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Silencing the Different Voice: Competence, Feminist Theory and Law

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Silencing the Different Voice: Competence, Feminist Theory and Law

SUSAN STEFAN*

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I. INTRODUCTION

I read a book a while ago called *I Raise My Eyes to Say Yes*.¹ It is the autobiography of a woman who is quadriplegic because cerebral palsy left her unable to move her hands or legs or to speak. Ruth lived with her family throughout her early childhood. She communicated by smiling, frowning, and making vocalizations and facial expressions that her family recognized from early on. As her parents aged and the strain of caring for her grew, her family placed her in a state institution. Ruth wrote that at the institution, despite information from her parents to the contrary:

My intake evaluation labeled me an imbecile, and thus determined how the nurses and attendants were to treat me for the next few years. Since everyone assumed that I couldn't understand what was going on around me, they ignored any and all evidence that I could present to the contrary.²

She tells the story of discovering other residents who were also

* Associate Professor, University of Miami School of Law. I acknowledge with gratitude the invaluable research assistance of Lester Perling, Judy Klein and Carol Grant, and the insights and suggestions of my colleagues Mary Coombs, Martha Mahoney and Wes Daniels. Special thanks to Ira Burnim for encouragement and inspiration. Diane Ashby gave indispensable secretarial support. This is dedicated to my mother, Gabrielle Stefan, who laid the foundation for all that I know and believe about equality and justice (and competence): that none of these are abstract constructs, but arise daily from the way we treat each other. My highest aspiration is that people who know her will recognize me as her daughter.

1. RUTH SIENKIEWICZ-MERCER & STEVEN B. KAPLAN (1989).

2. *Id.* at 39.

assumed to be imbeciles and of laboriously devising languages to communicate with them:

Theresa turned her head and nudged the yellow teddy bear lying beside her pillow. Making quiet, gentle sounds, Theresa repeated this gesture several times until she was certain I understood. By indicating her teddy, the only object of affection around her, she was telling me that she liked me very much. . . . I responded with loving sounds of my own, and raised my eyes in an emphatic "Yes!" to make sure Theresa understood that I felt the same way about her. At that instant Theresa figured out what none of the staff would decipher for years: that I raised my eyes to say yes.³

But the fact that Ruth could communicate with Theresa and other residents did nothing to change her label of "imbecile" or get her out of the institution. Staff members did not notice when patients communicated with each other. In a very real way, these communications between patients did not "count" in staff assessments of Ruth's capacity. Only Ruth's communications with those in power—the staff—counted. Because she had been presented to them as an imbecile, they ignored or misinterpreted her efforts to communicate with them. One day by sheer chance two attendants discovered that Ruth understood the conversation around her.⁴ After this, Ruth received a communication board that enabled her to point to letters and spell out messages. As staff members understood her messages more clearly from the communication board than they did from the limited repertoire of gestures and grimaces available to Ruth, they gave her increasingly sophisticated communication boards and equipment. The more assistance she was given, the better she was able to communicate with staff. The more she communicated, the more her competency was recognized in staff assessments. Today she is married and living in the community; she used her communication board with the assistance of a friend to compose her life story.⁵

3. *Id.* at 64-65.

4. These staff members had been very recently hired, a crucial point in their ability to be open to the possibility that Ruth had been mislabelled. They were telling a joke about a hated supervisor and Ruth laughed.

You should have seen the astonished expressions on their faces! First they looked at each other, then they looked at me, then they asked each other whether I could possibly be laughing at what they had said. This prompted me to gesture excitedly with facial expressions and sounds, to tell them, "Yes indeed, I was laughing at your joke." . . . Once Alice and Wessie discovered I appreciated adult humor, they started to direct comments to me instead of just talking about me More important, these new attitudes altered the very nature of the attention I received.

Id. at 108-109.

5. This effort took months. The story of the collaboration and communication between

Ruth's story is about the meaning and assessment of competence and the consequences of being perceived as incompetent. The question of competence is enormously important. Competence is a prerequisite for participation in our legal and social system. Law makes the power of individual choice legally contingent on competence. The right to make decisions in matters such as marriage, contractual relations, voting, testamentary disposition, and health care depends on being legally competent.

Surprisingly, nothing has been written about competence in feminist legal scholarship. Competence involves issues central to feminist theory: issues about autonomy, power and choice, and questions about the ability to make decisions and effectuate them. The very concept of competence, as well as the standards developed by courts to assess competence, incorporates unquestioningly many of the assumptions that feminist theory has worked hardest to challenge.

For example, the assumptions that incompetence inheres in the individual, that it is identifiable by objective, empirical observations by neutral experts, and that it is not subject to any gender distinctions or differentiations fly in the face of feminist challenges to traditional claims of objectivity, neutrality, and universality.⁶ The idea that any concept as fundamental to law as competence could be untouched by gender issues also runs counter to most feminist theory.⁷ In addition,

Ruth Sienkiewicz-Mercer and Steven Kaplan, the friend who transformed her communication-board fragments into a whole story faithful to the author's meaning, is a moving and thought-provoking account of the nature of communication. It cannot be summarized here with justice. I highly recommend it. See *id.* at vii-xxvi. For a strikingly similar story about an intelligent woman with cerebral palsy who was labelled profoundly mentally retarded and spend over twenty years in an institution, see Meg Laughlin, *Free at Last*, MIAMI HERALD, Feb. 28, 1993, Tropic Magazine, at 10.

6. See Leslie Bender, *Symposium: From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 11 n.24, 17 (1990). Feminists question the possibility of an aperspectival, objective position from which to assess the situation of women. See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 769 (1990). For a particularly comprehensive summary of feminist theory across all disciplines, including law, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 193-224 (1990).

7. A fairly concise and representative example of the feminist critique of law is that "rules formulated in a male-dominated society reflect male needs, male concerns and male experience." Nadine Taub, *Book Review*, 80 COLUM. L. REV. 1686, 1694 (1980) (reviewing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979)); see also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY* 181, 186 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) ("The law sees and treats women the way men see and treat women."); Robin West, *Jurisprudence and Gender*, in *id.* at 201, 228-30 (maintaining that modern jurisprudence is masculine in that the values, dangers, and the fundamental contradiction between autonomy and intimacy that characterizes women's lives are ignored).

there are many competence inquiries that apply solely or chiefly to women—competence to consent to sexual intercourse,⁸ competence testing of women who press rape charges,⁹ competence to make decisions about pregnancy, abortion and sterilization,¹⁰ competence to enter into separation and divorce agreements,¹¹ and competence to give children up for adoption.¹²

In this article I advance three principal arguments regarding gender discrimination and competence.¹³ Part II uses traditional liberal notions of equality to examine the application of concepts of competence to men and women and concludes that women are denied even formal equality in this area.

Part III contends that existing legal definitions of competence and methodologies of assessing competence are falsely based on an assumption that competence is an inherent, objective and measurable attribute of an individual. By contrast, I assert that questions of competence arise only as a function of a relationship between two or more people and that this relationship is necessarily a hierarchical one, characterized by dominance and subordination, by power and powerlessness.

Far from being an internal characteristic of an individual, competence is a value judgment arising from an individual's conversation or communication with individuals in positions of power or authority. Essentially, a judgment of incompetence is a judgment by those in power that the conversation has broken down. This failure of communication may be due entirely to one side—a patient in a vegetative state—or the other—a doctor who concludes that a patient is incompetent simply because she disagrees with his recommendation.¹⁴ More often, the failure of communication is due to the dynamic between the two people.¹⁵ Due to the fact that "[w]hen a system of power is thoroughly in command, it has scarcely need to speak itself

8. See *infra* part IV.A.

9. See Gregory G. Sarno, Annotation, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 A.L.R. 4th 310 (1986).

10. See *infra* part IV.D.

11. See *infra* part IV.B.

12. See *infra* part IV.C.

13. I do not consider assessments of women's competence in the context of criminal proceedings against them.

14. See, e.g., *Lane v. Candura*, 376 N.E.2d 1232, 1235 (Mass. App. Ct. 1978) (noting that psychiatrist's opinion of patient's incompetence was based in part upon his inference from her unwillingness to discuss a proposed operation with him that she was incapable of facing her problems); Nancy K. Rhoden, *The Presumption for Treatment: Has It Been Justified*, 13 LAW, MED. & HEALTH CARE 65 (1985); see also *infra* text accompanying notes 107-10.

15. See *infra* text accompanying notes 85-95.

aloud,"¹⁶ the whole focus of a competence inquiry centers on the alleged incompetent person to the exclusion of the powerful side of the dialogue. Therefore, incompetence is seen as the attribute of the less powerful person and all failures of communication are attributed to her.

Part IV argues that the concept of incompetence constructs and perpetuates a false social and legal vision of competent women and the world that competent women are supposed to live in. The law presumes competence. Competence presumes autonomy and freedom of will and action. Therefore, women's powerlessness must fit into one of two very separate and distinct legal doctrines in order to be cognizable at law. On the one hand, lack of competence or capacity due to completely internal deficiencies readily operates under law to relieve an individual of the burdens of a decision she is understood not to have made as an exercise of her own will. On the other hand, the law also recognizes coercion or duress—totally external compulsion generated by an identifiable individual or group—as a situation where an individual is robbed of power and autonomy in decisionmaking. The compartmentalization and doctrinal distinctions between these two categories dilute and distort women's experience of powerlessness, allow the law to play off one category against the other, and result in much of women's actual experience falling through the doctrinal abyss between the two categories. This vision results in an absence of legal remedies for many of the injuries that damage women most.

II. COMPETENCE AND FORMAL INEQUALITY

Competence doctrine embodies a classical liberal legal perspective.¹⁷ From that perspective, competence doctrine on its face presents few issues of particular concern to women. Theoretically, women are equal to men, entitled to the same presumptions of compe-

16. KATE MILLETT, *SEXUAL POLITICS* 87 (1971), *quoted in* Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1324 (1991).

17. By classical liberal legal perspective, I mean the perspective that reflects in law the central assumptions of the classical liberal tradition of Hobbes, Locke and Hume:

[T]he notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

Karl Klare, *Law Making as Praxis*, TELOS, Summer 1979, at 123, 132 n.28 (1979), *quoted in* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 400 n.62 (1984).

tence¹⁸ and tested by the same evaluations and instruments. Women's capacity to make health care decisions, enter into contracts, and devise property are evaluated as men's competence would be evaluated, according to the same legal standards. This is the current understanding of competence: both the concept and its application are essentially gender neutral. Yet the application and assessment of competence by both professionals and courts exhibit gender bias that would trouble even those who look primarily to formal equality¹⁹ to decide whether a given doctrine or area of the law disadvantages women.

Women are dramatically overrepresented as subjects in both guardianship and conservatorship proceedings.²⁰ Studies uniformly show a statistically significant proportion of women under guardianship, even after figures are adjusted to reflect women's greater representation among the population of older people in the state or region surveyed.²¹ A recent ten-state survey found that in Florida, for example, 70% of the guardianship appointments for persons over sixty are for women.²² In the other nine states, the figures were similar. On average, 67% of the guardianship appointments were for women.²³ Another recent study conducted in the city and county of St. Louis, Missouri found that between 72% and 74% of those subject to a "guardianship - conservatorship" over a three year period were women.²⁴ These recent figures also parallel those of an earlier study

18. This has not always been the predominant view on the matter. For example, "many nineteenth century Americans believed slaves, immigrants, and also women lacked the capacity to decide upon their own medical treatment." Martin S. Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in 3 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 23 (President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research ed., 1982). The cases discussed by Pernick involved involuntary administration of anaesthesia to women patients. *Id.*

19. Formal equality has been defined as "equality in the abstract, legal sense." See Olsen, *supra* note 17, at 391 n.14.

20. Final Report, Center for Social Gerontology, Dep't of Health and Human Services, Grant No. 90-AR-0124, *National Study for Guardianship System and Feasibility of Implementing Expert Systems*, August 31, 1992 (forthcoming study 1992) [hereinafter Final Report]. Older women are at particular peril because of the traditional view of women as dependent and unable to manage their own affairs. See MARSHALL B. KAPP & ARTHUR BIGOT, *GERIATRICS AND THE LAW* 88 (1985).

21. Figures indicate that 40.28% of people over 65 are men while 59.72% are women. U.S. STATISTICAL ABSTRACT, 1992, Table 12.

22. Final Report, *supra* note 20.

23. *Id.*

24. George H. Zimney et al., *Annual Reports by Guardians and Conservators to Probate Courts*, 3 J. ELDER ABUSE & NEGLECT 61, 66 (1991). The figures for 1985, 1986, and 1987 were 74%, 73% and 72% respectively. *Id.* at 66.

cited by the United States House of Representatives which found that 67% of guardianships in a nation-wide survey of 2200 cases were women.²⁵

Women are also underrepresented as guardians. While few statistics are kept on the gender of court-appointed guardians,²⁶ my own investigation of forty-four right to die cases revealed that of the forty cases where a guardian ad litem (G.A.L.) was appointed, thirty-one were male, six were female, and in four cases the gender of the G.A.L. was not ascertainable.²⁷ In the remaining seventeen cases that I investigated, the patients' family members or previously selected or appointed guardians or conservators spoke for the patients. Choice of guardians in conservatorship proceedings is probably discriminatory along a variety of dimensions.²⁸

Unequal applications of competence law are not limited to guardianships. Case law in areas that might appear gender neutral on the surface shows distinctly different analysis by courts depending on the gender of the individual in question. Health care court decisions that have been traditionally regarded as gender neutral in fact reflect gendered approaches and outcomes.

25. HOUSE SUBCOMM. ON HEALTH AND LONG TERM CARE OF THE SELECT COMMITTEE ON AGING, ABUSES OF GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. Doc. No. 639, 100th Cong., 1st Sess. 36 (1987) (citing to Associated Press study).

26. For example, "[i]n order to discover the percentage of women who have been appointed to these positions [in New York] one would have to wade through a three inch thick stack of paper, hand-counting the female names. This has been done . . . only 21% go to women." Marilyn Fitterman & Noreen Connell, *More Power to Women in the Courts*, *NEWSDAY*, December 20, 1988 at 65.

27. The reason that there is one more G.A.L. than there are cases is that in one case, *In re Lawrence*, 579 N.E.2d 32, 36 (Ind. 1991), the court appointed two successive guardians ad litem, one female and one male. Five of the six female G.A.L.s were appointed to represent female patients; the thirty-one male guardians ad litem represented twenty females and eleven males.

28. One such dimension is sexual preference. See, e.g., *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986). The court in *Kowalski* denied guardianship of an injured woman to her lesbian lover. *Id.* Eventually, the court awarded guardianship to the lover. *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1992). For a good discussions of the *Kowalski* case, see Amy L. Brown, Note, *Broadening Anachronistic Notions of Family in Proxy Decisionmaking for Unmarried Adults*, 41 *HASTINGS L. J.* 1029 (1990) and David Link, Note, *The Tie That Binds: Recognizing Privacy and the "Family" Commitments of Same Sex Couples*, 23 *LOY. L. A. L. REV.* 1055, 1134-39 (1990). A durable power of attorney may help to preserve the relationship between gay couples. Some states, however, limit who may be appointed as an attorney in fact in ways that would exclude same sex partners. Additionally, the family may legally challenge these appointments. See Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L. REV.* 511, 516-17 (1990).

A. *Health Care and the Right to Die*

The right to die has received enormous attention in the seventeen years since the *Quinlan*²⁹ case first gained national attention.³⁰ Authors and scholars frame the right to die issue as involving individual autonomy in the face of an impersonal and dehumanizing medical technology;³¹ as blurring previously recognized boundaries between life and death³² and between suicide and "natural" death;³³ as a contest for control between the medical and legal establishment;³⁴ or as an example of the need for ethicists to add their voices to the debate.³⁵ Until 1990, not a single article examined right to die cases to determine whether gender might play a part in the outcome or analysis of those cases.

In 1990, Steven Miles and Allison August reviewed over thirty cases concerning the right to die of once-competent individuals.³⁶

29. *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). Karen Quinlan was in a "chronic vegetative state" on life support when her father sought to have himself appointed her guardian with authority to terminate life support over the objection of her physician who expressed concern that to do so would violate medical practice and ethics. *Id.* at 657. The New Jersey Supreme Court granted the father's petition. *Id.* at 671. Karen Quinlan continued to live without life support for nine years, although she never emerged from her vegetative state. See *Cruzan v. Harmon*, 760 S.W.2d 408, 413 n.6 (Mo. 1988) (en banc), *aff'd*, 497 U.S. 261 (1990).

30. The *Quinlan* case continues to receive attention. See discussions see George J. Alexander, *Time for a New Law on Health Care Advance Directives*, 42 HASTINGS L.J. 755 (1991); Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253 (1991); Daniel B. Griffith, *The Best Interests Standard: A Comparison of The State's Parens Patriae Authority and Judicial Oversight in the Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283 (1991); Elizabeth G. Patterson, *Planning for Health Care Using Living Wills and Durable Powers of Attorney: A Guide for the South Carolina Attorney*, 42 S.C. L. REV. 525 (1991).

31. See, e.g., James Bopp, Jr. & Daniel Avila, *The Sirens' Lure of Invented Consent: A Critique of Autonomy-Based Surrogate Decision Making for Legally-Incapacitated Older Persons*, 42 HASTINGS L.J. 859 (1991); G. Steven Neeley, *Patient Autonomy and State Intervention: Reexamining the State's Purported Interest*, 19 N. KY. L. REV. 235 (1992).

32. See Debra L. Dippel, Note, *Someone to Watch Over Me: Medical Decision-Making for Hopelessly Ill Incompetent Adult Patients*, 24 AKRON L. REV. 639 (1991).

33. See Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable: Cruzan and The Looming Debate Over Active Euthanasia*, 2 MD. J. CONTEMP. LEGAL ISSUES (1991); Yale Kamisar, *When is There a Constitutional "Right to Die"? When is There No Constitutional "Right to Live"?*, 25 GA. L. REV. 1203 (1991).

34. See Michael R. Flick, *The Due Process of Dying*, 79 CAL. L. REV. 1121 (1991); Stephen A. Newman, *Euthanasia: Orchestrating "The Last Syllable of . . . Time,"* 53 U. PITT. L. REV. (1991).

35. See Ben A. Rich, *The Values History: A New Standard of Care*, 40 EMORY L.J. 1109 (1991); Susan M. Wolf, *Ethics Committees and Due Process: Nesting Rights in a Community of Caring*, 50 MD. L. REV. 798 (1991).

36. Steven H. Miles & Allison August, *Courts, Gender and the "Right to Die,"* 18 LAW MED. & HEALTH CARE 85 (1990). The cases reviewed by Miles and August are distinguished from those cases involving institutionalized severely retarded people who were never

Miles and August found that, depending on the gender of the incompetent patient, right to die cases reflected two very different styles of judicial reasoning and outcome. For example, courts treated previously expressed opinions about life support differently depending on the gender of the speaker. Men's opinions were seen as thoughtful and rational: Mr. Brophy "reached a judgment,"³⁷ Mr. Delio, called a doctor of philosophy by the courts, (his Ph.D. was in exercise physiology), expressed a "deeply held, solemn, intelligent determination,"³⁸ and twenty-three year old Mr. Gardner was "very serious."³⁹ By contrast, the Supreme Court of Maine in *In re Swan*⁴⁰ called a seventeen year old boy's expressions "serious and deliberative"⁴¹ as well as "valid."⁴²

Women, on the other hand, were portrayed as unreflective, emotional or immature: thirty-one year old Ms. Jobe's statements were "offhand remark[s] made by a person when young."⁴³ In *Cruzan v. Harmon*,⁴⁴ a case involving a thirty year-old comatose woman, the Missouri Supreme Court quoted language from *In re Jobes* to characterize Nancy Cruzan's expressed beliefs about life support as "informally expressed reactions to other people's medical condition and treatment"⁴⁵ which were "remote, general, spontaneous, and made in casual circumstances."⁴⁶ The dissent in *Cruzan* noted that there was much more testimony in the record concerning Ms. Cruzan's wishes than the majority's opinion recognized.⁴⁷ The testimony about Nancy Cruzan's expressed opinions, ignored by the majority in *Cruzan*, was very similar to that given effect in *Swan*.⁴⁸ In the *Quinlan* case itself, the court discounted Karen Quinlan's statements that she would not want to be kept on life support because "the conversations with her mother and friends were theoretical ones. She was not personally

competent. See, e.g., *Superintendent of Belchertown v. Saikewicz*, 370 N.E. 2d 417 (Mass. 1977).

37. Miles & August, *supra* note 36, at 87.

38. *Id.* at 88.

39. *Id.* at 87.

40. 569 A.2d 1202 (Me. 1990).

41. *Id.*

42. *Id.* at 1203.

43. Miles & August, *supra* note 36, at 88.

44. 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd*, 497 U.S. 261 (1990).

45. *Id.* at 424 (quoting *In re Jobes*, 529 A.2d 434, 443 (N.J. 1987)).

46. *Id.* The Missouri Supreme Court in *Cruzan* called Cruzan's statements concerning life support "similarly unreliable." *Id.*

47. *Cruzan*, 760 S.W.2d at 436 (Higgins, J., dissenting); see also *id.* at 443 (Higgins, J., dissenting from order denying rehearing).

48. Compare *id.* at 443 (Higgins, J. dissenting from order denying rehearing) with *Swan*, 569 A.2d at 1205.

involved."⁴⁹ On the other hand, judges have also rejected a woman's past statements that she did not want to be kept on life support *because* those statements were based on personal involvement with people on life support.⁵⁰

What is the source of this disparity in court decisions? The answer is not simply that women's words and declarations are taken less seriously than men's, although there is evidence from other fields that this is the case.⁵¹ Courts' doubts and decisions about capacity are likely to reflect ingrained assumptions about the appropriate process and result of decisionmaking.⁵² To the extent that women employ different processes and pursue different values in decisionmaking,⁵³ these differences may affect courts' judgments about women's competence.

Competence doctrine presumes that the individual is capable of making a rational decision⁵⁴ and competence is equated with rationality.⁵⁵ Women have long been portrayed and perceived as irrational, as incapable of objectivity or of engaging in reasoned decisionmaking.⁵⁶ Courts express strong ideas about what constitutes rational

49. *In re Quinlan*, 348 A.2d 801, 819 (N.J. Super. Ct. Ch. Div. 1979).

50. *In re Westchester County Medical Ctr.*, 532 N.Y.S.2d 133, 138 (N.Y. App. Div. 1988) (Brown, J., dissenting); *see infra* note 60 and accompanying text.

51. *See generally* DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990).

52. Miles & August, *supra* note 36, at 91-92; *see also* Bernard Lo, *Assessing Decision-Making Capacity*, 18 LAW, MED. & HEALTH CARE 193, 195-96 (1990).

53. Several authors have presented evidence regarding these differences in decisionmaking. *See, e.g.*, MARY FIELD BELENKY ET AL., *WOMEN'S WAYS OF KNOWING* (1986); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). *But see* William J. Friedman et al., *Sex Differences in Moral Judgments? A Test of Gilligan's Theory*, 11 PSYCHOLOGY OF WOMEN Q. 37 (1987); Kathleen M. Galotti, *Gender Differences in Self-Reported Moral Reasoning: A Review and New Evidence*, 18 J. YOUTH & ADOLESCENCE 475 (1989).

54. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 83 (3d. ed. 1989); John W. Parry & James C. Beck, *Revisiting the Civil Commitment/Involuntary Treatment Stalemate Using Limited Guardianship, Substituted Judgment and Different Due Process Considerations: A Work in Progress*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 102, 105 (1990).

55. "Capacity means the mental ability to make a rational decision . . ." State Dep't of Human Serv. v. Northern, 563 S.W.2d 197, 209 (Tenn. Ct. App. 1978); *see also* Flick, *supra* note 34, at 1136. Flick, a doctor, states (without citation) that "it is not any decision that should be respected, but rather decisions judged to be rational, those based on adequate information." *Id.*

56. Although this observation hardly needs a footnote, the following both support this point and make for fascinating reading. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 812-817 (1990) (tracing history of construction of women as irrational beginning with Aristotle); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 804 (1989) (noting that historically women were seen as creatures of "fundamental irrationality [unable] to engage in rigorous, abstract thinking").

decisionmaking.⁵⁷ For example, Miles and August suggest that because women may employ care-centered or communal moral reasoning to make decisions rather than affirming generalizable moral rules, their expressions of preference to be removed from life support in the event of their incompetence will be discounted by courts.⁵⁸ These courts will view an incompetent person's history of communal moral reasoning as inarticulate or immature in its failure to assert generalizable moral imperatives.⁵⁹ In addition, some courts view with suspicion decisions based on emotion or experience, even experience directly relevant to the circumstances at issue. For example, one judge rejected a woman's stated preference not to be kept alive on life support because after caring for her husband and two brothers in their terminal illnesses she based her decision on her own experience and her empathetic reaction to the experience of others:

While Mrs. O'Connor may have expressed a desire to forego the use of artificial means of life support, there was no indication that she had carefully reflected on the subject. While Mrs. O'Connor's statements may not have been "casual remarks," they were made at a time when she had recently experienced the loss of a loved one or shortly after her own hospitalization and may have reflected an emotional reaction to a perceived fear rather than a solemn pronouncement or clearly expressed decision regarding a future course of medical treatment.⁶⁰

The classical liberal ideology from which competence doctrine springs is characterized by a "presumption of an essentially selfish human (male) actor and . . . presumptively selfish choices."⁶¹ Cases involving decisions that are selfish may be more easily seen as the product of the rational deliberation of a competent person than decisions that involve self-sacrifice. For example, in the past, courts routinely overrode women's refusals of blood transfusions, not because of doubts about competence but because the women were pregnant or

57. See, e.g., *Lane v. Candura*, 376 N.E.2d 1232, 1233-34 (Mass. App. Ct. 1978). In *Lane*, the lower court judge decided a woman was incompetent because he "was not satisfied that [she] arrived at her decision in a rational manner, i.e. 'after careful consideration of the medical alternatives.'" *Id.* at 1234.

58. Miles & August, *supra* note 36, at 92.

59. *Id.*

60. *In re Westchester County Medical Ctr.*, 532 N.Y.S.2d 133, 138 (N.Y. App. Div. 1988) (Brown, J. dissenting) (citation omitted). Interestingly, Justice Brown's observation that Mrs. O'Connor's statements were made when "she had recently experienced the death of a loved one" are unsupported by the record. *Id.* at 138. Her husband died in 1967 and her brothers in 1975 and 1977. *Id.* at 135. The statements at issue were made in 1969, 1973 or 1974, and 1984. *Id.*

61. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 92-93 (1987).

were mothers.⁶² Courts now regularly cite language of individualism, autonomy and personal rights to uphold those decisions.⁶³ At the same time, however, judges are more willing to find incompetent those women who are willing to risk their lives or health in order to have babies.⁶⁴ These cases suggest that courts may find that certain kinds of decisions—oriented to self and rights—reflect capacity more readily than decisions that involve self-sacrifice. If so, this might have a disproportionate effect on judgments regarding women's capacity.

Judges also bring their values quite overtly to competence proceedings. It is interesting to see the use to which judges put ostensibly gender neutral concepts. For example, an individual can be competent for the purposes of making some decisions, while incompetent for the purposes of making others.⁶⁵ While this reflects an approach more attuned to the reality of people's lives—someone may not be able to handle finances but be capable of deciding where to live—it is used all too often to ratify decisions with which judges agree and to sweep aside choices that conflict with judges' values.

Courts assess competence quite blatantly in terms of the desirability of the outcome reflected by the challenged decision. Women

62. See, e.g., *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *reh'g en banc denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied sub nom. Jones v. President & Directors of Georgetown College, Inc.*, 337 U.S. 978 (1964) (noting that the state had an interest in preserving life of mother of seven-month-old child sufficient to authorize order for transfusion despite mother's refusal based on religious belief); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964) (holding that unborn child is entitled to law's protection and that an order to insure blood transfusions to the mother was appropriate where deemed necessary by physician in charge). Interestingly, when a man with children refused a blood transfusion, the court's attention focused on whether the man had materially provided for his children. *In re Osborne*, 294 A.2d 372, 374 (D.C. 1972).

63. E.g., *Wons v. Public Health Trust of Dade County*, 500 So. 2d 679 (Fla. 3d DCA 1987), *aff'd*, 541 So. 2d 96 (1989) (noting that individual has "fundamental right to be left alone"); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017 (Mass. 1991) (explaining that free choice and self-determination are "fundamental constituents of life"); *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990) (noting that the primary function of the state is to preserve and promote individual liberty and personal autonomy); cf. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (observing that privacy in the context of refusing life preserving medical treatment is defined as autonomy over personal identity); *Taft v. Taft*, 446 N.E. 2d 395 (Mass. 1983) (vacating order requiring a wife to have a surgical procedure to "hold" a pregnancy over her religious objections based upon her personal constitutional rights). But see *Application of Winthrop Univ. Hosp.*, 490 N.Y.S.2d 996, 997 (N.Y. Sup. Ct. 1985) (citing *Georgetown College*, 331 F.2d at 1000 (D.C. Cir. 1964) with approval); *Application of Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985) (noting that state's right in protecting midterm fetus outweighs the patient's right to refuse a transfusion).

64. See, e.g., *In re Romero*, 790 P.2d 819 (Colo. 1990); *Lefebvre v. North Broward Hosp. Dist.*, 566 So. 2d 568 (Fla. 4th DCA 1990); see also *infra* text accompanying notes 248-54 for further discussion of these cases.

65. DONALD VAN DE VEER, *PATERNALISTIC INTERVENTION* 346-47 (1986).

who are described in identical terms are judged incompetent in some cases but competent in others. For example, in cases involving the question of competence to consent to sexual intercourse,⁶⁶ mentally retarded women are routinely found incompetent. Mentally retarded women with similar I.Q.'s and functional capacities are equally routinely found competent in cases involving the capacity to consent to give up a child for adoption.⁶⁷ This is particularly well-illustrated in one case where the court determined that the same woman was competent to marry and to give up her children for adoption, but was not competent to consent to sexual intercourse with a man who was not her husband.⁶⁸ The court stated:

Concerning the woman's capability to consent to marriage and sexual relations with her spouse, understandably the law has granted leeway so that even persons of limited intelligence, such as this woman and her husband, may exercise their constitutionally recognized right to marry and procreate. Marriage has long been favorably recognized in our society as one of the fundamental institutions upon which our society is founded. . . . The same cannot be said about non-marital sexual relations which are not considered by society in a favorable light, in part because of the difficult consequences that may follow⁶⁹

As to the apparent anomaly of finding the woman competent to consent to the adoption of her daughter, but not to sexual intercourse with the defendant, the court was even less concerned with consistency as reflected in its statement that:

It is apparent that it was precisely the woman's lack of mental capabilities . . . that had a great deal to do with the decision of the court to terminate her parental rights. Thus, it is of little import that she was apparently deemed capable of legally consenting in a different proceeding to the termination of her parental rights to her child, and yet be found by the jury in this case not to be capable of legally consenting to non-marital sexual intercourse. . . .⁷⁰

This case and others⁷¹ reflect a particularly interesting result of the apparently neutral and salutary doctrine that a person can be determined to be competent for some purposes and not for others.

66. See *infra* part IV.A.

67. See *infra* part IV.C.

68. *State v. Soura*, 796 P.2d 109 (Idaho 1990).

69. *Id.* at 114.

70. *Id.* at 114-15.

71. See, e.g., *In re Burbanks*, 310 N.W.2d 138, 143, 151 (Neb. 1981) (noting that Multi-County Social Service Unit testified that parents did not have mental capability to be parents yet "assisted in the processing of legal instruments executed by the allegedly mentally deficient parents to authorize Shiela to have an abortion and for Shiela to be sterilized."). *Id.* at 151.

In summary, women do figure disproportionately high among those who are found incompetent, while men figure disproportionately high among guardians. In addition, the values of objectivity, distance and self-interest embedded in concepts of rational decision-making and rational outcomes probably work against women in competence hearings.

The preceding analysis is not a critique of the competence paradigm itself but only an assertion that an otherwise neutral concept has been infected by sexism in its application. The examples above might be corrected by more sensitive application of the competence paradigm. The problem identified in the right to die and health care cases could be solved by giving women's words the same credibility as men's words. Formal equality, however, cannot remedy the principal flaws of the concept of competence.

III. COMPETENCE AS A DYNAMIC: GENDER IMPLICATIONS OF COMPETENCE TESTING AND ASSESSMENT

Applying equality analysis to the doctrine of competence overlooks a number of problems. First, as I have already suggested, the concept itself rests on a foundation of assumptions about individuals and how they relate to society that distorts reality to the disadvantage of powerless people in general and women in particular. Competence law reflects this distortion in many ways. In this Part, I discuss the law's blindness to the social and political dynamics associated with a charge of incompetence and the process of assessing this charge. I suggest that the paradigm of competence itself and the methods of assessment used are flawed.

Incompetence is legally constructed as a characteristic of an individual, brought about by forces internal to the individual, such as "mental illness, mental retardation, senility, [or] excessive use of drugs or alcohol"⁷² that render the individual incapable of decision-making, self-care, or management of property.⁷³ Experts measure

72. FLA. STAT. ANN. § 86.041 (West 1992). Many other states use similar constructs. See, e.g., ALA. CODE § 26-2A-20 (1975); ARIZ. REV. STAT. ANN. § 14-5101 (1991); ARK. CODE ANN. § 28-65-101 (Michie 1987); COLO. REV. STAT. ANN. § 4-28-17-4 (Burns 1991); VA. CODE ANN. § 55-34.1 (Michie 1949-1992). Tests for competency are applicable to cases of mental illness, mental retardation/developmental disability, physical disability, advancing age, alcoholism, drug addiction, or any infirmity. See John Parry, *Incompetency, Guardianship, and Restoration*, in *THE MENTALLY DISABLED AND THE LAW* 369, 372-73 (Samuel Jan Brakel et al. eds., 1985); see also FAY A. ROZOVSKY, *CONSENT TO TREATMENT: A PRACTICAL GUIDE*, § 1.6 at 21 (2d ed. 1990) (noting that mental illness, shock, crippling physical injury or illness, or substance abuse are all reasons for incapacity).

73. An incapacity determination requires a finding that the *respondent* is unable to make or communicate decisions with regard to care for self or property. See STEPHEN J. ANDERER,

incompetence by using professional instruments such as questionnaires and tests.⁷⁴ While different tests for competence have been proposed,⁷⁵ each approach focuses on the qualities or capabilities of the alleged incompetent.⁷⁶ For example, one text defines competence as

DETERMINING COMPETENCY IN GUARDIANSHIP PROCEEDINGS 22 (1990). Furthermore, "[c]ompetency is defined as the ability of *individuals* to know and understand the nature and consequences of the legal proceedings in which they are involved or the medical situations confronting them." (emphasis added). Robert L. Sadoff, *Medical-Legal Issues*, in COMPREHENSIVE REVIEW OF GERIATRIC PSYCHIATRY 637, 639 (Joel Sodavoy et al. eds., 1991). The critical points in assessing a patient's capacity to make health care decisions are the *patient's* ability to understand the proposed treatment; her ability to make a choice and her ability to *communicate* that decision. ROBERT I. SIMON, CLINICAL PSYCHIATRY AND THE LAW 105 (1987); see also Benjamin Freedman, *Competence, Marginal and Otherwise: Concepts and Ethics* 4 INT'L J.L. & PSYCHIATRY 53, 64 (1981) (praising a criterion for competency because it is dependent upon characteristics of the "person himself"); Bernard Lo, *Assessing Decision-Making Capacity*, 18 L. MED. & HEALTH CARE 193, 194 (1990) ("The term incapacity is used to refer to assessments by physicians that *patients* lack the ability to make informed decisions about their health care."); Barbara A. Weiner, *Rights of Institutionalized Persons*, in THE MENTALLY DISABLED AND THE LAW 251, 291 (Samuel Jan Brakel et al. eds., 1985) (noting that clinical competency means that a *person* understands to what *he* is being asked to consent).

74. Assessment instruments can be useful in identifying functional deficits. See ANDERER, *supra* note 73, at 20; see also THOMAS GRISSE, EVALUATING COMPETENCIES (1986) (reviewing various competency questions that can be addressed by clinical assessment); Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635, 1637 (1988) (noting that capacity can be assessed by asking questions that elicit signs of the patient's abilities in key areas); M. Powell Lawton & Elaine M. Brody, *Assessment of Older People: Self-Maintaining and Instrumental Activities of Daily Living*, 9 GERONTOLOGIST 179, 179 (1969) ("The functioning human being may thus be assessed by measuring instruments designed to tap representative behavior at each level and within the range of competence appropriate to the individual."). In the views of attorneys, guardians, and judges cognitive capacity may be reflected by coherent speech. Thomas G. Gutheil & Harold Bursztajn, *Clinicians' Guidelines for Assessing and Presenting Subtle Forms of Patient Incompetence in Legal Settings*, 143 AM. J. PSYCHIATRY 1020, 1020 (1986). However, "competency is presumed as long as the patient modulates his or her behavior, *talks in a comprehensible way*, remembers what he or she is told . . ." Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 282 (1977) (emphasis added).

75. The range of measures used to assess competency is vast. Iseli K. Krauss & Samuel J. Popkin, *Competence Issues in Older Adults*, in TESTING OLDER ADULTS 277 (Thelma Hunt et al. eds., 1989); see also LEGAL COUNSEL FOR THE ELDERLY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY 108 (1987) (advocating use of mental status exam for determinations of incapacity); GRISSE, *supra* note 74, at 325 (reviewing different instruments available to assess individual's functional abilities); Gerald K. Goodenough, *The Lack of Objectivity of Physician Evaluations in Geriatric Guardianship Cases*, 14 J. CONTEMP. L. 53, 56 (1988) (listing several alternative testing instruments); Jeffrey S. Janofsky et al., *The Hopkins Competency Assessment Test: A Brief Method for Evaluating Patients' Capacity to Give Informed Consent*, 43 HOSP. & COMMUNITY PSYCHIATRY 132 (1992); John R. Murphy, *Older Clients of Questionable Competency: Making Accurate Competency Determinations Through the Utilization of Medical Professionals*, 4 GEO. J. LEGAL ETHICS 899, 908 (1991) ("The focus of most recognized judicial tests of mental competency is on the state of the *client's* mind.") (emphasis added).

76. PAUL APPELBAUM ET AL., INFORMED CONSENT 84, 87 (1987). The concept of

"a capacity to take in, process, assimilate, and employ information in guiding a decision."⁷⁷

However, some literature in the field of competence evaluation, as well as legal scholarship in other areas, suggests that the process of questioning and evaluating a person's competence is not so straightforward. Instead, this process is a matter of both interpersonal dynamics and social and political structuring of roles and communication. Anthropologists and historians have "explored the key question of whether competence is the creation of cultural systems and political, social and economic arrangements."⁷⁸ Psychologists and psychiatrists have recognized for many years that "a patient's competence can be so powerfully affected by the quality of the doctor-patient relationship as to be almost wholly contingent upon it . . . [so that] competence assessment is a process shaped by the relationship between therapist and patient."⁷⁹ Some of the most fascinating work in exposing the construction of incompetence from social interactions has been done by James Holstein, a sociologist, who argues that "many of the putative documents of competence or incompetence that are considered characteristic or 'symptomatic' of *individuals'* mental conditions can be analyzed as *interactional accomplishments*."⁸⁰

Recently, legal scholars in other fields have begun to parallel this work. Martha Minow's important work developing the social relations approach to law⁸¹ helps to underscore the assertion that incompetence is actually not a fixed status or intrinsic difference on the part of the allegedly incompetent person. Minow exposes the assumption "that 'differences' are intrinsic, rather than . . . expressions of compar-

general incompetence creates a competence/incompetence dichotomy. Either an individual fits into one category for all purposes (i.e. he is incompetent to vote, make a will, manage finances, etc.) or the individual is competent in all respects. Specific incompetence is the principle that an individual can be competent for one specific purpose, but not another (i.e., he is competent to vote, but not to manage finances).

77. DECISION MAKING IN PSYCHIATRY AND THE LAW 73 (Thomas G. Gutheil et al. eds., 1991).

78. David A. Gerber, *Listening to Disabled People: The Problem of Voice and Authority* quoted in Robert B. Edgerton's *The Cloak of Competence*, 5 DISABILITY, HANDICAP AND SOCIETY 3, 6 (1990). Gerber states that "much current research . . . conceives of most mental retardation as a social constructed syndrome, highly variable across time and space" (citations omitted). *Id.* at 6. For further insight into this concept, see Steven Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867 (1993). Gerber notes the opposing view that research "will ultimately reveal baseline conceptions of competence common to all cultures and societies." Gerber, *supra*, at 6.

79. DECISION MAKING IN PSYCHIATRY AND THE LAW, *supra* note 77, at 162.

80. James A. Holstein, *Court Ordered Incompetence: Conversational Organization in Involuntary Commitment Hearings*, 35 SOCIAL PROBLEMS 458, 459 (1988) (emphasis added).

81. MARTHA MINOW, MAKING ALL THE DIFFERENCE (1992).

isons between people.”⁸² She suggests that few characteristics are immutably located in an individual, but rather that judgments about difference come about as a matter of social relationships.⁸³ Determinations of competence cannot simply be the result of a series of observations or assessments and tests administered by an objective expert. Rather, as Holstein notes, “attributions of mental competence or incompetence are produced and sustained through interactional processes”⁸⁴

Lack of competence is perceived, assessed, and judged by others. Competence inquiries generally arise in the context of some form of breakdown in communications. These communications are largely about values.⁸⁵ Therefore, judgments about competence will vary depending on the roles, values, characteristics and gender⁸⁶ of the people involved in perceiving, assessing and ultimately determining incompetence, as well as the people whose competence is assessed. If the person assigned to determine competence is of similar socio-economic class and background as the person whose competence is assessed, the quality of the interaction is enhanced.⁸⁷ The quality of the interaction may also vary greatly depending on the setting.⁸⁸

Some psychiatrists and social scientists acknowledge the significance of the dynamic between the assessor and the alleged incompetent as a determining factor in whether an individual is labelled incompetent. For example, one text notes that “[w]hat may be obscured by the notion of competence as a capacity . . . residing

82. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987).

83. *Id.* at 22-23.

84. Holstein, *supra* note 80, at 458.

85. See BEAUCHAMP & CHILDRESS, *supra* note 54, at 83-84; Loretta M. Kopelman, *On the Evaluative Nature of Competency and Capacity Judgments*, 13 INT'L J. L. & PSYCHIATRY 309, 310 (1990); see also APPELBAUM ET AL., *supra* note 76, at 85. As Appelbaum notes, “the personal identity and professional allegiance of the tester [of competence] play an influential role. If the tester is a physician or other clinician, health values may receive great weight.” *Id.*

86. Gender influences judgments based on interpretation of speech. Numerous linguistic studies have demonstrated that

[W]omen and men are judged differently even if they speak the same way. . . .

[W]hen women used tag questions and disclaimers, subjects judged them as less intelligent and knowledgeable *than men who also used them*. When women did not give support for their arguments, they were judged less intelligent and knowledgeable, *but men who advanced arguments without support were not*.

TANNEN, *supra* note 51, at 228 (emphasis in original).

87. See Susan Stefan, *Leaving Civil Rights to the Experts: From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 658 (1992).

88. A person who is tested for competency in an unfamiliar environment may do significantly worse on the evaluation simply because of the anxiety generated by being removed from familiar surroundings. Stephen J. Anderer, *A Model for Determining Competency in Guardianship*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 107, 109 (1990).

within the person is the fact that its assessment—ostensibly a measure of the patient's status, like the measurement of blood pressure—is itself a bipersonal process.”⁸⁹ Because in many cases there is no formal or widely employed standard for measuring a person's competence,

the relative rigor of [the assessor's] own standard, the degree of intuitive empathy that he brings to the measurement, his own idiosyncratic sense of what faculties in the patient are required for competence—all play a role in his determination.

The assessor's clinical skills and sensitivity in eliciting information also influence the results of a competence assessment. The evaluator who is brusque, intimidating, unsympathetic or uncompromising may impair the patient's performance.

...

Thus, the patient's competence may be influenced or even impaired by the person performing the assessment. That person's style and personality may also impinge in various ways on the task of assessment. Clearly, then, competence assessment is a form of decision making that is interactive, partaking of various levels of communication (verbal and nonverbal) between patient and physician.⁹⁰

These observations, however, are never incorporated in court decisions about competence or incompetence. At each of these levels of communication, “we treat the perspective of the person doing the seeing or judging as objective, rather than as subjective.”⁹¹

A series of relational and communication tests confronts a person undergoing a competence assessment. The primary dynamic is between the individual and the person who alleges or assumes incompetence. For example, the attorney who raises the issue of his client's competence⁹² or the doctor in a health care situation who turns to the

89. DECISION MAKING IN PSYCHIATRY AND THE LAW, *supra* note 77, at 73. The measure of blood pressure itself, of course, could vary depending on the nature of the interaction between the patient and the person taking the blood pressure. See T.G. Pickering et al., *How Common is White Coat Hypertension?*, 259 J. AM. MED. ASS'N 225 (1988). In assessments of competence, the nature of the interaction between the examiner and the examined is even more crucial in determining the outcome.

90. DECISION MAKING IN PSYCHIATRY AND THE LAW, *supra* note 77, at 73-74. For many years Roesch and Golding in their work on assessing competence to stand trial have recognized the importance of examining the dynamics between the defendant and his or her attorney. See RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 89 (1980); see also Anderer, *supra* note 88, at 109.

91. Minow, *supra* note 82, at 32.

92. The Model Rules of Professional Conduct require that a lawyer suspecting that his client “suffers a disability” such that she is legally incapacitated should see that a legal representative is appointed. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1983).

court for permission to medicate a patient against his will⁹³ are the primary actors raising the issue of competence.

If a problem in communication between the primary actor and the allegedly incompetent person is brought to the attention of the court, there is inevitably a second communications test set up involving an expert who is appointed to assess the individual's competence. Although this expert could logically be assigned to observe the interactions between the primary actor and the person alleged to be incompetent, as well as asked to analyze the origins of the deficit in communications, the focus of the inquiry is totally on the allegedly incompetent person. The primary actor, and his or her contributions to the communication problem, fade out of the picture. The court-appointed expert is seen as a judge, rather than as a mediator. Once again, a failure of communication between the expert and the allegedly incompetent person will invariably be attributed to the latter. This expert is almost always a stranger to the alleged incompetent, who has no choice in the selection of the expert, the setting of the inquiry, the course of the conversation or the instruments used to assess competence. Yet both the setting and the identity of the expert assessing competence may have a substantial impact on the outcome of the assessment.⁹⁴ For example, there may be a difference between what a person is willing to share with a clinician and what he will share with his attorney. Testimony in a courtroom will differ from interviews in an office. Both will differ from conversation at home.

A person whose competence is challenged will face a third dynamic: the court hearing. There the individual may try to communicate with the judge to establish her competence. It is clear that courts are looking for demonstrations of communications skills in making decisions relating to competence. "Judges . . . infer competence and incompetence from the way patients deliver their testimony. That is, they attend to the *form* of patients' courtroom conversation for what they believe are indicators of interactional abilities or dysfunctions. . . . Judges thus infer incompetence . . . from such conver-

93. *E.g.*, *Guardianship of Roe*, 583 N.E.2d 1282 (Mass. 1992). Although Roe testified that he did not want medication because of concern that it causes tardive dyskinesia, and although Roe in fact had tardive dyskinesia, the court granted the mental health department's petition to declare him incompetent to make treatment decisions because he denied he had mental illness. Furthermore, the court found that if he were competent, he would have wanted to take the medication at issue. *Id.* at 1284-85; see also *In re Mary Ann D.*, 578 N.Y.S.2d 622 (N.Y. App. Div. 1992). In *Mary Ann D.* the court affirmed a decision that granted a psychiatric center's petition to forcibly administer lithium by nasogastric tube, finding that the patient's inability "to discuss her treatment with her psychiatrist" was one indication of her lack of competence. *Id.* at 623.

94. See *supra* notes 88-91 and accompanying text.

sational difficulties and failures."⁹⁵ Therefore, when capacity is questioned and assessed, there are potentially three different sets of communications tests, each focused solely on the allegedly incompetent person and each more formalized and potentially intimidating than the last.

If the insights that "competence does not 'reside' in the patient alone"⁹⁶ and "competence assessment is a process shaped by the relationship between therapist and patient"⁹⁷ were sufficient, three layers of inquiry might be preferable to one. Presumably, interviews by disinterested professionals and an assessment by an impartial court would serve to guard against suggestions of incompetence arising from family members with conflicts of interest or professionals whose recommendations had been challenged or flouted. In reality this is not what occurs. Competence assessments are not simply conversations between equal parties trying to understand each other. The perception that competence is essentially a characteristic of a relationship rather than an individual is accurate, but inadequate, because it does not in itself contain any conclusions about the nature of that relationship. Furthermore, these conversations and communications are not between equals.

Even the suggestion of incompetence operates to profoundly disempower the person so labelled. The very process that questions an individual's competence is disempowering and degrading to that person.⁹⁸ This is true for all persons, although it is only acknowledged when powerful people or celebrities are the subjects or proposed subjects of competency proceedings.⁹⁹ The simple filing of a petition can lead to humiliation and embarrassment.¹⁰⁰

95. Holstein, *supra* note 80, at 461-462.

96. DECISION MAKING IN PSYCHIATRY AND THE LAW, *supra* note 77, at 162.

97. *Id.*

98. See SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE OF THE HOUSE COMMITTEE ON AGING, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. Doc. No. 639, 100th Cong., 1st Session (1987); *In re Estate of Schriver*, 441 So. 2d 1105, 1106 (Fla. 5th DCA 1983) (noting that a durable power of attorney may help to alleviate the embarrassment relating to an incompetency proceeding).

99. One such recent case is Gary Coleman, former star of the television program *Diff'rent Strokes*. His parents claim that he was mentally incompetent resulted in a lengthy article in the *Los Angeles Times Magazine*. Bella Stumbo, *A Tale of a Falling Star*, L.A. TIMES MAG., May 20, 1990, at 12. Part of the subtitle of that story calls the situation a "pathetic fight against his own parents." *Id.* The article then proceeds to chronicle the intimate details of Coleman's life and more particularly his problems. *Id.*

100. This is illustrated by the case of Jan Stephenson, a professional golfer. Stephenson sought an annulment of a recent marriage. Her husband tried to have her declared incompetent and committed to a psychiatric hospital. In order to be served the petition, she was removed from a golf course in the middle of a tournament. After undergoing a voluntary psychiatric examination, the suit was dismissed and she returned to the tournament. This

At each level of inquiry, the powerful person controls the nature of the dialogue. As Catharine MacKinnon said in commenting about Carol Gilligan's suggestion that women have a different voice, "their difference lies in being on the bottom."¹⁰¹ It is different because it has been declared different by those with the power to characterize difference. "It is this hierarchy that defines what difference matters, not the other way around."¹⁰² The same can be said of the voice of the allegedly incompetent person. The powerful voice, the voice at the top of a hierarchy, always defines the differences between competence and incompetence.

Although competence is a matter of a dynamic or dialogue between doctor and patient or attorney and client, legal doctrine sets up this dialogue so that the powerful half of the conversation remains entirely invisible. In most of these situations, the attorney or doctor raising the question of competence describes only the client's or patient's inability to communicate. Although the doctor or attorney describes the failure of communication between himself and the client or patient, he writes himself out of the story. Thus, his perspective is transformed into an authoritative account of the client's incapacity. Again, as MacKinnon observed: "Having power means, among other things, that when someone says, 'This is how it is,' it is taken as being that way."¹⁰³

In fact, as one study persuasively argues:

Evidence regarding mental and interactional competence is "talked into being" Segments of a mental patient's talk during commitment proceedings are typically cited as evidence probative of arguments for commitment or release. While the production of this talk is attributed to that person alone, close examination of the interaction between hearing participants suggests that the testimony in question results from conversational collaboration between the patient and other courtroom participants. Thus, what are typically taken to be signs of individual deviance or normalcy are interactionally achieved.¹⁰⁴

experience devastated Stephenson, who went from being the fifth ranked money earner in the Ladies Professional Golfers' Association to earning just \$27,000 in the first six months of the next year. David Moore & Gioia Diliberto, *Nancy Isn't Alone: Jan Is Also Losing In Match Play*, PEOPLE, June 14, 1982, at 91. Stephenson's experience is common to many whose capacity is questioned, but who rarely are given a chance to tell their stories. For a compilation of many of these stories see SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE, *supra* note 98.

101. MacKinnon, *supra* note 16, at 1294.

102. *Id.*

103. Catharine MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3 (1985).

104. Holstein, *supra* note 80, at 459.

For example, district attorneys conducting cross-examinations of patients they wanted to institutionalize ask open-ended questions, then remain silent after the patient answered, leaving the patient struggling to fill conversational gaps. Often courts view this process as showing the patient's lack of competence.

Competence assessments are not a matter of communication between equals or even between two individuals, but rather are communication between an individual and a professional representing a system that has power over that individual. The individual who raises capacity as an issue is always the more powerful one in the relationship¹⁰⁵ and often acts in the capacity of a role-created institutional identity like physician or attorney. In these cases, competence is measured by the individual's ability to assist her *attorney*, or to convince her *doctor* that her health care decision is reasonable. Ultimately, a competence inquiry is often a complaint by a powerful authority figure that a less powerful individual is not adhering to the authority figure's particular value system. For example, a leading textbook in health law notes casually that "[t]ypically, competence is questioned only when a patient refuses to consent to a recommended treatment or chooses a course different from the one the doctor finds most reasonable."¹⁰⁶

Often, competence is raised as an issue when a less powerful person questions a more powerful person's version of reality. In fact, "[g]ood evidence supports the contention that denial [of mental illness] is the most common basis for finding a person incompetent to decide about [psychiatric] hospitalization."¹⁰⁷ Physicians and other health professionals may interpret a patient's decision to forego treatment as evidence of incompetency.¹⁰⁸ Generally, the same physician who questions the patient's competency is the one who makes at least the threshold determination of the patient's decisional capacity.¹⁰⁹ In many, if not most, circumstances this means the physician whose treatment recommendation is being rejected is the one making the initial competency determination. Some authors suggest that psychiatrists evaluating patients with the possibility of impaired competence

105. Many books and articles describe the doctor-patient relationship and underscore the great imbalance of power in that relationship. See, e.g., ELLIOT G. MISHLER, *SOCIAL CONTEXTS OF HEALTH, ILLNESS AND PATIENT CARE* 97-136 (1981); CANDACE WEST, *ROUTINE COMPLICATIONS* (1984); Sue V. Rosser, *Is There Androcentric Bias in Psychiatric Diagnosis?*, 17 J. MED. & PHIL. 215, 217 (1992); Stefan, *supra* at note 87, at 655-61.

106. GEORGE ANNAS ET AL., *AMERICAN HEALTH LAW* 652 (1990).

107. See Parry & Beck, *supra* note 54, at 105.

108. ROZOVSKY, *supra* note 72, at 23; Nancy K. Rhoden, *The Presumption for Treatment: Has it Been Justified?*, 13 LAW, MED. & HEALTH CARE 65 (1985).

109. LEGAL COUNSEL FOR THE ELDERLY, *supra* note 75, at 106.

should carefully note the patient's view of illness and medications because these views may be indicative of the patient's competence.¹¹⁰ This suggestion clearly implies that a view differing from the physician's is at least one indicator of incompetence.

At least one author notes that the same tendency can occur in the legal setting. Attorneys may begin to doubt the competence of elderly clients who do not wish to avail themselves of all legal rights and remedies available to them.¹¹¹ Thus, just as physicians question the competence of people who do not want to be treated, cured, or healed, lawyers question the competence of people who do not wish to assert their rights or seek available legal remedies. Those decisions clash with the doctors' or attorneys' professional values. Health care professionals and attorneys also question a person's competence when her behavior does not conform to gender norms. Thus, in one study of commitment proceedings "'gender inappropriate behavior' was literally cited as grounds for categorizing a variety of behaviors and demeanors as 'symptoms' [of mental illness]."¹¹²

To the extent that the person who raises the issue, the expert examiner, and the judge share the same values, the disagreement in values or defect in communication that initiated the competence inquiry is assumed to describe an immutable characteristic of the powerless person. For example, a woman was subject to a commitment hearing because she preferred to live in a large cardboard carton beneath a railroad pass rather than in subsidized public housing. The county attorney argued that

110. Gutheil & Bursztajn, *supra* note 74, at 1022. The issue of competency is not even raised unless a health care professional disagrees with a patient. The patient is then presented as "incompetent" because she disagrees with her "all-knowing" doctors. See Gladys Kessler, *Remarks on the Judge's Role and Moral Certainty*, 19 LAW, MED. AND HEALTH CARE, 34 (1991). Furthermore, the patient is likely to be adjudged incompetent by physicians whenever he refuses life sustaining treatment. See Kevin R. Wolff, Note, *Determining Patient Competency in Treatment Refusal Cases*, 24 GA. L. REV. 733, 745 (1990).

111. Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 91 (1988). For an excellent description of such a scenario see S. Van McCrary & A. Terry Walman, *Procedural Paternalism in Competency Determination*, 18 L. MED. & HEALTH CARE 108 (1990). This is also the case of convicted criminals who do not want to appeal—especially if sentenced to death. See G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 904-05 (1983) (noting that allowing a condemned inmate to waive appeal, especially after starting one, creates an ethical obligation for a lawyer to intervene); Welsh S. White, *Defendants who Elect Execution*, 48 U. PITT. L. REV. 853, 858 (1987) (observing that defense attorneys who pressure capital defendants to appeal believe they are usually not capable of making rational decisions about their desire to be executed).

112. James A. Holstein, *Producing Gender Effects on Involuntary Mental Hospitalization*, 34 SOC. PROBS. 141, 146 (1987).

You can't allow a woman to be exposed to all the other things that go on out there under the tracks. Many of those men have lived like that for years, but we're talking about a woman here. A sick and confused woman who doesn't realize the trouble she's asking for.¹¹³

If the county attorney, the mental health expert, and the judge all share the same assumptions and values, then the woman's desire to live under the railroad pass simply becomes symptomatic of her lack of insight, her sickness and confusion. If one powerful person is persuaded that the railroad pass may in fact be safer or preferable to a shelter or public housing,¹¹⁴ her preference becomes debatable, no longer a symptom of her incompetence. Competence in some ways is a measure of the individual's ability to respond to an authority structure in its own language.

An examination of actual competence tests¹¹⁵ and transcripts of competency hearings underscores these observations. For example, a competence test developed by Lipsitt in 1971 to evaluate the competence of defendants to stand trial,¹¹⁶ the Competency Screening Test or CST, involves sentence completion such as:

"Jack felt that the judge —."¹¹⁷

Defendants were asked to fill in the blanks, and were given a score of 2 (competent) 1 (questionable) or 0 (incompetent).¹¹⁸ Responses like "the judge was right" or "the judge was fair" received two points, while responses such as "was unjust" "was too harsh" or "was wrong" were given a score of zero.¹¹⁹ Another example of the sentence completion test given to the defendant is:

"When Bob disagreed with his lawyer on his defense he —."¹²⁰

113. *Id.* at 146.

114. In Chicago, a group of homeless people living in wooden huts under a highway overpass refused to move to public housing because they claimed that the huts were safer. Don Terry, *Homeless Prefer Huts to Chicago's Public Housing*, N.Y. TIMES, June 13, 1992, at A7.

115. Most standardized competence tests were developed for evaluating a defendant's capacity to stand trial. Competence assessments in other common situations tend to be more individualized. Often, they are based simply on an interview, (competence to contract or to make health care decisions) or conducted in retrospect (testamentary capacity). Even when testamentary capacity is raised as an issue during the life of the testator, experts follow generalized guidelines to assess capacity instead of using standardized instruments as in the case of a criminal defendant. See James E. Spar & Andrew S. Garb, *Assessing Competency to Make a Will*, 149 AM. J. PSYCHIATRY 169, 169 (1992).

116. Paul D. Lipsitt et al., *Competency for Trial: A Screening Instrument*, 128 AM. J. PSYCHIATRY 105 (1971).

117. *Id.* at 106, Table 1, Question 3.

118. *Id.*

119. RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 60 (1980).

120. Lipsitt, *supra* note 116, at 106.

A score of zero was given to the response "he figured there was no sense in arguing."¹²¹

The CST is used less frequently in the wake of criticism by scholars such as Roesch and Golding.¹²² But even more sensitive tests, such as the CAI (Competency Assessment Instrument) and the IFI (Interdisciplinary Fitness Instrument) frame assessments in terms of "the defendant's ability to relate to the attorney," and "the defendant's quality of relating to the attorney."¹²³ It is clear upon whom the burden of communication remains.

A recently published test, the Hopkins Competency Assessment Test, was developed especially to evaluate the competency of patients to give informed consent or write advance directives.¹²⁴ The test takes the form of an essay written at three reading comprehension levels.¹²⁵ The patient reads the essay, which is about informed consent and advance directives, and then answers six questions about the essay. For example, two of the questions and their correct responses are:

Question: What can sometimes happen to the thinking of a patient who has been sick for a long time?

Correct Answer: After a while, the patient's thinking may not be as good as it is now.

Question: Finish the sentence: A patient whose thinking gets bad may not be able to ———.

Correct Answer: Tell the doctor what the patient wants done.¹²⁶

The test itself is problematic. It purports to be a test of a patient's competence to give informed consent or write advance directives, and yet simply tests a patient's ability to remember information recently presented *about* advance directives, rather than examining a patient's ability to understand treatment issues and make decisions regarding his or her own treatment. In addition, while more than a third of the patients were determined by the test to be incompetent to give informed consent, "informed consent . . . from all participants" to participate in the study that validated the test was obtained.¹²⁷

121. Ronald Roesch & Stephen L. Golding, *Defining and Assessing Competence to Stand Trial*, in *HANDBOOK OF FORENSIC PSYCHOLOGY* 285, 378 (Irving B. Weiner & Allen B. Hess eds., 1987).

122. *Id.* at 385.

123. ROESCH & GOLDING, *supra* note 119, at 64; see also Stephen L. Golding & Ronald Roesch, *Competency for Adjudication: An International Analysis*, in *LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES* 73, 105 (D. Weissstut ed., 1988).

124. Janofsky et al., *supra* note 75, at 132.

125. *Id.* at 133. The levels are grades 13, 8, and 6.

126. *Id.* at 134.

127. *Id.* at 132.

In some ways, the third dynamic facing a person whose competence is questioned, that of communicating with a judge, is the worst.¹²⁸ The following exchange from a competence hearing¹²⁹ clearly reflects the hierarchical nature of capacity determinations involving a fifty-seven year old woman artist, some of whose work depicted scenes of violence. Because the woman had trouble paying her rent, she was assigned a case worker from a social service agency, who visited her, saw the pictures and was concerned. The social worker called in a psychiatrist. The combination of \$4,000.00 in overdue rent and the disturbing art resulted in a competency hearing. The following exchange between the woman proposed for guardianship and the judge, who is not a terrible or atypical judge,¹³⁰ gives a flavor of both competency as a relational concept and the competency relation as a hierarchical one. I will quote from the transcript at some length in order to adequately convey this:

- Court: Mrs. Rose, come nearer to me, so you can hear me and I can hear you.
- Mrs. Rose: Thank you.
- Court: Mrs. Rose, we've now taken a number of hours—
- Mrs. Rose: I'm sorry.
- Court: A number of hours, which is a very small period of time in your life, and this is an important occasion for you as an individual.
- Mrs. Rose: Yes.
- The Court: Under the law, the Court has the power to institutionalize you.
- Mrs. Rose: Uh-huh.
- Court: You know that?
- Mrs. Rose: I realize that, yes.
- Court: I also have the power to incarcerate you. When I use the word 'institutionalize,' we have facilities, mental facilities and other facilities to keep you for a period of time and put you under psychiatric treatment in the hospitals.
- Mrs. Rose: Uh huh.
- Court: Is that what you want to do?
- Mrs. Rose: I don't think that's appropriate or would be helpful to my sense of self or capacity to do anything—
- Court: No big speeches.

128. Michael L. Perlin, *Pretext and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

129. *In re Rose*, No. 54554/88, unpublished hearing transcript (N.Y. Sup. Ct. Oct. 20, 1988) (on file with author).

130. See generally Perlin, *supra* note 128.

Mrs. Rose: I think it would be very damaging, though I know these things do happen in the world, and I'm ready for anything.

Court: Based upon your testimony and based upon all the earmarks of this case, that's what should be done, but I'm not going to do that.

Mrs. Rose: Thank you.

...

Court: ... What I'm going to do is order a conservator to be appointed for you.

The conservator will require your cooperation.

Mrs. Rose: Yes.

Court: And there's a limited amount that any conservator can do for your welfare without your being amenable and helpful.

Mrs. Rose: I will try to the best of my ability. I try hard. And I don't expect much either. But I'm very grateful for what comes.

...

Court: ... Let's see how it works out. And as I said before, I cannot overemphasize that this requires your cooperation. I'm not taking your freedom away. I'm permitting you to be part of society.

But what I want you to do is be part of a—contribute something to society by taking care of yourself and by cooperating. When I use the words taking care of yourself, I mean the way society expects somebody to take care of themselves [sic]. You may not agree with all facets of society. That's irrelevant.

There was a great economist called Jeremiah Benson [sic] in England in 1700-something. His real test is the greatest amount of good to the greatest amount of people.

When we live in this complex society, we have to conform to a great degree with what's happening in our society, and you cannot become violent.

...

Mrs. Rose: ... [T]here's a difference between something pictorial and violence.

Court: Please. I do the talking, you do the listening.

Mrs. Rose: Okay.¹³¹

131. *In re Rose*, No. 43554/88, unpublished hearing transcript at 57-62. Published decisions rarely contain extended quotations from the transcript of proceedings, but those that do can be illuminating. For an example of the short shrift which a judge gives a woman's lack

Competence is, therefore, relational and contextual and describes communication. It is not a fixed, inherent characteristic of an individual.¹³² The relationships and communications that provide the context in which competence is questioned and assessed are powerfully unequal and hierarchical. The law, however, is not structured to take account of these differentials in power.

In this Part, I have discussed how the law ignores these differentials in the process of questioning and assessing competence. In the next section, I examine how the law compartmentalizes legal recognition of people's powerlessness into two very separate doctrinal areas, competence on the one hand and duress, coercion and necessity on the other. I also examine how this separation serves to efface the allegedly incompetent person's lack of agency,¹³³ rendering it ineffec-

of comprehension of the stipulation regarding marital assets, see *Howard v. Howard*, 352 N.W.2d 280, 283 (Mich. Ct. App. 1984).

132. RICHARD RESTAK, *THE BRAIN HAS A MIND OF ITS OWN* 154 (1991). Another moving example of the relationship between value judgments about the nature of communication and assessments of competence is recounted by Oliver Sacks. OLIVER SACKS, *The Twins*, in *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* 195, reprinted in OLIVER SACKS (1990). This true account, which I have read many times and have yet to read without crying, is about twins "variously diagnosed as autistic, psychotic or severely retarded." *Id.* at 195. They communicate with each other with "serene and meditative and almost holy intensity," by exchanging prime numbers which they seem to intuitively know without benefit of books or tables. *Id.* at 202. When Sacks wishes to communicate with them, he brings a book of prime numbers:

I quietly joined them. They were taken aback at first, but when I made no interruption, they resumed their "game" of six-figure primes. After a few minutes I decided to join in, and ventured a number, an eight-figure prime. They both turned towards me, then suddenly became still, with a look of intense concentration and perhaps wonder on their faces. There was a long pause . . . and then suddenly, simultaneously, they both broke into smiles. . . . They drew apart slightly, making room for me

Id. at 203.

Because the twins cannot communicate with people in power, they are:

[S]eparated—'for their own good,' to prevent their 'unhealthy communication together. . . . ' Deprived of their numerical 'communion' with each other, and of time and opportunity for any 'contemplation' or 'communion' at all . . . they seem to have lost their strange numerical power, and with this the chief joy and sense of their lives.

Id. at 209-10.

The twins now live in halfway houses and work at menial jobs. *Id.* at 209. Are they now more competent than when they were institutionalized? Who is to measure this? Who is to say?

I had a vivid example of this many years ago which I have been unable to forget. I was reading a psychiatry text that gave as an example of meaningless associations a woman patient's stream of words. Although meaningless to the psychiatrist, they were in fact an exact quotation of an obscure poem by Conrad Aiken that I happened to recognize. I often wonder what the meaning of the poem was for the woman, its association with her circumstances, and what became of her.

133. Although many feminists and scholars use the term "agency," few define it. In Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990), women's agency

tual in terms of legal doctrine.

IV. COMPETENCE: THE CONSTRUCTION OF FALSE AUTONOMY

Competence doctrine has its greatest impact in the way it constructs the world of competent people, especially competent women, and its separation of their lives from those of incompetent women. Competence doctrine is a strong statement that all people are equally powerful in their own lives, regardless of gender; and that constraints on one's agency are self-generated and not socially caused at all. This is because competence doctrine is based on an unquestioned assumption that all individuals inherently possess equal agency and, barring aberrant internal disabilities or specific external duress, are equally free to exercise it. Competence doctrine holds that people who cannot make and effectuate decisions in their lives because of mental retardation, age, alcoholism, or mental or physical illness,¹³⁴ are powerless because of the conditions themselves, and not because the social construction of any of these conditions has rendered them powerless. Feminist scholars have difficulty articulating the actual constraints on women's agency and self-determination in terms of legal doctrine. This is partly because of the world constructed by competence doctrine.

Within the concept of competence are embedded a series of assumptions about the world that do not reflect the experience of women or powerless groups generally. The world constructed by competence doctrine is one in which the norm is a rational, autonomous, volitional individual who makes choices by receiving information and weighing the pros and cons of a given decision in a rational way. It is a world in which law presumes that all people are empowered to act as their own agents and to effectuate their own decisions. "The well-entrenched view that individuals are free, self-determining, and independent of social structures, systems, and groups is connected to the basic Western conception of individual responsibility for the consequences of choice."¹³⁵ As one court stated, "[C]ompetency

appears to be equated with control over their lives. *Id.* at 780. Martha Mahoney contrasts the traditional approach to agency, which describes a wholly mobile autonomous individual who can leave and choose what she is going to do at any time with a more complex approach to agency as women's struggle to construct their lives in the midst of ongoing violence and oppression. Martha Mahoney, *Oppression or Victimization? Women's Lives, Violence and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* (Martha Fineman & Roxanne Tykitiuk eds.) (forthcoming 1994, manuscript on file with author). See also Martha Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1310, 1314 (1992).

134. See *supra* text accompanying notes 72-77.

135. Minow, *supra* note 82, at 55 n.217.

... turns on the patient's ability to function as a decision-maker, acting in accordance with her preferences and values."¹³⁶ Two assumptions are implicit here: first, if a person can make decisions, it follows that she can act upon those decisions, and her actions will accord with her preferences and values. Second, if she cannot function as a decisionmaker in accordance with her preferences and values, it must be caused by her own incapacity or lack of volitional ability.¹³⁷ By separating out some people as unable to make choices, and having special rules about them, the law reaffirms the power and agency of the rest of us, underscores our choices as our own, and distracts us from our commonality with women who have been found incompetent.

In the world of the law, there are only two doctrinal explanations for the inability to exercise choice and autonomy, that is, for a woman's lack of agency in her own life: incompetence or lack of capacity, where the problem springs from within the person; and coercion or duress, where the problem springs from the unlawful acts of a specifically identifiable other. Anything else, anything systemic, falls into the category which the law labels as "force of circumstances."¹³⁸

I agree at least that there is force involved in many of these circumstances. Yet women's ability to function as decisionmakers, and the impairment of those abilities, do not actually look like the legal doctrines that purport to reflect these issues. The law ignores the effect of continual and powerful domination and subordination on who we are and on our decisionmaking capacity. For example, circumstances such as long-term violence and abuse may obliterate a woman's recognition of herself as a decisionmaker at all; this violence and abuse is labelled as learned helplessness or battered woman syndrome.¹³⁹ If this is seen as *her* pathology, the law may offer her some

136. *In re A.C.*, 573 A.2d 1235, 1244 (D.C. 1990).

137. ALAN WERTHEIMER, *COERCION* 9 (1987). Otherwise volitional acts become involuntary when the actor's will is impaired by insanity, retardation, or uncontrollable urges. So too are acts resulting from external pressure such as torture or intimidation. Additionally, some acts may be purely of one's own volition but if all of the alternatives available to choose from are unacceptable, this volition is constrained. *Id.*

138. See *infra* text accompanying notes 190-255; see also RESTATEMENT (SECOND) OF CONTRACTS § 174-175 and introductory notes at 473 (1981); 25 AM. JUR. 2D, *Duress and Undue Influence* § 3 (1966); 13 SAMUEL WILLISTON, *WILLISTON ON CONTRACTS* § 1608, at 682 (3rd ed. 1970). For a particularly comprehensive explanation of the doctrines of duress, coercion and undue influence, see *Lempert v. Singer*, 766 F. Supp. 1356 (D.V.I. 1991).

139. See Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 330 (1992) (explaining that the theory of learned helplessness demonstrates that because a battered woman has learned not to trust her natural responses, she cannot predict that what she does will impact upon her safety).

redress. But, as both Lenore Walker¹⁴⁰ and Martha Mahoney¹⁴¹ have pointed out, the battered woman's perceptions of the constraints on her decisionmaking may not be pathological at all but grounded in reality. Paradoxically, this eliminates the change of legal remedy by transforming the inquiry from her mental incapacity to her circumstantial constraints. Because these constraints are not cognizable as either her incompetence or (except under very extreme conditions) duress, the law presumes that she is a competent individual whose actions and decisions are a result of her own free will. Battered women are perceived by law to be either pathological victims who are out of contact with reality, and therefore entitled to some remedy, or autonomous individuals capable of making choices in their lives (presumably, the choice to leave) and therefore responsible for those choices. There is, as Martha Mahoney explains, no room for complexity or struggle in this legal vision.¹⁴²

Both competence and coercion doctrine analyze people's situations—their capacity or the coercion exerted on them—in typically narrow time frames and in very individualized and localized ways. Because incapacity and duress or coercion are separate legal doctrines, they can be played off against each other. Because they focus on the individual woman and her situation, the law excludes any consideration of systemic powerlessness and denial of autonomy. Although these doctrines dictate the questions we ask about the power to make choices, they are the wrong questions.

Occasionally, legal scholars and policymakers attempt to bridge the conceptual gap between competency doctrine and duress doctrine, and to grapple with systemic issues of lack of agency and autonomy. This has happened only when the systems involved are circumscribed, limited and well-defined. For example, in the 1970s, ethicists and legal scholars frequently debated whether prisoners and institutionalized individuals could ever autonomously consent to experimental procedures.¹⁴³ In these cases, the populations are not inherently incompetent in the traditional sense, so competence doctrine does not

140. *Id.* at 333. Walker notes that leaving an abusive relationship will not stop the violence, thus limiting a battered woman's options of how to respond.

141. See Mahoney, *supra* note 133, at 1288, 1304; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64-71 (1991) [hereinafter Mahoney, *Issue of Separation*].

142. Mahoney, *supra* note 133, at 1308-10.

143. For example, in one case a patient was committed for an indefinite period to a state hospital under a criminal sexual psychopath statute. The patient signed an informed consent form agreeing to psychosurgery. The court determined that "involuntarily detained patients cannot give informed and adequate consent to experimental psychosurgery," due to "the inherent inequality of their position" vis-a-vis doctors and institutional administration.

explain the sense that the decisions were not made freely.¹⁴⁴ Traditional doctrines of duress were difficult to apply since the decisions of prisoners and patients to participate in experiments were not the result of any threats. In other words, the prisoners' and patients' choices appear to be competent and voluntary, *within the context* of the systems that incarcerate and institutionalize them. And yet courts,¹⁴⁵ scholars,¹⁴⁶ and policymakers¹⁴⁷ were uneasy with the assumption that the decisions were autonomous:

It seems at first glance that the principle of respect for persons requires that prisoners not be deprived of the opportunity to volunteer for research . . . [but] when persons seem regularly to engage in activities which, were they stronger or in better circumstances, they would avoid, respect dictates that they be protected against those forces that appear to compel their choices¹⁴⁸

The assumption of autonomy and agency with which the law endows all individuals is so strong, however, and the consequences of recognizing as a matter of law that systemic circumstances could impinge on individual autonomy are so dire, that ultimately a strong consensus emerged that prisoners and institutionalized persons could act with autonomy within their environments.¹⁴⁹ Arguments by feminist

Kaimowitz v. Department of Mental Health, No. 73-19434-AW, 2 Prison L. Rep. 433 (1973) (Mich. Ct., Wayne County, July 10, 1973).

144. The court in *Kaimowitz* based its concern about the patient's competence to consent to experimental psychosurgery on the "fact [that] institutional confinement has special force in undermining the capacity of the mental patient to make a competent decision on this issue even though he be intellectually competent to [make the decision]." *Id.* at 476.

145. *Id.*

146. See, e.g., J. Arboleda-Florez, *Ethical Issues Regarding Research on Prisoners*, 35 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 4 (1991) (noting that prisoners are exposed to overt and covert pressures to participate in research). Because a prison is a coercive setting, a prisoner's informed consent does not necessarily imply that the decision was voluntary. See ROZOVSKY, *supra* note 72, at 21; see also George Bach-y-Rita, *The Prisoner As an Experimental Subject*, 229 J. AM. MED. ASS'N 45 (1974) (observing that several types of coercive pressure occur in prisons); Bernard Barber, *The Ethics of Experimentation with Human Subjects*, 234 SCI. AM. 25, 31 (1976) (noting that prisoners' consent may be logically impossible due to their implicitly coercive situation). Moreover, "[i]n the prison population, communications of researchers regarding informed consent becomes less important than the fact that the prisoners are inherently unfree and without alternatives." BERNARD BARBER, INFORMED CONSENT IN MEDICAL THERAPY AND RESEARCH 165 (1980). But see Carl Cohen, *Medical Experimentation on Prisoners*, in ETHICAL ISSUES IN PROFESSIONAL LIFE 193 (Joan C. Callahan, ed., 1988) (noting that while prisons are coercive this does not necessarily mean that a prisoner cannot give full consent).

147. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, RESEARCH ON PRISONERS, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. OS76-132, 3-6 (1976).

148. *Id.* at 6.

149. See, e.g., Cohen, *supra* note 146, at 197, 200 (observing that it has not been shown that a prisoner cannot give full consent); Edward A. Fitzgerald, *Chemical Castration: MPA*

theorists that women in this society share much in common with prisoners¹⁵⁰ and institutionalized persons¹⁵¹ have not addressed this particular similarity: that individual actions in an environment whose purpose and process operates to constrain autonomy are legally assumed to be acts of agency.

In sum, the division between competence doctrine and coercion doctrine does two specific things. First, it creates a legal and conceptual abyss between women in what might otherwise be understood as similar situations. Second, it splits what are otherwise powerful stories of women's lives into artificial distinctions. Each part of the now disjointed story is then subject to separate legal analysis, ultimately resulting in a failure to provide a remedy for obvious injury.¹⁵² Most of the cases in which this occurs are not readily susceptible to equality

Treatment of the Sexual Offender, 18 AM. J. CRIM. L. 1, 21-22 (1990) (suggesting that prisoners who participate in medical experiments do not feel coerced); Nancy M. P. King & Gail Henderson, *Treatments of Last Resort: Informed Consent and the Diffusion of New Technology*, 42 MERCER L. REV. 1007 (1991) (noting that situational coercion may impair freedom without necessarily impairing autonomy); Jeffrie G. Murphy, *Total Institutions and the Possibility of Consent to Organic Therapies*, in RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 183 (1979) (theorizing that inmates can give informed, voluntary, and competent consent to such procedures as psychosurgery); Barbara H. Stanley & Michael Stanley, *Psychiatric Patients in Research: Protecting their Autonomy*, 22 COMPREHENSIVE PSYCHIATRY 420, 421 (1981) (noting that mentally ill patients can consent to research and not allowing them to do so results in a loss of autonomy). This argument is reemerging with the recent trend of courts offering individuals convicted of sex offenses or child abuse the option of castration, sterilization, or implantation with contraceptive devices. See Douglas J. Besharov, *Sex Offenders, Is Castration an Acceptable Punishment?: Yes: Consider Chemical Treatment*, A.B.A. J., July 1992, at 42; Linda S. Demsky, *The Use of Depro-Provera in the Treatment of Sex Offenders*, 5 J. LEGAL MED. 295, 321 (1984) (concluding that treatment of sex offenders with Depro-Provera offers a promising solution to the high recidivism rate of sex offenders); Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 57 (1990) ("MPA treatment should be considered as acceptable innovative therapy for the treatment of convicted paraphiliacs."); Andrew Vachhs, *Sex Offenders, Is Castration an Acceptable Punishment?: No: Pragmatically Impotent*, A.B.A. J., July 1992 at 43; Sandra G. Boodman, *Does Castration Stop Sex Crimes? An Old Punishment Gains New Attention, but Experts Doubt its Value*, WASH. POST, March 17, 1992, at Z7 (reviewing the rekindled public debate caused by a Texas man's request that the state castrate, rather than imprison him, for rape); Tamar Lewin, *Implanted Birth Control Device Renews Debate on Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20 (focusing on renewed debate over forced contraception after a court ordered a woman convicted of child abuse to have Norplant implanted as a condition of probation); Robert Matas, *Castration Mulled for Serious Sex Offenders*, ARIZ. BUS. GAZETTE, Jan. 19, 1990, at L6 (reporting Washington state legislature's debate of proposals calling for surgical castration of serious sex offenders).

150. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

151. Susan Stefan, *The Cloak of Benevolence* (1989) (unpublished manuscript on file with author).

152. The observation that the law is constructed in ways that place women's suffering outside the scope of legal redress is not new. See, e.g., WEST, *supra* note 105, at 82.

analysis, precisely because they apply only to women.¹⁵³ These cases include competence to consent to sexual intercourse, to decide to bear children, and to give children up for adoption.

A. Competence to Consent to Sexual Intercourse

Rape law in all fifty states and the District of Columbia punishes sexual intercourse with a woman who lacks capacity or is incompetent to consent.¹⁵⁴ This is somewhat similar to the concept of statutory rape, although it is significantly different in that statutory rape imposes bright-line boundaries of age, whereas the laws regarding incompetence give courts wide latitude to interpret the meaning of capacity to consent to sexual intercourse. Thus, for example, one statute defines rape as an act of sexual intercourse with a female "[w]here she is incapable, through lunacy or any other unsoundness of mind whether temporary or permanent of giving legal consent."¹⁵⁵

When I began to research this material, my hunch was that courts would use these statutes to criminalize consensual sexual intercourse involving mentally handicapped women because of deep-seated social hostility to the idea of handicapped women as sexual beings and

153. Catharine MacKinnon, among others, notes that one of the central flaws of formal equality analysis is that it requires a referent or comparison. If the challenged action does not happen to men differently, any injustice or oppression in how it happens to women is not cognizable under equality analysis. CATHERINE MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1987). MacKinnon notes that:

These experiences have been silenced out of the difference definition of sex equality largely because they happen almost exclusively to women. Understand: for this reason, they are considered *not* to raise sex equality issues. Because this treatment is done almost uniquely to women, it is implicitly treated as a difference, the sex difference, when in fact it is the socially situated subjection of women.

Id. at 41.

154. See K.H. Larsen, Annotation, *Rape or Similar Offense Based on Intercourse With a Woman Who Is Allegedly Mentally Deficient*, 31 A.L.R. 3d 1227 (1970 and Supp. 1992).

155. IDAHO CODE § 18-6101 (Supp. 1992). Another statute states that "[l]ack of consent results from . . . [i]ncapacity to consent." N.Y. PENAL LAW § 130.05(2)-(3) (McKinney 1988). The statute goes on to define a person as "deemed incapable of consent when he is: (a) less than seventeen years old; or (b) mentally defective; or (c) mentally incapacitated; or (d) physically helpless." *Id.* See also N.Y. PENAL LAW § 130.10 (allowing as an affirmative defense lack of knowledge of facts and conditions responsible for incapacity to consent). But see *State v. Sullivan*, 298 N.W.2d 267, 273 (Iowa 1980) (stating that the crime does not require knowledge or consent). Constitutional challenges to these statutes almost always fail. See, e.g., *State v. Degrenier*, 424 A.2d 412, 413 (N.H. 1980). But see *Sullivan*, 298 N.W.2d at 270, 272 (Iowa 1980) (striking down as constitutionally vague that portion of the statute making it a crime to participate in a sex act with a person who "lacks the mental capacity to know the right and wrong of conduct in sexual matters").

as mothers.¹⁵⁶ Although there are one or two cases that seemed to fit into this category,¹⁵⁷ the vast majority did not tell this story at all.¹⁵⁸

Instead, the defendant in a typical case described his relations with the woman alleged to be incompetent as follows:

If you were to look at [her] and tell her to get undressed, get into bed, she would do it if you told her to do it, if you asked her to do it, she'd tell you no or she'd say do I have to, but if you looked at her and gave her an order do it, she would do it.¹⁵⁹

A woman in another typical case told the man that:

[S]he did not want to have sex with him, but they had sex anyway. About an hour later, [he] wanted to have sex again, and they did, on the living room floor. [The woman] again said she did not want to have sex. [She] said [he] did not threaten her or promise her anything.¹⁶⁰

In both these cases, the jury found the women incompetent to understand the nature of sexual intercourse and convicted the men of rape.¹⁶¹

These cases are not about criminalization of consensual sexual behavior with handicapped women who consented to intercourse, but rather about criminalization of nonconsensual sexual behavior with women who have capacity to understand the nature of the act and who object to sex.¹⁶² The woman does not meet the statutory standard at all: she does not lack the capacity to understand the meaning of sexual intercourse. She just does not want to have sex. However, these are cases where standard rape law would not have sufficed to sustain a conviction.¹⁶³ There is little or no resistance beyond the hesitation or reluctance that clearly conveys the woman's distaste for and

156. Susan Stefan, *Whose Egg is it Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 454-55 (1989).

157. The defendant is rarely convicted in these cases. See, e.g., *People v. Blunt*, 212 N.E.2d 719 (Ill. Ct. App. 1965); *Wilson v. Commonwealth*, 160 S.W.2d 649 (Ky. App. 1942); *State v. Green*, 1990 Tenn. Crim. App. LEXIS 653 (Oct. 3, 1990).

158. I have based this section on my examination of over sixty cases from thirty-one states, dating between the late 1800s and 1992.

159. *State v. Soura*, 796 P.2d 109, 111 (Idaho 1990) (alteration in original).

160. *State v. Willenbring*, 454 N.W.2d 268, 269 (Minn. Ct. App. 1990).

161. *Soura*, 796 P.2d at 115; *Willenbring*, 454 N.W.2d at 271.

162. In *Salsman v. Commonwealth* 565 S.W.2d 638 (Ky. Ct. App. 1978), the woman refused defendant's request for sex, refused his request for fellatio and "resisted by covering her mouth." *Id.* at 639-40. Defendant "grabbed her" and removed her clothes. *Id.* at 640. She continued to protest, saying, "No, no." *Id.* In *State v. Kingsley*, 383 N.W.2d 828 (N.D. 1986), while one victim testified she was "forced," the other testified she asked defendant to "please get off me." *Id.* at 829-30. See also *Wootton v. State*, 799 S.W.2d 499, 501 (Tx. Ct. App. 1990) (finding that victim "resisted the alleged sexual assault").

163. Traditionally, rape law requires resistance to show non-consent or force. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1099, 1130-31 (1986).

desire to avoid intercourse. The woman says, "No," or "Do I have to?" Under our law, this would never be enough to convict a man of rape.

Courts must find these women incompetent in order to circumvent the discontinuity between rape law and women's experiences of forced sex. Thus, the laws criminalizing sexual contact with incompetent women essentially affirm that sex for every other woman is the product of understanding and conscious choice. If it were not, she would have manifested it through far more resistance than occurs in these cases. Ironically, the only women whose "No" is taken to mean "No" are women that the law finds incompetent to make decisions.

This conclusion is strikingly underscored by the fact that when mentally handicapped women engage in clearly consensual sex, courts will not uphold the conviction of the man regardless of the apparent severity of the woman's disability. A thirty-two-year-old woman who had been in nursing homes since the age of eight because of irreversible brain injury (and whose competence was not questioned when she signed a consent form for sterilization), invited a regular visitor to the nursing home to have sex with her. He was prosecuted on the grounds that she was incompetent to consent to intercourse.¹⁶⁴ Evidence was introduced that she had been married, and that the nursing home regularly allowed her private time to have sex.¹⁶⁵ The woman testified, and it was apparent that she had wanted to have sex.¹⁶⁶ Correctly noting that the sexual activity was a crime only if the victim was "incapable of appraising the nature of her conduct,"¹⁶⁷ the court threw out the conviction.¹⁶⁸ The part of this case that is in marked contrast to the cases where convictions are sustained relates to the woman's apparent consent to and desire for the intercourse. The level of disability, which is technically all that should matter under these laws, is hardly mentioned at all.¹⁶⁹

What would case law look like if courts could recognize the commonality of women's situations in this area? One interesting case

164. *State v. Green*, 1990 Tenn. Crim. App. LEXIS 653 at *4 (Oct. 3, 1990). Green was charged with assault with intent to commit sexual battery and burglary. The burglary conviction depended, of course, on the illegality of his underlying actions with regard to sexual intercourse. *Id.* at *11.

165. *Id.* at *4.

166. "No issue of consent or force was presented." *Id.*

167. *Id.* The court remarked that no psychiatric or psychological testimony was offered as to the woman's disability. *Id.* at *5. On the other hand, the woman's present and previous medical doctors testified. *Id.* at *7-*10. This would have been more than sufficient expert testimony in other cases.

168. *Id.* at *11.

169. *See id.* at *7.

reflects the beginning of the answer to this question. A recent Florida case involved a charge of sexual battery.¹⁷⁰ The State indicated that it would contend at trial that "because of a history of an abusive relationship between the victim and the defendant, the victim was incapable of consenting to the sexual intercourse."¹⁷¹ Essentially, the brutality of the relationship made her "unable to refuse," and her fear cause[d] her to behave in ways that appear to show 'things are normal' when in fact they are not."¹⁷²

This is a striking case because the court is recognizing that the woman's outward behavior, which looked like a choice to have sex, is not in fact an act of consent to sex at all, but a choice for survival. In those sorts of circumstances, she is "incapable of consenting to sexual intercourse,"¹⁷³ yet the court does not have to justify her incapacity to consent by reference to some pathology or defect within her, but finds her incapacity in the constraints of her situation.

B. *Competence to Enter Divorce and Separation Agreements*

Both women and men sometimes seek to set aside divorce agreements that are adverse to them on the grounds that they lacked capacity at the time they consented to these arrangements. Like the right to die cases, courts in cases contesting separation and divorce agreements on grounds of capacity theoretically apply gender neutral concepts of competence. In fact, the courts' approach to, and the outcome of, cases differ depending on whether the party seeking to rescind the agreement is a woman or a man. Women win these cases far more frequently than men for a variety of reasons.¹⁷⁴ First, courts

170. *State v. Rhone*, 566 So. 2d 1367 (Fla. 4th DCA 1990).

171. *Id.* at 1367.

172. *Id.* at 1368. Ultimately, Rhone pled guilty to false imprisonment, and prosecutors dropped the sexual battery counts. He was sentenced to probation for the false imprisonment and time served for the battery. He later violated probation and received a four-year sentence. Telephone Interview with Les Seidman, Assistant State Attorney, Sex Crimes and Child Abuse Unit of the Florida State Attorney's Office, Broward County, Fla. (March 22, 1993).

173. *Rhone*, 566 So. 2d at 1367.

174. Men who claim that they were incompetent when they entered into economically disadvantageous separation agreements almost uniformly lose. See, e.g., *Goza v. Goza*, 470 So. 2d 1262 (Ala. Civ. App. 1985); *Johnston v. Johnston*, 465 A.2d 436 (Md. Ct. App. 1983); *Van Wagoner v. Van Wagoner*, 346 N.W.2d 77 (Mich. Ct. App. 1983); *Ridings v. Ridings*, 286 S.E.2d 614 (N.C. Ct. App. 1982); *DiPietro v. DiPietro*, 460 N.E.2d 657 (Ohio Ct. App. 1983); *Pillow v. Pillow*, 410 S.E.2d 407 (Va. Ct. App. 1991). One of the few cases where a man won such a case is *Blattner v. Blattner*, 411 N.W.2d 24 (Minn. Ct. App. 1987). In that case, after a sixteen-year marriage, the husband contracted multiple sclerosis. He was hospitalized in January and again in March. He was transferred to a nursing home in March, where he was placed on antidepressant drugs. His wife and her lawyer came to his room at the nursing home with a stipulation awarding the wife the house and the car and waiving rights to spousal maintenance. *Id.* at 25. Although there was some evidence that the divorce was "for purposes

tend to entertain men's claims of mental and even physical incapacity with skepticism, often looking behind or disregarding entirely the testimony of experts that a man was "severely depressed"¹⁷⁵ or suffering from "impaired mental status."¹⁷⁶ When women make these claims, courts accept the testimony of experts on incapacity far more readily. When women lose these cases, the courts often cite the law as controlling.¹⁷⁷ In contrast, many courts simply do not believe a man's claim of incapacity, and look for more plausible reasons for his agreeing to an unequal bargain. Often these reasons are seen by courts as arising from the fact that the husband was involved in an affair prior to the dissolution of the marriage:

The court is satisfied that he knew exactly what he was doing and that there should be no relief granted from a settlement that he entered into knowingly in open court without any pressure from anybody else other than his own knowledge that he could lose the whole thing if some of his peccadilloes with his girl friend came out.¹⁷⁸

of medicaid eligibility," apparently not all of the property the husband gave up was necessary for this eligibility. *Id.* at 27. Women win more frequently in those cases where they claim they were incompetent when they entered into economically disadvantageous separation agreements. *See, e.g., In re Marriage of Baltins*, 212 Cal. App. 3d 66 (Cal. Ct. App. 1989); *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987); *Eckstein v. Eckstein*, 379 A.2d 757 (Md. Ct. Spec. App. 1978); *Lindsey v. Lindsey*, 369 N.W.2d 26 (Minn. Ct. App. 1985), *modified*, 388 N.W.2d 713 (Minn. 1986); *Galloway v. Galloway*, 281 N.W.2d 804 (N.D. 1979). Women argue lack of capacity far more often than men, and lose more of these cases than they win; but their success in making these arguments is still disproportionately greater than men who are similarly situated. In all, of thirty-one cases examined, nine involved men making claims of incapacity and twenty-two involved women. Men lost eight of nine cases, while women lost twelve of twenty-one cases.

175. *DiPietro*, 460 N.E.2d at 663-64.

176. *Van Wagoner*, 346 N.W.2d at 79.

177. For example, courts in Alabama have developed an interpretation of the law that virtually ensures that no one can win a claim of incapacity. A plaintiff must show that he or she was *non compos mentis* at the time of the agreement, that is, "there must be a showing of actual insanity" *Goza*, 470 So. 2d at 1264. Women's claims of lack of capacity that probably would have succeeded elsewhere uniformly lose in Alabama. *See, e.g., McDaniel v. McDaniel*, 515 So. 2d 13 (Ala. Civ. App. 1987); *Hester v. Hester*, 474 So. 2d 734, 735 (Ala. Civ. App. 1985) (finding wife competent when she signed settlement agreement even though less than two weeks later she was hospitalized for "major depression with psychotic features"); *Ritenour v. Ritenour*, 448 So. 2d 956 (Ala. Civ. App. 1984); *McLaughlin v. McLaughlin*, 302 So. 2d 233, 235 (Ala. Civ. App. 1974) (finding wife incompetent when she signed agreement under the following circumstances: The wife's seventeen year old pregnant daughter eloped. The wife then began to drink heavily and was institutionalized May 29th and released June 3rd. On June 6th, her husband discussed divorce with her. On June 8th she attacked him. On June 12th she was served with complaint. On June 14 she went with husband (a doctor) to the office of a lawyer engaged by husband "to handle the divorce for both," where she signed the agreement). Husbands also lose in Alabama. *See Bailey v. Bailey*, 560 So. 2d 1076 (Ala. Civ. App. 1990).

178. *Van Wagoner*, 346 N.W.2d at 79. In *Van Wagoner* the husband had multiple surgeries

The record in this case argues more strongly for a conclusion that appellant signed the separation agreement to relieve himself of the stress caused by his extra-marital relationship, and to fulfill his desires to be removed from an unhappy marriage and to live with and marry another woman.¹⁷⁹ Interestingly, while conceding that adultery could cause women great stress, courts do not explore the emotional effect of the extra-marital affair on the man. Courts assume that stress, whether from physical illness or emotional pressure, does not seriously affect a man's competency. In retrospect, courts are more likely to assess women in similar circumstances to have lacked capacity. For example, the Minnesota Supreme Court found that Roseann Lindsey lacked capacity when she agreed to a property settlement and support provisions.¹⁸⁰ Her psychiatrist testified that she was "severely depressed and afraid of her husband, and that this fear had affected her judgment; she would simply 'give in' to her husband and was dependent upon him. . . . He also testified that Roseann had difficulty dealing with reality and making rational decisions during the period in question."¹⁸¹ Roseann testified that her husband "told her he would take care of her and that he threatened to take her children away if she sought legal representation."¹⁸²

The court of appeals characterized Roseann Lindsey as suffering from a severe mental illness. Professionals diagnosed her as manic depressive and also as suffering from periodic memory failures.¹⁸³ The Minnesota Supreme Court found that she "clearly lacked the capacity to validly enter into a stipulated dissolution decree."¹⁸⁴

The approach courts use in these cases probably differs because the facts of the situations presented by men and women differ dramatically. Many of these cases tell stories of husbands' infidelity,¹⁸⁵ physical abuse and violence,¹⁸⁶ separation of the wife from her children, and threats that she would never see them again unless she signed the

before trial and was in pain during trial. His surgeon and a psychiatric social worker testified that he "was under stress and impaired mental status at the time of the trial"). *Id.* at 78-79.

179. *See, e.g., DiPietro*, 460 N.E.2d at 664. In the months prior to signing the separation agreement, the husband had been hospitalized for severe depression, placed on medication and had suffered a temporary loss of memory. His wife testified "that at one time she was afraid he might take his life." *Id.* at 662.

180. *Lindsey v. Lindsey*, 388 N.W.2d 713 (Minn. 1986).

181. *Id.* at 715.

182. *Id.*

183. *Id.*

184. *Id.* at 716.

185. *Van Wagoner v. Van Wagoner*, 346 N.W.2d 77, 78 (Mich. Ct. App. 1983); *Barrie v. Barrie*, 381 A.2d 374, 376 (N.J. Super. Ct. App. Div. 1977); *DiPietro*, 460 N.E.2d at 663; *Pillow v. Pillow*, 410 S.E.2d 407, 408 (Va. Ct. App. 1991).

186. *See, e.g., In re Marriage of Baltins*, 212 Cal. App. 3d 66, 75 (Cal Ct. App. 1989); *Casto*

agreement.¹⁸⁷ The women are more often institutionalized, for longer periods of time, and subjected to intrusive treatments such as electric shock.¹⁸⁸ The men give evidence of incapacity such as crying in front of their friends.¹⁸⁹

The most striking aspect of these cases, however, is not the dissimilarity between the experiences of men and women who claim incapacity during separation or divorce. It is the similarity between the experiences of women who claim that they entered into a disadvantageous divorce agreement solely because of lack of capacity and the experiences of women who do not claim incapacity or duress in entering into divorce agreements. It is difficult to distinguish between Roseann Lindsey and many other competent women in her position—afraid of her husband, financially dependent on him, and afraid to lose her children. These women must live with the results of the dissolution agreements they agreed to competently but powerlessly.¹⁹⁰

Both these cases and the rape cases discussed in Part IV.A show that courts will manipulate competence doctrine to reach a just result. Unfortunately, courts will only protect women that they perceive as, or who are willing to label themselves as, particularly powerless because of an internal mental defect or disability. Competence doctrine leaves the courts blind to the similarity of experiences between women labeled as competent and those labeled as incompetent. So-called competent women may in fact feel equally powerless. But because the law presumes they are autonomous free agents, they have no legal remedy in the absence of arguing that some internal disability incapacitated them or of presenting proof of egregious duress. Presently the doctrines of competence and duress are completely separated. The effect of domination not rising to the level of duress or vulnerability not falling to the level of incapacity is not cognizable by the legal system. When women urge that their circumstances be considered as a whole, courts explicitly reject the women's arguments. In *Lundstrom v. Lundstrom*,¹⁹¹ a woman who had been hospitalized for

v. Casto, 508 So. 2d 330, 334-35 (Fla. 1987); *Young v. Young*, 455 N.E. 2d 1360, 1361 (Ohio Ct. App. 1982).

187. *Eckstein v. Eckstein*, 379 A.2d 757, 760 (Md. Ct. Sp. App. 1978).

188. See, e.g., *Ritenour v. Ritenour*, 448 So. 2d 956, 957 (Ala. Civ. App. 1984); *Ford v. Ford*, 605 S.W.2d 756, 757-58 (Ark. Ct. App. 1980); *Lindsey v. Lindsey*, 369 N.W.2d 26, 28 (Minn. Ct. App. 1985).

189. See, e.g., *Goza v. Goza*, 470 So. 2d 1262, 1265 (Ala. Ct. Civ. App. 1985).

190. "[M]others often find themselves bargaining away financial claims in exchange for custody. . . . Even if the father does not want custody, his lawyer often will advise him to claim it in order to have a bargaining chip with which to bargain down his wife's financial claims." Williams, *supra* note 56, at 838.

191. 1992 WL 20734 (Minn. Ct. App. Feb. 11, 1992).

taking an overdose of medication less than five weeks before the hearing moved to vacate a stipulation dividing marital assets. A psychologist's affidavit was introduced stating that:

[H]e saw appellant in his office the day before the . . . hearing [at which the stipulation was negotiated and signed] and that she was very confused and had told him that she did not feel prepared for the divorce proceedings the next day. The psychologist opined that appellant was unable to understand and participate meaningfully in the stipulation and default proceedings because of her severe depression, passivity disorder, and adjustments to new medication.¹⁹²

The court methodically disjoined the issues of fraud (relating to incompetence) and duress, and applied the tests for each separately. Because the test of "whether a person can fairly and reasonably understand the matter he [sic] is considering," was met, there was no fraud perpetrated upon the court.¹⁹³ Duress, of course, requires "threat or compulsion."¹⁹⁴ The court noted that the appellant did not "separate the issues of fraud and duress. Instead, appellant seems to say that a combination of all her circumstances shows that she could not object to the agreement."¹⁹⁵

The argument that a court should look at a "combination of all her circumstances" is not unprecedented in other areas. Many legal questions turn on the "totality of the circumstances test."¹⁹⁶ To require a woman under these circumstances to show that a man used actual force or threats, as courts have interpreted duress doctrine, fails to appreciate that "power can be exercised without violence."¹⁹⁷ Domestic situations in which there is the most duress may be those in which the least overt force is manifested,¹⁹⁸ and when the woman is

192. *Id.* at *1.

193. *Id.* at *3. The claimed fraud upon the court in this case was appellant's incompetency at the time of the hearing.

194. *Id.*

195. *Id.*

196. For example, the totality of the circumstances test is used to determine whether probable cause exists to support a search warrant. *Illinois v. Gates*, 462 U.S. 213 (1983). The test is also used to determine whether a defendant in a criminal case is entitled to a jury instruction that he is presumed innocent, *Kentucky v. Whorton*, 441 U.S. 786, 789 ((1979) (per curiam), and whether federal law preempts state law in a given area. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 747-48 (1985).

197. Estrich, *supra* note 163, at 1105.

198. JUDITH HERMAN, *TRAUMA AND ABUSE* 76-95 (1992). In the wake of violence, women may try to modify their behavior to avoid further violence. To an observer, the past violence appears invisible, and the woman appears to be acting of her own free will, when in fact she is responding to violence in order to survive. Martha Mahoney, *Issue of Separation*, *supra* note 141, at 33.

separating from a man, the chances of violence against her escalate.¹⁹⁹ The signing of a separation agreement and an appearance in court are often the culmination of a long and difficult process of separation, a time when judges should be most alert to signs of force, undue influence, or incapacity in some form. Instead, courts point to the likelihood of stress and pain affecting the parties' judgment as the best reason to ignore those factors. As one court noted, "If agreements between husbands and wives could be set aside on the ground that one of the parties was severely depressed . . . agreements executed by persons involved in dissolution or divorce proceedings would tumble like pins in a bowling alley."²⁰⁰

It is not clear what social goal the insistent protection of these agreements and contracts made under such inauspicious conditions serves. However, when the clear underlying goal of courts in these situations is to uphold these agreements, the party under the most emotional pressure, the party with the least power, certainly stands to lose even more if the courts refuse to look at the combination of all her circumstances. Although courts are more willing to entertain the notion of a woman's incapacity than a man's in challenges to dissolution agreements, holding "competent" women to these agreements is a particularly punitive result of the competence/duress dichotomy and the law's assumptions that each individual acts with total autonomy and free will.

C. *Competence to Consent to the Adoption of a Child*

The harm done by formally separating coercion and capacity doctrines is apparent in an area where the courts have a strong preference for finding capacity—the decision to give up a child for adoption. In most states, revocation of consent for adoption, like invalidation of a separation agreement, requires a showing of fraud, duress or coercion.²⁰¹ In these cases, a court's orientation to a particular outcome,

199. Mahoney, *Issue of Separation*, *supra* note 141, at 65-66.

200. DiPietro v. DiPietro, 460 N.E.2d 657, 664 (Ohio Ct. App. 1983).

201. See, e.g., ILL. ANN. STAT. ch. 40, para. 1513 (Smith-Hurd 1992); OR. REV. STAT. § 109.312 (Supp. 1991); VA. CODE ANN. § 63.1-225 (Michie 1992); WASH. REV. CODE ANN. § 26.33.160 (West Supp. 1992); W. VA. CODE § 48-4-5 (1992). Even in states where a biological parent may revoke consent without such a showing, statutes often confer a significant preference in situations involving coercion and duress. For example in New York, consent to adoption made in a judicial proceeding is immediately irrevocable. Consents signed on documents become irrevocable after thirty days. If parents choose to revoke in thirty days, the court holds a hearing to determine the best interests of the child. However, if parents successfully claim fraud, duress, or coercion in the execution of consent, the child may be returned to the parents without such a hearing. See, e.g., *In re Sarah K.*, 487 N.E.2d 241 (N.Y. 1985) (noting that revocation of consent in the absence of fraud and duress leads to

and the extent to which the doctrinal division between coercion and capacity assists desired outcomes is quite explicit.

For example, in one case a pregnant mother with an IQ of sixty was in jail awaiting trial for fornication.²⁰² A Massachusetts agency had brought neglect proceedings against her and sought to take custody of the children. She signed adoption consent forms giving up her four children for adoption after a conversation with an adoption agency representative that led her to believe she would be in jail for two years. The next day, when she retained an attorney, she learned that the maximum sentence for fornication was only three months. She immediately filed to revoke her consent to the adoption. She argued that she did not have the capacity to consent to the adoption, or alternatively, that she had done so under duress. Although the lower court had granted her petition, the appeals court reversed.²⁰³ Though the appeals court noted that she was classified as a "moron,"²⁰⁴ and few, if any, courts have ever found that a woman with an IQ in this range has the capacity to consent to sexual intercourse, the court nevertheless found that she did have capacity to give her children up for adoption. The court held that "the mother understood precisely what she was doing . . . and acted for the paramount, sound reason that she believed she would be confined for some time and unable to care for her children."²⁰⁵ She had capacity, therefore, because she acted rationally on the basis of information available to her even though that information was false.

As a separate matter, the court found that she had not acted under duress because any misinformation from the agency was neither deliberate nor "designed to overcome the mother's will and compel assent."²⁰⁶ Thus, the court considered the mother's retardation under the capacity rubric, but considered the misinformation about the jail sentence under the duress rubric. The fact that she was in jail and pregnant falls into no legal category at all because it is neither inherent in her nor the bad or unlawful act of someone else. In the end, the court held her to have acted voluntarily and competently in surrendering her children. If we simply ask the question of whether she really exercised agency in signing the adoption consent form, the answer looks a lot different.

hearing to determine best interests of child and that revocation of consent due to fraud and coercion is tantamount to no consent at all, leading to return of child without further findings).

202. *In re Surrender of Minor Children*, 181 N.E.2d 836 (Mass. 1962).

203. *Id.* at 840.

204. *Id.* at 836.

205. *Id.* at 839.

206. *Id.*

The division between capacity and duress is also made in another case²⁰⁷ where the court, discussing capacity to consent to adoption executed three days²⁰⁸ after the baby was born, noted that "the fact that appellant was weakened by her recent delivery and depressed, as *all women would be under similar circumstances*, does not constitute duress."²⁰⁹ The court did not consider this as a capacity argument at all, because capacity is an individualized inquiry. If *all* women are torn with emotions and stress when they give up their babies, then those emotions and stress cannot constitute the basis for a capacity inquiry. In considering the mother's argument, the court viewed her confusion from the pain medication she was taking, as well as her claim that her priest and the adoptive parents' attorney subjected her to duress, as individualized factors. The court rejected both the medication argument, which went to capacity, and the duress arguments as separate matters, under separate analyses, without ever considering the synergistic effects of the depression, emotions, stress, medication and the strong persuasion of her priest and the attorney together.

And yet issues of competence and duress interact with each other in the reality of women's lives. But courts specifically refuse to consider either the individual or cumulative effects of "parental threats, pressure by the surrendering mother's family, advice by the surrendering parent's physician and mother, emotional distress or depression"²¹⁰ as sufficient to constitute "the 'kind of force' which would sustain a finding of duress."²¹¹

The inability of competence and coercion doctrine to provide an adequate remedy for women's injuries is illustrated in the case of *Regenold v. Baby Fold, Inc.*²¹² The plaintiff, Ms. Regenold, became pregnant her senior year in high school. She and her husband lived with her parents, who were in the process of a painful divorce and fought constantly. After she had the baby, her husband refused to work, and her mother demanded rent. Ms. Regenold found a job, which she testified required her to do the work of three people. The

207. *Anonymous v. Anonymous*, 530 P.2d 896 (Ariz. Ct. App. 1975).

208. The applicable state statute had a seventy-two hour waiting period. *Id.* at 897. The adopting parents' attorney obtained the woman's consent immediately after the waiting period elapsed. The biological mother testified that she asked the adopting parents' attorney, "Does this have to be done today?" and he replied, "Yes." *Id.* at 899. The court found that even if the mother were telling the truth, this testimony "falls far short in our opinion, of showing that at the time she released her child for adoption, she was acting under duress." *Id.*

209. *Id.* at 898 (emphasis added).

210. *Father's Consent is Required Despite DRL § 111 Noncompliance*, N.Y.L.J., Nov. 7, 1989 at 21.

211. *Id.*

212. 369 N.E.2d 858 (Ill. 1977).

court found her earnings to be insubstantial.²¹³ From these earnings, she paid day care and rent and tried to pay the hospital and doctor bills for the delivery. Her husband moved out and she divorced him. At the same time her mother complained that she did not pay enough rent and warned her that she would have to leave when she sold the house after her own divorce from Ms. Regenold's father.²¹⁴ To make matters worse, she developed a bad infection. Although she took medication for the infection, her doctor told her that she might require a partial hysterectomy.²¹⁵ Ms. Regenold sought assistance at public agencies but was unsuccessful. During this entire time, her three year old brother, who was mentally retarded, was physically attacking her baby.²¹⁶

In October, Ms. Regenold went to defendant Baby Fold, a child welfare agency, and poured out her problems. Baby Fold arranged for her to sign papers giving up her child within two days of her first visit. Approximately four days after that, sick with grief, she decided to rescind the agreement and get her baby back.²¹⁷ Although a psychiatrist testified that when she signed the agreement she was under such pressure that she did not have the capacity to make rational judgments,²¹⁸ the judge found that she neither lacked capacity, nor had the agency exerted duress. Therefore, the court refused to rescind the agreement.²¹⁹ The law presumed that Ms. Regenold was competent to make her decision, and there was insufficient proof of the agency's misbehavior to constitute duress.²²⁰ There was and is simply no remedy provided by law for Ms. Regenold.

As Professor Mahoney notes, "[c]ontemporary conservative insistence on agency [from this article's point of view, the law's assumptions about competence and competent women] treats self-realization as a question of pure will, not constrained in any serious way."²²¹ Neither the weight of Ms. Regenold's pain and oppression nor her acts of strength are cognizable at law. The legal assumption

213. *Id.* at 860.

214. *Id.*

215. *Regenold v. Baby Fold, Inc.*, 355 N.E.2d 361, 363 (Ill. App. Ct. 1976).

216. *Regenold v. Baby Fold, Inc.*, 369 N.E.2d at 860-61.

217. *Id.* at 862. In their decisions, neither the Appellate Court of Illinois, *Regenold*, 369 N.E.2d at 361, nor the Illinois Supreme Court, *Regenold*, 369 N.E.2d at 858, mentioned anything about a time period to change one's mind. The relevant statute was changed specifically to make adoptions irrevocable in the absence of fraud or duress by the person to whom the baby was relinquished. ILL. ANN. STAT. ch. 40, para 1513 (Smith-Hurd 1992).

218. *Regenold*, 359 N.E.2d at 862.

219. *Id.* at 868.

220. *Id.* at 865.

221. Mahoney, *supra* note 133, at 1314. Prof. Mahoney's analysis of "conservatism" is in all ways consistent with my analysis of law.

of her competence has nothing to do with her real acts of strength and struggle to maintain her life—getting work, paying child-care, seeking public assistance, filing litigation to reclaim her child. The legal assumption of her competence results in denying her the legal remedy she needs to get her child back. It thus robs her of power in one of the most important situations in her life.

D. *Competence to Decide to Have Children*

Courts assume that decisions regarding child-bearing and sterilization, like decisions about sexual intercourse, are the product of autonomous and voluntary choice by competent women.²²² However, the conditions under which many women bear children or are sterilized, like the conditions under which many women have sex, are not so easily characterized. Although women make many of these choices freely, the continuum shades into a gray area of involuntariness and coercion very quickly. The law does not adequately address or remedy a woman's lack of agency in these areas. In either case, the circumstances are completely individualized. The doctrine that each individual is presumed competent constructs a world of private atomistic individuals making voluntary and rational choices by selecting among options available to them. Constraints are personal and private and the law has nothing to do with them. Thus, women who, in reality, are similarly situated are never considered as similar by law. Women who are sterilized after a finding of incapacity by courts,²²³ women who are sterilized without their knowledge because they are

222. Despite the fact that many women experience their decisions to bear children as intentionally interfered with by a variety of people, cases challenging such interference are rare. The most prominent successful examples are the cases striking down statutes that enshrine such interference in law, such as parental or spousal consent requirements in abortion cases. *See, e.g.,* *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979). Intentional interference with a woman's decision to have a child, while it happens both on an individual basis and as a matter of social policy, is rarely legally constrained. A recent notable exception is *Int'l Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (striking down as sex discrimination a policy prohibiting fertile women from employment in jobs involving actual or potential lead exposure).

223. *Buck v. Bell*, 274 U.S. 200 (1927); *In re Moe*, 432 N.E.2d 712 (Mass. 1982); *In re Grady*, 405 A.2d 851 (N.J. Super. Ct. Ch. 1979), *vacated*, 426 A.2d 467 (N.J. 1981).

poor,²²⁴ or mentally disabled,²²⁵ or members of ethnic minorities;²²⁶ women who consented to sterilization under threat of losing medical care or welfare benefits,²²⁷ or as an alternative to a prison sentence;²²⁸ Native American²²⁹ and Puerto Rican women²³⁰ whose choices might

224. MacKinnon, *supra* note 16, at 1301 n.94.

225. *Stump v. Sparkman*, 435 U.S. 349, 351-53 (1978); *Chasse v. Mazerolle*, 580 A.2d 155, 156 (Me. 1990); *see also* Gerber, *supra* note 78, at 7. Gerber notes a study of:

[One hundred] adult men and women who were discharged from a southern Californian state mental institution in or around 1954, . . . premised on the determination that each of these individuals was capable of holding a job and hence, it was assumed, living independently. (Though they would not know it until much later, almost all of them were sterilized as a condition for their release. They were told they needed appendectomies).

Id. (emphasis added).

226. *See, e.g.*, Carlos G. Velez-I, *The Nonconsenting Sterilization of Mexican Women in Los Angeles*, in *TWICE A MINORITY: MEXICAN AMERICAN WOMEN* 235 (Margarita B. Melville ed., 1980); Patricia J. Williams, *On Being the Object of Property*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 23-24 (Martha A. Fineman and Nancy Thomason eds., 1991); Edward J. Spriggs, Jr., Comment, *Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor*, 4 N.Y.U. REV. L. & SOC. CHANGE 127 (1974).

227. *See, e.g.*, *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated as moot*, 565 F.2d 722 (D.C. Cir. 1977). Interest in sterilization or Norplant as a criminal sanction for child abuse or drug use by pregnant women is growing along with suggestions for the use of Norplant in institutional settings or for women on welfare. *See also* Williams, *supra* note 226, at 24 (discussing a case charging that chief of obstetrics at Los Angeles County General Medical Center, "pursued a policy of recommending Caesarian delivery and simultaneous sterilization for any pregnant woman with three or more children and who was on welfare.").

Id.

228. *See, e.g.*, Michele Oberman, *The Control of Pregnancy and the Criminalization of Fetal Death*, 7 BERKELEY WOMEN'S L.J. 1 (1992); Nancy K. Schiff, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991); Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037 (1991/92); Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20.

229. Williams, *supra* note 226, at 24 ("[O]ne quarter of all Navajo women of childbearing age—literally all those of childbearing age ever admitted to a hospital—have been sterilized"); *see also* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 326 (1990) (discussing involuntary sterilization of Indian women); Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L. J. 923, 939 n.101 (1988); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 692-93 n.113 (noting federal government's defense of involuntary sterilization of Indian women).

230. Compulsory sterilization was legal in Puerto Rico from 1937-1980. HARRIET B. PRESSER, *STERILIZATION AND FERTILITY DECLINE IN PUERTO RICO* 6 n.2 (1973). Over thirty percent of married women in Puerto Rico were sterilized as of 1984. Claude Robinson, *Population: U.N. Study Cites Rapid Increase in Contraceptive Use*, Inter Press Service, July 30, 1984 available in LEXIS, NEXIS Library. Furthermore,

While it is difficult to prove that the choice. . . was not voluntary, it can nevertheless be argued that this choice was conditioned and constrained by the surrounding social framework. Medical authority, eugenic ideology, *machismo*,

look voluntary and autonomous examined individually but who are obtaining sterilizations at massively disproportionate rates to white women; and women who (until recently) worked for Johnson Controls or American Cyanamid²³¹—most of these women probably did not experience sterilization as an act of agency, voluntariness, or even as a choice among available options.

Decisions regarding capacity to have children or to be sterilized make more sense considered in the following context. First, these decisions are never before the court because a mentally disabled or poor woman has expressed the desire to be sterilized (or to have an abortion) and some doubt exists about her capacity to decide *not* to have a child.²³² One can map a social landscape with substantial

restricted employment opportunities, and lack of other birth control alternatives were all factors that limited women's options.

ANNETTE B. RAMIREZ DE ARELLANO AND CONRAD SEIPP, *COLONIALISM, CATHOLICISM AND CONTRACEPTION: A HISTORY OF BIRTH CONTROL IN PUERTO RICO* 144 (1983) (footnotes omitted).

231. *International Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (striking down a policy prohibiting fertile women from jobs involving actual or potential lead exposure because such policy is facially discriminatory and not a bona fide occupational qualification); *Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) (upholding a policy requiring the sterilization or resignation of fertile female employees who may be exposed to lead).

232. When voluntary sterilizations and abortions of women of dubious capacity come to light, it is often through cases before the court in another context. *See, e.g., In re Burbanks*, 310 N.W.2d 138 (Neb. 1981). This case involved the termination of parental rights where the court found that the director of a multi county social service unit:

[A]ssisted in the processing of legal instruments executed by the allegedly mentally deficient parents to authorize Shiela [the mother] to have an abortion and for Shiela to be sterilized. The abortion did take place. The director testified that the sterilization did not. However, there is other evidence in the record that it may have taken place. At what time and on whose initiative does not appear. The director testified that Shiela understood what she was signing.

Id. at 151.

The court searched the statutes to determine whether any welfare agency in Nebraska was authorized to engage in such activities and found no such authorization. *Id.*; *see also State v. Green*, No. C.C.A. 01-C-01-9002-CC-00045, 1990 Crim. App. LEXIS 653 at *9 (Tenn. Crim. App. Oct. 3, 1990) *9 (involving man charged with assault with intent to commit sexual battery on a woman in a nursing home who was allegedly incompetent to consent to sexual relations where the court considered evidence that, *inter alia*, the woman was considered competent to consent to a tubal ligation which had taken place earlier). Many of these situations also come to light when a woman sues for having been coerced into consenting to sterilization. *See, e.g., McCullough v. Allen*, 449 N.E.2d 1168 (Ind. Ct. App. 1983). In *McCullough*, the court noted that

Linda voluntarily entered Floyd County Hospital on April 30, 1970, to have a baby. The hospital records for May 1, 1970, show Linda was anxious and suspicious of the staff after delivery, and was given Thorazine [a powerful psychotropic drug]. On this same day, Linda signed a consent to a tubal ligation. Linda later alleged [Dr.] McCullough coerced her into signing this consent form.

accuracy by looking at the decisions that result in the questioning of the decisionmaker's competence, as well as the "decisions" that are never questioned. The cases involving assessment of capacity for purposes of sterilization or abortion come before courts for one of two reasons: either a third party wishes to arrange for a woman's sterilization or to abort her pregnancy,²³³ or the woman wishes to have a child.²³⁴

These cases are often framed in terms of protection of the incompetent woman or girl who is to be sterilized.²³⁵ In order to demonstrate a lack of capacity sufficient to justify sterilization without consent, these cases focus on the woman's lack of understanding about both sex and pregnancy.²³⁶ At the same time, the courts clearly assume that the woman will have sex, since otherwise sterilization would not be necessary. Thus, courts implicitly—and sometimes even explicitly—acknowledge that the allegedly incompetent woman will be subject to sexual abuse or rape.²³⁷ For example, in one case the

Id. at 1169.

In *Flateau v. Thom*, 393 So. 2d 392 (La. Ct. App. 1980), the court notes that, "Plaintiffs urge that Mrs. Flateau was 'pressured, coerced and humiliated without her legal, valid and competent informed consent, to be sterilized'. . . ." *Id.* at 392-93. In another interesting case, an institutionalized woman claimed that "she denied pregnancy at the Ancora hearing because she believed its doctors would force her to have an examination which she did not want and might force her to have an abortion." *In re D.K.*, 497 A.2d 1298, 1301 (N.J. Super. Ct. Ch. 1985). According to doctors, "[p]rior to the hearing she told her doctors that she wanted an abortion," but at the hearing "she said she was opposed to an abortion, while acknowledging the difficulties which the birth of a child would present." *Id.* at 1300.

233. See *McKinney v. McKinney*, 805 S.W.2d 66 (Ark. 1991) (involving adult's request to restrain her father from forcing her to undergo involuntary sterilization permitted by statute); *Motes v. Hall County Dep't of Family & Children Servs.*, 306 S.E.2d 260 (Ga. 1983) (involving county welfare department that sought to sterilize woman); *Lulos v. State*, 548 N.E.2d 173 (Ind. Ct. App. 1990) (involving adoptive parents who sought sterilization of incompetent adult daughter); *Holmes v. Powers*, 439 S.W.2d 579 (Ky. 1968) (involving a county health officer and local medical society that sought a declaratory judgment that they could sterilize without civil or criminal liability a thirty-five year old mentally retarded woman); *Wentzel v. Montgomery Gen. Hosp.*, 447 A.2d 1244 (Md. 1982) (involving grandmother and aunt who sought a hysterectomy for mentally retarded thirteen year old girl in their care).

234. See *In re Romero*, 790 P.2d 819, 824 (Colo. 1990) (en banc) (noting desire of incompetent woman to remain capable of having children); *Lefebvre v. North Broward Hosp. Dist.* 566 So. 2d 568, 570 (Fla. 4th DCA 1990) (per curiam) (noting that mentally ill woman who was nine and one half weeks pregnant refused to consent to an abortion).

235. P.S. by *Harvin v. W.S.*, 452 N.E.2d 969, 972 (Ind. 1983); *Lulos*, 548 N.E.2d at 173.

236. E.g., *In re A.W.*, 637 P.2d 366, 367 (Colo. 1981); *In re Grady*, 426 A.2d 467, 470 (N.J. 1981); see also *In re C.D.M.*, 627 P.2d 607, 608 (Alaska 1981) (focusing on woman's inability to make responsible decisions and prevent pregnancy).

237. E.g., *In re C.D.M.*, 627 P.2d at 608; P.S. by *Harbin*, 452 N.E. 2d at 972; see also *In re Truesdell*, 304 S.E.2d 793, 806 (N.C. Ct. App. 1983) (requiring a showing that the mentally incompetent woman "will voluntarily or otherwise engage in sexual activity") (emphasis added).

court found that "[t]here was evidence showing that the guardianship petition [to sterilize a thirteen year old girl] was motivated by a sincere desire to free [the girl] of the pain and other consequences suffered by her during menstruation and because of genuine concern that [she] was an easy subject for rape and resulting pregnancy."²³⁸ In other words, courts that justify sterilization because a woman is incompetent to understand the meaning of sex assume that the mentally retarded woman will be raped.

Even more ironically, most courts have framed these involuntary sterilization orders as compelled by the woman's constitutional right of freedom to control her own reproduction.²³⁹ Thus, the law sets up a system that assumes that women who cannot understand sex will be raped, and that decrees nonconsensual surgical intrusion to prevent pregnancy as a vindication of such women's reproductive rights.²⁴⁰ When these women *are* raped, as happens frequently,²⁴¹ courts order abortions as further vindications of their reproductive rights.²⁴²

Disabled women who decide to have children do not have their reproductive rights attended to so scrupulously. When Denise Lefebvre discovered she was pregnant, she stopped taking her lithium because she knew the medication might harm the fetus.²⁴³ She clearly expressed that the reason for discontinuing her medication was to protect her child from the risk of birth defects associated with lithium. In the absence of medication, her condition deteriorated rapidly and she was hospitalized. The hospital sought to abort the fetus despite her express wishes to the contrary. As her court-appointed attorney said, "This woman is very lucid regarding her baby . . . everyone wanted to give her an abortion except her."²⁴⁴ The trial court ignored her consistently expressed wishes both before and after she was hospitalized.²⁴⁵ The trial court found that at the time of the

238. *Wentzel v. Montgomery County Gen. Hosp.*, 447 A.2d 1244, 1246 (Md. 1982).

239. *E.g.*, *Conservatorship of Valerie N.*, 707 P.2d 760, 772 (Cal. 1985) (en banc); *In re Moe*, 432 N.E.2d 712, 719-720 (Mass. 1982); *In re Grady*, 426 A.2d at 474-75.

240. Catharine MacKinnon makes a similar observation about the framing of the right to abortion as a woman's constitutional right to privacy, when, as long as nonconsensual sex is common, abortion can appear to merely facilitate a man's sexual access to a woman without his having to assume responsibility for the resulting pregnancy. CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 190 (1989); see also Stefan, *supra* note 87, at 413-27.

241. *E.g.*, *In re Doe*, 533 A.2d 523 (R.I. 1987) (per curiam); Lisa Belkin, *Grim Crossroads: Rape, Retardation and Abortion*, N.Y. TIMES, Oct. 19, 1990, at B20; see also *In re Moe*, 432 N.E.2d at 715 n.1 (referring to woman's experience as a "sexual incident").

242. *In re Doe*, 533 A.2d at 525-26.

243. *Lefebvre v. North Broward Gen. Hosp.*, 566 So. 2d 568 (Fla. 4th DCA 1990).

244. *Psychotic's Pregnancy Stirrs Legal Fight*, CHI. TRIB., Aug. 24, 1990, at 9.

245. *Lefebvre*, 566 So. 2d at 570.

hearing she "was not capable of consenting or objecting to the termination [of her pregnancy] due to her psychotic condition,"²⁴⁶ a condition that resulted precisely because she wished to safeguard the health of the fetus.²⁴⁷

Another example of a judge's inability to comprehend decision-making that does not follow accepted rational calculations involved a woman, LaVista Romero, who objected to the sterilization proposed by her guardian because she wished to remain capable of having a child.²⁴⁸ She had a diabetic condition that rendered pregnancy medically risky. At her hearing, the court found that she testified in an articulate manner, understood the consequences of sterilization and wanted to remain capable of having another child.²⁴⁹ A psychiatrist testified that Ms. Romero was not competent to consent to sterilization because she was "subject to rapid changes in mood, has poor social judgment, has episodes of anger and apathy, is sometimes paranoid, and has difficulty thinking abstractly."²⁵⁰ According to the court, the only justification the psychiatrist offered for this conclusion was that Ms. Romero "doesn't look at things in terms of future consequences."²⁵¹ The Colorado Supreme Court denied the petition to sterilize Ms. Romero, with three justices dissenting strongly.²⁵² The dissent quoted the following language from the trial transcript to support its position that Ms. Romero was incompetent:

Q. You've told us that you want to have a child.

A. Yes.

Q. And the doctors have been telling me here today in the hearing that that would be very dangerous for you to do. In fact, it could be threatening to your health, or even to your life. Did you hear that testimony?

A. Yes.

246. *Id.*

247. The appellate court reversed the decision because the lower court had not followed the appropriate statutory procedure in appointing a guardian for the woman. *Id.* at 571. By the time the decision was reversed, however, the time for an abortion was past. The woman had her son, who was promptly removed from her care. *Baby Born After Abortion May Be Up for Adoption*, CHI. TRIB., Jan. 2, 1991 at 3. She later lost custody of the child. *Mental Patient Abortion* U.S.A. TODAY, July 11, 1991 at 3A.

248. *In Re Romero*, 790 P.2d 819, 824 (Colo. 1990) (en banc). The case was before the court because Romero's mother, her guardian, had petitioned to have her sterilized. Her mother had been her guardian since Ms. Romero suffered brain damage from oxygen deprivation associated with diabetes complications four years earlier. *Id.* at 820.

249. *Id.* at 823-24.

250. *Id.* at 824.

251. *Id.*

252. *Id.* at 824-27.

- Q. Does that make you feel maybe you should be more cautious or maybe you shouldn't have a baby because of what they said?
- A. No.
- Q. Why is that?
- A. Because I want one bad enough.
- Q. Realizing that it could even kill you?
- A. Yes, sir.²⁵³

The next line of the dissent reads: "[i]t appears that Romero could not connect her diabetic condition with the risks of pregnancy and childbirth."²⁵⁴

There is a spectrum of capacity to make decisions, and of agency expressed by decisions, as well as a spectrum of state involvement and constraint on decisionmaking. To the extent that competence doctrine considers women with mental disabilities who want to have children or for whom sterilizations are recommended by third parties incapacitated, while considering most poor or minority women who obtain sterilizations free agents with individual choice, it obscures the enormous commonality shared by these women. Whether a woman is mentally disabled, on welfare, pregnant and charged with drug abuse, a Native American, or a woman of color, her capacity to make decisions regarding childbearing may matter less than the fact that those with economic, political and social authority and power do not want her to have children. The collective efforts made to prevent childbearing by women in these disfavored categories are obscured because the law has no name for such efforts. When those efforts fail, the machinery of society stands poised to remove the children born to these women from their mothers, although studies year after year demonstrate that the removal is generally detrimental to the children.²⁵⁵

V. CONCLUSION

Competence doctrine assumes unconstrained autonomy on the part of atomized individuals acting in a social vacuum. The flaw of competence doctrine is not only that it fails to recognize the condition of women in this society. By treating powerless people as though they

253. *Id.* at 826 (Mullarkey, J., dissenting).

254. *Id.*

255. See, e.g., MaryLee Allen et al., *Federal Legislative Support for Independent Living*, 67 CHILD WELFARE 515 (1988) (detailing federal legislative developments and activities establishing independent living for adolescents in foster care); Norma Blank, *Reunification Planning for Children in Custody of Ohio's Children Services Boards: What Does the Law Require?*, 16 AKRON L. REV. 681 (1983) (discussing Ohio's intervention and reunifications policies).

possess equal agency, it enforces and strengthens inequality and oppression and makes legal remedies for these conditions inconceivable.

I propose that competence questions be refocused on whether the woman—or any person subject to competence inquiry—was exercising agency when she acted; whether she was “functioning as a decision-maker, acting in accordance with her preferences and values.”²⁵⁶ If the law were consciously reformulated to support acts of agency, to promote autonomy rather than assume it, to effectuate preferences and values, rape law would recognize “no” as sufficient to mean “no” for all women, not just women who were held to lack decisionmaking capacity. The law would reflect what we all know: that the “yes” of the mentally retarded mother in jail and Ms. Regenold and the woman in *State v. Rhone*²⁵⁷ were not expressions of power but of powerlessness.

As it is now, competence inquiry, assessment, and judgment are made by those in authority pursuant to their own values. Competence doctrine takes that power and those values as immutable, invisible givens, which simply form part of the legal landscape against which presumptively autonomous individuals make rational decisions. Feminist theory must bring the pain and loss of that legal landscape to life, and rename its landmarks according to the reality of our lives.

256. *In re A.C.*, 573 A.2d 1235, 1244 (D.C. Ct. App. 1990).

257. 566 So. 2d 1367 (Fla. 4th DCA 1990).