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Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities

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ESSAY

Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities

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I. INTRODUCTION

People with disabilities have long harbored a silent dream of equality, which has recently erupted into a demand for equal citizenship. Its realization has been frustrated by perceptions of difference—both real and imagined—as well as by formalistic rules that reaffirm the distinctions between those with disabilities and those temporarily without such attributes. Its achievement presumes a deconstruction of that difference, through an adjusted awareness of our fragility and the reform of those legal rules that perpetuate distinctions, including doctrines designed to protect people from the disadvantaging consequences of disability.[1]

Although the guarantee of equal protection of the laws is firmly rooted in our legal tradition, its application to persons with disabili-

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1. While this Article will refer to all persons with disabilities, the primary victims of these disadvantages and the subjects of incompetency determinations are individuals with mental disabilities. These disabilities are usually serious or complicated impairments, although they may be temporary, such as the case of an individual experiencing an acute and disorienting phase of an emotional illness, or they may be permanent, such as the situation with individuals with profound retardation or traumatic head injuries. While the duration of the disability is at least theoretically irrelevant to the assessment of competency, the severity of the disability clearly is not.

ties has generated considerable debate and unresolved confusion. The Supreme Court has assumed that such equality is both elusive and unattainable, given the inherent differences between those with disabilities and those without.[2] The Congress has recently adopted the opposite assumption, although not without some qualifications and concessions.[3] The common law has clearly tilted towards recognizing and even constructing inequality for persons with mental disabilities, through rules that allow marriages to be voided, families to be broken, contractual obligations to be excused, wills to be negated, and decisionmaking authority over fundamental liberty and property interests to be transferred to third persons. Similarly, the criminal law assumes that it is a conceptual imperative to stay its process and excuse its verdict, where a defendant's disability is deemed severe.

Whatever the perspective or vision, the undeniable reality is that, in at least critical respects, persons with disabilities are neither exactly the same as, nor fully equal to, those who, at the present time, lack such disabilities. Yet this reality co-exists with the fundamental promise of equal citizenship under the law. The relevant inquiry thus becomes whether, or more properly to what extent, legal constructions may properly reinforce these differences, even for benevolent purposes.

The doctrine of legal competency is perhaps the most pervasive and invasive distinction between persons with disabilities and those who temporarily lack such conditions.[4] It classifies all citizens into two distinctly separate and differently entitled groups: those who are deemed capable of acting knowingly, and those who are deemed unable to do so. The doctrine establishes a hierarchy of personhood, with the attributes of full citizenship vested only in those who satisfy a

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2. Justice White, speaking for the majority in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985), described persons with mental retardation in somewhat pejorative terms: "They are thus different, immutably so, in relevant respects . . . ."

3. In enacting the recent Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (1991), the Congress identified equality as one of the primary purposes of the statute, but then recognized that special assistance, reasonable accommodations, and program modifications might be needed to ensure equal opportunity and access to persons with disabilities.

4. The concept of competency is not limited to persons with disabilities. It is a doctrine rooted in the common law, originating from a benevolent but paternalistic determination of the English Crown to protect all subjects not capable of ensuring their own welfare nor asserting their own interests. *See* SAMUEL BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 435-36 (3d ed. 1985). Historically, such status-related distinctions were found to inhere in race, gender, and lineage. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990). Even today, society accepts these distinctions as appropriate for age, both inherently for minors and eventually for seniors. While the concerns expressed and the reforms proposed herein could apply with similar force to other classes, the implications for persons other than those with disabilities are beyond the scope of this Article.

standard of mental fitness. For those declared less capable, elementary choices concerning liberty, property, and bodily privacy can be, and frequently are, wholly restricted. Political rights and civic responsibilities can be effectively nullified. In the guise of benevolent protectionism, people with disabilities may be rendered nonpersons and relegated to a status of dependency, with full assurance that their views and actions will not implicate them in difficulty nor subject them to any consequences—even those which they reasonably seek and understandably prefer.

It is worth asking, *from the perspective of those with disabilities*,[5] what would be the effect of pursuing a vision of full equality, with the necessary consequence that certain legal protections, limitations, and preferences would have to fall. One possible ramification of such a strategy would be the abolition or drastic curtailment of certain jurisprudential concepts such as the doctrine of competency.

While competency is allegedly a neutral construct, designed to classify citizens according to some cognitive and intellectual standard, incompetency is virtually synonymous with mental disability. Thus, although not all persons with disabilities are incompetent, no one can be declared to lack the ability to make decisions without simultaneously qualifying as a "individual with a disability" under federal law. It is similarly significant that the competency standard which separates and distinguishes people is vague, subjective, and difficult to apply, thereby providing little comfort that the classification system is either accurate or consistent. As such, competency has become the most pervasive legal concept for differentiating persons with mental disabilities from those not so labeled.

Abolishing this doctrine is a radical approach for deconstructing this difference. Abolition is grounded in a view that legal principles which establish or reinforce difference should be examined in relationship to those traditional values and common practices which affect all citizens, rather than through a narrow lens that focuses only on disability. When applied to a wide range of substantive rights and relationships, the implications are impressive, intriguing, and perhaps alarming. A rule of law lacking a concept of competency would have no doctrinal foundation for protecting or differentiating persons with mental disabilities.

5. That perspective is not articulated by any one spokesperson nor elucidated in a formal position statement of any one organization; rather it is inferred from the thousands of inmates, consumers, and friends with disabilities with whom I have come in contact over the past two decades. This perspective is both a consensus of my clients and the passionately presented viewpoint of associations created and controlled by persons with disabilities.

This Article explores the question of whether, to what extent, and at what cost such a reform should be pursued. It argues that, with respect to the assertion or affirmative exercise of fundamental rights *through actions initiated by a person with a disability,* the doctrine of competency results in unnecessary restrictions, has deleterious societal as well as individual consequences which outweigh any paternalistic benefits, and therefore should be abolished. On the other hand, *where a third party or the state initiates actions against a person with a disability* that would restrict or invade individual rights, a narrowly circumscribed application of a competency rule should be retained.[6] Finally, the protective justifications for the competency doctrine may retain some vitality where a person with a disability who neither affirmatively acts nor is acted upon is at imminent risk of physical harm as a direct result of her inaction related to a cognitive impairment. The Article analyzes the impact of these reformist rules in the following five substantive areas: (1) political rights: voting; (2) civil rights: marriage; (3) personal rights: bearing and raising children; (4) criminal process: competency to stand trial, criminal responsibility, plea bargaining, and sentencing; and (5) privacy rights: bodily integrity and medical treatment. Finally, it attempts to analyze the implications of this revisionist proposal for the general law of guardianship.

II. THE APPLICATION OF THE REFORMIST RULE

A. *Political Rights: Voting*

After almost two centuries of denying persons with disabilities all access to the electoral process, many states now permit some citizens with disabilities to vote under some circumstances.[7] However, most states still preclude persons under any form of guardianship or those who are otherwise considered incapable of informed choice, by virtue

6. The possibility, of course, exists for addressing the negative consequences of the doctrine through a variety of less drastic alternatives, such as heightening the substantive standards for incompetency, enhancing the procedural protections in competency determinations, creating degrees of restrictions associated with different levels of cognitive impairments or the varying importance of the interests involved, or even experimenting with more respectful guidelines to be applied by alternative decisionmakers. A detailed analysis of these alternatives has been explored by several commentators. *See, e.g.*, Lori A. Steigel et al., *Durable Powers of Attorney: An Analysis of State Statutes*, 25 CLEARINGHOUSE REV. 690 (1991); Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 ISSUES L. & MED. 131 (1985). A similar analysis is beyond the scope of this Article. None of these options, however, address the basic assumption underlying the competency doctrine: that limitations in cognitive capacity can and should deny a person with a disability decisionmaking autonomy and the opportunity to enjoy one's choices.

7. BRAKEL ET AL., *supra* note 4, at 445-46.

of their mental condition, from exercising the franchise.[8] The rationale for this exclusion is often confused and always difficult to sustain. Presumably, the prohibition is intended to prevent those deemed to be without sufficient capacity to properly determine their own interests and to affect the interests of others.

Arguably, in promoting a regime of equality under the law, no compelling state interest exists in denying the vote to persons with disabilities who are possibly or even clearly incapable of comprehending all aspects of the electoral process. Using a standard of the average voter as the reference for assessing the acceptability of an exclusionary rule, one would have to determine what level of information and understanding is the bare minimum to qualify for becoming a qualified voter.[9]

There is, of course, an important value in safeguarding the democratic process against corruption or undue influence. But the means selected for achieving this legitimate goal should be equally applicable to all citizens and not have a discriminatory impact on a selected subgroup. This concern, even if specially relevant to persons with mental disabilities, can be addressed through less restrictive means which do not wholly preclude persons with more severe impairments from all participation in the political process.

The high value traditionally placed on civic responsibility and membership in the body politic is directly undermined by denying any class of citizens the franchise. The minimal cost to the democratic process of an occasional uninformed or even unintelligible vote by a person with a serious mental disability is outweighed by the stated societal interest in including *all* persons with disabilities in the political process. Thus, abolishing the doctrine of competency as a standard for restricting the affirmative exercise of the fundamental right

8. *Id.* at 445. In a seminal case, the Massachusetts Supreme Judicial Court rejected the claim of a local registrar that all residents of a state school for persons with retardation in the town were *de facto* under the guardianship of the institution's superintendent and thus barred from voting. Boyd v. Registrars of Voters, 334 N.E.2d 629 (Mass. 1975). When counsel for the residents suggested at oral argument that the court strike down the state statute which disenfranchised all persons under court appointed guardianship, regardless of their actual ability to participate in the electoral process, members of the Court inquired whether any standard of decisionmaking capacity was permissible. *Id.* at 631-32. Pointing to the voting public's general lack of familiarity with the substantive positions of their preferred candidates, the commonplace practice of voting a straight party ticket, and the notorious Boston tradition of voting early and often for one's favorite politician, counsel responded in the negative. The court nevertheless declined the invitation to declare the statute unconstitutional. *Id.* at 632-33.

9. Clearly, literacy tests or similar assessments of civic knowledge are impermissible. Presumably, questioning by registrars or electoral officials to measure cognitive capacity, intelligence, reasoning ability, or even understanding of the responsibilities of officeholders would be equally suspect.

to vote would result in little burden to the efficient operation of the government and would significantly facilitate the equal citizenship of persons with disabilities.[10] Where an individual can participate in the electoral process by selecting a candidate or position, the issue of competency should be irrelevant to the person's right to vote.

B. *Civil Rights: Marriage*

Marriage is perhaps the most intimate and socially valued relationship which is subject to legal regulation. Majoritarian values of family and property have commonly dictated the parameters of the law of marriage, at certain times even barring devalued classes from entering officially sanctioned relationships.[11] Despite the general civil right to marry, established limitations still exist in most states[12] which preclude disabled individuals with limited mental capacity from marrying, or at least that create grounds for voiding a marriage, because of their inability to fully comprehend the consequences of their commitment. Such restrictions presumably serve to safeguard property interests of the partners with disabilities, although the non-disabled spouse often invokes allegations of incompetency to avoid the legal, economic, and spiritual burden of divorce.

Assessing competency to marry is a precarious business. Avoiding discriminatory impact is even more delicate. Using as a reference the average husband or wife's understanding of the consequences of the marriage contract,[13] it is difficult, if not impossible, to identify the minimum level of information and understanding that is necessary to qualify for loving and living with another in a relationship sanctified by the state. Thus, excluding only persons with mental disabilities from the challenges and rewards of officially endorsed, intimate relationships requires a distinction that is problematic to apply and even harder to justify.

It is also difficult to discern any compelling state interest in denying certain persons with severe disabilities the right to have personal, legally recognized relationships. A legitimate societal interest exists

10. A parallel claim could be advanced for other disenfranchised groups, such as minors and aliens. An assessment of the merits of such claim is beyond the scope of this Article.

11. Jim Crow laws prohibited interracial marriages in most states for over a century, until finally invalidated not long ago. *See* Loving v. Virginia, 388 U.S. 1 (1967). Similar restrictions applied to persons with disabilities. *See* BRAKEL ET AL., *supra* note 4, at 507-09.

12. BRAKEL ET AL., *supra* note 4, at 507-09. For a list of each state's provisions on marriage, see *id.* at 532-38 (Table 9.1).

13. Marriage vows involve a permanent, life-long commitment to care for and tend to one's partner, through various conditions and without limitation. Many people now commonly accept that almost half of all marriages formally disavow such a commitment.

in protecting against suggestibility and undue influence, although these concerns primarily affect the property rights, rather than the family and emotional interests involved in marriage. Other less restrictive and equally protective options are available to avoid depleting assets of spouses with disabilities, such as pre-nuptial agreements, separate ownership of property, marital trusts, and limitations on spousal liability. Moreover, these same risks inhere in a wide variety of personal, economic, political, and legal relationships characterized by unequal bargaining power, desperation, differential expectations, and conflicting cultural traditions such as arranged marriages in western society. It is highly questionable whether these factors have any unique application to persons with disabilities or even to persons deemed incapacitated by virtue of their disability.

The value traditionally placed on family and personal relationships outweighs the cost *to the other partner* of an occasional uninformed living arrangement by a person with a mental disability.[14] Relieving an entire class of persons from all personal and legal responsibility for their social relationships, by reason of disability, also entails a significant collective cost. Competency is a weak justification for assessing an individual's readiness for formal emotional commitments or permanent familial bonds. Abolishing it as a standard for entering or voiding a marriage would impair few valid interests and enhance numerous others. Thus, persons with disabilities should not be restricted from affirmatively exercising the civil right to marry, solely as a result of the nature of their handicap or even its effect on their supposed understanding of the meaning of marriage.

C. *Fundamental Personal Rights: Procreating and Parenting*

A long and shameful legal history has developed of precluding persons with mental disabilities, even those who are not cognitively impaired, from exercising their rights to procreate.[15] Compulsory sterilization laws enacted in most states during the early part of this century in response to eugenic theories of retardation equated mental disability with incompetency.[16] In the name of ensuring the purity of the race, they mandated that women with disabilities, and particularly those living in public institutions or otherwise supported by the public

14. Divorce is the obvious, acceptable alternative to such an arrangement. Even here, special rules may apply where one partner has or had a mental disability. *See* BRAKEL ET AL., *supra* note 4, at 510-12.

15. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207-08 (1927). For an enlightening exposition of the conspiratorial history which led to this decision, see Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 31 (1985).

16. BRAKEL ET AL., *supra* note 4, at 521-24.

fisc, surrender their procreative capabilities. In an effort to correct this history of discrimination and abuse, a few states enacted new laws that totally banned the sterilization of persons with retardation, thereby denying them both the choice of whether or not to procreate, as well as the same consent options and mechanisms as are afforded to temporarily able-bodied women.[17] Other jurisdictions endorsed new statutory schemes that permit the sterilization of disabled women, but establish classifications and different procedural protections for those lacking the ability to understand the implications of sterilization.[18]

An uncodified tradition of denying all persons with mental disabilities, other than those with minor impairments, the right to raise their own children has also developed.[19] Through child protection laws that authorize state officials to remove children from their parents and to terminate parental rights when the best interests of the child allegedly require, persons with mental disabilities—particularly those who lack a sophisticated understanding of child rearing responsibilities—regularly are forced to surrender their children to foster placements or adoption agencies.[20]

Given the fundamental rights of procreation and parenting, only a colorable state interest exists in denying persons with disabilities, including those with limited decisionmaking capacity, the right to have personal, intimate, and legally recognized familial relationships. No compelling interest exists for forcibly foreclosing procreation opportunities, based solely on a finding of disability or limited mental capacity.[21] There is a legitimate concern for protecting children from parental abuse and neglect. But this concern extends to all citizens, without regard to the parent's (or child's) label of disability or incapacity. In fact, it may be statistically more relevant in families of poverty, parents who themselves suffered abuse or neglect, or parents with a history of substance abuse. Yet none of these relevant predicates, in and of themselves, could justify a sterilization or parental termination decision by the state. Rather, verifiable factual information of specific abusive or neglectful actions must be proven by clear and convincing evidence before the fundamental right to rear one's

17. *See, e.g., Conservatorship of* Valerie N., 707 P.2d 760, 762 (Cal. 1985).

18. *See, e.g., In re* Mary Moe, 432 N.E.2d 712, 724 (Mass. 1982). For a list of each state's provisions on sterilization, see BRAKEL ET AL., *supra* note 4, at 552-58 (Tables 9.5, 9.6).

19. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1249-50 (1990).

20. BRAKEL ET AL., *supra* note 4, at 516-18.

21. *See* Helvey v. Rendour, 407 N.E.2d 17 (Ill. Ct. App. 1980); State *ex rel.* E. & B. v. J.T., 578 P.2d 831 (Utah 1978).

children can be curtailed.[22] The existence of a disability or limitations in decisionmaking capacity simply cannot be equated with abuse or neglect.[23]

Predicting who will not be a responsible parent is a troubling inquiry. Relying on the label of disability or incapacity aggravates the probability of error. And acting on such speculations to wholly preclude procreation is a discredited response grounded on a prejudicial premise. Even assessing what degree of disability or incapacity is likely to result in neglect is elusive, as evidenced by the near random results in parental termination proceedings conducted in various lower state courts.[24] Using as a standard the average parent, it is problematic to determine the precise level of information and understanding that constitutes the minimum abilities necessary to qualify for caring for one's child. Whatever these abilities, they clearly should not be focused on a parent's disability or decisionmaking capacity, but instead on the more profound, personal, and relevant criteria concerning the parent's ability to care, protect, and love her child.

While abolition may not be as convincing here as it is in the areas of political and civil rights, a competency test has limited utility and substantial costs in the affirmative exercise of fundamental personal rights. The substantial value traditionally placed on the rights of procreation and family integrity probably outweighs the cost *to others* of an occasional problematic living arrangement involving a parent with a mental disability. Where such parent engages in actual abuse or neglect of the child's basic needs, then these facts—and not her disability or cognitive developmental level—should determine whether parental rights are terminated.

D. *The Criminal Process: Competency, Responsibility, and Sentencing*

The criminal process has been especially solicitous to and stigmatizing of persons with disabilities. It has devised numerous doctrines to preserve the conceptual integrity of the criminal law and to avoid trying or incarcerating persons with cognitive impairments. In

22. Santosky v. Kramer, 455 U.S. 745 (1982) (clear and convincing evidence is needed to terminate parental rights).

23. No empirical evidence exists that parental neglect is related in any demonstrable way to either disability or cognitive incapacities. On the contrary, much evidence exists that even persons with severe mental retardation make good parents. Hayman, *supra* note 19, at 1219-22. There is also a significant cost to relieving a class of persons from all responsibility for their children, solely by reason of disability.

24. *Id.* at 1234-41.

order to ensure that defendants can participate in the process for assessing guilt and exacting retribution, it has constructed the concept of competency to stand trial. To promote the purposes of punishment, it has precluded a finding of criminal responsibility for defendants not capable of appreciating the wrongfulness of their actions.

Courts have struggled to adopt the moral principles of intent, capacity, and responsibility to the pleading, sentencing, and incarceration phases of the criminal process. Some have denied individuals with severe impairments the freedom to plead guilty, even when doing so reflects an honest confession of responsibility or a practical assessment of the risks of conviction.[25] Others have attempted to articulate principles of decency that would only preclude defendants with certain severe disabilities from being subjected to particularly offensive punishments, such as the death penalty.[26] Finally, courts have frequently taken solace in the notion of treatment to legitimate indefinite institutionalization in a rehabilitation facility, in lieu of term-limited incarceration in a correctional setting.[27] But in each phase of the criminal process, disabled defendants remain segregated by a criterion of competency as the justification for more lenient though potentially more harmful dispositions. While the ostensible purpose of these exceptions is to accommodate certain disabling conditions, the principles actually reflect a preoccupation with the doctrinal purity of the process. And the practical consequences of lengthy confinement in forensic institutions often overshadow the benign motive of protecting individuals with serious disabilities from penal incarceration.

Much has been written concerning the relevance and utility of these exceptions, with a few commentators suggesting their abolition, but most others heralding their importance.[28] Without revisiting the complexity of these arguments, it is worth asking a wholly different question than that which has thus far shaped the debate: what is the consequence *to persons with serious disabilities* of treatment different than that of all other defendants and of exemption—in principle though not necessarily in practice—from the responsibility for their actions?

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25. *E.g.*, Commonwealth v. Delverde, 496 N.E.2d 1357, 1362 (Mass. 1986).

26. *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 315 (1990).

27. BRAKEL ET AL., *supra* note 4, at 725.

28. *See* Norval Morris, *Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477 (1982); Stephen J. Morse, *Treating Crazy People Less Specially*, 90 W. VA. L. REV. 353 (1988); Symposium, *Current Issues in Mental Disability Law*, 39 RUTGERS L. REV. (1987); Symposium, *The Mentally Retarded in the Criminal Justice System*, 41 ARK. L. REV. 723 (1988); Symposium, *Perspectives on Mental Illness and Mental Handicaps*, 14 RUTGERS L.J. 233 (1983); Samuel Silverman, Note, *Mental Aberration and Postconviction Sanctions*, 15 SUFFOLK U. L. REV. 1219 (1981).

Surely, persons with disabilities have an interest in avoiding criminal trials, adjudications of guilt, incarceration, and particularly death sentences. But that interest is not related primarily to, nor is it justified by, any limitation in intellectual understanding. Instead, it is an interest in physical liberty that all defendants share. Abolition of the concepts of competency in the criminal process undoubtedly would limit the strategic options available to attorneys for disabled defendants, but no more so than those that currently exist for all other defendants and with no *greater* cost to the actual functioning of the process.[29] Individuals with disabilities also have an interest in being, and being perceived as being, responsible citizens who are capable of honoring a social compact to respect the rights and privileges of all other citizens, or to bear the consequences for failing to do. Exceptions to social norms crafted to reflect their inability to respect those common rights or to be held accountable for their actions severely undermines that perception of responsibility. If given a choice to devise law or policy, the community of persons with disabilities would not likely exchange freedom from punishment for a selected few, for the opprobrium and stigma that has attended the legal conclusion that disability is properly an excuse from responsibility.[30] Not surprisingly, that conclusion fuels a public concern that persons with disabilities are fundamentally different, incapable of being trusted neighbors, and unworthy of the attributes of equal citizenship. One might even question whether a particular individual with a severe disability would necessarily exchange the strict protections of the criminal process for the paternalistic informality of the mental health system and the indefinite deprivation of freedom in a mental institution.

E. *Privacy Rights: Bodily Integrity*

Historically, persons with mental disabilities either were considered not to possess privacy interests in bodily integrity or were deemed to have waived such interests in exchange for the state's beneficence in protecting their welfare. Thus, governmental authorities traditionally would determine whether and where medical care, mental health treatment, or habilitation services were required, without regard to the individual's authorization, preferences, or even

29. Several jurisdictions currently permit defendants who have been found incompetent to stand trial to submit evidence to prove their innocence, and if acquitted at a mini-trial, to have all criminal charges dismissed. *E.g.*, MASS. GEN. L., ch. 123, § 17 (1986).

30. *See supra* note 5 and accompanying text.

physical compliance.[31] Not surprising, public institutions and their employees customarily approved the administration of most interventions deemed necessary, beneficial, or possibly useful.[32] Private hospitals and community clinicians were less likely to conduct the same inquiry for persons with disabilities that they commonly afforded to all other citizens under the law, in order to obtain informed consent before engaging in a procedure that otherwise constituted an invasion of the individual's privacy.

The controversial nature and disturbing effects of certain psychiatric treatments prompted a concerned public to legislate limited exceptions to this broad scale practice of ignoring—and, in fact, never even soliciting—the views of persons with disabilities. Review procedures in lieu of the traditional consent process were enacted for electro-convulsive treatment (electroshock) and cranial lobotomies.[33] While the alternative procedures rarely mandated an inquiry into the individual's preferences, they occasionally required a preliminary assessment of the person's decisionmaking capacity and usually required authorization from a substituted decisionmaker, even if the standard for granting authorization was the person's perceived "need" for these intrusive interventions.[34]

The judiciary soon reflected this concern in a series of mostly state court decisions applying a similar rationale to anti-psychotic medication.[35] While many of these cases spoke only of a right to

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31. This history, and the *parens patriae* rationale allegedly supporting this dispensation with individual consent, is thoughtfully catalogued by Professor Bruce Winnick in his analysis of the role of competency in psychiatric medication decisions. Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15 (1991). He explores the competing values of individual autonomy, as reflected in the law of battery and consent, and the state's responsibility to protect its incompetent citizens. He suggests that this tension is best reconciled by respecting an individual's choice to accept treatment, through the application of a lowered standard of competency than customarily applied through the doctrine of informed consent. It is difficult to understand why the fundamental principle of autonomy should not compel the same conclusion with respect to a treatment refusal as it does for treatment acceptance.

32. *See* Buck v. Bell, 274 U.S. 200 (1972) (upholding constitutionality of state statute allowing superintendent of state facility to decide whether sterilization is in resident's best interest).

33. BRAKEL ET AL., *supra* note 4, at 456-58.

34. *Id.* at 330-31.

35. *See, e.g.*, Bea v. Greaves, 744 F.2d 1387 (10th Cir. 1984); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980); Stensvad v. Reivitz, 601 F. Supp. 128 (W.D. Wis. 1983); Anderson v. State, 663 P.2d 570 (Ariz. Ct. App. 1982); Reise v. St. Mary's Hosp. & Med. Ctr., 243 Cal. Rptr. 241 (Cal. Ct. App. 1987); People v. Medina, 705 P.2d 961 (Colo. 1985); *In re* Orr, 531 N.E.2d 64 (Ill. 1988); Rogers v. Commissioner of Department of Mental Health, 458 N.E.2d 308 (Mass. 1983); Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988); Opinion of the Justices, 465 A.2d 484 (N.H. 1983); Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986); *In re*

refuse certain psychotropic medications,[36] the leading decisions recognized the perversion of history and reinstated the traditional doctrine of consent for persons with mental disabilities whose physicians sought to administer psychiatric treatment.[37] The Massachusetts Supreme Judicial Court explicitly recognized the inherent right of all citizens, whether or not competent, to approve any invasion of their bodily integrity.[38] Other courts that adopted this approach provided the doctrinal foundation for reconstructing the principle of equality in the provision of medical care. But they simultaneously resurrected the dilemma of difference inherent in the concept of competency, by requiring a finding of capacity to make treatment decisions and by prohibiting individuals with serious mental disabilities and cognitive impairments from rendering those decisions themselves.

Privacy rights differ in a significant and relevant respect from the other vestiges of citizenship already discussed. Unlike most political, civil, family, and criminal rights, which are affirmatively exercised through actions initiated by the individual, privacy rights seek to protect citizens from actions brought by the government or other third parties that are imposed upon the person. More precisely, the competency question relevant to the exercise of most political, civil, family, and criminal rights involves whether *a proposed action by the individual*—such as the exercise of the franchise, the solemnization of a marriage, the bearing and rearing of children, and participation in the criminal justice process—should be legally honored. A declaration of incompetency in these areas results in a prohibition on such action and a restriction on the exercise of these rights. The competency doctrine tilts just the other way with respect to fundamental privacy interests. Disability is not the measure used to restrict the exercise of a constitutional right or other civil privilege, but rather the element that is relied upon to prove a waiver of a fundamental right. It determines whether *a proposed action of a third party* should proceed against the protected interests of the individual. A finding of incompetency often results in a justification for such action and a concomitant invasion of such rights.[39]

K.K.B., 609 P.2d 747 (Okla. 1980); State *ex rel.* Jones v. Gerhardstein, 416 N.W.2d 883 (Wis. 1987).

36. *See, e.g.*, Reise v. St. Mary's Hosp. & Med. Ctr., 243 Cal. Rptr. 241 (Cal. Ct. App. 1987).

37. *See, e.g.*, Rogers v. Commissioner of Dep't Mental Health, 458 N.E.2d 308 (Mass. 1983).

38. *Id.* at 317-19.

39. In this respect, it closely parallels basic constitutional protections in the criminal justice system, such as searches, confessions, and self-incrimination. A similar analysis is

Privacy matters that involve treatment issues implicate the most fundamental concerns of bodily integrity and subject the individual to potentially intrusive, permanent, and painful violations. The abolition of the competency doctrine with respect to medical care would have particularly harsh and untoward consequences. If applied without qualification to treatment decisions, it would allow all persons, including those clearly incapable of authorizing invasions of their bodily integrity, to be treated whenever their caretakers or professionals deemed it appropriate and the person with a disability apparently concurred or at least did not actively object. The implication of that reform would be to merely reinstate the regime of inequality and *parens patriae* authority that existed for most of the last millennium and that only recently was deconstructed through doctrines that sought to honor the inherent worth and rights of all persons with disabilities.

In order to ensure respect for the values underlying fundamental privacy rights, a narrowing rather than an abolition of the competency doctrine is more appropriate. Some meaningful threshold of understanding should exist before an individual's right to bodily integrity can be wholly waived. This caveat, when applied to treatment decisions, would require a preliminary inquiry into whether the person understands the most basic elements of the treatment decision. If so, the person's decision—whether to accept or reject the proposed intervention—would be respected. Competency would be retained as a minimalist inquiry that, if affirmed, would preclude treatment without the individual's assent, but if found lacking, would prevent intrusive interventions absent appropriate approval from a substituted decisionmaker.

III. THE IMPLICATIONS OF THE REFORMIST RULES FOR THE LAW OF GUARDIANSHIP

The law of guardianship provides the traditional response to allegations of impaired judgment. With its somewhat ambiguous standards and formalistic procedures, this legal response frequently has been challenged as arbitrary, unduly restrictive, and unnecessarily protective.[40] Although national models exist, state guardianship

appropriate, although perhaps less compelling and in any event more complicated by competing interests, with respect to the waiver of these fundamental rights.

40. *See* Sally B. Hurme, *Steps to Enhance Guardianship Monitoring*, REPORT OF THE ABA COMMISSION ON THE MENTALLY DISABLED AND COMMISSION ON THE LEGAL PROBLEMS OF THE ELDERLY (1991); Annina M. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 CLEARINGHOUSE REV. 451 (1978); Roger B. Sherman, *Guardianship: Time for Reassessment*, 49 FORDHAM L. REV. 350 (1980).

schemes vary widely in scope, process, and effect.[41] Reforms have been proposed that narrow the inquiry and individualize the outcome, but these proposals assume the legitimacy of the construct and endorse the acceptability of the classifications.[42]

The reform of the doctrine of competency described above would significantly modify current guardianship law. In many respects, guardianship would no longer retain its basic purpose, function, or effect. Legal relationships would not be neatly ordered between those deemed able and those declared unable to consent. The affirmative exercise of most political, civil, family, and criminal procedural rights would not depend on intellectual capacity or simplistic standards of rationality. In many of these areas, the law of guardianship would be obsolete.

But in other arenas, such as the protection of privacy interests, the provision of medical care, and perhaps the preservation of certain property rights, guardianship models would be retained, albeit in a narrower and more respectful form. Where third parties' actions threaten persons with disabilities with invasions of their fundamental interests or where inaction threatens the individual's physical safety or property, protective mechanisms such as guardianship and conservatorship have continued utility.

Clear standards of capacity would need to be devised, but they should not insist on an unduly rigorous demonstration of cognitive ability. In those instances where some decision has to be made on behalf of the person with a mental disability, alternative methods, such as substitute decisionmaking, would be required. To be sure, difficult questions of alternative decisionmaking must be addressed, with all the complexities of discerning the individual's preferences, rendering a meaningful judgment, and appointing a qualified surrogate. Special protections would be legitimate only when directly related to the ability to actually exercise a right.

IV. CONCLUSION

In order to formulate a truly egalitarian model of legal rights and a vision of people with disabilities as full citizens, it is worth asking whether rights analysis can be reconstructed from the perspective of individuals with disabilities. Specifically, should our legal system abandon its preoccupation with the rational person as the sole model of legal decisionmaking and substitute instead a more flexible appreci-

41. For a list of each state's provisions on guardianship, see BRAKEL ET AL., *supra* note 4, at 408-24 (Tables 7.3, 7.4).

42. *Id.* at 386-88.

ation of personhood that accommodates degrees of cognitive impairments and incapacities?

Under this approach, all citizens, regardless of disability or decisionmaking ability, would possess the same rights and would be subject to the same basic responsibilities. Neither limitations on the rights available, nor protections from the responsibilities assumed, would be imposed on individuals with serious disabilities, any more than they are for people of color or other disadvantaged minorities. As long as one can actually exercise a vestige of citizenship, such as voting and family relationships, or is capable of engaging in an activity, such as anti-social or criminal behavior, the same rights, responsibilities, and processes would apply to all persons, regardless of the level and nature of disability. Intellectual capacity would be relevant only where such physical expression of choice or action is not possible *and* where the activity involves an action initiated by a third party against the individual with a disability in a manner which invades or impairs fundamental interests.

Such a reform of the doctrine of competency surely would be radical, perhaps too much so for established social and political institutions and for long venerated legal rules. But the failure to reform the doctrine relegates persons with disabilities to a different class of citizenship and to a lesser sense of personhood. If the consequences of a common law with a drastically revised rule of competency are problematic, then the implications of a world classified by cognitive capacity are even more disturbing. The former may present logistical difficulties and complicate legal relationships, but the latter creates troubling inequities and fundamentally precludes more important relationships.