are central to the liberty protected by the Fourteenth Amendment."[80] By recognizing Valerie N.'s liberty interest in sexual intimacy, Coleman's decision also anticipates the Supreme Court's inclusion of private sexual intimacy as a protected liberty interest in the 2003 case *Lawrence v. Texas*.[81]

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[77] *Valerie* N., 707 P.2d at 788 (Bird, C.J., dissenting).

[78] *Id.* at 781–782.

[79] 505 U.S. 833 (1992).

[80] *Id.* at 851.

[81] 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes … certain intimate conduct.").

In the 1990s, women of color activists began to challenge the mainstream pro-choice movement to adopt a broader framework and recognize the ways that other aspects of women's identity including race/ethnicity, socioeconomic status, sexual orientation, immigration status and ability/disability combine to impact women's access to reproductive rights.[82] The reproductive justice movement was founded to push the pro-choice movement beyond an exclusive focus on the right not to have a child and to fight for an individual's right have children and to parent children in a safe and healthy environment.[83] A key aspect of reproductive justice is a commitment to recognizing and combating the barriers that women from different communities face in realizing these rights, whether those barriers are legal, structural, societal or cultural.

Since the 1990s, reproductive justice has provided an intersectional framework that can help better identify and analyze reproductive oppression faced by people with disabilities. However, stereotypical attitudes about the sexuality and parenting abilities of people with disabilities persist. In a 2012 report, the National Council on Disability found that several states still retained some form of involuntary sterilization laws and that women with disabilities continued to contend with coercive tactics to encourage sterilization or abortion.[84] Despite widespread criticism, the Supreme Court has not overruled *Buck v. Bell*,[85] and, as recently as 2001, the Eighth Circuit stated, in *Vaughn v. Ruoff*,[86] that "involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling governing interest."[87] And as *Vaughn v. Ruoff* illustrates, women with disabilities continue to be the target of coercive sterilization tactics. In that case, Margaret Vaughn, who was described by the court as "mildly retarded,"[88] proved that Missouri child welfare agency workers coerced her to undergo a tubal ligation by falsely telling her that she could regain custody of two children who had been taken by the state if she underwent the procedure.[89]

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[82] *See* Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 Berkley J. Afr.-Am. L. & Pol'y, 71, 72 (2011).

[83] Loretta J. Ross & Rickie Solinger, Reproductive Justice: An Introduction 9 (University of California Press 2017).

[84] National Council on Disability, Rocking the Cradle 40–41 (2012).

[85] 274 U.S. 200 (1927).

[86] 253 F.3d 1124 (8th Cir. 2001).

[87] *Id.* at 1129.

[88] *Id.* at 1127.

[89] *Id.* at 1127–1129.

Toward Supported Decision-Making and Greater Autonomy

In 1987, just two years after the California Supreme Court issued the *Valerie N.* decision, the Associated Press ran an exposé on adult guardianship, prompting congressional hearings and other reform activities that began to shift capacity assessment from a model in which medical diagnosis was central to one based more on individual function.[90] Over the next decade, numerous states comprehensively revised their guardianship statutes,[91] and they began to recognize a person with an intellectual disability as a "bundle of capacities, presumptively able to make most decisions, whose 'wishes, preferences and desires' are nevertheless to be honored when a guardian exercises power in a domain in which the person has proven incapacity."[92] This newer paradigm used "the least restrictive means of protection," in the form of limited instead of plenary guardianship, to promote greater autonomy of individuals with intellectual disabilities.[93]

Changing expectations about how guardians should exercise their decision-making powers accompanied the transition from plenary to limited guardianship based on specific incapacities. For instance, the National Guardianship Association (NGA) Standards of Practice adopted in 2002 embraced "substituted judgment," the primary alternative to decision-making based on a best interests analysis.[94]

Against the backdrop of the Americans with Disabilities Act[95] (ADA) and international human rights law, the newest emerging paradigm "sees incapacity as socially constructed, insists on the full legal capacity of every person with intellectual disabilities, and does away with substituted decision-making in favor of society's obligation to provide appropriate supports to permit everyone to make his or her own decisions."[96] Enacted in 1990, the ADA explicitly recognized that socially constructed barriers, rather than inherent defects, threatened the integration of people with disabilities into society.[97] The international community had already begun the shift from a medical model to a social model of disability as early as the 1970s and 1980s.[98] Thus,

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[90] Booth Glen, *supra* note 4, at 109.

[91] *Id.*

[92] *Id.* at 115.

[93] *Id.* at 98.

[94] *Id.* at 116–117.

[95] 42 U.S.C. ch. 126 § 12101 *et seq.*

[96] Booth Glen, *supra* note 4, at 98.

[97] *Id.* at 126.

[98] *Id.* at 132.

it was perhaps no surprise when, in 2006, the Convention on the Rights of Persons with Disabilities (CRPD) redefined individuals with intellectual disabilities as legal actors with full capacity akin to that of persons without disabilities, and made it the state's responsibility to support that capacity.[99]

Although the CRPD has not been ratified by the United States,[100] the Third National Guardianship Summit in 2011 recommended that a person under guardianship facing a medical decision must be supported in making her own decision.[101] Support can include gathering information relevant to the decision, explaining that information simply, weighing the costs and benefits of the decision, communicating the decision to others, and helping to implement the decision.[102] Substituted decision-making should only be employed if supported decision-making is impossible, and best interests may be employed only under extreme circumstances where neither alternative is possible, "*for example where there is no information about an unconscious person, or a person in a persistent vegetative state.*"[103]

IMPLICATIONS

A more revolutionary response to the history of oppression faced by individuals with intellectual disabilities, and the best way to honor Valerie's personhood, would be to recognize Valerie and those similarly situated as candidates for supported decision-making. In 1985, this would have been a bold move, at best grounded in international law,[104] but by today's evolving domestic standards, it is the only proper first step.

Kristin Booth Glen, a former New York judge and advocate for supported decision-making, wrote of her own adjustment to the new paradigm. On the bench as a Surrogate of New York County, Booth Glen was "totally taken aback" when first presented with the notion of supported decision-making.[105] She thought advocates were naïve about how severely disabled those facing

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[99] *Id.* at 137–138.

[100] *Id.* at 161.

[101] *Id.* at 139.

[102] Kristin Booth Glen, *What Judges Need to Know about Supported Decision-Making, and Why*, 58 Judges' J. 26, 27 (2019).

[103] Booth Glen, *supra* note 4, at 139 (emphasis in original).

[104] For instance, the U.N. General Assembly's World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/52, at 185–186 (Dec. 3, 1982), promoted accessible cultural environments for disabled people.

[105] Booth Glen, *supra* note 4, at 122.

guardianship could be.[106] However, with time and experience, she internalized the new paradigm.[107]

In 2008, Judge Booth Glen appointed a guardian for a young man named Mark based on certifications that he had "profound mental retardation and autism" and testing that placed his receptive communication skills at less than two years old and his expressive skills at three months old.[108] Mark was unable to "feed, bathe, or dress himself."[109] When Booth Glen learned that Mark lived in an institution without any support from his trustees, she directed the trustees to hire an experienced care manager for him. The care manager "began to create supports for Mark to express his wishes, to become part of a community and to begin to make – and act on – decisions about his life."[110] Specifically, the manager trained Mark to use a facilitated communication device, scheduled consultations with specialists, purchased computer and outdoor play equipment, and arranged for Mark to go to public places with aides.[111] Mark experienced a "near miraculous transformation."[112] He went on to graduate from his special education program and move into transitional supportive group housing, where he cleaned, shopped, cooked, and communicated with his housemates and support staff.[113] Mark expressed preferences and acted on those preferences.[114]

Booth Glen described her own transformation as follows:

> I notice that I am beginning to "see" Mark, and others like him, in an entirely different light, with "capacities" that were previously invisible.
>
> Now, as I conduct guardianship hearings involving young people who have been labeled "severely retarded" and who do not speak – but who, if you watch carefully, are constantly communicating feelings and choices to their trusted family members – I begin to see the spark . . . I wonder how much more fully these apparently "totally incapacitated" young people could live their lives in a society that provided them and their caretakers with the supports necessary for them to enjoy and exercise that full legal capacity . . . .[115]

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[106] *Id.* at 122–123.
[107] *Id.* at 169.
[108] *Id.* at 168.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 169.
[113] *Id.* at 168.
[114] *Id.* at 169.
[115] *Id.*

Coleman accepts that Valerie's intellectual disability is "most severe," and that could very well be true. However, such labels could also be the mark of a wholly incomplete narrative – just like the one that stripped Mark of autonomy before he received the proper supports, and that subjected Carrie Buck to forced sterilization. We know little of Valerie's experiences and opportunities, how they might have limited her capacities, and how additional supports might have expanded her ability to make certain decisions on her own behalf.

There will, of course, be people for whom supported decision-making does not work. Nonetheless, presuming capacity and beginning with support is the best way to maximize individual autonomy.

CONCLUSION

The history of reproductive injustice in the United States requires us to recognize the ways in which women's bodies have been used as sites to enforce social norms or implement policy goals, ignoring the individual choices, well-being and lived experiences of women. The ways in which laws and policies have sought to control women's bodies and sexual behavior have often depended on other aspects of identity. For "undesirable" groups, the state has often sought to prevent or discourage childbearing, reflected in its most base form with the forced sterilization of women with disabilities. Although eugenic ideas have been discredited, ableist stereotypes about the sexuality and parenting ability of women with disabilities persist. But threats to the reproductive autonomy of women with intellectual disabilities go much further than prejudicial attitudes about their sexuality and childbearing, or even coercive sterilization policies, as guardianship laws in many states take away their very legal capacity to make such decisions themselves. This is starting to change.

Since the 1990s, capacity has come to be understood as contextual and potentially fluid, such that a person without capacity in one realm may have capacity in another, or may receive training and have experiences that create future capacity. Accordingly, many policymakers and advocates increasingly argue for *supported decision-making* rather than the surrogate decision-making that characterizes traditional guardianship and the *Valerie N.* opinions. Today, a truly feminist *Valerie N.* decision would demand to know more about the nuances of Valerie's capacities, explore the potential fluidity of any apparent incapacities, and, if necessary, test the possibility of accessing Valerie's wishes for her own life through supported decision-making rather than a surrogate or best interests analysis.

CONSERVATORSHIP OF VALERIE N., 707 P.2D 760 (CAL. 1985)

JUSTICE DORIANE LAMBELET COLEMAN, CONCURRING IN THE JUDGMENT

This case raises the issue whether our current statutory scheme is constitutional if its effect is to make it impossible for an incompetent woman lawfully to be sterilized, even in circumstances where the procedure is actually necessary to secure her liberty and her medical best interests. Like my colleagues in the majority, I find that it is unconstitutional. I also base my analysis in the law's guarantees of liberty and equality.

I write separately because it appears to me that they, and the Chief Justice in dissent, have lost sight of the particular disabled woman who stands before us, and the liberties she values and needs us to recognize. Our state's disgraceful history of eugenic sterilizations, ostensibly on the grounds that they served the public good, is the reason for the prohibition at issue in this case. Because of this, it is understandable that we would consider the rights of individuals to procreate and to make decisions about reproduction. But on the record before us, these are really beside the point. On the record before us, what matters are the rights to sexual intimacy without regard to procreation, and to autonomy in health care decision-making more generally.

That we are dealing with a person who is thrice vulnerable by account of her sex, her disability, and the conflicts of interest inherent in conservancy, and that we have managed to get these matters so wrong for important periods of our history, is all the more reason to take special care to get it right now, at least as right as we can.

I THE FACTS

Valerie N. is an adult in her late twenties who is "severely retarded as a result of Down's syndrome." *Conservatorship of Valerie* N., 191 Cal. Rptr. 283, 285 (Cal. Ct. App. 1983) (quoting testimony). She has an IQ of 30, which indicates the severest level of intellectual disability. *Id.* Those aspects of Valerie's disability that are most relevant here involve her extremely limited capacities for self-sufficiency and communication, her responses to medical or physical examinations, and her demonstrated lack of social and sexual inhibitions. *See id.*

At the hearing on the merits in December 1980, the trial court heard from Valerie's mother and from three experts, including two physicians and a counselor who specializes in "behavior management with developmentally disabled clients." *Id.* Their testimony was that Valerie was living at home with her mother and step-father, that she was "unable properly to provide for her personal needs," and that she required consistent supervision. Br. for Resp't at 1. Valerie's "'social behavior' was described as 'not acceptable.'" *Conservatorship of Valerie N.*, 191 Cal. Rptr. at 285. "This is particularly true with regard to men and boys, with whom she is 'very aggressive' and 'very affectionate' physically. The counselor described this behavior as 'inappropriate sexual attention to adult males.'" *Id.*

Consistent with evolving social norms and policies concerning the habilitation of the developmentally disabled, Valerie's mother testified that she wanted Valerie "to be able to broaden her social activities somewhat" but was both "concerned about her safety" and did "not wish her to become pregnant." *Id.* Specifically, she "testified that her fear that her daughter may become pregnant as a result of sexual contact with members of the opposite sex has forced her to confine her daughter under strict scrutiny, though she would prefer to allow Valerie the freedom to form natural bonds with other retarded men." Br. for Pet'r at 7.

The witnesses agreed that pregnancy would cause Valerie "psychiatric harm." *Conservatorship of Valerie N.*, 191 Cal. Rptr. at 285–286. To address this concern, Valerie's mother and step-father had "attempted to have [her] take 'birth control pills . . . , which she rejected and became ill.'" *Id.* at 285. Her mother testified that the use of contraceptive devices was not feasible because Valerie "would not know how to apply them," that she did not believe that IUDs were "medically safe," and that in any event "there was 'no possibility for an IUD at this time' because [Valerie] 'won't cooperate' in having a pelvic exam performed." *Id.* In her mother's view, this left only the option of tubal ligation as an effective way to secure Valerie's physical and mental welfare. *Id.*

II ANALYSIS

A

In its 1923 decision in *Meyer v. Nebraska*, the US Supreme Court explained in relation to the meaning of the word "liberty" in the Fourteenth Amendment:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitively stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to

> contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. 390, 399 (1923) (concluding a state statutory scheme that prohibits the teaching of the German language to younger children in a private Catholic school's Bible class violates the teacher's liberty interest in pursuing their chosen occupation, the parent's liberty interest in retaining the teacher to teach their children, and the children's right to acquire useful knowledge).

The partial list of "included things" set out in Meyer focuses on the aspects of liberty that were pertinent to the resolution of the issues raised in that case. *Id.* Different cases, including some out of our own Court, have added to this list. Together, the cases provide a more complete picture of the set of liberties that are protected in our constitutional system.

The opinions of my colleagues focus on two: the rights to procreate and to make decisions about procreation or reproduction. These rights are related to but distinct from the rights "to marry, establish a home and bring up children" set out in *Meyer*. Indeed, the former may be said to be predicates to the latter, or else to come within the "privileges … essential to the … pursuit of happiness by free [wo]men." Other rights pertinent here are similarly related but again distinct: the rights to society or sexual intimacy without regard to procreation, and to physical autonomy, including to autonomy regarding medical decisions. While the latter may not have been "recognized at common law" as part of women's then carefully-ordered liberties, developments in our equality jurisprudence have assured that they are undoubtedly within our rights today.

Thus, well before it decided *Meyer*, the US Supreme Court announced that

> [n]o right is held more sacred, or is more carefully guarded … than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. … "The right to one's person may be said to be a right of complete immunity: to be let alone."

Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (quoting Thomas Cooley, *Cooley on Torts* 29 (1879)). In 1972, this Court affirmed our state's commitment to this principle as applied to health care settings, holding that "a person of adult years and in sound mind has the right, in the exercise and control over his own body, to determine whether or not to submit to lawful medical treatment." *Cobbs v. Grant*, 502 P.2d 1, 9 (1972). *See also Schloendorff v. Soc'y of* N.Y. *Hosp.*, 1015 N.E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .").

More recently, the U.S. Supreme Court added that liberty includes a right to privacy regarding "the most intimate of human activities and relationships" and that, among others, minors have a constitutionally protected interest in purchasing contraceptives in connection with those activities and relationships. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977). Minors, of course, are one category of legal incompetents.

Shortly thereafter, the Court added that "a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily" including for mental health reasons. *Parham v. J.R.*, 442 U.S. 584, 600 (1979). Our own state's policy is consistent. *See* Cal. Welf. & Inst. Code, § 4502(a) (West 1978) (detailing the rights of the disabled to "treatment and habilitation services [to] foster the developmental potential of the person . . . provided with the least restrictive conditions necessary to achieve the purposes of treatment"); Cal. Welf. & Inst. Code, § 4502(f)–(h) (West 1978) (detailing the right of the disabled to "social interaction and participation in community activities . . . to physical exercise and recreational opportunities" and to be "free from . . . isolation").

When it comes to the exercise of these liberties, today all are equal in the eyes of the law, including our disabled citizens. *See, e.g., N. L.A. Cty. Reg'l Ctr. v. Jarakian*, 148 Cal. Rptr. 296 (Cal. Ct. App. 1978) (holding involuntary commitment of developmentally disabled hospital resident based on his status as a voluntary resident to be a violation of due process rights). If it is not possible because of their disability for them to exercise their rights directly, and substantial equality can be achieved by allowing them to be exercised through their legally-designated proxies, the law requires that we abide by their proxies' decisions as though they were their own. Most relevant for present purposes, proxies speak for their incompetents in circumstances involving physical and mental health care. *Parham*, 442 U.S. at 619 (recognizing the state's ability to appoint a custodial agency to make medical decisions for a minor child); Cal. Prob. Code § 2355(a) (West 1981) ("If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, the conservator has the exclusive authority to give consent."); *see also Foy v. Greenblott*, 190 Cal. Rptr. 84, 87 (Cal. Ct. App. 1983) (describing appointment of county as public guardian responsible for consent to medical treatment for incompetent mother).

Proxy decision-makers, acting on behalf of those who have always been legal incompetents, are bound to take decisions in their incompetent's best interests, and are subject to supervision by the state to ensure that they do not violate their fiduciary obligations. Parents as proxies are often especially privileged, because "the natural bonds of affection [usually] lead [them] to act in the best interests of their children." *Parham*, 442 U.S. at 602. This presumption only formally applies through the period of the child's minority. But, of course, the bonds themselves defy the law's arbitrary lines. In preferring continuity of care by parents and siblings of adult incompetents, the law recognizes this truth. *See* Cal. Prob. Code § 1812(b)(3) (West 1981) (stating that in the absence of a spouse or adult child, preference is given first to parents and then to siblings for appointment as conservator); *see also In re Raya*, 63 Cal. Rptr. 252, 255 (Cal. Ct. App. 1967) ("A dominant parental right to custody of the child pervades our law.").

The fact that a proxy decision-maker may have conflicts of interest that sometimes cause them to take decisions that are not in their charge's best interests justifies the state's supervision of their choices, also under the best interests standard. *Guardianship of Brown*, 546 P.2d 298, 305 (1976). This check is especially important in circumstances where "the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing." *Parham*, 442 U.S. at 602. Our statutory scheme reflects precisely this vigilance. *See* Cal. Prob. Code § 2356 (West 1981) (enumerating specific limitations to a conservator's health care decision-making powers). Ultimately, however,

> [t]hat some parents "may at times be acting against the interests of their children" ... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Id. at 602–603 (citations omitted).

B

If we have learned anything from our long and unfortunate history with forced sterilizations, it is that our state, through its officials, failed time and time again carefully to consider the rights and interests of the vulnerable persons who were subject to its extraordinary power. Most fundamentally, it failed to see them as fellow human beings deserving of equal protection in the exercise of their individual liberties. In the process, it allowed the politically motivated characterization of entire groups of people as unfit and unworthy based largely on prejudice and on an extraordinary measure of intellectual hubris. The effect was to permit official decision-makers to blur exactly the details that should have mattered to the just resolution of their individual cases.

The Carrie Buck we encounter in Oliver Wendell Holmes' *Buck v. Bell* is an uncomplicated caricature of the type of woman the eugenicists intended to preclude from procreating: herself "feeble minded ... the daughter of a feeble minded mother ... and the mother of an illegitimate feeble minded child." 274 U.S. 200, 205–207 (1927) (this characterization allowing Holmes to proclaim the Court's support for forced sterilization on the infamous grounds that "[t]hree generations of imbeciles are enough"). This caricature is nothing like the real person who was Carrie Buck. The real Carrie was neither feeble-minded nor otherwise in any way incapable or undeserving of having children or being a mother if this was what she wished to do and be. To the contrary, "[t]hroughout Carrie's adult life she regularly displayed intelligence and kindness that belied the 'feeblemindedness' and 'immorality' that were used as an excuse to sterilize her." *See generally* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. Rev. 30, 61 (1985).

I fear that in their drive to signal both their categorical rejection of this history and their embrace of reproductive freedom for the disabled, my colleagues are guilty of a different but also politically and intellectually driven myopia: Where previously the disabled, incompetent, and otherwise vulnerable were treated as an indistinguishable group of individuals, uniformly undeserving of the rights to bear children and to exercise autonomy in matters of reproduction, today these particular liberties are privileged for them, even if they are actually among the least precious, the least relevant, for the individuals themselves. Justice Holmes saw the Carrie he wanted to see as he built his case for eugenic sterilizations, and my colleagues see the Valerie they want to see as they build their case for procreative liberty and reproductive autonomy for the disabled.

Deciding that our statutory scheme as applied to Valerie is unconstitutional because it deprives her of the right to procreate (as the dissent does) or of the right to make decisions about procreation or reproduction (as the majority does) is not to see Valerie herself. It is to lump her together with the broader group of disabled and incompetent citizens without regard to the details of her disability and her own hierarchy of liberties. From what we know from the record to date, for Valerie, preservation of her rights to procreate and to make decisions about reproduction over time is likely as important as the preservation of her right to learn to read the Bible in German. For her parents as conservators, it must seem as though we have gone mad.

Valerie's particular disability is intellectual, and it is most severe. It renders her at best childlike in her abilities to communicate, to understand and act on social boundaries, and otherwise to take care of her personal needs. At the same time, she is not childlike in her size, her capacity for movement, or her sexual maturity. This particular combination of traits is complicated for her conservators, of course, but it is also separately complicated for Valerie herself. It means that she instinctively seeks social relations and intimacy; but also that she is especially vulnerable if she manages to achieve them. Indeed, from the record we know that although Valerie is sexually "aggressive" toward men and boys, she "won't cooperate" with medical examinations and would experience "psychiatric harm" were she to become pregnant.

Pregnancy as a medical condition is not inherently harmful, of course. Whether it is or not depends on the individual and their physical and mental health. We have recently recognized that pregnancy can be harmful for adolescent girls, even when they are not intellectually disabled and even when the pregnancy results from sexual relations they may initiate and enjoy. *Michael M. v. Superior Ct. of Sonoma Cnty.*, 601 P.2d 572, 575 (1979), *aff'd*, 450 U.S. 464 (1981) (noting that unplanned pregnancy in adolescence can result in physical, emotional, and psychological harm that boys do not suffer). This is instructive.

The record reflects that Valerie has an IQ of 30, which means that her mental age is and will forever remain far below that of the adolescent girls who were our focus in *Michael M*. It makes sense in these circumstances that those who know Valerie's condition best would conclude that pregnancy would cause her psychiatric harm and that they would seek medical options consistent with her mental and physical health care needs. There is nothing in the record that would suggest that Valerie's mother is not acting in her best interests. To the contrary, her concern that IUDs are not "medically safe" – whether scientifically sound or not – suggests that "the natural bonds of affection" between the two remain strong.

That someone like Valerie would be harmed by pregnancy but still enjoy and be permitted to enjoy sexual intimacies also makes sense. Again, the facts matter. The genetic condition that caused her cognitive impairment did not affect her development into a sexual being and it does not affect her endocrine profile. She is functional in some ways and dysfunctional in others. Treating her as though she were dysfunctional across the board would be, again, not to see her for who she is. If disability rights are to be meaningful, including for women and girls, they need to be attentive to the capacities and incapacities that matter for the person herself. Of course, Valerie will never be capable of giving legally effective consent to sexual relations. But in this way, she is quite like younger adolescent girls who are also legal incompetents: So long as she at least assents and there is no reason to believe she is being taken advantage of by her partner, if she is also safe, the state has reached the boundaries of its authority to intrude on her privacy. *Cf. Carey*, 431 U.S. 678 (holding that state statute criminalizing sale of over-the-counter contraceptives to children under sixteen violates First and Fourteenth Amendments).

The liberties we know matter to Valerie herself and to her parents as conservators acting on her behalf should be the bases for our decision. From the record, we know that these include the liberty to make medical decisions based on her mental and physical health care needs, and on her expressed preferences for uncomplicated treatment. They also include the liberty to move about freely and to enjoy some measure of society and sexual intimacy. If sterilization should be on the table as one of the medical options toward these combined ends, precluding this possibility is an unconstitutional deprivation of her liberty interests. Because the procedure is not prohibited for competent women with the same basic medical needs and personal preferences, it is also an unconstitutional deprivation of her right to the equal protection of the laws. Albeit severely disabled, Valerie is a woman who with support may be able to enjoy a few of "the privileges . . . essential to the . . . pursuit of happiness." *Meyer*, 262 U.S. at 399. Our law should not prevent her proxies from making the health care decisions that are necessary to those ends.

I conclude where I began, with the admonition that because we are dealing with a person who is thrice vulnerable by account of her sex, her disability, and the conflicts of interest inherent in conservancy, and that we have managed to get these matters so wrong for important periods of our history, we must take special care to get it right now, at least as right as we can. What this means is that before we authorize Valerie's conservators to consent to sterilization on her behalf, we must ensure that the record is fully developed on the facts that ought to be dispositive in this case. Thus, I would remand to ensure that (1) the assessment of her IQ and its immutability are correct so that it makes sense to continue to presume that she does not and will never understand or be interested in procreation; (2) there is no other evidence suggesting that she would want to bear children; (3) she is in fact fertile so that it makes sense to consider subjecting her to any intrusive contraceptive procedure; and (4) there are no equally safe and effective means of protecting her from an eventual pregnancy so that this most intrusive approach is appropriate. This meticulous review is necessary both to ensure that the procedure is actually in Valerie's best interests, unclouded by any understandable but inappropriate consideration for her conservators, and so that the state itself is not complicit in the authorization of unwarranted medical procedures of any kind. This is and should be the extent of its compelling interest in Valerie's health and welfare.