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Protecting the "Right" to Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments against Fetal Representation

Catherine M. French

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PROTECTING THE "RIGHT" TO CHOOSE
OF WOMEN WHO ARE INCOMPETENT:
ETHICAL, DOCTRINAL, AND
PRACTICAL ARGUMENTS AGAINST
FETAL REPRESENTATION

INTRODUCTION

In Florida, two women with severe mental retardation1 were raped
and impregnated in separate group homes supervised by the Depart-
ment of Children and Families (DCF).2 In the Miami case, the woman
has the mental capacity of a four-year-old and communicated, "My
baby no more."3 Family members advocated an abortion, and her neu-
rologist viewed the pregnancy as life-threatening.4 A judge subse-
quently ordered an abortion of her approximately twenty-three-week-
old fetus.5

In the Orlando case, the twenty-three-year-old woman, identified
only as J.D.S., has the mental capacity of a one-year-old and commu-
nicates inaudibly.6 J.D.S.'s pregnancy did not place her in "imminent
danger."7 As a DCF spokesperson explained, J.D.S., unlike the Miami
woman, had "no one to speak for her, not even herself."8 J.D.S. did
not have a guardian at the time of her pregnancy.9 Governor Jeb Bush

1 This Note uses terms such as "woman with mental retardation" or "person who has
mental retardation" instead of terms such as "the mentally retarded." This is consistent with
the "People First" movement: the person comes before the disability, conveying the message that a
disability does not define the whole person. "Persons first" terminology emphasizes that a dis-
ability is only one aspect of the person. E.g., MARTHA A. FIELD & VALERIE A. SANCHEZ,
EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION ix-x (1999); AMERICAN ASso-
org/Policies/faq_movement.shtml (last visited Sept. 30, 2005) (discussing that the name "People
First" originated out of a "dislike of being called 'retarded'").

2 E.g., Melissa Harris, 2 Rape Cases Generate Scrutiny; Retarded Victims' Pregnancies

3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Anthony Colarossi, Disabled-Adults Panel Named: Group Will Look into Cases Like
supported appointment of a guardian for J.D.S., and eventually, a court declared J.D.S. legally incapacitated and appointed a guardian.

With the appointment of a guardian for J.D.S., both she and the Miami woman had surrogates to voice concerns on their behalf regarding the pregnancies. Yet, in J.D.S.’s case, Governor Bush also pushed for a guardian for the fetus. If Governor Bush and DCF were truly concerned about giving J.D.S. a voice, efforts should have focused exclusively on guardianship for J.D.S., not J.D.S. and the fetus.

On January 9, 2004, the Florida Fifth District Court of Appeal upheld the trial court’s decision that the appointment of a guardian for J.D.S.’s fetus was improper. Although J.D.S. had already given birth to a baby girl, the court decided this case because this issue is “of great public importance and capable of recurring.” The Miami case demonstrates that this type of case is indeed likely to recur. Despite differences between the Miami and Orlando women’s abilities to communicate and the fetus’s risk to maternal health, there are important similarities, notably both women have severe mental retardation.

It is easy to see that the disputes involve the question of abortion. Fetal representation is a political issue. Pro-life advocates may favor fetal representation, and pro-choice advocates may disfavor fetal representation. It is hard to imagine, therefore, that many proponents of fetal guardianship would only push for fetal guardians in cases when the pregnant woman has severe mental retardation and is unable to communicate.

J.D.S. was an easier target than the Miami woman for appointment of a fetal guardian. Thus, it is reasonable to conclude that fetal guardianship proponents are likely to target women in future similar situations.
While Florida law currently bans appointment of fetal representation in this abortion context, proponents and opponents remain vocal. Despite the holding that a guardian for J.D.S.'s fetus was improper, the concurring opinion in the case suggests that the state legislature is the "appropriate forum to debate" the matter. Yet, proponents are likely to also face challenges in the legislature. Many conservative lawmakers who would support a fetal guardianship bill acknowledge their limited legislative ability because other similar anti-abortion bills have failed. While the debate over the propriety of fetal representation may shift from the courts to legislatures, it is unlikely to end any time soon.

This Note argues that courts and legislatures should not allow fetal representation—either fetal guardians or fetal guardians ad litem—in cases where a pregnant woman who has a guardian seeks an abortion. Often (like J.D.S.), a woman in this situation will have mental retardation. Part I provides background information on the diagnosis of mental retardation, the relation between capacity and competency for decision-making, and the similarities and differences between guardians and guardians ad litem. Part II explores the ethical arguments against fetal representation. Fetal representation undermines a woman's simulated autonomy and perpetuates the legacy of institutional discrimination for women with mental retardation. Part III puts forth doctrinal arguments regarding fetal representation. Existing guardianship statutory frameworks do not provide for fetal representation. Furthermore, existing court proceedings and abortion laws already protect state interests in the potential life of the fetus and the health of the mother. Fetal representation also creates a false conflict between the mother and the fetus. Part IV considers practical arguments concerning fetal representation. Fetal representation is ultimately unworkable. How, for example, would a guardian determine the "best interests" of the fetus? Furthermore, fetal representation results in a slippery slope putting other interests and rights in jeopardy. Part V concludes that legislatures should not draft statutes that allow fetal representation in the abortion context. If a legislature passes such a statute, courts should exercise caution in upholding it. This Note does not consider the constitutionality of fetal representation in the abortion context.

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16 This Note does not discuss the propriety of fetal representation in other contexts, such as child abuse or neglect, wrongful death, or refusal of medical treatment cases.
17 864 So. 2d at 540 (Orfinger, J., concurring).
18 Kjos, supra note 10.
19 For an argument on the unconstitutionality of fetal representation see Jill A. Wieber, Note, Second-Hand Choice: An Incapacitated Pregnant Woman's Constitutional Right To
Many of the ethical, doctrinal, and practical arguments regarding fetal representation in this Note apply not only to pregnant women with guardians but also to all pregnant women. Fetal representation threatens the autonomy of all women. Existing guardianship statutes do not provide for fetal representation for any woman. Fetal representation creates a false conflict between any pregnant woman and her fetus. Current abortion law adequately protects state interests. In a final example, determining the best interests of a fetus presents the same difficulties regardless of a woman’s competency. Why then, does this Note argue, in particular, against fetal representation for women who are incompetent? First, the threat of fetal representation currently falls on women with guardians rather than all women. Second, it is precisely because the threat targets only some women rather than all women that this Note finds fetal representation for women with guardians particularly problematic. Third, some arguments against fetal representation are even stronger for women with guardians than for women without guardians. For instance, additional procedural protections for state interests exist for women with guardians. Thus, this Note presents both general arguments pertaining to all women and specific arguments pertaining to women with guardians.

I. BACKGROUND

A. Diagnosis of Mental Retardation

J.D.S. and the Miami woman mentioned in the introduction both have a diagnosis of mental retardation. While these women represent the controversy over fetal guardianship, they do not accurately represent all persons with mental retardation. How legislators and judges perceive women with mental retardation affects how policies and laws impact their lives. Therefore, they need an accurate understanding of the condition of mental retardation.

Approximately 1 percent of the population meets diagnostic criteria for mental retardation. A person may be diagnosed with mental retardation if they meet diagnostic criteria for mental retardation.

Choose Abortion, 90 IOWA L. REV. 791, 808 (2005) (arguing that a fetal guardian creates a "substantial obstacle" that interferes with the ability of a woman who is incompetent to choose through her guardian). But see Carrie Ann Wozniak, Comment, Difficult Problems Call for New Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Mothers in State Custody?, 34 STETSON L. REV. 193, 226 (2005) (arguing the constitutionality of fetal guardianships of viable fetuses where the mother has a guardian because of mental incapacity and where the state would gain custody upon birth); Helena Silverstein, In the Matter of Anonymous, a Minor: Fetal Representation in Hearings To Waive Parental Consent for Abortion, 11 CORNELL J.L. & PUB. POL’Y 69, 102-03 (2001) (acknowledging that fetal guardianships are likely constitutional in regards to minors as the purpose of a fetal guardian is to encourage birth by discouraging minors from waiving parental consent and having an abortion).

20 AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DIS-
retardation if she has significantly below-average general intellectual functioning—measured by an IQ score of approximately seventy or below. In addition, taking into account age and cultural considerations, a person must have impairments in adaptive functioning in a minimum of two of the following skills areas: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." The diagnostic inclusion of functioning emphasizes that mental retardation is not necessarily a permanent diagnosis, as a person whose functioning improves will lose the diagnosis. These symptoms must be present before the age of eighteen.

In approximately 30–40 percent of cases, there is no clear cause for the mental retardation. Known predisposing factors are numerous, including heredity, changes in embryonic development, underlying medical conditions, and environmental influences during infancy or childhood.

Degrees of mental retardation are often attached to a diagnosis based on the IQ score, including mild, moderate, severe, and profound. About 85 percent of persons with mental retardation have mild forms; such persons can usually live either independently or in group homes with proper supports. Persons with severe mental retardation comprise 3–4 percent of all those with mental retardation; often, as adults, they are able to perform simple tasks in closely supervised settings. Individuals with either severe or profound mental retardation are often limited in language but understand more than can be expressed.

Many persons with mental retardation, however, object to these labels because the distinctions between degrees are based solely on IQ scores and do not take into consideration actual abilities. The
American Association on Mental Retardation (AAMR) does not use these specifiers but creates distinctions based on "intensity and pattern of support services: intermittent, limited, extensive, or pervasive." Persons with mental retardation also object to being equated to a mental age. Using a mental age results in a person viewing an adult with mental retardation as a child, thereby underestimating his or her abilities. Think back to reading the introduction of this Note; upon hearing J.D.S. has the mental capacity of a one-year-old, how did you view J.D.S in terms of her capabilities? Mental ages are also relatively stagnant, although a person's abilities often increase over time.

The legal profession, however, does not always use the same distinctions as psychologists or developmental specialists. For example, courts may refer to "borderline" mental retardation, although this is not a clinical term. At other times, the courts essentially ignore distinctions in levels of functioning, viewing all degrees of mental retardation as simply "mental retardation." Reliance on mental age also produces long-term consequences for those represented as a number—who would allow an eight-year-old to make reproductive choices? Yet, while this person may have an academic ability of an eight-year-old, this number does not describe the person's emotional, social, or sexual maturity.

B. Capacity and Competency

Many people with mental retardation make their own decisions, including reproductive decisions. Courts presume that a person with mental retardation is capable and competent to make decisions. Therefore, a diagnosis of mental retardation does not equate to a determination of incapacity or incompetence. Capacity generally refers to a person's "actual ability to understand, appreciate, and form a relatively rational intention with regard to some act." Mental retardation may affect a person's capacity. Like the diagnosis of mental retardation, capacity is based on present functioning. A determination

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32 Id. at 31 (citing AAMR).
33 Id. at 36.
34 Id. at 38.
35 Id.
36 Id. at 31.
37 Id. at 33.
38 Id. at 38.
39 Id. at 38-39.
of incapacity does not mean that the person will always be incapable of performing a particular task.

States may legally define capacity to determine whether a person is competent to make decisions. In defining capacity, state statutes may take into account the person’s ability for self-care, cognition, risk of harm, and underlying conditions, such as mental retardation. Competency generally refers to a legal determination of capacity. Thus, courts may find a person incompetent when he or she fails a legal standard of capacity, barring the person from performing a particular act.

Capacity and competency are situational. For example, a court may find a person incompetent to make financial decisions. The person, however, is still legally presumed competent to make other decisions, such as medical ones. If a person’s competence to make medical decisions is later in question, a court may then decide whether the person is competent in this regard. In determining competency for medical decision-making, including abortion, a court generally considers whether the person is capable of understanding the specific treatment, making a rational decision regarding the treatment, and communicating the decision verbally or nonverbally.

While standards for capacity and competency are gender-neutral, the assessment and application of these standards suggest gender bias. As compared to men, courts find women disproportionately incompetent, based, at least in part, on women’s overrepresentation in proceedings. Furthermore, judges may deliberately or inadvertently insert value preferences when determining competency for a specific act, producing seemingly inconsistent results that nonetheless produce the desirable social outcome. For example, courts often find women

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41 Id. at 39.
42 See Am. Bar Ass’n Comm’n on Law and Aging & Sally Hurme, Initiation of Guardianship Proceedings, (Mar. 2004), http://www.abanet.org/aging/guardian2.pdf (providing a comparison of state definitions of incapacity). Numerous other conditions, besides mental retardation, affect capacity. Some conditions result in no decision-making capacity, such as those responsible for a coma or a vegetative state. MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS 472 (2003). As there is no capacity for persons with these conditions, these persons are clearly incompetent. Id. Other conditions impair decision-making capacity, such as dementia, brain injury, or serious mental illness. Id. Thus, these conditions may contribute to a determination of incompetence.
43 Bisbing, supra note 40, at 38.
44 Id.
45 Id.
47 Id. at 768, 776 (citing studies finding that women are overrepresented in guardianship and conservatorship proceedings).
48 Id. at 774.
with mental retardation incompetent to consent to sexual intercourse but competent to consent to put a child up for adoption, even taking into account women with similar degrees of mental retardation.\textsuperscript{49}

This Note focuses on women, particularly women with mental retardation, whom courts have adjudicated as incompetent to make a medical decision concerning abortion. Understanding the sexist application of capacity and competency standards is important because it challenges us to think about how sexism exists in court proceedings. As women are found disproportionately incompetent as compared to men, perhaps some women with mental retardation who are adjudicated incompetent are actually competent. While this would not likely apply to women with severe or profound forms of mental retardation, like J.D.S., it may apply to women with milder forms. Therefore, for these women, medical professionals, guardians, and courts should continually assess capacity for medical decision-making, especially as capacity may fluctuate.

Understanding that judges may consciously or unconsciously insert value preferences is also important as abortion is often a strong, controversial personal and political value preference. It motivates us to think that perhaps some pro-life judges are using fetal representation to produce an outcome in line with their value preferences—choosing childbirth over abortion. It is interesting to ponder possible scenarios of women with similar degrees of mental retardation, some wanting an abortion and some resisting an abortion, and whether courts would find, disproportionately, those resisting an abortion as competent and those wanting an abortion as incompetent.

\textbf{C. Guardians and Guardians Ad Litem}

As this Note focuses on women who are adjudicated incompetent, an understanding of guardianship is necessary because courts typically appoint a guardian for a person who is incompetent. A guardian is a court-appointed person who has authority over an individual's person or property.\textsuperscript{50} The court defines the specific authority of a guardian, often limiting it to health care, financial, or personal decisions.\textsuperscript{51} A court may further define the scope of the guardian's authority within a particular area, such as authorizing a guardian to make major medical decisions while allowing the person adjudicated in-

\textsuperscript{49} Id. at 775.

\textsuperscript{50} BLACK'S LAW DICTIONARY 712 (7th ed. 1999); see also Bisbing, supra note 40, at 42 (defining guardianship as "the delegation by the state of authority over an individual's person or estate to another party").

\textsuperscript{51} Bisbing, supra note 40, at 42.
competent to make day-to-day medical decisions. The purpose of such limitations on a guardian’s powers is to preserve an individual’s autonomy as much as possible. Sometimes, however, a court may impose a general or plenary guardianship, granting the guardian broad but not absolute powers over the individual’s health care, financial, and personal decisions. This Note addresses women who have court-appointed guardians with authority over health care decisions, including authority to make the abortion decision or to petition a court for permission to have an abortion.

In making decisions, guardians or courts upon the guardian’s petition for a medical procedure, use either a substituted judgment or best interests standard. A substituted judgment standard asks the question: “What would the person decide if she had been competent?” A best interests standard asks the question: “What decision best serves the person’s interests?” Guardians or courts choose standards based on particular state requirements. For women who never had capacity, the best interests standard is applied de facto, even if still referred to as substituted judgment. For either standard, when possible, the decision-maker takes into account the communicated preferences of the person-found-incompetent thus enhancing her autonomy. Under the substituted judgment standard, however, the communicated preferences are determinative.

A Model Code of Ethics for Guardians, adopted by the National Guardianship Association, emphasizes the guardian’s moral duty to take the person’s preferences into account when making a decision on behalf of the person. This moral duty exists to protect “the civil rights and liberties” of the person and maximize “independence and self-reliance.” The guardian has a duty to make a diligent effort to involve the person in the decision-making process by investigating previously stated and current preferences. This duty increases “in direct proportion to the significance of the decision.” Therefore, a

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52 Id.
53 See id.
54 See, e.g., id. at 42-43 (noting the difference between a subjective “substitute judgment” approach and the objective “best interests” approach).
55 E.g., id.
56 FIELD & SANCHEZ, supra note 1, at 96; see also MICHAEL D. CASASANTO ET AL., A MODEL CODE OF ETHICS FOR GUARDIANS 7 (1988), available at http://guardianship.org/associations/2543/files/CODEOFET2.pdf (noting that the best interests standard is appropriate where there is no “previous competency” or where there is “no indication of preference which could guide the guardian in making the decision”).
57 FIELD & SANCHEZ, supra note 1, at 99.
58 CASASANTO ET AL., supra note 56, at 10.
59 Id.
60 Id. at 11.
61 Id.
guardian who makes the abortion decision or petitions the court for an abortion has a heightened duty to ascertain the person's preferences, as abortion is a significant decision. The Model Code of Ethics for Guardians recognizes that a guardian may override the person's preferences if substantial harm will occur by carrying out the person's preferences. If the guardian cannot determine prior or current preferences, the guardian must then use the best interests standard.

A guardian ad litem (GAL) is a guardian appointed during legal proceedings. Thus, a GAL's authority is more limited in scope than a plenary guardian or even a guardian with authority to make medical decisions, as a GAL's authority typically exists only within the courtroom. Courts may also appoint a GAL where "a potential conflict exists between the usual decision-maker and the individual whose interests are at stake." Generally, a GAL has a duty to represent the "best interests" of the person-found-incompetent.

When a woman who is adjudicated incompetent becomes pregnant and the guardian who has authority over her health care decisions contemplates an abortion, the following decision-making contexts may occur (1) if authorized by state statute, the guardian makes the decision, taking into account the person-found-incompetent's preferences; or (2) the court makes the decision, upon the guardian's petition for an abortion, taking into account various actors' preferences. The court may theoretically call upon a variety of actors in making a decision, including (1) the woman; (2) the woman's guardian; (3) the woman's GAL (representing the woman's best interests during the hearing and acting as a check against guardian abuse); (4) a fetal guardian; or (5) a fetal GAL. Presumably, the court would define the scope of authority of the fetal guardian, perhaps allowing the fetal guardian to not only make decisions regarding abortion but also deci-
sions regarding the types of medication the woman could take, the kinds of food the woman could eat, or virtually any decision that may impact the fetus. This Note will address only the issue of a court’s specification of the fetal guardian’s authority to make decisions regarding abortion. A fetal GAL would represent the fetus’s best interests exclusively during the court proceeding determining whether to grant the guardian’s petition for an abortion.

This Note argues against fetal representation either by fetal guardians or fetal GALs in the abortion context, assuming that a woman has a guardian with authority for health care decisions. While many of the arguments in this Note apply to all women who are incompetent, this Note focuses on women who are incompetent and have mental retardation. It does so for the following reasons: (1) J.D.S., the woman igniting the controversy, has mental retardation, providing a personalized lens in which to view the issue; and (2) there are additional context-specific arguments against fetal representation for women with mental retardation, specifically regarding the history of institutional discrimination.

II. ETHICAL ARGUMENTS

Ethical principles of autonomy and equal treatment contribute to the discussion of fetal representation. While these ethical principles do not legally bind political institutions, they do inform legislatures and courts on how they ought to resolve the issue of fetal representation for women with guardians. Fetal representation ultimately undermines society’s values of autonomy and equal treatment.

67 This Note focuses on the ethical notion of equal treatment as it is broader than the constitutional right to equal treatment. The Equal Protection Clause does not protect against all forms of unequal treatment. As legislatures need only a rational basis to discriminate against persons with disabilities, the Equal Protection Clause offers little utility in preventing disability-based discrimination as compared to racial- or gender-based discrimination. FIELD & SANCHEZ, supra note 1, at 13-15. Thus, even if fetal representation statutes do not violate an equal protection right to equal treatment, this Note argues that they still violate ethical notions of equal treatment. Substantial literature exists concerning equal treatment beyond the Equal Protection Clause. E.g., RONALD DWORIN, SOVEREIGN VIRTUE 1-2 (2000) (arguing that “[e]qual concern is the sovereign virtue of political community,” and, thereby, “a precondition of political legitimacy”).

68 One student author alludes to such arguments to support the claim that fetal guardianship is inconsistent with the purpose of guardianship laws. Wieber, supra note 19, at 813-15. In terms of equal treatment, the student author argues that fetal guardianship is a “sort of state-sanctioned exploitation” because: (1) “the state is normally not able to appoint a guardian for the fetus of a competent woman” and (2) “it enables the state to treat the [woman-found-incompetent] differently based on her mental capacity.” Id. at 813-14. This Note elaborates on such arguments. The student author also argues that a fetal guardian would thwart the ability of the guardian to make decisions on the woman’s behalf. Id. at 814-15. This Note directly relates this argument to the principle of autonomy and further develops this thought.
Note first discusses how fetal representation violates the simulated autonomy of a woman who is incompetent by constraining her ability to exercise her right to choose an abortion through her guardian. It then argues that if political institutions allow fetal representation, they will institutionally discriminate against women who are incompetent.

A. Simulated Autonomy and the "Right" to Choose

Autonomy literally means self-government. A person exercises autonomy through personal choices. Guardianship strips away the legal authority to make particular kinds of choices. The concept of guardianship recognizes that this legal absence of autonomy in certain instances warrants beneficence. Beneficence recognizes a duty "to help others further their important and legitimate interests." The purpose of guardianship is to protect persons incapable of making certain kinds of decisions. Guardianship essentially weakens a person's legal autonomy by removing fundamental legal rights. Yet, guardianship does not necessarily strip away all moral, or even all legal, autonomy. For persons who are conscious yet incompetent, including those with severe or profound mental retardation, residual autonomy remains. Even under plenary guardianship, a person who is incompetent may exercise autonomy, for example, through daily clothing or meal choices, even if she cannot make medical decisions.

While this residual autonomy does not rise to the level of autonomy needed to exercise legal rights, society and courts may simulate the higher level of autonomy needed to exercise a legal right. The guardian, with surrogate decision-making power, simulates the per-
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son's autonomy. Thus, although she is incompetent, society and courts ought to treat her as competent through her guardian. This means that rights initially removed through the guardianship process be "reinstated" as long as the guardian acts as her surrogate in the exercise of these rights. Therefore, the right to make reproductive decisions, including the right to choose an abortion, should extend to a woman who is incompetent, as long as this right is exercised through her guardian. The guardian may directly exercise this right on the woman's behalf or with the court's permission, depending on the jurisdiction. In this way, the woman who is incompetent only has a right-exercisable-via-guardian, or a "right" to choose.

Why simulate autonomy to make reproductive decisions? First, for some women who are incompetent, it provides a mechanism to enhance residual autonomy. Courts and society already find this desirable. The guardian's or court's inquiry into current preferences when making decisions on the person's behalf maximizes this residual autonomy. If residual autonomy was not respected, why inquire at all into current preferences? Why not just make the decision without the person's input? Although guardianship is inherently paternalistic, since society values autonomy, guardians and courts consider current preferences.

Second, simulating autonomy respects prior autonomy of an individual who is now incompetent. Of course, some women with mental retardation never were competent, so this argument would not apply. It likely applies, however, for women with milder forms of mental retardation. Courts and guardians already respect prior autonomy when they inquire into past preferences before making a decision on the person's behalf. If a woman who is now incompetent articulated views while competent concerning abortion, guardians and courts respect this prior autonomy by either making these views determinative or taking these views into consideration.

Finally, simulating autonomy protects the woman's current interest in autonomy. Although a court has declared her legally incompetent, there is always a possibility that the court erred in its decision. Society values this current interest in autonomy as exemplified by the fact

77 See Field & Sanchez, supra note 1, at 139-44 (acknowledging that in some jurisdictions a guardian may make the abortion decision whereas in other jurisdictions the guardian needs court consent). The difference between jurisdictions regarding who decides is discussed in another section of the Note. See discussion infra Part III.B. For now, what is important is recognizing that both ways tie into exercising the right to choose.

78 Remember, courts may disproportionately find women incompetent compared to men. See supra notes 46-47 and accompanying text. This suggests that courts do make mistakes. Of course, the mistake could be that courts should be finding more men incompetent rather than finding more women competent.
that guardians and courts already inquire into a woman’s current preferences.

In order to maximize reproductive autonomy, if the guardian and the woman agree on a choice regarding abortion, that choice could prevail. Yet, in order to guard against guardian abuse, states may balance autonomy with paternalism/beneficence, and require that even if the guardian and the woman agree, the court still makes the final decision. Thus, if the woman and her guardian agree, states have a choice between allowing the guardian or court to make the final decision, depending on the value the state places on autonomy. If the guardian and the woman, however, do not agree on the abortion decision, court oversight may actually protect the woman’s current interest in autonomy more so than allowing the guardian to exercise a choice contrary to the woman’s current expressed preferences. Although coming before the court still legally incompetent, the court would essentially reevaluate the woman’s competency to make the abortion decision. Thus, there is another check to determine whether her expressed preferences should prevail.

Some may argue, however, that simulated autonomy does not go far enough in protecting the reproductive rights and interests of women who are incompetent. Perhaps, residual autonomy, although not the ideal level of autonomy, should be enough to exercise a legal reproductive right. Some scholars argue that women who have guardians—at least women with mental retardation who can communicate—should be allowed to make reproductive decisions that include abortion, without third party interference, despite a lack of capacity to make the medical decision. Therefore, if a woman can express a preference after receiving relevant information, even without a full understanding of that information, the preference equates to legal consent. This approach stands in contrast to current law in all states. Why consider adopting such a seemingly drastic approach? Procreative decision-making, unlike some other types of decision-making, does not always involve intellectual processes or have a “right” answer. Furthermore, this best protects any current interest in autonomy. It also enhances residual autonomy more so than

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79 FIELD & SANCHEZ, supra note 1, at 60-61, 158, 179.
80 Id. at 191.
81 Id. at 60.
82 Id.
83 See id. at 129 (recognizing that “persons who have guardians still may have authority to make the particular decision at issue”).
simulating autonomy through a guardian. Finally, perhaps most importantly, this approach prioritizes equal treatment over protection.\(^4\)

As a current abandonment of the guardianship system appears unlikely, this Note urges that we view the guardianship system holistically. It is based on beneficence; yet, recognizing simulated autonomy keeps the principles of autonomy and equal treatment in the forefront alongside beneficence.

Fetal representation violates the principle of autonomy, whether actual or simulated, by inserting a fetus’s voice (whose choice is presumptively birth) into the decision-making process. This is why courts generally do not appoint fetal representation before a woman decides whether or not to have an abortion. Society recognizes abortion as the woman’s choice, not the fetus’s choice. If pregnant women who are incompetent have fetal representation but not other pregnant women, this fetal representation undermines simulated autonomy, as the purpose of simulated autonomy is to treat people who are incompetent similar to people who are competent in terms of decision-making. Fetal representation thus constrains the ability of a woman through her guardian to exercise her choice—whether for or against an abortion.

B. Institutional Discrimination

As the purpose of simulated autonomy is to treat women who are incompetent similar to women who are competent, the guardian should exercise on the woman’s behalf any reproductive rights possessed by a competent woman. States have a history of institutionally discriminating against women with mental retardation based on both gender and disability, especially concerning reproductive rights. Fetal representation perpetuates the legacy of institutional discrimination in regards to reproductive rights for women who have mental retardation and who are incompetent.

Institutional discrimination refers to arrangements or practices in social institutions that tend to favor one group over another.\(^5\) Social institutions include structures such as the family and the state.\(^6\) Po-
itical institutions, such as courts and legislatures, are also social institutions. Institutional discrimination is not always conscious but often results as a by-product of past deliberate discrimination. This Note emphasizes institutional discrimination rather than individual discrimination. While we may not approve of individual discrimination, it is more morally problematic if social institutions do not treat people equally. This Note breaks down the term institutional discrimination and focuses on the narrower category of invidious institutional discrimination. Invidious institutional discrimination refers to institutional discrimination motivated by prejudice. Prejudice refers to overt and subtle "attitudes and beliefs that tend to favor one group over another or to cause unequal treatment." Thus, state action is likely to be considered invidious if the action is not consistent across groups without a morally acceptable justification. If state action meets criteria for invidious institutional discrimination, it should raise a red flag that such action is particularly morally problematic.

This Note first considers the history of institutional discrimination against women with mental retardation, including those who are incompetent. It then argues that if legislatures or courts allow fetal representation only for women who are incompetent, their actions constitute invidious institutional discrimination due to their inconsistency in allowing groups the right to choose an abortion.

1. History

In the early 1800s, persons with mental retardation were subject to institutional discrimination. Persons viewed "retarded" lived with family, in public facilities as wards of the state, or were "auctioned out" to strangers who were paid to provide care. Those who lived with family were usually well cared for and tutored, while those who lived with paid caretakers or in public facilities were often subject to abuse.

By the 1880s, however, institutional discrimination unquestionably became invidious institutional discrimination. Society's worsening attitudes regarding mental retardation were due, in part, to the popularity of the eugenics theory, arguing the heritability of mental retardation. Women with mental retardation of child-bearing age were no longer regarded as "unfortunates" but as "immoral" or "criminal" and
possessing aggressive, uncontrollable sexual drives. These are prejudicial attitudes and beliefs because they are based on inaccurate stereotypes. This prejudice led to state-sanctioned policy changes—essentially invidious institutional discrimination. Women were placed in all-female institutions and received forced sterilization. This practice continued throughout the early- and mid-1900s. Young women who were fortunate enough to live with families were not legally allowed to marry in most states and often subject to mandatory sterilization. From 1950 to 1970, federal funding prompted a building craze for institutions, increasing those who lived in institutions by 65 percent. Yet federal funding was not available for operating expenses, contributing to poor care and conditions.

The Supreme Court case of Buck v. Bell upheld the practice of sterilization. The Court upheld a Virginia statute that authorized “sterilization of mental defectives” based on eugenics theory. In a famous opinion, Justice Holmes wrote, “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” Referring specifically to Carrie Buck, whose mother and child were supposedly also “feeble-minded,” Holmes declared, “Three generations of imbeciles are enough.” In fact, Carrie Buck did not have mental retardation but was an unwed mother placed in the institution after a rape, as was common practice. Her own attorney was allegedly a eugenics supporter, colluding with supporters of the sterilization law in bringing a lawsuit to encourage sterilization. The Court’s decision is another example of invidious institutional discrimination, especially as it has never been overruled.

Near the second half of the twentieth century, science and society rejected the eugenics movement, prompting sterilization reform.
laws.\textsuperscript{105} Also contributing to the reform movement, courts and legislatures had a heightened awareness of reproductive privacy in general, and mental retardation became conceptualized under a developmental perspective.\textsuperscript{106} At this time, there was also a movement towards deinstitutionalization and "normalization." Normalization promoted independence, including respect for the sexual autonomy of persons with mental retardation.\textsuperscript{107}

These sterilization reform laws aim to protect the interest in procreating of a woman who has mental retardation.\textsuperscript{108} The court determines whether or not the person is competent to make an informed medical decision about sterilization, and if incompetent, courts use either a substituted judgment or best interests standard to make a decision regarding sterilization.\textsuperscript{109} A few states, however, outright banned sterilization of persons found incompetent.\textsuperscript{110} Today, states still struggle over how best to balance protecting persons with mental retardation from abusive sterilization practices and providing access to sterilization.\textsuperscript{111} The sterilization reform laws reflect efforts to rid society of the effects of past invidious institutional discrimination.

The sterilization laws that require court oversight are similar to the laws in many states requiring court oversight of abortion. These court proceedings are not necessarily examples of invidious institutional discrimination. Allowing fetal representation in these court proceedings, however, perpetuates the past legacy of institutional discrimination and perhaps even invidious institutional discrimination.

2. Consistency

Fetal representation is institutional discrimination because it favors women who are competent over women who are incompetent. Only women who are incompetent would face a fetal guardian or GAL in a court proceeding in order to obtain an abortion. Institutions who allow fetal representation in this context perpetuate institutional discrimination.

\textsuperscript{105} Elizabeth S. Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, 1986 DUKE L.J. 806, 809-12. Even though science and society rejected the eugenics movement, heredity is still a factor in some cases of mental retardation. As noted in the background section, however, there are other causes of mental retardation, including medical conditions and environmental influences as well as other unknown causes. AM. PSYCHIATRIC ASS'N, supra note 20, at 45-46; see also FIELD & SANCHEZ, supra note 1, at 75 (noting that "the underlying theory of negative eugenics is considered invalid").

\textsuperscript{106} Scott, supra note 105, at 809-14.

\textsuperscript{107} Id. at 815-16.

\textsuperscript{108} Id. at 807.

\textsuperscript{109} Id. at 817-18.

\textsuperscript{110} Id.

\textsuperscript{111} FIELD & SANCHEZ, supra note 1, at 80.
The next issue then is whether this institutional discrimination is invidious. One may argue that fetal guardianship reflects the belief of promoting childbirth over abortion. This belief is not necessarily prejudice. Yet, proponents of fetal guardianship target women who are incompetent, like J.D.S., rather than all women. This targeting may simply reflect strategy—go after the “easy” cases before advocating fetal representation for all women. The attitude that women who are incompetent are “easy targets,” however, reflects prejudice, as it results in unequal treatment by targeting only women who are incompetent. On the other hand, one may not agree that pro-life advocates are only targeting women who are incompetent. Pro-life advocates may not intend to discriminate because they may support fetal representation for all women.

Pro-life advocates, however, are not social institutions. Invidious institutional discrimination will only occur if courts or legislatures allow fetal representation solely for women-found-incompetent based on prejudicial motives. Legislators or judges who act primarily as sympathizers to these pro-life advocates and allow fetal guardianship would cross the line into invidious discrimination. Note that this parallels the lawyer’s alleged collusion in Buck v. Bell. Yet, legislators or judges who are not motivated by a pro-life agenda but would still allow fetal guardians only for women who are incompetent are likely still invidiously discriminating. Remember, prejudice can also be subtle.\(^1\) Such legislators or judges may not even be aware of their own prejudice. The underlying prejudicial belief is that women who are incompetent are not deserving of the same reproductive rights as women who are competent. Thus, the legacy of institutional invidious discrimination regarding reproductive interests would continue.

Therefore, regardless of the intent of pro-life advocates, it is the actions of legislatures and courts on this issue of fetal representation that matter, as this Note’s focus is institutional discrimination. An understanding of Ronald Dworkin’s principle of institutional integrity\(^1\) further illuminates this discussion on the institutional nature of discrimination regarding fetal representation. Integrity can be divided into two forms: legislative integrity and adjudicative integrity.\(^1\) Legislative integrity requires legislatures to ensure that a new law is coherent in principle to existing laws.\(^1\) Adjudicative integrity requires judges to interpret and enforce a law as coherent to other laws.\(^1\)

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\(^1\) FARLEY, supra note 85, at 14.
\(^1\) RONALD DWORKIN, LAW’S EMPIRE (1986).
\(^1\) Id. at 167.
\(^1\) Id.
\(^1\) Id.
Judges, therefore, must not engage in "independent crusades."\textsuperscript{117} Along with perpetuating institutional discrimination, if legislatures allow fetal representation only for women who are incompetent or if the courts uphold such legislation or allow fetal representation through existing guardianship laws, then our institutions also violate their integrity.

Regardless of society's division over the correct way to handle abortion issues, our political institutions can still maintain integrity when they nonetheless act in a single, coherent way regarding abortion.\textsuperscript{118} Integrity thereby rejects a "checkerboard" or arbitrary approach to resolving the divisive moral issue of abortion.\textsuperscript{119} For example, a checkerboard approach to abortion would allow only women born in even years to have an abortion but not women born in odd years.\textsuperscript{120} This is essentially a Solomonic internal compromise between pro-life and pro-choice groups.\textsuperscript{121} A checkerboard approach is also inherently discriminatory because it results in an unequal effect of a policy.\textsuperscript{122}

Mandating fetal representation for women with guardians seeking an abortion but not other women is a checkerboard approach to the issue of fetal representation in abortion proceedings. Our instincts may question, however, whether this distinction is truly arbitrary in the same way as the distinction between even and odd years. Yet, it is arbitrary if we view the distinction as an internal compromise. On one side, pro-life advocates may argue "fetal representation for everyone," and, on the other side, pro-choice advocates may argue "no fetal representation for anyone." An internal compromise, therefore, is "fetal representation for some." Who is the "some" becomes arbitrary—in this case, the "some" is women with guardians. Therefore, political institutions who allow this approach violate integrity. Political institutions would also discriminate, as the effect of fetal representation falls squarely on these women.

Why, however, not prefer a checkerboard approach, producing an internal compromise rather than a winner-take-all scheme?\textsuperscript{123} The

\textsuperscript{117} Id. at 410.
\textsuperscript{118} See id. at 166 ("Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are.").
\textsuperscript{119} Id. at 178-79.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 178 (describing a Solomonic compromise as one "of trades and compromises so that each body of opinion is represented . . . in the final result").
\textsuperscript{122} See FARLEY, supra note 85, at 16 (acknowledging that institutional discrimination does not necessarily focus on intent but on the unequal effect of a policy).
\textsuperscript{123} DWORKIN, supra note 113, at 179.
primary problem with an institution adopting a checkerboard approach is that, in doing so, it acts unprincipled, as it "must endorse principles to justify part of what it has done that it must reject to justify the rest."124 Thus, institutional integrity demands consistency in principle.125 Consistency in both legislative and adjudicative integrity is not simply following past precedent if that past precedent conflicts with the system's fundamental principles.126 One of our government's fundamental principles is an egalitarian principle. Integrity thereby requires that our government "settle on a single conception [of an egalitarian principle] that it will not disavow in any decision, including those of policy."127 Integrity assumes "that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."128 Thus, courts cannot simply uphold a law favoring one group but not others just because it is past precedent, as integrity condemns special treatment unless it can be justified in principle.129 Institutional integrity, then, protects against partiality.130 In doing so, institutional integrity also protects against invidious institutional discrimination. If special treatment cannot be justified in principle, unequal treatment suggests a prejudicial motivation.

Integrity and consistency, however, do not always demand equality.131 A legislature, for example, may find a justification in principle for special treatment in that favoring one group is best for the general interest.132 The legislature may only confer a benefit to one group while excluding other groups if there is a relevant difference between groups. Integrity, however, requires that the legislature not grant special treatment to one group simply because that one group only has a

124 Id. at 183-84.
125 Id. at 184.
126 Id. at 219. Integrity demands not only consistency among abortion laws but also consistency among abortion laws and other types of laws as well as the system as a whole. See id. at 179, 184, 251. Dworkin emphasizes that judges interpreting the law aim to make "the law coherent as a whole" even if this calls for "ignoring academic boundaries and reforming some departments of law radically to make them more consistent in principle with others." Id. at 251. Dworkin does realize, however, that departmentalization may be necessary based on certain moral principles, such as the separate departments between criminal and civil law, as moral principles distinguish types of fault or responsibility. Id. at 252.
127 Id. at 222.
128 Id. at 213.
129 Id. at 219-20. As an example, Dworkin points to British law that exempted barristers from professional liability, even though other professions remained liable. Id. at 219. While a narrow approach to consistency would require continuing this exception, integrity requires elimination of that exception. Id. at 220.
130 Id. at 188.
131 Id. at 221.
132 Id.
right to that benefit.\textsuperscript{133} Thus, integrity demands that institutions "strive to protect for everyone what it takes to be their moral and political rights, so that public standards express a coherent scheme of justice and fairness."\textsuperscript{134} Regardless how we feel about a particular law, the law acts on everyone equally.

Consistency, with regards to fetal representation, would mandate either fetal representation for all women or fetal representation for no women. Currently, the law does not mandate fetal representation for adult women seeking an abortion. A law allowing fetal representation for women who are incompetent is inconsistent with current law. The issue next becomes whether there is a justification in terms of the general interest for special treatment for women who are incompetent. This Note considers, and rejects, some possible justifications below. It argues that the primary purported justification essentially asserts the theory that women who are incompetent do not have the same reproductive rights as women who are competent. Integrity in an egalitarian scheme rejects this type of justification giving moral or political rights only to some, as the above discussion demonstrates. This justification also reflects a prejudicial belief that institutional discrimination rejects.

Let us consider the argument that women who are incompetent do not have the same right to choose an abortion as women who are competent, and, therefore, this difference justifies fetal guardianship for only women who are incompetent. There are two responses. First, if we value simulated autonomy, even if not the same right, we allow guardians to exercise the right to choose on behalf of the woman. This is essentially what a court decided regarding the reproductive right of sterilization. The Supreme Judicial Court of Massachusetts recognized that the "personal decision" to "bear or beget a child is a right so fundamental that it must be extended to all persons, including those who are incompetent."\textsuperscript{135} This is accomplished through substituted judgment, whereby the court or guardian makes the decision as the woman would make if she were competent.\textsuperscript{136} Abortion, like sterilization, certainly involves the fundamental issue of bearing or begetting a child. Thus, even if guardianship legally takes away the right to

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} In re Moe, 579 N.E.2d 682, 685 (Mass. App. Ct. 1991) (citing the Supreme Judicial Court decision In re Moe, 432 N.E.2d 712 (Mass. 1982)); see also Daniel Pollack et al., The Capacity of a Mentally Retarded Person To Consent: An American and Jewish Legal Perspective, 20 N.Y.L. SCH. INT'L & COMP. L. 197, 199 (2000) (noting that "[c]ourts have held that the decision of whether to carry to term or to abort a child is a fundamental right held by all citizens," including those with mental retardation or adjudicated incompetent).

\textsuperscript{136} Moe, 579 N.E.2d at 685.
choose, we give that right back as long as the guardian exercises that right as a surrogate decision-maker. The goal with simulated autonomy is to treat a woman who is incompetent as competent. By using simulated autonomy, we honor the idea that all women have the right to choose an abortion. To have fetal guardianships for only some women offends the notion of simulated autonomy and undermines its goal of equal treatment.

Second, even if one wishes to reject the simulated autonomy argument and assume that a woman who is incompetent does not have the right to choose, there is still unequal treatment in terms of protecting reproductive interests. Even for women with severe or profound mental retardation who have never been competent, these women still have important interests in bodily integrity, physical well-being, and procreative capacity, even if self-determination is not applicable. Restricting a woman who is incompetent so that she does not have the ability to have an abortion that a woman who is competent can have denies that woman’s dignity interest in equal treatment. In a sterilization context, the California Supreme Court asserted: “An incompetent developmentally disabled woman has no less interest in a satisfying or fulfilling life free from the burdens of an unwanted pregnancy than does her competent sister.”

A proponent of fetal representation may also argue that justifiable unequal treatment already exists between women who are incompetent and women who are competent in terms of accessing an abortion and that fetal representation is simply an extension of this justifiable unequal treatment. Requiring court supervision before a woman who is incompetent accesses an abortion may be justified as guarding the woman against potential guardian abuse. Fetal representation, however, does not even purport to advance such a goal. Fetal representation aims to guard the fetus by presumably advocating birth.

Furthermore, even if some unequal treatment exists, we can strive to promote equal treatment as much as possible in terms of access and process. The most effective way to promote the dignity of persons who have never been competent is to afford “access to beneficial results which competent patients could, and likely would, choose under similar circumstances.” While the results are important, so is the process. The process in achieving those results, such as the choice

138 See id. at 45.
140 Cantor, supra note 137, at 79.
regarding abortion, should be as close as possible to the process that women without disabilities goes through. Fetal representation deviates too far from the "standard" process of making a decision whether or not to have an abortion, especially as there is no convincing justification as to why fetal representation ought to apply to women who are incompetent and not women who are competent.

There are some possible justifications for unequal treatment but none are convincing. Advocates of fetal representation generally point to state interests in the potential life of the fetus; yet, as explained below, this argument would then apply to all women. Some, however, may argue that the state’s interest is greater in the potential life of a fetus for a woman who is incompetent. Possibly, the state’s interest in potential life is more likely to be protected by a competent adult mother because of inherent motherly affection for her potential offspring. This argument fails because competent women may not necessarily feel affection for a fetus, particularly in the early stages of a pregnancy. Also, it assumes that the guardian will not feel a similar affection for the offspring. Often, the guardian is a relative of the woman, such as her mother, so the guardian may also feel affection. Most importantly, it also erroneously assumes that a person who is incompetent is not capable of affection. Even if there is greater affection, it may hardly adequately protect the state’s interest in potential life, as it depends on the woman herself and, clearly, competent women do have abortions. Another suggestion is that the difference in treatment lies in the fact that fetal representation is necessary to ensure that the guardian accurately takes into account the health and life risks to the mother. Yet, as argued in Part III.B, existing procedures are adequate to address these concerns. Such different treatment without convincing justification offends the idea of equality.

In addition to women with disabilities, fetal guardianship proponents in the abortion context also target minors. Although the appropriateness of fetal representation in regard to minors is beyond the scope of this Note, comparing fetal representation for these two groups illustrates the unequal treatment towards women with guardians in the abortion decision-making process.

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141 See M. Todd Parker, Comment, A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses, 48 ST. LOUIS U. L.J. 1419, 1421, 1467 (2004). The author acknowledges that he does not consider the issue of whether fetal representation "could be required whenever a competent woman pursues an abortion." Id. at 1467.

142 Id. at 1466.

143 Field and Sanchez similarly adopt a comparative approach between minors and women who are incompetent to demonstrate the unequal treatment towards women with guardians in the abortion decision-making process, illustrating the helpfulness in such a comparison. FIELD & SANCHEZ, supra note 1, at 162-65. "Nothing demonstrates the existence of a state agenda more
While states may require a minor to receive parental consent before obtaining an abortion, states must also provide the minor the opportunity to seek a court waiver of that consent.\footnote{\textsuperscript{144} Silverstein, supra note 19, at 69.} In Alabama, a couple of judges routinely appoint a fetal guardian during waiver proceedings.\footnote{\textsuperscript{145} Id. at 87.} Four judges in the Alabama Supreme Court explicitly support the practice, with the five other judges implicitly consenting through silence on the issue.\footnote{\textsuperscript{146} Id. at 85-86.} In Florida, a trial judge similarly appointed a guardian ad litem for the fetus of a minor, yet the Supreme Court of Florida held that the appointment was "clearly improper."\footnote{\textsuperscript{147} In re T.W., 551 So. 2d 1186, 1189-90 (Fla. 1989).}

Imagine a state sets up a new procedure for minors seeking an abortion such that even minors with parental consent must attend a court hearing with a parent present. The consenting parent, rather than the minor, must then face an adversarial fetal guardian. It is hard to imagine such a scenario taking place. An initial question may be, why the parent? The parent is an adult, presumably capable of weighing the benefits and consequences of an abortion for his or her child.

Yet, this is essentially the scenario for a woman who has a guardian. Minors are similarly legally considered incompetent, and a parent, generally, is the legal guardian. While a guardian must seek court approval for the woman’s abortion and the parent does not, both are apparently able to weigh the benefits and consequences of an abortion for the person within their legal care. In some ways, a guardian is in a better position than a parent to make the decision. When a person becomes a parent, the court does not approve such a status to ensure that the person will make decisions with the minor’s best interests in mind. Yet, such a procedure is in place when a person becomes a guardian because the guardian has a fiduciary duty to use substituted judgment or act in her best interest. Furthermore, court consent, in many states, serves as an additional safeguard to make sure the guardian acts appropriately. There is no comparable court hearing if a parent consents to an abortion.

What is important is with whom the fetal guardian is in an adversarial position. In one context, the fetal guardian is in an adversarial position with the parent, and, in the other context, the fetal guardian is in an adversarial position with the "competent" guardian. The guardian acts as the competent voice of his or her ward. If a fetal guardian

conclusively than a comparison of the legal treatment of persons who have mental retardation with that of others usually deemed legally incompetent, such as children." Id. at 162. Yet, their concern is not with fetal representation. Their comparison is between minors and women who are incompetent regarding third-party reproductive decision-making. Id. at 162-65.
is in an adversarial position with the "competent" guardian, then why not have a fetal guardian for all competent women? Furthermore, if the purpose of fetal guardianship is to promote the state's interest in childbirth, does this interest not apply to all women? There is no difference in the fetuses of women who are incompetent, women who are competent, and minors. The concurring opinion in the J.D.S. case recognizes that the issue cannot be framed as applying to only women found incompetent, arguing that

viewing the problem through that narrow a lens distorts the real issue of the scope, if any, of fetal rights. If a fetus has rights, then all fetuses have rights. And, if a fetus is a person, then all fetuses are people, not just those residing in the womb of an incompetent mother.

The concurring judge acknowledges that it is "inviting" to think about the issue narrowly, yet also acknowledges "it would be dangerous to do so when the potential for state intrusion into the lives of women is so significant."

Unequal treatment regarding fetal representation between women who are incompetent and women who are competent is without justification, regardless of intent. Governmental institutions should not allow fetal representation since it offends ethical notions of equal treatment regarding both substantive "rights" and the process in exercising those "rights." Unequal treatment in this context undermines autonomy, perpetuates unfair reproductive institutional discrimination for women with mental retardation, and violates institutional integrity.

III. DOCTRINAL ARGUMENTS

While ethical principles of autonomy and equal treatment suggest why institutions should not allow fetal representation in the abortion context for women who are incompetent, legal doctrines suggest that the current legal framework does not support fetal representation. Current guardianship statutes do not protect fetuses. The law already protects both procedural and substantive fetal interests. Furthermore,

\[148\] See Silverstein, supra note 19, at 108 (observing that "if the presence of guardians in waiver hearings is constitutional, we should not be surprised to see future regulations that require adult women to meet with a designated representative of the fetus prior to obtaining an abortion").


\[150\] Id.
fetal representation creates a false conflict between the mother and the fetus, as it is the state’s interest in the potential life of the fetus that conflicts with the mother’s interests.

A. Guardianship and GAL Statutes

In the *J.D.S.* case, the state of Florida contended that fetal guardianship is “neither new, nor novel,” arguing that courts consider fetal interests in wrongful death cases. While courts have appointed representation for fetuses in wrongful death cases as well as neglect, homicide, and refusal of medical treatment cases, abortion cases are different because the fetus is not recognized as having any rights in the abortion decision. *Roe v. Wade* acknowledged that courts have recognized the unborn as having rights or interests in other contexts, specifically in property cases, and noted that guardians ad litem have represented fetal interests. Yet, the Court emphasized that fetuses have never been legally recognized as “persons in the whole sense.” The Court ultimately held that a fetus is not a person for purposes of the Fourteenth Amendment.

This idea that a fetus is not a person is important in deciding whether or not guardianship or GAL statutes cover fetal representation in an abortion context. In *In re D.K.*, a lower court appointed a guardian ad litem for the fetus of a hospitalized woman with schizophrenia. The fetal GAL then successfully obtained an order restraining the mother from taking any potentially harmful medication and from having an abortion. In addition, the fetal GAL petitioned for a guardian for D.K. The Superior Court of New Jersey, Chancery Division, held appointment of a fetal guardian ad litem “improper” prior to viability. The court reasoned that a guardian ad litem can only represent a person, stating that “[t]he reference to ‘person’ [in

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152 410 U.S. 113 (1973).
153 *Id.* at 162.
154 *Id.*
155 *Id.* at 158.
157 The court uses the term “guardian” throughout the opinion but looks to a guardian ad litem statute in its analysis. Therefore, it appears that by “guardian” the court really refers to a “guardian ad litem.” *Id.*
158 *Id.* at 1300. While D.K. had a mental illness and not mental retardation, persons with mental illness and mental retardation have faced similar types of oppression, including institutionalization and stigmatization. Despite the similarities, mental illness and mental retardation are “distinct phenomena,” as mental retardation is a developmental disorder associated with lower intellectual functioning, and mental illnesses are often psychiatric disorders frequently associated with impaired emotional functioning. *FIELD & SANCHEZ, supra* note 1, at 24.
159 497 A.2d at 1300.
160 *Id.* at 1301.
the guardian ad litem statute] is significant.161 The court went on to say that “[a] fetus is not a person,” citing Roe.162 The court further noted that the mother has constitutional control of the fetus until viability and that a guardian must exercise that control for a mother who is incompetent.163 The court, however, left open the possibility of fetal guardianship after viability, noting that if future proceedings implicated fetal interests, the court may find it necessary to appoint a fetal GAL.164

The Court of Appeal of Florida used similar logic in denying appointment of a fetal guardian165 for J.D.S. The court noted that the guardianship statute specified that a guardian acted on behalf of a person.166 No Florida statute or case law defined a fetus as a person; instead, the court cited cases (such as Roe and In re D.K.) finding that a fetus is not a person.167 The guardianship statute also neither explicitly mentions nor defines a fetus, although the legislature had done so in other contexts.168 Unlike the D.K. court, the J.D.S. majority did not hint at a possible distinction between nonviability and viability. Even if a fetus has reached viability, however, it is still not a person until birth. Viability is only meaningful because this is the point that the state’s interest in potential life becomes compelling.169 As guardianship and GAL statutes refer to a person, a viable fetus is still not included. Thus, the D.K. court’s entertainment of the possibility of fetal representation for a viable fetus is inconsistent with its own analysis. Under the current framework of guardianship and GAL statutes, the fetus is not protected until birth.

It is worth considering, however, the possibility that the definition of person for guardianship and GAL statutes may be different from the definition of person in the Fourteenth Amendment context. The D.K. and J.D.S. courts chose to adopt the Roe definition of person,

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161 Id. at 1302.
162 Id.
163 Id.
164 Id. at 1309.
165 As noted in note 64, the petition was for a guardian but the trial court denied appointment of a guardian ad litem. The majority opinion frames the issue as “whether the trial court had the authority to appoint a fetal guardian pursuant to Florida’s guardianship statutes.” Wixtrom v. Dep’t of Children & Families, (In re Guardianship of J.D.S.), 864 So. 2d 534, 537 (Fla. Dist. Ct. App. 2004). Thus, it appears that the majority addresses whether a “guardian” rather than a “guardian ad litem,” or perhaps also encompassing a “guardian ad litem,” is proper.
166 864 So. 2d at 538.
167 Id.
168 Id.

169 See Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992). The Court held “that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.” Id. Whenever viability occurs, it “may continue to serve as the critical fact.” Id.
but they did not necessarily have to do so. They may have done so because the cases before the courts involved an abortion context. Thus, although the guardianship statute was not set up as an abortion regulation, the courts likely saw that the practical effect of allowing fetal representation in the cases before them amounted to an abortion regulation. This guardianship statute turned de facto "abortion regulation" would have the practical effect of allowing fetal guardians to participate in an abortion hearing regarding a woman who is incompetent. Thus, in this context, it was logical, and preferable, for the courts to draw upon the Roe definition of person. Legislatures should learn from this by understanding that any inclusion of fetus into a guardianship or GAL statute may subsequently become an abortion regulation, even if the intent is to provide protection for fetuses in other contexts. As the guardianship or GAL statute would then serve to protect fetuses, such a statute would apply to all fetuses, regardless of the competency of the mother. To avoid this result, legislatures should carve out an exception by stating inclusion of a fetus does not extend to issues concerning abortion.

B. Procedural Protections

One student author has argued that even if a guardianship statute does not cover fetuses, courts have an equitable power to appoint guardians, especially as is necessary to protect the state's interest in potential life. He rejects the position that existing mechanisms protecting state interests are necessarily adequate for women found incompetent, as the fundamental difference between J.D.S. and other women is that J.D.S. does not decide for herself whether or not to have an abortion. Therefore, this student author concludes that a fetal guardian is minimally necessary to ensure a balanced testimony regarding the health and life risks of the mother in cases similar to J.D.S. This Note instead argues that existing mechanisms sufficiently protect state interests, regardless of whether the guardian or court ultimately makes the abortion decision.

At times, the guardian makes the abortion decision independently. Overall, there is little law on whether a guardian for a woman with mental retardation needs third-party consent to abortion. The paucity of case law suggests that abortions in these situations are ob-

170 Parker, supra note 141, at 1465.
171 Id. at 1465-66.
172 Id. at 1466.
173 FIELD & SANCHEZ, supra note 1, at 139.
tained without court permission.\textsuperscript{174} In the more than dozen states that have adopted the Uniform Probate Code provisions on substituted consent for persons found incompetent, this is most likely legal, as there are indications that abortion is covered under the "medical treatment" section.\textsuperscript{175}

In instances where the guardian makes the abortion decision, the state's interests are still protected. The state not only has an interest in the potential life of the fetus, but also has an interest in the mother's well-being.\textsuperscript{176} Both interests are protected through the initial guardianship hearing, when the court appoints a guardian. In the selection of a guardian, the court chooses a person with the woman's well-being in mind. Furthermore, the guardian has a fiduciary duty. In choosing a guardian, the court has not only an opportunity but rather a duty to appoint a guardian who would, either through substitute judgment or best interests standards, weigh the interests of both the mother and the fetus. Since the guardian acts as a surrogate decision-maker, the guardian has an ability to take into account the fetus's interests, as any pregnant woman would consider fetal interests. The state's interests are protected, more so than women who do not have a guardian, as the court may question during appointment proceedings whether the guardian would take into account both maternal and fetal interests in the event of pregnancy. Yet, ultimately, as with women without guardians, the guardian, as the surrogate voice of the woman, must make a choice between competing interests.

Critics express concern over the potential for abuse if the guardian makes the abortion decision. They may believe that the state's interest in ensuring that the guardian properly assesses the situation is not adequately protected when the guardian makes the decision.\textsuperscript{177} Yet, the court deciding the abortion question upon a guardian's petition better addresses this concern than appointment of a fetal representative. Many states have this requirement, either amending the Uniform Probate Code provision to specifically exclude abortion, adopting other statutory laws requiring the guardian to seek court permission, or requiring court consent through case law.\textsuperscript{178}

\textsuperscript{174} Id.
\textsuperscript{175} Id. at 143 (noting that the "indications" that abortion in these Uniform Probate Code jurisdictions are subsumed under "medical treatment" include a court decision interpreting "medical treatment" to include abortion, an absence of cases indicating judicial involvement, and the fact that other states have expressly excluded abortion when adopting the Uniform Probate Code).
\textsuperscript{177} Parker, supra note 141, at 1466.
\textsuperscript{178} \textsc{Field} \& \textsc{Sanchez}, supra note 1, at 143-44. Some states also explicitly prohibit a guardian from making a decision regarding abortion but do not say who can make it; it is not
Even in states where the court decides the abortion question, there are mistaken assumptions that the guardian still makes the decision, as exemplified by the J.D.S. case. One student author, in particular, seems to suggest that the guardian for J.D.S. would ultimately make the decision. The woman petitioning to be the fetal guardian for J.D.S. was also concerned that J.D.S.’s guardian would make the abortion decision. These mistaken beliefs erroneously perpetuate the idea that there is a lack of protection of state interests. Even more so than states that allow the guardian to make the abortion decision, states requiring court permission protect not only the state’s interest in the potential life of the fetus but also the state’s interest in the mother’s health and life.

For example, in Florida, where the J.D.S. controversy occurred, a guardian cannot consent to an abortion on behalf of the woman without obtaining court permission. Before a court grants permission to the guardian to exercise the right to choose, the court must appoint an attorney to represent the pregnant woman, consider independent evidence, and find by clear and convincing evidence that the pregnant woman cannot make the decision and that the abortion is in her best interest. This existing procedure may take fetal interests into account. The concurring judge in the J.D.S. case also noted that “the guardianship court has the authority and obligation to consider the fetus’s well-being, although the mother’s life and health must trump concern for the welfare of the fetus, if those interests are irreconcilable.” Thus, this procedure more than adequately protects state interests.

C. Substantive Protections

In addition to existing court procedures, existing laws limiting abortion protect state interests. Unfortunately, when a woman has a disability, her disability often becomes the focus rather than her gender. Thus, it becomes easy to forget that a pregnant woman who is incompetent is first and foremost a pregnant woman. Like any pregnant woman, state laws limiting the availability of abortion after viability protect state interests.

\[\text{clear if this is an outright ban or if someone else, such as the court, can make the decision. Id.}

179 Parker, supra note 141, at 1466 (noting that “a court-appointed guardian woman is making the decision based on a determination of J.D.S.’s best interests as a ward”).


181 FLA. STAT. ANN. § 744.3215(4)(e) (West 2005).

182 Id. § 744.3725.

183 864 So. 2d at 541 n.7 (Orfinger, J., concurring).
The brief in the J.D.S. case submitted by the American Civil Liberties Union (ACLU), the ACLU of Florida, the Florida National Organization for Women, and the Center for Reproductive Rights as amicus curiae, all argued against fetal representation since existing Florida law already protects the state’s interest in the fetus. The organizations noted that Florida law limited J.D.S., along with every Floridian pregnant woman, from having an abortion after twenty-four weeks unless necessary to save the life or protect the health of the pregnant woman. Other states have similar restrictions as well, although states differ in the kind of restrictions necessary to protect state interests. Thus, laws limiting the availability of abortion adequately protect state interests without fetal representation.

D. False Conflict

Setting up a system of fetal representation improperly casts the debate as a conflict between the woman and her fetus. Although not an abortion case, one trial court appointed a fetal guardian with the ability to consent for a blood transfusion for a pregnant woman who refused the blood transfusion. The Appellate Court of Illinois reversed noting that this was not a case balancing maternal and fetal rights. The proper inquiry was how to balance the mother’s right (to refuse treatment) against the state’s interest in the viable fetus. The appellate court held that “[t]he asserted legal interests did not require the public guardian’s representation of the separate, putative interests of the viable fetus.” Using similar reasoning, a dissenting judge on the Alabama Supreme Court argued that, where a lower court appointed a fetal GAL for a pregnant minor’s parental consent by-pass hearing, such appointment “casts the inquiry as a contest between a baby struggling to save its own life and the mother fighting to kill the baby.” As abortion is really a conflict between a pregnant

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185 Id.
188 Id. at 406.
189 Id.
190 Id.
191 Ex parte Anonymous, 889 So. 2d 525, 527 (Ala. 2003) (per curiam) (Johnstone, J., dissenting).
woman and the state, a guardian is not needed for the fetus, as the fetus has no interest in the conflict. It is the state’s interest in the fetus that is at issue. Fetal representation gives the fetus a voice that may conflict with the voice a woman who is incompetent regarding abortion as either exercised directly through herself or indirectly through her surrogate. Thus, the presence of fetal representation improperly interjects another entity into the conflict.  

IV. PRACTICAL ARGUMENTS

Although the current legal framework does not support fetal representation in the abortion context for women who are incompetent, legislatures could change the legal framework. Pro-life forces would likely drive the change, intending to promote childbirth. Fetal representation, however, would likely result in unintended consequences. Already mentioned are the ethical consequences, undermining notions of autonomy and equal treatment. Unforeseen practical consequences include the difficulty in applying the “best interests” standard and the ability of a fetal guardian to have a voice in other matters besides abortion. Another consequence, perhaps foreseen by pro-life advocates but not by others, is the risk of fetal representation applying to all women.

A. The “Best Interests” Standard

Besides the fact that a fetus is not a person, and, therefore, does not have any rights in the abortion context, even taking into account fetal interests, how would a fetal guardian or fetal GAL determine what is in the “best interest” of the fetus? Essentially, the fetal guardian or fetal GAL would make a decision based on his or her own personal values. Typically, fetal representatives will define the “best interest” in terms of birth, translating into the goal of preventing the woman from having an abortion. Yet, is birth necessarily in the fetus’s best interest? What happens if the fetus is to have a short or

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192 While this Note’s argument that fetal representation creates a false conflict applies equally to women who are incompetent and women who are competent, another interesting argument is that fetal representation creates an improper conflict within a guardianship framework solely for women who are incompetent. See Wieber, supra note 19, at 815-16. The adversarial relationship created by fetal representation may result in the subordination of a woman’s interests with a fetus’s interests, which is at odds with the guardianship notion of protecting the woman’s best interests. See id.

193 See Goldberg, supra note 64, at 535 (acknowledging the “difficulty of ascertaining the ‘best interests’ of a fetus”).

194 Id.

195 Silverstein, supra note 19, at 101.
painful life? What about an "altruistic" fetus that may sacrifice its potential life for the sake of the mother's quality of life? Pro-life advocates who support fetal guardianship should not necessarily expect that a fetal guardian would always "choose life." In the case of a woman with mental illness who was on medication with potentially damaging side effects to the fetus, the fetal guardian testified in favor of abortion as in the best interests of both the fetus and the mother.

Another problem with a "best interests" standard is that the guardian or GAL ought to take into account the person's preferences. This is impossible with a fetus, as how can a fetus express its preferences? One may have the same difficulty with a never competent person or an unconscious person. Yet, to help determine best interests in these cases, one may simply look to others stated preferences or even a personal preference, trying to decide through comparison. Yet, how can we ask other fetuses, as they similarly cannot communicate? Also, a representative will not remember what it was like when he or she was a fetus. Thus, comparison will not work as a guide.

Therefore, even if society wants to prioritize fetal interests, it is still not practical to advocate for fetal representation in the abortion context based on the difficulty in applying a "best interests" standard.

B. Slippery Slope

Fetal representation is also not a practical policy choice because of the slippery slope involved—if we allow fetal representation for abortion decisions, why not other decisions affecting the fetus? Where do we draw the line? The ACLU and other organizations acting as amicus curiae in the J.D.S. case expressed concerns that the guardian may try to influence other decisions besides abortion, potentially negatively impacting the woman's health as well. This brief noted that the appellant's brief stated that the fetal guardian may face issues such as "whether to obtain a sonogram, use of anesthesia for any medical procedure, the type of vitamins, choice of delivery, medications, and other pre-natal 'dilemmas.'" The slippery slope extends to a parade of horribles; a woman may also find herself facing fetal representation if she "smoked, ate 'junk food,' failed to seek prenatal care, engaged in strenuous exercise, worked in a hazardous environ-
ment, engaged in sexual activity when contraindicated, breathed polluted air, or lived near electric force fields or toxic waste sites."

It is not only a question of where to draw the line, but to whom to draw the line. Even if one rejects this Note’s ethical and doctrinal arguments and accepts the concept of fetal representation for women who are incompetent, does one necessarily want to extend this approach to all women? Current reality is that all women are not yet targeted by proponents of fetal representation. Fetal representation is entwined with the pro-life movement. Historically, those supportive of limiting abortion have had the most success by targeting “the least powerful categories of pregnant females—poor women and unmarried minors.” Now, supporters of limiting abortion have targeted another vulnerable group—women who are incompetent, often with mental retardation. By targeting vulnerable populations, the pro-life movement can introduce the concept, create legal precedent, and then extend the concept to more women. This is essentially a “divide and conquer” tactic; fetal representation is targeted to both minors and women who are incompetent. Eventually, fetal representation could extend to all women.

V. CONCLUSION

Many people, with either pro-life or pro-choice views, may consider fetal representation for all pregnant women a distant, unlikely occurrence. This Note doubts that fetal representation currently comprises a serious threat to all pregnant women. It is precisely because fetal representation does not threaten all pregnant women that fetal representation for women who are incompetent is particularly morally problematic. Legislatures and courts must remain consistent in preserving the right (including the “right”) to choose for all women. Fetal representation, therefore, is not only an abortion issue but also an autonomy and equal treatment issue. Yes, women who are incompetent are different from women who are competent in terms of competency. Once the court appoints a guardian to act as a surrogate voice, the difference, however, theoretically disappears. Therefore, the guardian should have the ability to exercise the right to choose on behalf of the woman in as similar a way possible as a competent woman. To guard against guardian abuse, states may impose some constraints on a guardian’s exercise of rights. For example, legisla-

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201 Goldberg, supra note 64, at 537.
tures may require court oversight of a guardian's decision. Fetal representation, however, guards the fetus, not the guardian.

Guardianship statutes are in place to protect the interests of a person who is incompetent. Currently, guardianship statutes do not extend protection to fetuses. States, however, already have existing mechanisms to protect their interest in the potential life of the fetus. Guardians or courts making the abortion decision can take fetal interests into account, as a competent woman can also take fetal interests into account. Existing substantive laws limit the availability of abortion to all women, including women who are incompetent. This existing framework protecting state interests correctly ensures that the conflict remains between the woman and the state rather than the woman and her fetus.

If legislatures include protection of fetuses in guardianship statutes, a host of unintended practical problems may arise. How would the "best interests" standard apply to a fetus? Also, fetal guardians may then not limit decisions solely to abortion but pervade other decisions made during pregnancy. Furthermore, all women may eventually face fetal representatives before accessing an abortion.

In order to truly protect interests of women who are incompetent, including those with mental retardation, efforts should focus on ensuring access to quality guardians who will act as a surrogate voice rather than providing a fetal guardian or fetal GAL who will act as a fetal voice. Women who are incompetent, like J.D.S., already have a difficult time getting their voices heard. Providing a voice to the fetus acts to silence, rather than strengthen, a voicing of a "right" to choose by women who are incompetent.

Catherine M. French†

†J.D. and M.S.S.A. candidate 2006, Case Western Reserve University School of Law and Mandel School of Applied Social Sciences. I would like to thank Professors Jessica Berg, Dale Nance, and Jonathan Entin for their support and comments. I also thank my family and friends for their love and encouragement.