

# national lawyers guild

Volume 76  
Number 2  
Summer 2019

# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



## **WOMXN'S BODIES ARE A BATTLEFIELD**

***NIFLA v. Becerra* and  
Crisis Pregnancy Centers:  
Constitutionalizing the  
Distribution of False Medical  
Information to Pregnant People**

Amelia Spencer

75

**Choice at Risk: The Threat of  
Adult Guardianship to Substantive  
and Procedural Due Process  
Rights in Reproductive Health**

Marissa Ditkowsky

92

**National Lawyers Guild  
Amicus Brief: The State  
Lacks Jurisdiction over  
Reproductive Decisions**

Brendan T. Beery et al.

126

## Womxn's Bodies Are A Battlefield

Against a backdrop of national hostility against womxn, emanating from a demonstrably misogynistic President of the United States, the National Lawyers Guild continues its struggle for gender and reproductive equality. In this theme issue, our *Review* seeks to expose and redress different aspects of latter day female oppression through the curtailment of reproductive freedom.

In 1973, seven men recognized that womxn were entitled to some bodily autonomy and self-determined healthcare. In the last four decades, however, womxn have realized just how controversial this seemingly obvious precept is. For most, our right to “choose” is such a self-evidently necessary part of our liberty that its deprivation constitutes a line in the sand and a point of no return.

In “*NILFA v. Becerra* and Crisis Pregnancy Centers: Constitutionalizing The Distribution of False Medical Information to Pregnant People,” Amelia Spencer takes on Crisis Pregnancy Centers—“faith-based” resource centers that provide medically false and misleading information to vulnerable womxn with the object of preventing abortions—in light of recent Supreme Court case law. Spencer describes, with chilling exactitude, this ongoing mass manipulation industry and recommends three urgent reforms to blunt its influence.

In “Choice at Risk: The Threat of Adult Guardianship to Substantive and Procedural Due Process Rights in Reproductive Health,” Marissa

---

**NATIONAL LAWYERS GUILD REVIEW, formerly GUILD PRACTITIONER**, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. NATIONAL LAWYERS GUILD REVIEW is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, and the Alternative Press Index.

EDITORIAL BOARD: Meredith O'Harris, Editor-in-Chief; Traci Yoder, Executive Editor; Crystal Abbey, Managing Editor; Nathan Goetting, Articles Editor; Kathleen Johnson, Book Editor; Deborah Willis, Layout Editor; Cece McGuire, Layout Editor; Tasha Moro, National Office Liaison. Contributing Editors: Alan Clarke, Marjorie Cohn, Pooja Gehi, David Gespass, Ann Fagan Ginger, Harold McDougall, Kathryn Taylor, Paul Von Blum, Henry Willis. The opinions expressed in the articles are those of the various authors, and each article is Copyright, 2019, by the author and by NATIONAL LAWYERS GUILD REVIEW.

ADVISORY PANEL: Elvia Arriola, John Brittain, Margaret Burnham, Erwin Chemerinsky, David Cole, Barbara Dudley, Richard Falk, Lennox Hinds, Sylvia A. Law, Staughton Lynd, Ruben Remigio Ferro, Jitendra Sharma, Kenji Urata, Frank Valdes, Patricia Williams.

***NIFLA V. BECERRA* AND CRISIS PREGNANCY  
CENTERS: CONSTITUTIONALIZING THE  
DISTRIBUTION OF FALSE MEDICAL  
INFORMATION TO PREGNANT PEOPLE**

**I. Introduction**

An abortion clinic and a crisis pregnancy center (CPC) stand directly across from each other at the corner of 12th and Delaware in Fort Pierce, Florida.<sup>1</sup> A man hovers outside the abortion clinic holding a poster of a bloody, mangled fetus.<sup>2</sup> A woman paces the sidewalk holding a rosary and singing hymns.<sup>3</sup> As patients enter the abortion clinic, protesters alternate between insulting them, calling them murderers, and attempting to lure them across the street to the CPC.<sup>4</sup> When the doctor arrives, he is covered by a sheet to protect his identity.<sup>5</sup> Seeking an abortion in the U.S. can be traumatic. *Performing* abortions can be downright dangerous.<sup>6</sup>

With the passage of *Roe v. Wade*,<sup>7</sup> pro-life activists mobilized on a national level, sowing the seeds for an intensely polarized battle over abortion rights that, in great part, defines the Democratic and Republican party platforms as they exist today.<sup>8</sup> A key component of anti-choice activism has been the establishment of CPCs. California became the first state to regulate CPCs through its Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act, which required CPCs to disclose that state funded clinics offer other pregnancy options (including abortion) and inform patients if they are not licensed to provide medical services.<sup>9</sup>

In *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court held that California's FACT Act violated the First Amendment.<sup>10</sup> In light of *NIFLA v. Becerra*, there are three necessary policy changes. First, state and federal governments should refuse to fund CPCs directly or indirectly. CPCs violate the First Amendment's Establishment Clause on separation of church and state when they use government funds to masquerade as healthcare clinics and provide inaccurate medical information to pregnant people. Second, the federal government should enact a National Deceptive Trade Practices Act to target CPCs' false advertising and deceptive practices. Finally, Congress should promulgate a statute that conforms with *NIFLA v. Becerra*. CPCs impose an unconstitutional "undue burden" on individuals seeking abortions when they provide them with inaccurate

medical information and intentionally conceal that they do not provide abortion services.<sup>11</sup>

## II. Background

### A. Crisis Pregnancy Centers: Overview and Brief History

CPCs are anti-choice, faith-based centers that provide pregnancy-related services and seek to discourage abortion through dishonest advertising and dissemination of false medical information.<sup>12</sup> Unlike abortion clinics, CPCs are “exempt from regulatory, licensure, and credentialing oversight that apply to health care facilities.”<sup>13</sup> Most CPCs are affiliated with large organizations such as Care Net, Heartbeat International, or the National Institute of Family and Life Advocates (NIFLA), which provide free pregnancy tests, ultrasounds, parenting classes, Bible studies, and legal support.<sup>14</sup> CPCs mimic the appearance of doctor’s offices and are often strategically located near abortion clinics.<sup>15</sup> Most are unlicensed (i.e. not subject to regulation) and “give the appearance that they provide abortions or abortion-related education” to draw pregnant people to their doors.<sup>16</sup>

Once inside, patients are subjected to judgment and bullying, given false medical information about health risks related to abortion, and shown graphic depictions of abortions.<sup>17</sup> According to Sarah Christopherson, the Policy Advocacy Director for the National Women’s Health Network, CPCs “are designed for one purpose—to make sure that everyone carries their pregnancy to full term—and they’ll do or say anything to make sure that happens.”<sup>18</sup>

Robert Pearson established the first CPC in 1967 with the goal of preventing abortions after Hawaii legalized the procedure.<sup>19</sup> However, CPCs did not truly begin to proliferate until after 1973 when the Supreme Court held in *Roe v. Wade*<sup>20</sup> that women have a constitutionally protected right to privacy in seeking an abortion.

Religious groups, galvanized by *Roe v. Wade*, mobilized to combat the expansion of abortion rights. These groups discovered an ally in Pearson, who founded The Pearson Institute to help anti-abortion activists establish CPCs across the nation.<sup>21</sup> Since the late 20th century, CPCs have burgeoned in the United States. As of 2018, there were roughly 4,000<sup>22</sup> CPCs in the United States, outnumbering abortion clinics approximately four to one.<sup>23</sup>

One reason for this success is that CPCs are not subject to state regulation, whereas abortion providers are subject to heavy scrutiny and regulation.<sup>24</sup> CPCs found themselves in hot water however, after investigations by the National Abortion Federation and NARAL Pro-Choice America revealed the shocking tactics they use to dissuade pregnant people from seeking abortions.<sup>25</sup> Nevertheless, while a number of states have attempted to regulate

CPCs, they have been largely unsuccessful in the face of First Amendment freedom of speech principles.

## **B. Crisis Pregnancy Center Tactics**

### **1. Deceptive Advertising and Masquerading as Medical Clinics**

CPCs mimic the appearance of medical clinics and structure their advertisements to insinuate that they provide abortion services when, in reality, they refuse to provide such services. The deceptive advertising is deliberate; pro-life advocate for Heartbeat International, Abby Johnson, is quoted as saying, “We want to appear neutral from the outside. The best call, the best client you ever get is one who thinks they’re walking into an abortion clinic. The ones that think you provide abortions.”<sup>26</sup>

Heartbeat International recommends that centers use two websites—one for fundraising and donors describing CPCs’ anti-abortion mission and a second website professing to provide medical information to individuals seeking contraception, counseling, or abortion.<sup>27</sup> Additionally, some CPCs list their centers in directories under “abortion” or “abortion services.”<sup>28</sup> CPCs are intentionally vague about the services they offer and often use ambiguous names (such as “Her Choice Birmingham Women’s Center” and “Choices Pregnancy and Health”) that mislead patients about the services they provide.<sup>29</sup> At their physical locations, CPCs offer free pregnancy tests, ultrasounds, and other services.<sup>30</sup> Once inside, however, patients may be confronted with anti-abortion films, lectures, or pictures and staff who refuse to provide referrals to abortion clinics.<sup>31</sup> CPCs are designed to look like comprehensive reproductive health clinics. However, many are operated by unlicensed volunteers who “may wear lab coats and require clients to complete paperwork prior to seeing a so-called counselor.”<sup>32</sup>

### **2. False Medical Information, Religious Propaganda, and Bullying**

CPCs provide false medical information about contraception and abortion, such as telling patients abortion can be a deadly procedure, increases the risk of breast cancer and infertility, causes depression, suicide, and post-abortion stress disorder (not recognized by the American Psychiatric Association), and can cause miscarriages, stillbirths, and birth defects.<sup>33</sup> Centers tell patients that incomplete abortions may lead to uterus perforation, toxic shock, or death (some centers state that decaying fetal body parts may be left inside patients’ bodies after the procedure).<sup>34</sup>

In addition to opposing abortion, many CPCs refuse to make referrals for birth control (claiming it is the equivalent of an early abortion) and tell patients that condoms have a high failure rate and are ineffective at preventing STI transmission.<sup>35</sup> Many CPCs lie to patients about the gestational age of the fetus, falsely advise them that abortion is an option in their state up

until birth, or recommend that they wait to see if they miscarry before opting to abort.<sup>36</sup> As a result, when pregnant people seek medical care, it may be too late to get an abortion, depending on their state's legal restrictions.

Once patients are inside clinics, they are pressured to remain pregnant and shamed for considering abortion. Some CPCs have reportedly convinced patients to sign contracts pledging to give birth; the contract (containing their personal information and social security number) includes a notice that it will be provided to every abortion provider where the pregnant person may go, all law enforcement agencies with jurisdiction where the person resides or where they may seek an abortion, all state authorized Child Protective Services with jurisdiction where the person resides or make seek an abortion, and legal counsel for the CPC and the individual.<sup>37</sup>

### **C. Particularly Affected Groups: People of Color, Immigrants, and Low-Income Individuals**

CPCs are disproportionately located in low-income neighborhoods where people of color and low-income individuals live.<sup>38</sup> Heartbeat Miami's website stated CPCs must be "mainstreamed into Black and Latino churches in the cities" and the CPC-to-comprehensive clinic ratios in Houston are 13:2 in low-income neighborhoods and 15:4 in communities of color.<sup>39</sup> The pro-life movement advocates for decreased access to Medicaid (which is the only healthcare option for many low-income people) and defunding Planned Parenthood (the only source for contraceptives in many low-income areas) while simultaneously littering these neighborhoods with CPCs, which have a proven history of lying to patients about their healthcare options and providing them with false medical information.<sup>40</sup>

The result of these efforts is that, compared to their white counterparts, people of color and low-income people have restricted access to contraceptives, experience teen pregnancy at significantly higher rates, and are three to four times more likely to die in childbirth.<sup>41</sup> Additionally, lack of access to comprehensive reproductive healthcare limits economic outcomes for people of color, who face heightened income inequality and are more likely to live in poverty than their white counterparts.<sup>42</sup> This, in turn, impacts educational opportunities and inadequate housing, which comes full circle to further decrease access to healthcare.<sup>43</sup> Finally, immigrants in government custody are particularly at risk. The Office of Refugee Resettlement directed government-funded shelters and legal service providers to send pregnant people to CPCs for counseling services.<sup>44</sup> As a result of these policies young immigrants are at risk of what is, in practice, government-mandated birth. For example, a 17-year-old undocumented immigrant held by the federal Office of Refugee Resettlement in Texas nearly missed the state's 20-week abortion deadline when the state forced her to obtain a judicial bypass for

the procedure, caused her to miss two medical appointments, and sent her to a CPC instead of an abortion clinic.<sup>45</sup>

### **D. Crisis Pregnancy Centers are Government-Funded**

In 2018, 14 states set aside approximately \$40.5 million taxpayer dollars in their budgets for CPCs while simultaneously slashing funding for healthcare and public assistance programs and enacting more stringent requirements to qualify for public assistance.<sup>46</sup> There are 1,255 CPCs, compared to only 214 abortion providers, in these 14 states.<sup>47</sup>

Additionally, 32 states currently provide “Choose Life” license plates, which are \$25 to \$70 more expensive than standard plates and whose proceeds are directed toward antichoice organizations (including CPCs); some states go as far as explicitly prohibiting funds from these license plates from being allocated to organizations that provide abortion services. Reproductive health activists have successfully challenged this in some states as a First Amendment violation and government establishment of religion.<sup>48</sup>

Beginning with the Bush Administration in 2001, CPCs have received millions of dollars in federal funding through programs such as Community-Based Abstinence Education, Title V Abstinence Only, and Compassion Capital Fund; federal funding decreased significantly under the Obama Administration but was not eliminated.<sup>49</sup> In contrast, the Hyde Amendment mandates that

No funds authorized or appropriated by Federal law. . . shall be expended for any abortion. . . [or] health benefits coverage that includes coverage of abortion. . . [unless] the pregnancy is the result of an act of rape or incest. . . [or] would place the woman in danger of death unless an abortion is performed.<sup>50</sup>

Only seventeen states use state funds to provide abortions for people using Medicaid beyond the Hyde Amendment’s restrictions.<sup>51</sup>

### **E. NIFLA v. Becerra**

In 2015, California adopted the FACT Act to regulate CPCs. The Act required licensed clinics primarily serving pregnant people to provide notice that California provides low-cost or free family planning services—including abortions—and a phone number to call for those services; that Act also required unlicensed clinics to notify patients that they were not licensed to provide medical services.<sup>52</sup> The Act’s stated purpose was to “ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.”<sup>53</sup>

In response, NIFLA, Pregnancy Care Center (a licensed center), and Fallbrook Pregnancy Resource Center (an unlicensed center) (collectively “NIFLA”) filed suit alleging the FACT Act violated their First Amendment right to free speech.<sup>54</sup> A California District Court denied their motion for



a preliminary injunction and the 9th Circuit affirmed, finding that NIFLA could not demonstrate they were likely to succeed on the merits.<sup>55</sup>

In 2017, the Supreme Court agreed to hear the case. In a 5-4 decision, the court struck down California's FACT Act as an unconstitutional violation of the First Amendment.<sup>56</sup> Writing for the majority, Justice Thomas found the notice requirement for licensed clinics targeted speech based on its content because it forced clinics to advertise abortion.

Content-based laws are subject to strict scrutiny and "may be justified only if the government proves they are narrowly tailored to serve compelling state interests."<sup>57</sup> The Court stated there are two exceptions to the strict scrutiny requirement: disclosure of factual, non-controversial information in commercial speech and professional conduct that only incidentally involves speech.<sup>58</sup> The majority found the licensed disclosure to be controversial because it required anti-choice organizations to disclose information about state-sponsored abortion services.<sup>59</sup>

The licensed notice requirement was additionally found to be burdensome because it governed "all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed."<sup>60</sup> The majority further commented that the licensed notice requirement would not survive intermediate scrutiny because it only applied to clinics whose primary purpose was providing family planning or pregnancy-related services while excluding other clinics that performed services for low-income individuals.<sup>61</sup>

With regard to the unlicensed notice requirement, California's stated objective was to ensure pregnant people knew if they were receiving care from licensed medical professionals.<sup>62</sup> However, California denied that the justification for the requirement was that patients did not know what kind of facilities they were going to when they entered unlicensed CPCs.<sup>63</sup> Based on this, the Court found that the harm California intended to remedy was purely hypothetical.<sup>64</sup> The Court finally held that, even if the harm was not hypothetical, the unlicensed disclosure unduly burdened free speech by imposing government-scripted speech on a narrow subset of individuals (CPCs) that was "wholly disconnected from the state's informational interest."<sup>65</sup>

Writing for the dissent, Justice Breyer pointed out that, if taken literally, the majority opinion could "radically change prior law" and that the majority explicitly stated it did not "question the legality of health and safety warnings long considered permissible" but failed to give any reason why the FACT Act did not fall under that "health" category.<sup>66</sup> Furthermore, the dissent noted that, pursuant to *Planned Parenthood v. Casey*, abortion providers can be required to tell people seeking abortions about "the nature of the abortion procedure, the health risks of abortion and of childbirth, the



probable gestational age of the unborn child, and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services” because these informational requirements do not impose an “undue burden” on people seeking abortions.<sup>67</sup>

The majority attempted to distinguish *Planned Parenthood v. Casey* as “concerning a regulation of professional conduct that only incidentally burdened speech” but the dissent posited that “[t]his distinction. . . lacks moral, practical, and legal force” because “[t]he individuals at issue. . . are all medical personnel engaging in activities that directly affect a woman’s health—not significantly different from the doctors at issue in *Casey*.”<sup>68</sup> As Justice Breyer stated: “If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?”<sup>69</sup>

The practical effect of *NIFLA v. Becerra* is that religiously affiliated, anti-choice family planning centers providing medical services and information are not held to the same standard as abortion providers. They are not obligated to provide pregnant people with accurate healthcare information, inform them about the availability of abortion services, or even provide notice that they are not staffed by licensed medical professionals. *NIFLA v. Becerra* runs counter to prior Supreme Court reproductive healthcare decisions, arguably violates *Planned Parenthood v. Casey* by knowingly allowing CPCs to intentionally confuse patients about their medical care, and demonstrates a clear preference for CPCs by failing to hold them to the same standards as other reproductive healthcare providers.

### **III. Analysis and Policy Recommendations**

#### **A. End Government Funding for CPCs**

CPCs are a clear violation of the separation between church and state. The federal government and states that allocate millions of taxpayer dollars and carve out funding in their budgets for CPCs are engaging in the unconstitutional establishment of government-funded religion.

The Supreme Court expounded on the meaning of the First Amendment’s Establishment Clause in *Everson v. Board of Education of Ewing Township*, stating:

Neither a state nor the Federal Government can pass laws which aid one religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson,

the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”<sup>70</sup>

Additionally, in *Lemon v. Kurtzman* the Court developed a three-part test to determine whether laws satisfy the First Amendment’s Establishment Clause.<sup>71</sup> To pass constitutional muster, the legislation “must have a secular legislative purpose. . . its principal or primary effect must be one that neither advances nor inhibits religion. . . [and it] must not foster ‘an excessive government entanglement with religion.’”<sup>72</sup>

Laws that allocate portions of the state or federal budget to CPCs and funnel taxpayer dollars into CPCs satisfy none of *Lemon*’s requirements. It is implausible that legislation providing monetary support to explicitly religious organizations has a “secular legislative purpose.”<sup>73</sup> Care Net, one of the largest CPC umbrella organizations, advertises that it “offers compassion, hope, and help to anyone considering abortion by presenting them with realistic alternatives and Christ-centered support through our life-affirming network of pregnancy centers, churches, organizations, and individuals.”<sup>74</sup> CPC volunteers have informed patients that centers were Christian organizations, stated that God chose to bless them with pregnancy, pressured patients to consider what God would want them to do, handed out Bibles, and prayed with patients during clinical visits.<sup>75</sup>

It is more far-fetched that the principal effect of this legislation does not advance religion. The states and federal government have directly contributed to CPCs’ successful operation and expansion by providing them with millions of dollars.<sup>76</sup> Although CPCs also rely on private donations, a number of them are unable to continue operating without government assistance and would necessarily cease to operate if this funding disappeared.<sup>77</sup> Government funds allow many CPCs to remain in operation, thus directly contributing to the purpose of their existence—“Christ-centered” abortion prevention by any means necessary.

The fact that state and federal governments are directly subsidizing openly religious organizations that use this funding to advance their religious agenda necessarily establishes that this genre of legislation fosters “an excessive government entanglement with religion.”<sup>78</sup> The government is more than simply entangled in religion—it is literally funding it.

CPCs certainly have the right to operate and exercise their Constitutionally guaranteed right to freedom of religion. However, they do not have the right to receive government funding to advance their religious agenda. As such, state legislatures and Congress must repeal any legislation that apportions taxpayer dollars for these centers, prohibit federal programs from using government funds to support these centers, and cease to earmark funds for CPCs in the state and federal budgets.

## **B. Enact a National Deceptive Trade Practices Act**

The Court in *NIFLA v. Becerra* stated that it does not “question the legality of . . . purely factual and uncontroversial disclosures about commercial products” and acknowledged that laws requiring professionals to “disclose factual, noncontroversial information in their commercial speech” are not presumptively unconstitutional and are exempt from strict scrutiny if the disclosure “relates to the services that [the regulated entities] provide.”<sup>79</sup> Required disclosures of this nature are to be “upheld unless they are ‘unjustified or unduly burdensome.’”<sup>80</sup> *NIFLA v. Becerra* notably fails to foreclose the avenue of regulating CPCs through consumer protection laws and, incidentally, the First Amendment does not protect false and deceptive advertising.<sup>81</sup> Lack of standing at the federal level and inadequate state consumer protection calls for implementation of a National Deceptive Trade Practices Act (“National Act”) modeled after the Uniform Deceptive Trade Practices Act (“Uniform Act”) currently in force in several states.

At the federal level, the Federal Trade Commission Act’s Section 5 on Unfair or Deceptive Acts or Practices fails to provide a private cause of action.<sup>82</sup> Although every state has a consumer protection statute, they vary widely in their strength, scope, and content.<sup>83</sup> The states have demonstrated that they are either incapable of or unwilling to enforce state consumer protection statutes against CPCs and many continue to funnel millions of dollars into these organizations.

Section 1 of the Uniform Act provides a private right of action for any “person likely to be damaged” by deceptive trade practices; it defines “person” as “an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest or any other legal or commercial entity.”<sup>84</sup> The Uniform Act generally prohibits deceptive commercial activity and specifically prohibits misleading advertising and deceptive trade practices (among other practices).<sup>85</sup> It further eliminates the requirement of establishing actual confusion or misunderstanding, intent to deceive, or provable monetary damages to obtain relief.<sup>86</sup> Although the Uniform Act does not provide for recovery of damages, a proposed National Act should authorize damages recovery in addition to the existing attorneys’ fees provision.

The proposed National Act would apply generally to all individuals or businesses engaging in commercial activity but would encompass CPCs’ advertising strategies, thus avoiding the constitutional challenge that it particularly targets CPCs. One potential hiccup pertains to the argument that CPCs are exempt from consumer protection laws because they are nonprofit organizations not engaged in commercial activity. However, courts have previously held that nonprofits are subject to consumer protection laws

when they provide goods and services<sup>87</sup> and mislead consumers about the services they provide.<sup>88</sup> Significantly, in *First Resort, Inc. v. Herrera*, the 9th Circuit found a CPC liable under California consumer protection law (and not protected by First Amendment freedom of speech principles) when it engaged in misleading commercial speech.<sup>89</sup> The *First Resort, Inc.* court found that lack of payment for services was not determinative because the advertisements were “placed in a commercial context and [were] directed at the providing of services rather than toward an exchange of ideas. . . [so they constituted] classic examples of commercial speech.”<sup>90</sup>

CPCs engage in misleading advertising and deceptive trade practices when they operate two websites with drastically different information (one for donors and one for consumers), provide patients with brochures containing demonstrably false medical information unsupported by scientific evidence, and pass themselves off as abortion service providers (including listing themselves under headings that say “abortion” or “abortion services”). *Fargo Women’s Health* and *First Resort* strongly support the position that CPCs’ activities and advertisements constitute deceptive trade practices and commercial speech that violate consumer protection laws and lack First Amendment protections.

### **C. National Legislation in Conformity with *NIFLA v. Becerra***

Leaving aside the point that the majority virtually steamrolled *Planned Parenthood v. Casey* in an opinion that “lacks moral, practical, and legal force,”<sup>91</sup> *NIFLA v. Becerra* is now part of our Supreme Court jurisprudence and legislatures must promulgate laws in accordance with this decision. Fortunately, lawmakers may use *NIFLA v. Becerra*’s detailed First Amendment analysis as a roadmap during legislative efforts to promulgate statutes in conformity with the Court’s constitutional interpretation of California’s FACT Act.

The Court found that notice requirement for licensed clinics compelled CPCs to “speak a particular message,” thus altering the “content of [their] speech.”<sup>92</sup> As such, the licensed notice was a presumptively unconstitutional, content-based regulation subject to strict scrutiny unless it was narrowly tailored to fit compelling state interests.<sup>93</sup> The two exceptions to strict scrutiny are disclosure of factual, non-controversial information in commercial speech and professional conduct only incidentally involving speech.<sup>94</sup> The FACT Act fell short of constitutionality because it compelled CPCs to volunteer information about state-sponsored abortion services, the very thing CPCs advocate against.

Future legislative efforts should refrain from requiring CPCs to provide customers with a state-sponsored mandatory script containing information

about abortion service providers. Instead, legislators should require CPCs to meet minimum transparency standards by informing pregnant people who inquire after abortions that the centers do not provide this service. This limits the notice requirement to “purely factual and uncontroversial information about . . . [which] services will be available.”<sup>95</sup> It does not require clinics to provide information about state-sponsored services. It is a simple, minimally burdensome requirement that clinics maintain transparency by answering customer inquiries honestly.

Finally, the majority expressed concern that the licensed notice was “wildly underinclusive” because it only applied to clinics that have a “‘primary purpose’ of ‘providing family planning or pregnancy-related services’ and that provide two of six categories of specific services.”<sup>96</sup> As a result of the statute’s narrow focus, federal clinics, Family PACT providers, and at least 1,000 California community clinics were—without explanation—not subject to the licensed notice requirement.<sup>97</sup> The simple fix for this concern is to simply broaden the scope of the licensed notice requirement so that it applies generally to clinics that provide services to pregnant people.

Regarding the unlicensed notice requirement, the Court did not question that states have an interest in “ensuring that ‘pregnant women. . . know when they are getting medical care from licensed professionals.’”<sup>98</sup> The Court simply found that California’s interest, while legitimate, was “purely hypothetical” because California denied that patients were unaware unlicensed CPCs are not staffed by licensed medical professionals.<sup>99</sup> However, it is “self-evident” that patients may believe a facility is staffed by licensed medical professionals when “they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care.”<sup>100</sup> States have an admittedly legitimate interest in ensuring pregnant people know they are receiving medical care from licensed professionals. In the future, states should not shy away from acknowledging that CPCs rely on misleading advertisements and should assert that patients *are* often unaware the CPCs they enter do not employ licensed medical professionals. Additionally, future legislation should cover a more general category of speakers to avoid targeting a “narrow subset of speakers.”<sup>101</sup> Finally, to ease the risk of undue burden,<sup>102</sup> centers should only be required to publish the disclaimer in English and the second most widely spoken language in the area where a center is located.

By carefully structuring future legislation, states will be able to justify requiring unlicensed disclosures as being narrowly tailored to serve compelling state interests—thus overcoming the presumption against constitutionality.

#### IV. Conclusion

The new wave of anti-choice activism is discreet. It relies on deception and confusion packaged in the form of seemingly friendly clinic volunteers who cheerfully hand out pamphlets claiming that abortion causes breast cancer, post-abortion stress disorder, and infertility. CPCs have been one of the most successful tactics used by anti-choice activists. Fake clinics have crept into our neighborhoods and have quietly received government funding to support their operation. They are subject to almost no regulatory restrictions or licensing standards. They look exactly like medical clinics and advertise their services under headings like “choice” and “abortion.” They are not required to inform pregnant people about available abortion services or even provide them with accurate medical information.

Abortion providers, on the other hand, are subject to strict regulation. Doctors are required to read state-mandated scripts to individuals seeking abortions. The federal government and most state governments have prohibited the use of federal funds for abortions unless an individual’s life is in danger or the pregnancy is the result of rape or incest.<sup>103</sup> Pregnant people are subjected to 24-hour waiting periods, gestational limits, mandatory ultrasounds, and counseling sessions.<sup>104</sup>

CPCs have the right to operate and provide pregnancy related services. They should not, however, be given free rein to engage in government-funded false advertising and misinformation campaigns. The states and federal government should withdraw funding from CPCs to reduce the number of fake medical clinics in the United States, which now outnumber abortion service providers.<sup>105</sup>

Additionally, a narrowly tailored consumer protection law that encompasses CPCs’ deceptive and misleading advertising tactics should be implemented. Although *NIFLA v. Becerra* dealt a hard blow to state efforts to regulate CPCs’ activities, the majority opinion provided a roadmap for future legislative efforts. States should reformulate their statutes and reimplement legislation in conformity with *NIFLA v. Becerra*. Implementing these policy initiatives will reaffirm the state’s commitment to the separation of church and state, support for reproductive health, and a constitutionally protected right to abortion.

---

#### NOTES

1. *12th & Delaware* (HBO 2010).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

6. *2017 Violence and Disruption Statistics*, National Abortion Federation (2017), <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>.
7. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a right to privacy under the 14th Amendment's Due Process Clause when seeking an abortion).
8. Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 W.L.L.R. 969, 1005 (2014).
9. Cal. Health & Safety Code § 123470.
10. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
11. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882-83 (1992).
12. Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, AMA J. ETHICS (Mar 2018), <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03>.
13. *Id.*
14. Alice X. Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933, 934 (2013).
15. *Id.*; Sam Levin, *Google Search Results for Abortion Services Promote Anti-Abortion Centers*, GUARDIAN (Feb. 13, 2018), <https://www.theguardian.com/world/2018/feb/13/abortions-near-me-google-search-results-anti-pro-life-groups-promote>.
16. Brittany A. Campbell, *The Crisis Inside Crisis Pregnancy Centers: How To Stop These Facilities From Depriving Women of their Reproductive Freedom*, 37 B.C.J.L. & SOC. JUST. 73, 78 (2017).
17. Lisa McIntire, *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom*, NARAL PRO-CHOICE AMERICA, 1, 13 (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf>;
18. *Media Highlights—2018*, NAT'L WOMEN'S HEALTH NETWORK, <https://nwhn.org/media-highlights-2017/> (last visited Mar. 6, 2019).
19. Dawn Stacey, *The Pregnancy Center Movement: History of Crisis Pregnancy Centers*, MOTHER JONES, 1, 2 [www.motherjones.com/files/cpchistory2.pdf](http://www.motherjones.com/files/cpchistory2.pdf) (Pearson stated in a 1994 speech that a "... girl who wants to kill her baby, has no right to information that will help her kill her baby.").
20. 410 U.S. 113 (1973).
21. Campbell, *supra* note 16, at 81.
22. Victoria Colliver, *Supreme Court Sides with Crisis Pregnancy Centers in Fight Over California Law*, POLITICO (Jun. 26, 2018), <https://www.politico.com/story/2018/06/26/supreme-court-crisis-pregnancy-centers-673183>.
23. Madelyn McKeague, *The Fake News Behind Fake Health Centers*, NAT'L WOMEN'S HEALTH NETWORK (NWHN) (Mar. 19, 2018), <https://www.nwhn.org/fake-news-behind-fake-health-centers/>.
24. Chen, *supra* note 14, at 953.
25. *The Truth About Crisis Pregnancy Centers*, NARAL PRO-CHOICE AMERICA (Jan 1, 2017) [hereinafter NARAL America CPC Report], <https://www.prochoiceamerica.org/wp-content/uploads/2016/12/6.-The-Truth-About-Crisis-Pregnancy-Centers.pdf>.
26. Allison Yarrow, *The Abortion War's Special Ops*, NEWSWEEK (Aug. 20, 2014), <https://www.newsweek.com/2014/08/29/inside-covert-abortion-war-265866.html>.
27. Meaghan Winter, "Save the Mother, Save the Baby": *An Inside Look at a Pregnancy Center Conference*, COSMOPOLITAN (Apr. 6, 2015), <https://www.cosmopolitan.com/politics/a38642/heartbeat-international-conference-crisis-pregnancy-centers-abortion/>.
28. NARAL America CPC Report, *supra* note 25, at 2.



29. *What are the Fake Clinics in Your Community?*, EXPOSEFAKECLINICS.COM, <https://www.exposefakeclinics.com/cpc> (last visited Mar. 7 2019).
30. NARAL America CPC Report, *supra* note 25, at 1.
31. *Id.*
32. Clio Chang, *When Anti-Abortion Activists Mislead, Women Suffer*, THE CENTURY FOUNDATION (Oct. 14, 2015), <https://tcf.org/content/commentary/when-anti-abortion-activists-mislead-women-suffer/>.
33. Chen, *supra* note 14, at 954; *Maryland Crisis Pregnancy Center Investigations: The Truth Revealed*, NARAL Pro-Choice Maryland Fund 1, 4 (Jan. 14, 2008). A Maryland CPC brochure stated that abortion could increase chances of being diagnosed with breast cancer by 800 percent and volunteers at that CPC told patients that many patients bleed to death on the operating table while undergoing abortions. *Id.*
34. *Abortion & Choice*, CARE NET PREGNANCY CENTER OF NORTHERN CALIFORNIA, <https://www.carenetnorcal.org/abortion/> (last visited Mar. 8, 2019); *12th & Delaware* (HBO 2010).
35. Chen, *supra* note 14, at 956-67; McIntire, *supra* note 17, at 11; *The Deceptive Practice of Limited Service Pregnancy Centers: A Report*, LEGAL VOICE and PLANNED PARENTHOOD VOTES! Washington, 1, 9 (2009). A CPC volunteer stated that condoms have a 50 percent failure rate and do not protect against STDs. *Id.*
36. NARAL America CPC Report, *supra* note 25, at 6.
37. *What Exactly is a Fake Clinic?*, EXPOSEFAKECLINICS.COM, <https://www.exposefakeclinics.com/what-is-a-cpc-2> (last visited Mar. 24, 2019).
38. Maggi J. Buchanan et al., *The Anti-Choice Movement's Continued Pursuit of Politicized Medicine*, CENTER FOR AMERICAN PROGRESS (Mar. 14, 2018), <https://www.americanprogress.org/issues/women/reports/2018/03/14/447885anti-choice-movements-continued-pursuit-politicized-medicine/>.
39. NARAL America CPC Report, *supra* note 25, at 8.
40. Buchanan, *supra* note 38.
41. *Id.*
42. *Id.*
43. *Id.*
44. Megan Burrows, *Despite Court Order, Trump Continues to Pressure Immigrants into Carrying Unwanted Pregnancies*, ACLU (May 7, 2018), <https://www.aclu.org/blog/reproductive-freedom/abortion/despite-court-order-trump-continues-pressure-immigrants-carrying>.
45. Stephanie Loraine, *I Was Once Jane Doe, Too, and Today I Suffer for Her*, UNIVISION NEWS (Oct. 25, 2017), <https://www.univision.com/univision-news/opinion/i-was-once-jane-doe-too-and-today-i-suffer-for-her>.
46. Teddy Wilson, *State-Level Republicans Pour Taxpayer Money into Fake Clinics at an Unprecedented Pace (Updated)*, REWIRE.NEWS (Feb. 16, 2018), <https://rewire.news/article/2018/02/16/state-level-republicans-pour-taxpayer-money-fake-clinics-unprecedented-pace/>. States engaging in these activities are Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, and Wisconsin. Texas accounts for over half of that \$40.5 million figure. *Id.*
47. Andrea Swartzendruber & Danielle Lambert, *Crisis Pregnancy Center Map & Finder*, CRISIS PREGNANCY CENTER MAP, <https://crisispregnancycentermap.com> (last visited Mar. 23, 2019); Rebecca Harrington & Skye Gould, *The Number of Abortion Clinics in the US Has Plunged in the Last Decade—Here's How Many Are*

- in Each State*, BUSINESS INSIDER (Feb. 10, 2017), <https://www.businessinsider.com/how-many-abortion-clinics-are-in-america-each-state-2017-2>.
48. ‘Choose Life’ License Plates, Guttmacher Institute, <https://www.guttmacher.org/state-policy/explore/choose-life-license-plates> (last visited Mar. 23, 2019).
49. Chen, *supra* note 14, at 938-89.
50. Pub. L. 94-439, Sept. 30, 1976, 90 Stat. 1418.
51. Alina Salganicoff et al., *The Hyde Amendment and Coverage for Abortion Services*, Henry J. Kaiser Family Foundation (Oct. 16, 2017), <https://www.kff.org/womens-health-policy/perspective/the-hyde-amendment-and-coverage-for-abortion-services/>.
52. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2365 (2018).
53. 2015 Cal. Legis. Serv. Ch. 700, § 2 (A.B. 775) (West) (Cal. Legis. Serv.).
54. *NIFLA v. Becerra*, 138 S.Ct. at 2365.
55. *Id.* at 2365.
56. *Id.* at 2367.
57. *Id.* at 2365 (citing *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)).
58. *Id.* at 2366.
59. *Id.*
60. *Id.*
61. *Id.* at 2367.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2380.
67. *Id.* at 2384 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992)).
68. *Id.* at 2385.
69. *Id.*
70. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 14-15 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).
71. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
72. *Id.* at 612-3 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 674 (1970)).
73. *Lemon*, 403 U.S. at 612.
74. *Mission & Vision*, CARE NET, <https://www.care-net.org/mission-and-vision> (last visited Mar. 24, 2019).
75. *Will the Deception Ever End?: An Investigative Report of Anti-Choice Crisis Pregnancy Centers in Maryland (Appendix C: CPC On-Site Survey Results)*, NARAL Pro-Choice Maryland Fund (May 2018), <https://maryland.prochoiceamericaaffiliates.org/wp-content/uploads/sites/11/2018/05/CPC-report-NPCMF-053118-FINAL.pdf>.
76. Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California’s Reproductive FACT Act*, 12 NW. J. L. & SOC. POL’Y. 78, 109 (2017).
77. See Colliver, *supra* note 22.
78. *Lemon*, 403 U.S. at 612.
79. *NIFLA v. Becerra*, 138 S.Ct. at 2372, 2380 (Breyer, J., dissenting) (quoting the majority opinion).

80. *Id.* at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).
81. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 771-72 (1976).
82. 15 U.S.C. § 45; *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593, 602 (1926) (holding that individuals do not have standing to bring a lawsuit under the FTC Act).
83. Carolyn L. Carter, *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, National Consumer Law Center 1, 5 (Feb. 2009), [https://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](https://www.nclc.org/images/pdf/udap/report_50_states.pdf).
84. The current version of this Act, titled the Revised Uniform Deceptive Trade Practices Act, appears in the Handbook of the National Conference of Commissioners on Uniform State Laws 306-315 (1966).
85. Uniform Act § 2(a).
86. *Id.* §§ 2(b), 3(a).
87. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 573 (1997).
88. *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1038 (8th Cir. 2011); *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D.), *cert denied*, 476 U.S. 1108 (1986) (upholding a preliminary injunction preventing a CPC from engaging in deceptive advertising designed to trick pregnant people into believing it provided abortions).
89. 860 F.3d 1263, 1272 (9th Cir. 2017). *First Resort* was decided in 2017 but was not overturned as a result of *NIFLA v. Becerra*. California government officials emphasized that the Ordinance did not impose unwanted speech and was narrowly tailored to protect consumers by prohibiting CPCs from propagating misleading advertisements. *Id.* at 1269.
90. *Id.* (quoting *Fargo Women's Health Org.*, 381 N.W.2d at 181).
91. *NIFLA v. Becerra*, 138 S.Ct. 2361, 2385 (2018) (Breyer, J., dissenting) (writing that the majority opinion's attempt to distinguish *Planned Parenthood v. Casey* as "concerning a regulation of professional conduct that only incidentally burdened speech. . . lacks moral, practical, and legal force.").
92. *Id.* at 2371 (quoting *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).
93. *Id.*
94. *Id.* at 2372.
95. *Zauderer*, 471 U.S. at 651.
96. *NIFLA v. Becerra*, 138 S.Ct. at 2375 (quoting Cal. Health & Safety Code § 123471(a)).
97. *Id.* at 2375-76.
98. *Id.* at 2389 (Breyer, J., dissenting) (quoting the majority opinion).
99. *Id.* at 2377. The court also noted that many of the services CPCs provide (collecting health information, counseling, and over-the-counter pregnancy tests) do not require a medical license and that it is a crime to practice medicine without a medical license in California. *Id.*
100. *Id.* at 2390 (Breyer, J., dissenting); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 250-51 (2010) (stating that "advertisements for professional services pose a special risk of deception" and finding that "When the possibility of deception is . . . self-evident . . . the State [need not] conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.") (internal citations omitted).
101. *Id.* at 2377.

102. The majority expressed concern that the statute may require centers to publish the notices in as many as 13 languages. *Id.* at 2378.
103. *State Funding of Abortion Under Medicaid*, Guttmacher Institute (Mar. 1, 2019), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid>. *Id.*
104. *Counseling and Waiting Periods for Abortion*, Guttmacher Institute (Mar. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.
105. McKeague, *supra* note 23.



## GIVE BACK 2 THE GUILD

***For information about opportunities to support the National Lawyers Guild through planned giving, please contact Marjorie Suisman, Esq. at [msuisman@davismalm.com](mailto:msuisman@davismalm.com) or 617.589.3836.***

**Bequests:** Include the National Lawyers Guild in your will or estate plan and leave a legacy of defending civil rights and civil liberties to future generations. Request information on making gifts of life insurance, retirement plan benefits, stock, property, cash or proceeds from a charitable trust.

**Stock Gifts:** Save on capital gains taxes and make your contribution with stock or mutual fund shares instead of cash. If you have appreciated securities worth more than you paid for them, you gain a charitable deduction for the full fair market value of the shares and avoid capital gains tax.

**Charitable Gift Annuity:** Establish a charitable gift annuity and you, or someone you choose, will receive fixed income for life. You can use your income payments for current financial needs, or defer them until you retire, and you qualify for an income tax deduction the year you make the gift.

*Do you value the work that the National Lawyers Guild does?  
Has a Guild attorney helped you or someone you know?*

**Please reach out and help the Guild continue its work  
—work it has been doing for almost 80 years  
and with your support will continue doing.**

**As long as we are needed, we will be there.**

**CHOICE AT RISK: THE THREAT  
OF ADULT GUARDIANSHIP TO  
SUBSTANTIVE AND PROCEDURAL  
DUE PROCESS RIGHTS IN  
REPRODUCTIVE HEALTH**

Choosing when or if to have a child is a fundamental right, which includes both the right to procreate and the right to undergo abortion or sterilization. Even minors retain guaranteed rights and safeguards for abortion proceedings, albeit more limited. Nonetheless, there are adults who are not legally guaranteed the right to make such choices: some adults, typically with intellectual or psychiatric disabilities, judges deem to have a diminished capacity. These adults must rely on their legal guardians to consent to or refuse medical procedures, such as abortion or sterilization.

But, it is unconstitutional for guardians to decide whether a person under guardianship who can bear children may undergo abortion or sterilization without further court proceedings; however, a path must also be available for adults under guardianship who seek abortion or sterilization. Constitutional, specific, substantive and procedural standards must be met to protect the reproductive rights of individuals with disabilities under guardianship.

## **I. Introduction**

In the early 1900s, the rise of the eugenics movement normalized the belief that individuals could inherit “feeble-mindedness,” leading to widespread compulsory sterilization of individuals with disabilities.<sup>1</sup> This eugenic philosophy even made its way to the Supreme Court.<sup>2</sup> Justice Oliver Wendell Holmes, Jr. wrote, “It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. Three generations of imbeciles are enough.”<sup>3</sup> Research and common knowledge now recognizes that there is little to no hereditary component to most intellectual disabilities and that forced sterilization has an emotional impact on individuals with intellectual disabilities.<sup>4</sup>

Despite the end of the eugenics movement, eugenic and paternalistic rationales persevere and continue to play a role in society’s oppressive views of individuals with disabilities, their capacity, and their sexuality.<sup>5</sup> In 2007, when Ashley X was six years old, her parents elected to perform estrogen therapy and fusion of bone plates, a hysterectomy, and breast bud removal

---

Marissa Ditkowsky is a juris doctor candidate at the American University Washington College of Law. She would like to thank Professor Robert Dinerstein, Professor of Law at the American University Washington College of Law, for advising her in the writing process.

on her because she would never develop past the motor and cognitive skills of a three-month-old.<sup>6</sup> Supporters claimed the procedure would improve Ashley's quality of life.<sup>7</sup> However, her parents' decision prevented her from ever developing into a woman, denying Ashley bodily autonomy and the potential for sexual intimacy.<sup>8</sup> Although Washington eventually declared the procedure illegal, the hospital and doctors' complicity in performing the surgery, Ashley's parents' beliefs, and the support of so many Americans highlight deeply entrenched notions about disabilities.<sup>9</sup>

Choosing when or if to have a child is a fundamental right, which includes both the right to procreate and the right to undergo abortion or sterilization.<sup>10</sup> Even minors retain guaranteed rights and safeguards for abortion proceedings, albeit more limited.<sup>11</sup> However, adults remain who are nonetheless not legally guaranteed the right to make such choices: adults, typically with intellectual or psychiatric disabilities, whom judges legally deemed to have a diminished capacity.<sup>12</sup> These persons must rely on their legal guardians to consent to or refuse medical procedures, such as abortion or sterilization.<sup>13</sup>

This article argues that it is unconstitutional for guardians to decide whether an adult under guardianship<sup>14</sup> who can bear children<sup>15</sup> may undergo abortion or sterilization without further court proceedings; however, a path must also be available for individuals under guardianship who seek abortion or sterilization.<sup>16</sup> Part II discusses guardianship, fundamental rights, and current laws regarding sterilization and abortion for persons under guardianship.<sup>17</sup> Part III argues that the lack of guarantees protecting the reproductive rights of adults under guardianship violates fundamental constitutional rights.<sup>18</sup> Part IV recommends adopting specific state standards for abortion or sterilization proceedings, adopting less restrictive alternatives to guardianship, and requiring judicial training on modern disability models in each state.<sup>19</sup> Part V concludes by tying these policy recommendations to the potential to prevent gross constitutional violations against adults under guardianship.<sup>20</sup>

## II. Background

### A. What is an Adult Guardianship?

A guardian is an individual or entity, whether a private party, family member, or state employee, appointed by a court to make some or all decisions on behalf of an adult whom the court finds to have a diminished decision-making ability.<sup>21</sup> Guardianship is intended to protect individuals with disabilities from coercion and exploitation.<sup>22</sup> Essentially, guardianship is an extension of the state's *parens patriae* responsibilities.<sup>23</sup> Any interested person, including the disabled individual in some states, can initiate proceedings for guardianship.<sup>24</sup> However, the requirements to find that someone has diminished decision-making ability, determine who qualifies

as a guardian, and determine the possible duties and limitations of guardians, vary by jurisdiction.<sup>25</sup>

A court can assign a guardian to make decisions regarding an adult's estate, person, or both.<sup>26</sup> Many jurisdictions also allow for limited guardianships in which guardians can only make decisions in limited areas, although this option is often overlooked and underutilized.<sup>27</sup> The court determines which decisions the guardian can make, which decisions the adult retains authority to make, and which decisions require further court approval.<sup>28</sup>

## **B. The Purpose of Adult Guardianship**

The concept of informed consent, meaning that one can voluntarily and without coercion assess the facts, weigh the risks and benefits of a certain choice, and, ultimately, make a decision, drives the right to autonomy in decision-making.<sup>29</sup> An individual who has a diminished capacity might be unable to expressly communicate wants and needs, or might not be able to assess the risks to come to an informed decision.<sup>30</sup> In these instances, a guardian's supposed purpose is to provide protection and assistance.<sup>31</sup> Because persons deemed to have diminished health-care capacity cannot consent to, refuse, or withdraw from medical treatment, the only potential paths for an adult under guardianship to undergo an abortion or sterilization is (1) to allow the adult's guardian to consent to abortion or sterilization or (2) to allow, or even require, the courts to make those determinations.<sup>32</sup> Alternatively, such procedures would not be permitted at all.

## **C. Procedural Due Process in Guardianship Proceedings**

There are no universal due process rights that are inherently attached to guardianship proceedings; the Supreme Court case has not established what the Constitution might require in these cases, although general due process requirements would inevitably apply.<sup>33</sup> Similarly, there is also no established universal procedural due process right to counsel in guardianship or related proceedings. However, jurisdictions may have statutory requirements for counsel, zealous advocacy, appearance at hearings, and in-person service, among other protections.<sup>34</sup> Despite statutory protections, they are not always enforced in practice. For example, service may be forged; judges may waive appearance at the hearing in some jurisdictions, leading to a lack of familiarity with the individual's actual capacity; and counsel may agree with the individual pursuing guardianship at the expense of the client, among other potential concerns.<sup>35</sup> The factors to consider in determining whether certain constitutional procedural due process rights exist in such cases is (1) the nature of the interest affected, (2) the comparative risk of erroneous deprivation without such safeguards, and (3) the nature and magnitude of countervailing interests in not providing the safeguard.<sup>36</sup>



## **D. Issues with Guardianship and its Scope**

Statutorily, guardians must generally involve the person under guardianship in making decisions, or, if the adult cannot communicate any preferences, make a decision consistent with the adult's values.<sup>37</sup> However, a guardian might have a conflict of interest, lack information or medical expertise, or be guided by emotions in decision-making.<sup>38</sup> One cannot always assume that a guardian or next of kin has the adult's best interest or preferences in mind, and yet, guardians retain broad power.<sup>39</sup> Guardianship is particularly problematic when imposed on those with the ability to make certain decisions, which can occur despite laws including broad procedural safeguards and alternatives.<sup>40</sup> Additionally, capacity may vary over time while an individual is under guardianship, particularly when an individual receives habilitative services and education.<sup>41</sup>

## **E. Current Standards Addressing Abortion or Sterilization for Adults under Guardianship**

Laws establishing a guardian's authority to consent to abortion or sterilization are often unclear and inconsistent because the authority for a guardian to consent to abortion or sterilization is not always memorialized by statute. Each jurisdiction applies its own statutes and case law.<sup>42</sup> For example, in Texas, guardians cannot consent to abortion or sterilization on behalf of individuals under their guardianship at all.<sup>43</sup> Other jurisdictions, such as the District of Columbia, only allow guardians to consent to abortions or sterilizations on behalf of the adult after further judicial proceedings.<sup>44</sup>

In *In re Hayes*, Washington developed a standard that provides a basic framework for determining whether an abortion or sterilization should be performed on an individual under guardianship, although the case involved a minor.<sup>45</sup> In deciding whether to sterilize a minor with diminished decision-making ability, the court held that a petitioner would need to demonstrate by clear and convincing evidence that the individual with a disability (1) is incapable of making one's own decision about sterilization, (2) is unlikely to be able to make an informed judgment about sterilization in the foreseeable future, (3) is physically capable of procreation, (4) is likely to engage in sexual activity at the present or in the near future that could result in pregnancy, and (5) has a disability that renders the individual permanently incapable of caring for a child.<sup>46</sup> Additionally, a petitioner must demonstrate by clear and convincing evidence that (1) all less drastic contraceptive methods, including supervision, education, and training, are unworkable or inapplicable, (2) the method of sterilization is the least invasive possible, (3) scientific and medical advances do not call for a reversible procedure or are not on the cusp of developing another less invasive contraceptive method, and (4) science is on the cusp of finding a treatment for the individual's dis-

ability.<sup>47</sup> Procedurally, (1) the individual with diminished decision-making ability must be represented by a disinterested guardian ad litem, (2) the court must receive independent advice based upon a medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court must elicit and consider the individual's wishes.<sup>48</sup>

In *In re Grady*, the court held that a judge, and not a guardian, would be the appropriate decisionmaker to determine whether it is in the best interest of a person with intellectual disabilities to undergo sterilization.<sup>49</sup> The court also established factors similar to *Hayes* and applied a clear and convincing evidence test, similar to the one mandated in *Addington v. Texas*.<sup>50</sup> Other states, such as Illinois, Pennsylvania, and Minnesota, have also adopted their own standards regarding whether to sterilize individuals under guardianship, many of which rely upon the holding in *Hayes*.<sup>51</sup>

## **F. Due Process and the Fundamental Right to Privacy**

The Fourteenth Amendment guarantees no state can deprive a person of life, liberty, or property without due process.<sup>52</sup> Due process provides individuals the opportunity to be heard prior to the deprivation of individual liberties, protecting individuals from arbitrary or unreasonable state government deprivation of fundamental personal rights and liberties.<sup>53</sup> State action is required to invoke or violate the Fourteenth Amendment protection of due process under the law.<sup>54</sup> The requirement that state action exists in order to make a due process claim applies regardless of how discriminatory a private act may be.<sup>55</sup> There must be a sufficiently close nexus between the state and the challenged action, such that the actor who caused the harm may be fairly said to be a state actor.<sup>56</sup>

In addition to the protections inherent in the text of the Fourteenth Amendment, the Ninth Amendment allows due process rights to expand beyond those explicitly enumerated in the Constitution.<sup>57</sup> Due process protects numerous privacy rights, including the right to procreate, the right to refuse treatment, and the right to have an abortion.<sup>58</sup> Although the Supreme Court has not ruled on such a right, lower courts have held that there is also a privacy right to undergo a voluntary sterilization procedure should a person so choose.<sup>59</sup> Cases such as *Doe v. District of Columbia*, *In re Grady* and *In re Hayes* have cited these privacy rights to impose high judicial standards for determining whether an individual with a disability should undergo sterilization or an abortion without the individual's express consent.<sup>60</sup>

Despite the existence and required protection of such constitutional due process rights, there are also limitations to these rights, particularly when discussing those due process rights pertaining to the right to privacy or any penumbra of rights not explicitly enumerated in the Constitution.<sup>61</sup>

### III. Analysis

#### **A. Consenting to or Denying an Abortion or Sterilization on Behalf of Adults under Guardianship is State Action**

To violate due process, an action must be fairly said to be a state action.<sup>62</sup> A guardian's provision of, or refusal to, consent to an abortion or sterilization of an adult under guardianship is a state action. A court's decision to provide or refuse consent to an abortion or sterilization is similarly, although more explicitly, a state action. Therefore, these actions may violate due process.

##### **1. Guardians as State Actors**

Allowing guardians to give or withhold consent on behalf of an adult under guardianship is state action because the court delegates that power to the guardian. Even though a guardian is a private individual, allowing any guardian to consent or withhold consent on behalf of an adult under guardianship is state action because the state delegates that power to the guardian.<sup>63</sup> The court is the state actor, and the action is authorizing and delegating the power to make all decisions on behalf of the individual alleged to have diminished capacity to a guardian.<sup>64</sup>

Imbuing guardians with powers over an individual deemed to have diminished capacity is not comparable to passively permitting otherwise unregulated private conduct.<sup>65</sup> Sanctioning and delegating powers in guardianship is an act more similar to, if not more directly related to state action than, enforcement of a racially discriminatory restrictive covenant because courts directly executed and enforced both of these actions; without a court proceeding, a guardian would have no such power over the adult.<sup>66</sup> A court would be directly responsible for overseeing proceedings that could deprive adults of their fundamental rights, and, as such, the court has certain responsibilities to protect due process and fundamental rights to privacy during guardianship or other intervention proceedings.<sup>67</sup> To some extent, courts act in accordance with statutes, which themselves might not adequately protect the rights of persons under guardianship. However, the court is ultimately responsible for determining whether the statute sufficiently protects the constitutional rights of individuals with disabilities, delegating decision-making powers to a guardian, and finding that delegating such powers is within its authority.<sup>68</sup> In some states, courts must review guardianships and provide oversight over guardians every set number of years, further solidifying the court's supervisory role as a state actor.<sup>69</sup>

A guardian is also a state actor in executing decisions for an individual under guardianship because there is a sufficiently close nexus between the state and the guardian, such that a guardian himself would be fairly said to

be a state actor.<sup>70</sup> Unlike the utility company in *Jackson*, which the court held was not a state actor, a guardian is directly delegated power from the state.<sup>71</sup>

In cases in which the court appoints a public, or government, guardian, the state directly employs the guardian, meaning the guardian is likely automatically a state actor.<sup>72</sup> This circumstance would be similar to that of *Doe*, in which the court found that a director of a publicly funded District of Columbia institution violated due process by consenting to a resident's abortion without her consent.<sup>73</sup> Private guardians also might receive state payments, typically in the form of reimbursements.<sup>74</sup> While the state does not pay or reimburse every guardian, a guardian who receives state money would also be a state actor because the guardian receives significant aid from the state for providing his or her services as a guardian.<sup>75</sup>

The courts act to delegate powers to these guardians, making their actions in granting guardianship and establishing the scope of the guardianship subject to the requirements of due process.<sup>76</sup> The court ultimately provides guardians with their authority and enables guardians to make decisions in lieu of the adult with a disability under guardianship.<sup>77</sup> The mere role of the courts in the guardianship appointment process, as well as the state's asserted *parens patriae* responsibilities in assisting those with diminished decision-making capacity, create a sufficiently close nexus between the state and any potentially challenged action in regard to a guardian's decision.<sup>78</sup>

## 2. Courts as State Actors

In cases in which a guardian petitions for court approval, the court plays an even more direct role because the court makes the ultimate decision as to whether the adult should undergo abortion or sterilization.<sup>79</sup> A guardian might file a petition for an adult to undergo abortion or sterilization when (1) there are statutory or judicial requirements to do so, (2) there is unestablished precedent or the laws are unclear and the guardian wishes to seek clarification, (3) the guardian wishes to protect him or herself, or (4) there is some other continuing harm or obstacle.<sup>80</sup> The court, as a state actor, would then either directly consent to or deny the request for the adult to undergo an abortion or sterilization.<sup>81</sup> Therefore, the court is a state actor that can violate due process in deciding whether to consent the abortion or sterilization of an individual under guardianship.<sup>82</sup>

### **B. Allowing guardians alone to give or withhold consent to abortion or sterilization on behalf of an adult under guardianship violates due process**

Adults under guardianship are entitled to due process in (1) determining whether they require a guardian and (2) balancing the roles of and limitations on a guardian against the adult's rights to privacy and autonomy.<sup>83</sup> In

many cases, individuals who are placed under guardianship do not require a guardian; a less restrictive option such as a power of attorney or a supported decision-making agreement would often suffice.<sup>84</sup> The overreliance on and overbroad application of guardianship deprives individuals of their autonomy unnecessarily, because the guardian would be permitted, and in fact be required, to make decisions on behalf of the individual in all of the areas for which the person is found to be incapacitated.<sup>85</sup> Allowing guardians to give or withhold consent to abortion or sterilization violates due process because making the decision for the adult without further court proceedings is insufficient to protect the adult's constitutionally mandated rights.

There are often insufficient procedural safeguards, which are overlooked by judges and other parties, and bias in the guardianship appointment process itself.<sup>86</sup> For example, many jurisdictions allow judges to waive appearance requirements for the adult alleged to have diminished capacity at guardianship hearings, meaning judges might rely on the opinions of others to determine the adult's capacity and increasing the likelihood of an erroneous deprivation of fundamental rights.<sup>87</sup> Although concerns about ability to physically attend or sit through a hearing might arise, technological advances, such as telephones and video conferences, allow for new accommodations in the courtroom to more appropriately fulfill due process requirements. Vague standards for capacity make it more likely that bias and miseducation surrounding disabilities can inform decisions on capacity, interfering with a fair hearing required by due process.<sup>88</sup> Although preventing unnecessary and overbroad guardianships would protect the reproductive rights of adults with disabilities by eliminating the guardian from the decision-making process altogether, this topic presents a different procedural due process concern from the substantive due process concern at issue here.<sup>89</sup>

As to the second prong, although guardians are appointed to make certain decisions on behalf of individuals with disabilities through a court process, the appointment process insufficiently protects all fundamental rights, particularly those as imperative and potentially permanent as reproductive rights. Additionally, as a one-time process, it is unlikely to provide adequate protection over an adult's entire lifetime. Therefore, guardian consent to or refusal of an abortion or sterilization without further court approval fails to meet strict scrutiny standards necessary to avoid violating any fundamental rights under due process.<sup>90</sup>

Permission for a guardian to give or withhold consent to abortion or sterilization can be (1) impliedly or expressly permitted by law or (2) specifically granted in initial guardianship proceedings in the terms of the scope of guardianship.<sup>91</sup> In theory, states that require a specific mention of this ability in the initial scope of guardianship would limit a guardian's power in more situations.<sup>92</sup> However, in practice, both of these methods essentially

have the same effect: depriving adults under guardianship of their fundamental rights from the inception of the guardianship. This deprivation may continue throughout the adult's lifetime despite the fact that capacity is so fluid and may change over time.<sup>93</sup>

Many jurisdictions require guardians to involve persons under their guardianship in all decisions to the fullest extent possible.<sup>94</sup> However, these laws do not guarantee that (1) the guardian will follow the rule, (2) the guardian knows how to effectively engage the adult, or, (3) if the guardian fails to follow the law, the guardian will be removed or held accountable.<sup>95</sup> Despite bookkeeping that states typically require of guardians to prevent financial abuse in particular, courts cannot realistically track every decision or potential abuse of discretion by a guardian.<sup>96</sup> Additionally, when courts are faced with accusations of guardian abuse of discretion, courts tend to fail to hold guardians accountable: guardian removal is extremely difficult.<sup>97</sup>

That the National Guardianship Association has suggested restrictions that require guardians to seek further court approval to consent to abortion or sterilization, as opposed to any other medical treatment or procedure, indicates the seriousness and predominance of the issue.<sup>98</sup> Especially given the history of eugenics and the potential vulnerability of persons with certain types of disabilities when dealing with exploitative individuals, the unchecked ability to consent to abortion or sterilization on behalf of an adult under guardianship is particularly concerning.<sup>99</sup>

When either communication or informed consent is difficult to determine or obtain, the right to procreate becomes complicated to protect.<sup>100</sup> However, in many cases, adults under guardianship can communicate their preferences when properly prompted.<sup>101</sup> Therefore, when it is possible to determine, the adult's expressed preferences should be paramount.<sup>102</sup> If not, the constitutional rights of individuals under guardianship must be protected in some other manner.<sup>103</sup>

For all individuals, regardless of disability, the nation's legal tradition and early common law value notions of bodily integrity, given that even touching another without consent constituted battery, allowing the Supreme Court to incorporate such rights as fundamental liberties under the due process clause.<sup>104</sup> Such liberties, which are implicated in a guardian's decision to consent or withhold consent to abortion or sterilization, include the right to procreate, the right to an abortion, and the right to refuse treatment.<sup>105</sup>

### **1. Violations of the Fundamental Right to Procreate**

When guardians determine that an adult under guardianship must undergo sterilization or abortion, the guardian's decision implicates the adult's right to procreate because the adult cannot assert decision-making power, or privacy and autonomy rights, in bearing a child.<sup>106</sup> A guardian, even if

a family member, might not have the adult's expressed preferences or best interests in mind; pervasive eugenic and paternalistic tendencies might still arise.<sup>107</sup> There is therefore no guarantee that the choices of individuals under guardianship will be honored, violating their right to procreate, and potentially to raise children of their own. This concern is well noted, particularly in the area of child welfare.<sup>108</sup> However, the same logic may be applied to reproductive rights; many still assume that individuals with disabilities are incapable of parenting children, feeding into beliefs that abortion or sterilization might be proper.

Protecting individuals with disabilities from exploitation using a structure such as guardianship is a compelling state interest for the purpose of strict scrutiny; in fact, many states view it as a fiduciary duty.<sup>109</sup> However, because guardianship aims to protect persons with disabilities, if the guardian could execute the same eugenic abuses or oppressive paternalism by exercising affirmatively court-sanctioned powers, those laws that allow guardians to consent to abortion or sterilization are not narrowly tailored to this interest, which violates constitutional demands.<sup>110</sup> As noted, a guardian, even if a family member, cannot be assumed to have the adult's best interest or expressed preferences in mind.<sup>111</sup> Additionally, just because an adult is deemed to have diminished decision-making capacity at one point, it does not mean that sterilization or abortion, both irreversible procedures, would be appropriate at any given time.<sup>112</sup>

In *Skinner*, an Oklahoma statute that required the sterilization of criminals after committing three crimes of moral turpitude was of particular concern to the Supreme Court because it implicated race and the subjectivity of moral turpitude.<sup>113</sup> Similarly, whether an adult has capacity or could take on the responsibility of parenthood are subjective determinations, which can be easily colored by bias or misunderstanding of disability.<sup>114</sup> *Buck v. Bell* demonstrated this potential bias against individuals, in particular impoverished women, with disabilities, even on the judicial bench.<sup>115</sup> *Buck*, however, was based upon an outdated scientific assumption that intellectual disability is inheritable.<sup>116</sup> These changes in understanding, both scientifically and ethically, should make lawmakers and judges hesitant to allow guardians to make permanent medical decisions, such as abortion or sterilization, that infringe upon an individual's fundamental right to procreate without a further process.<sup>117</sup>

Justice Stone noted in *Skinner* that the theory of due process, as opposed to equal protection, should have been applied to require a hearing and opportunity to demonstrate that a person cannot inherit moral tendencies.<sup>118</sup> Although Justice Stone did not outline a specific procedure, he claimed that a reasonable and just procedure with appropriate steps to safeguard liberty would satisfy the requirements of due process.<sup>119</sup> Similarly, guardian con-



sent to sterilization without further court approval or hearing fails to meet strict scrutiny standards necessary to avoid violating the fundamental right to procreate under due process, even though one must go through a court process to be appointed as a guardian.<sup>120</sup>

The fundamental right to procreate has been directly cited in cases applying stricter protective standards for adults under guardianship in sterilization proceedings.<sup>121</sup> In *In re Grady*, the court acknowledged the country's history of eugenics and compulsory sterilization in its discussion of a right to procreate.<sup>122</sup> In *In re Hayes*, the court also discussed this history, its relationship to inaccurate assumptions about people with disabilities, and the unalterable nature of a sterilization procedure.<sup>123</sup> The right to procreate thus clearly extends to individuals under guardianship despite a determination that the individual allegedly has a diminished decision-making ability.<sup>124</sup> In either case, the court asserts the court must make the final determination in all such cases to properly protect the individual's constitutional interests – even the good faith decision of a parent insufficiently guarantees the protection of the fundamental right to procreate.<sup>125</sup> The court in *In re Grady* discusses the conflict that necessarily arises out of recognizing both a privacy right to sterilization and to procreate in such cases: the adult under guardianship might not always be “competent” to choose between asserting either of those rights in any given situation, but both rights must still be available to the adult.<sup>126</sup> However, this lack of ability should not result in a forfeiture of these constitutional interests; rather, these rights must be asserted on the adult's behalf.<sup>127</sup>

## 2. Violations of the Right to Refuse Treatment

Another fundamental right implicated when guardians consent to abortion or sterilization on behalf of an adult under guardianship is the right to refuse treatment.<sup>128</sup> If an individual can provide informed consent, regardless of intelligence, the individual may refuse treatment, even for life-sustaining treatments.<sup>129</sup> However, persons under guardianship do not have the same option because only their guardians can refuse medical treatment.<sup>130</sup> Sterilization and abortion are both medical procedures that adults under guardianship might not wish to undergo, despite a court's finding that the adult lacks capacity to make medical decisions.

Informed consent is critical, and a lack of ability to make medical decisions allows for abuse, neglect, poor quality of life, suffering, or even death.<sup>131</sup> When an individual with a disability struggles to communicate or understand a doctor's advice, it is imperative that another individual is available to facilitate communication with the doctor and assist in making decisions.<sup>132</sup> However, granting that individual unqualified power to make

medical decisions, particularly in regard to fundamental rights, violates the right to refuse treatment.<sup>133</sup>

In *Cruzan*, a woman's parents wished to end life-sustaining treatment for their daughter who was in a persistent vegetative state.<sup>134</sup> Although the Supreme Court recognized a right to refuse treatment, the Supreme Court held that her parents could not make such a decision absent a living will or meeting Missouri's clear and convincing evidence standard.<sup>135</sup> These standards, however, applied specifically to life-sustaining treatment given the state's compelling concern: the preservation of life.<sup>136</sup>

*Cruzan*, unlike situations involving the reproductive rights of adults under guardianship, involved (1) withdrawing life-sustaining treatment from (2) a woman who was "competent" prior to an accident, meaning that her wishes could have more easily been discerned prior to "incompetence."<sup>137</sup> However, even though a guardian's consent to an unwanted abortion or sterilization would not cause death, it still implicates a serious constitutional concern and deprives future lives.<sup>138</sup> Additionally, even if the individual under guardianship did not previously have the capacity to draft an advance directive or power of attorney, many such individuals are not in a persistent vegetative state or coma such that they would not be able to express their wishes whatsoever.<sup>139</sup>

The Constitution allows for a state to mandate proving an individual would want to refuse life-sustaining treatment by a clear and convincing evidentiary standard, which is an even higher burden than currently is technically or universally required in regard to abortion or sterilization of adults under guardianship, who may be able to express their wishes and preferences when properly prompted.<sup>140</sup> The state's compelling interest in *Cruzan* was to accurately honor the patient's wishes, even if the patient was in a coma.<sup>141</sup> Similarly, the state has a compelling interest in accurately honoring the wishes of adults who are conscious and able to express their wishes.<sup>142</sup> Allowing a guardian to consent to sterilization or abortion of an adult under guardianship without further judicial proceedings to consider the adult's wishes deprives the adult of the right to refuse treatment.<sup>143</sup> The evidence provided in guardianship proceedings alone appears to be insufficient to meet the constitutional demands of *Cruzan*.

### **3. Violations of the Right to Obtain an Abortion or Undergo Sterilization**

Guardians might also refuse to consent to an abortion, sterilization, or birth control method that an adult under guardianship would like to use or undergo due to moral or other objections.<sup>144</sup> Refusal to consent to these procedures implicates the right to privacy and autonomy also guaranteed under due process.<sup>145</sup> *Roe* guarantees the right to an abortion, should an individual so choose, prior to viability.<sup>146</sup> Although the Supreme Court has

never expressly held that there is a right to sterilization, lower courts have applied its holdings on the right to privacy and autonomy under due process to the right to undergo a voluntary sterilization.<sup>147</sup>

When persons under guardianship cannot make any decisions related to their reproductive health for themselves, they cannot assert their constitutional right to privacy because only their surrogate decision-makers, or guardians, may assert this right.<sup>148</sup> Therefore, without providing an alternative method of obtaining consent, adults under guardianship are deprived entirely of their constitutional right to choice if they do want an abortion or sterilization procedure and their guardian objects.

There are limits to the constitutional privacy right to undergo an abortion.<sup>149</sup> Informed consent requirements, for example, are a constitutional exercise of the state's compelling interest to protect life.<sup>150</sup> The permissiveness of an informed consent might lead one to believe that adults with diminished decision-making capacity must not be permitted to make such a choice. However, this limitation, among others, does not logically imply that guardians specifically should be responsible for deciding whether adults under their guardianship should undergo an abortion, particularly given the nature of this constitutionally protected fundamental right and the potential for eugenic foul play or problematic paternalism by guardians.<sup>151</sup>

Even minors have more robust constitutional guarantees established through precedent than adults under guardianship.<sup>152</sup> Even though a minor's ability to obtain an abortion is more limited than that of an adult, it is unconstitutional for states to require minors to obtain parental consent without providing a procedure for judicial bypass.<sup>153</sup> Even though it would appear to be constitutionally required, this judicial bypass for adults under guardianship is by no means guaranteed to exist in every state, given the lack of precedent or express establishment of such a standard by a body such as the Supreme Court.<sup>154</sup> However, if minors must be allowed a judicial bypass, it follows that adults under guardianship should, at a minimum, also be provided this option to meet constitutional commands and requirements.<sup>155</sup>

Some states, such as Texas, not only do not allow guardians to consent to abortion or sterilization, but also do not provide a judicial path for requesting such procedures.<sup>156</sup> In that case, an individual under guardianship could not undergo an abortion or sterilization procedure at all. This practice similarly takes away the adult's choice if the adult does want to undergo an abortion or sterilization procedure, depriving the adult of due process.<sup>157</sup> As previously established, when a guardian refuses to consent to an abortion without the existence of an alternative process, such as a court proceeding, the due process rights of a person under guardianship are violated.<sup>158</sup> However, when a court itself categorically refuses to per-

mit any sterilization or abortion application, it deprives the adult under guardianship of due process rights to an abortion or sterilization, period.<sup>159</sup>

#### **4. Violations of Procedural Due Process Rights in Judicial Proceedings**

The due process rights of adults under guardianship are not protected, due to discrimination, bias, and the lack of sufficient and consistent standards constraining judges to decide important questions affecting them. Many states require that a court determine whether to give or withhold consent to abortion or sterilization procedures.<sup>160</sup> These requirements may be statutory or court-imposed.<sup>161</sup> For example, the District of Columbia Code requires guardians to initiate further judicial proceedings to consent to abortion or sterilization if the initial guardianship order does not grant the guardian that ability.<sup>162</sup> Some states, such as New Jersey and Washington, have established this requirement through case law.<sup>163</sup> Although these judicial requirements dodge the constitutional problems and conflicts of interest that arise when guardians make such decisions, the requirement does not inherently address all due process concerns because (1) judges can still be ableist,<sup>164</sup> basing their decisions on outdated and discriminatory biases, and (2) specific standards and factors must be employed to prevent the court itself from violating the due process rights of an adult under guardianship who can bear children.

*Cleburne* provides an example of judicial ableism and misunderstanding of disabilities.<sup>165</sup> The Court refused to consider individuals with intellectual disabilities a suspect or quasi-suspect class, holding only that states may not pass legislation that distinguishes between individuals with intellectual disabilities and others unless the distinction is rationally related to a legitimate governmental purpose.<sup>166</sup> Instead of using its power to protect the rights of individuals with disabilities, the Court relied upon its own misconceptions about individuals with disabilities in its ruling, treating disabilities in a manner in which it would not have treated race.<sup>167</sup> *Buck* is another such example of judicial ableism and misunderstanding of disability because the Supreme Court upheld involuntary sterilization of “feeble-minded” women based largely on inaccurate science and a misunderstanding of disability.<sup>168</sup> Although establishing specific safeguards and factors in sterilization or abortion proceedings does not guarantee prejudices will not color judges’ decisions, requiring judges to consider these factors using specific standards curbs that possibility to the greatest extent possible.<sup>169</sup>

##### **a. Required Evidentiary Standards, Factors, and Interest Frameworks to Provide Due Process**

When a guardian petitions for abortion or sterilization of the adult, to comply with due process requirements, the court must apply a clear and

convincing evidentiary standard, begin by attempting to apply an expressed interest framework, and apply specific factors. The first question is whether judges should apply a substituted judgment, best interest, or expressed interest paradigm. Expressed interest involves honoring the stated wishes of the adult, substituted judgment involves making a decision that conforms as closely as possible to the decision the adult would have made, and best interest involves weighing a number of factors to determine what is best for the adult's well-being.<sup>170</sup> In *Bellotti*, the Court held that minors are entitled to proceedings to demonstrate that (1) they are mature and well informed enough to make their own decisions regarding abortion or (2) the abortion is in the minor's best interest.<sup>171</sup> Presumably, a court has already determined that persons under guardianship cannot make their own decisions; that is why these individuals have guardians.<sup>172</sup> That would leave only the determination as to whether an abortion is in the adult's best interest.<sup>173</sup> However, as discussed, courts often erroneously and too restrictively decide guardians are necessary due to a misunderstanding of capacity and ingrained ableism and paternalism. Additionally, adults with disabilities are not minors, and should therefore not be treated as such.<sup>174</sup> Therefore, an immediate presumption of the application of best interest is not constitutionally appropriate. The court should first attempt to apply expressed interest, then substituted judgment, and then best interest, applying the least restrictive alternative possible to prevent a due process violation.<sup>175</sup>

Although *In re Hayes* does not apply an expressed interest standard, it does state that the court must consider the view of the individual with diminished decision-making capacity to the greatest extent possible.<sup>176</sup> The court only applied the best interest standard after the petitioner established the woman was unable to make her own decisions, and was not likely to develop such an ability.<sup>177</sup> An expressed interest standard should always be applied when possible; however, for an individual under guardianship, an express interest should be extremely difficult, if not impossible, to obtain.<sup>178</sup> Although certain express interests might suggest diminished capacity, individuals without disabilities are able to regularly make irrational decisions that do not lead to guardianship. If a judge can determine an express interest, the guardianship should be under some level of scrutiny.<sup>179</sup>

If expressed interest is difficult to obtain, the next course of action is to apply a substituted judgment standard, which is, typically, the standard guardians must follow in making decisions on behalf of the individual under guardianship.<sup>180</sup>

The final standard, which should only be applied after the court has made a good faith and thorough effort to discern the adult's preferences, is the best interest standard.<sup>181</sup> However, this standard completely removes any

decision-making from the adult; another individual, here the court, decides what is in the adult's best interest, making it inherently restrictive and paternalistic.<sup>182</sup> However, if the adult truly cannot express any preference, it is necessary. Otherwise, adults under guardianship who could not express themselves and might actually require or wish to undergo an abortion or sterilization procedure would never be able to do so.

If the court must apply a best interest standard, the court needs to consider certain factors to protect the constitutional rights of adults under guardianship.<sup>183</sup> A petitioner would need to demonstrate that the adult, or even minor, (1) is incapable of making one's own decision about sterilization, (2) is unlikely to be able to make an informed judgment about sterilization in the foreseeable future, (3) is physically capable of procreation, (4) is likely to engage in sexual activity at the present or in the near future that could result in pregnancy, and (5) has a disability that renders the individual permanently incapable of caring for a child.<sup>184</sup> Additionally, a petitioner must demonstrate that (1) all less drastic contraceptive methods, including supervision, education and training, are unworkable or inapplicable, (2) the method of sterilization is the least invasive possible, (3) scientific and medical advances do not call for a reversible procedure or are not on the cusp of developing another less invasive contraceptive method, and (4) that science is not on the verge of finding a treatment for the individual's disability.<sup>185</sup> On top of these factors, the court must ensure that only the best interests of the individual, and not of society or the guardian, are considered.<sup>186</sup>

The final question is what burden of proof is constitutionally required when discussing these factors. The clear and convincing evidence standard is appropriate because of the fundamental nature of the right and to prevent any abuse of judicial authority.<sup>187</sup> Many states cite *Addington v. Texas*, which required the courts to apply, at a minimum, a clear and convincing evidence standard in determining whether to involuntarily commit an individual to a state hospital for an indefinite period, in such cases.<sup>188</sup>

A preponderance of the evidence standard is not strict enough in cases involving abortion or sterilization of adults under guardianship because (1) applying this standard would undermine the state's *parens patriae* interest in protecting these adults and (2) the possible harm that could arise from applying such a standard is far greater than any possible harm to the state.<sup>189</sup>

In *Addington*, the Supreme Court declined to apply the "beyond a reasonable doubt" standard, which it reserved for criminal cases due to the standard's stringency and nature of the rights involved.<sup>190</sup> Therefore, the clear and convincing evidence standard would be the highest possible civil proceeding standard that could be applied.<sup>191</sup> Although a higher standard

would be preferred, and some states might choose to apply such a standard, it is not constitutionally mandated.<sup>192</sup>

### **b. The Court Must Meet Certain Procedural Requirements in Considering Petitions for Sterilization or Abortion**

Specific procedural requirements must also be met to prevent erroneous deprivation of substantive due process rights in involuntary sterilization and abortion proceedings for adults under guardianship.<sup>193</sup> Although the Supreme Court has not addressed these specific requirements, based upon case law and the substantive rights at stake, procedurally, (1) the individual with diminished decision-making ability must be represented by a disinterested guardian ad litem, (2) the court must receive independent advice based upon a medical, psychological, and social evaluation of the individual, and 3) to the greatest extent possible, the court must elicit and consider the individual's wishes.<sup>194</sup> Requiring counsel to represent the adult's expressed interests or, if impossible to determine, the arguments against sterilization or abortion, is also necessary to comply with due process to protect the adult's liberty interests, considering the fundamental right at stake and the higher risk of erroneous deprivation or coercion.<sup>195</sup>

The Supreme Court has yet to categorically require legal representation for civil cases; rather, the Supreme Court left space for these determinations to be made on a case by case basis by weighing the *Matthews* factors.<sup>196</sup> However, in *Lassiter*, the Supreme Court noted that the Constitution would definitively not require the appointment of counsel in every parental termination proceeding.<sup>197</sup> The same arguments could not be made about individuals under guardianship, whom a court has already determined to lack capacity in some manner, and for whom the court has appointed someone to make decisions in their stead. The risk of erroneous deprivation in these cases is therefore, inherently, far greater. This risk, as well as the nature of the autonomy rights at stake, are evidenced by statutory requirements for representation that already exist in many jurisdictions for guardianship or intervention proceedings.<sup>198</sup> Logically, these risks extend to proceedings involving abortion or sterilization of an adult under guardianship.

### **c. Reassessment of the Appropriateness of Guardianship**

If an adult under guardianship, as opposed to an individual on the adult's behalf, petitions for abortion or sterilization, it indicates that the adult is likely able to communicate and evaluate decisions, and the adult's express preferences are likely known.<sup>199</sup> That behavior may contradict the requirements of establishing guardianship.<sup>200</sup> Therefore, if an adult does petition to undergo abortion or sterilization, the court should (1) revisit whether guardianship is still appropriate and (2) give more weight to the adult's request.<sup>201</sup> If a judge finds that guardianship is no longer appropriate, at least



in the particular area implicated when requesting an abortion or sterilization, it must be terminated either completely or in the areas in which the adult has capacity.<sup>202</sup> This process would appropriately balance the constitutional rights of persons under guardianship with the compelling state interest to protect individuals with disabilities.<sup>203</sup>

Even if a court finds by clear and convincing evidence that the adult is still unable to evaluate or communicate decisions to provide informed consent, the court must address the adult's request, but in the same manner in which it should address sterilization or abortion proceedings initiated by a guardian.<sup>204</sup> First, it must attempt to apply express interest, then substituted judgment, and finally best interest, all by clear and convincing evidence.<sup>205</sup> If the adult is still found to have diminished capacity, the court must also prevent coercion of individuals with disabilities by third parties to petition for their own abortion or sterilization, in the same manner that it would prevent such coercion should a guardian file the petition.<sup>206</sup> Potential factors include (1) why the adult is filing the petition, (2) who assisted the adult in filing the petition, and (3) who is representing the adult.

## IV. Policy Recommendation

### A. Statutory Requirements, Judicial Standards, and Factors

One method of addressing these constitutional concerns without the need for litigation is for states to pass statutes establishing a process, requirements, judicial standards, and specific factors that must be considered when an individual under guardianship's guardian, or the individual under guardianship, petitions for abortion or sterilization. All states pass statutes that require guardians to seek further court approval for any abortion or sterilization procedure. Statutes such as those in D.C., which still allow judges to delegate the choice of whether to undergo abortion or sterilization in the appointment order, are insufficient because capacity is fluid.<sup>207</sup> In addition, such a policy should require that a court apply (1) a clear and convincing burden of proof, (2) the preferred expressed interest standard, and (3) specific factors if the court must use a substituted judgment or best interest standard.<sup>208</sup> This policy would require compliance by doctors and other professionals, and therefore would require sanctions on doctors who ignore legal standards and protocol.<sup>209</sup> In Ashley X's case, for example, Washington state's laws were not sufficient.<sup>210</sup>

One potential pitfall of this policy would be that adults under guardianship who want an abortion or sterilization would still have to petition the court, potentially placing an undue burden on these adults.<sup>211</sup> Without a clear understanding of rights or process, adults under guardianship who might want to undergo abortion or sterilization are effectively deprived of

the right to do so.<sup>212</sup> Additionally, guardians themselves might pose barriers to this right.<sup>213</sup> More education, notice, and intervention by the state is required for the adult's right to be appropriately accessed; otherwise, the right to be heard is only existent in theory, curtailed by the state's appointment of a guardian.<sup>214</sup>

This policy also would not guarantee that judges would not still discriminate against parties with disabilities. One potential suggestion is to require education and training for judges on issues surrounding disabilities, although the likelihood of success or feasibility of such education and training is unclear. At the very least, however, stringent standards would make it more difficult to make judgments that stem from discriminatory beliefs or practices.<sup>215</sup>

### **B. Supported Decision-Making and Less Restrictive Alternatives to Guardianship**

Another option is to attack the issue at its root: the often overly-restrictive institution of guardianship itself. Many states require that judges apply the least restrictive alternative possible and permit limited guardianship.<sup>216</sup> However, these options are underutilized.<sup>217</sup> To combat some of these barriers, states should also adopt supported decision-making framework.<sup>218</sup> Supported decision-making is a less restrictive alternative to guardianship that involves the formalization of a network of trusted individuals who would assist the individual in making decisions; however, the decision would ultimately be left to the individual.<sup>219</sup> If adults with disabilities were to make their own decisions, as opposed to a guardian, the same constitutional implications would not be present; the adults would retain their right to choice and bodily autonomy.<sup>220</sup> Using this framework, supporters can, instead, focus on building the capacity of the individual by discussing safe and healthy intimate relationships, birth control, and other options.<sup>221</sup> Although supported decision-making is an alternative that should be encouraged, it might not always be appropriate; guardianship might still be appropriate for some, meaning states must still act to protect the rights of those persons under guardianship.<sup>222</sup>

## **IV. Conclusion**

Adults under guardianship are just that—adults. They are individuals with their own preferences, needs, and autonomy, a right that is ingrained in American jurisprudence.<sup>223</sup> Additionally, the history of eugenic practices makes reproductive rights of particular interest when an adult with a disability who may bear children is involved.<sup>224</sup> States must therefore balance the compelling interest to protect adults with disabilities from exploitation via guardianship with the adult's interest in the fundamental rights to procreate, to undergo voluntary abortion or sterilization, and to refuse treatment.<sup>225</sup>

As such, guardians, without any further court proceeding, cannot consent to abortion or sterilization of an adult with a disability; it must be up to a court of law.<sup>226</sup> Further, courts making such determinations must also apply a clear and convincing evidence standard to specific factors to prevent abuse of judicial discretion that violate the constitutional due process rights of adults under guardianship.<sup>227</sup> There must also be a path for individuals under guardianship to obtain an abortion or sterilization; otherwise, that right is effectively denied.<sup>228</sup> All laws that fail to protect the right of an adult under guardianship to undergo a voluntary sterilization or abortion, or to fight involuntary sterilization or abortion, at all, as well as those that are not meet the requirements of due process, are simply unconstitutional, overly restrictive, and violate the person's right to privacy.<sup>229</sup> Adopting less restrictive alternatives, such as supported decision-making, when appropriate would assist in correcting this issue.<sup>230</sup> However, states must also take care of adults under guardianship by enforcing and enacting strict standards and requirements for guardians to petition for sterilization and abortion, as well as by providing a clear and accessible path for adults under guardianship who seek abortion or sterilization.<sup>231</sup>

---

#### NOTES

1. See ELLEN BRANTLINGER, *STERILIZATION OF PEOPLE WITH MENTAL DISABILITIES: ISSUES, PERSPECTIVES, AND CASES 1-5* (1995) (explaining the belief that the "parasitic population" burdened society).
2. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (holding that a Virginia statute authorizing compulsory sterilization of individuals with intellectual disabilities for eugenic purposes was not unconstitutional).
3. See *Id.* (reasoning that the sterilization statute did not violate due process because the substance of the law was "justified" to protect the public welfare).
4. See *In re Hayes*, 608 P.2d 635, 640 (Wash. 1980) (applying stricter guidelines, considerations, and requirements to demonstrate that sterilization is in the best interest of a minor or adult under guardianship).
5. See BRANTLINGER, *supra* note 1, at 8 (explaining that although eugenic rationales and assumptions persist in modern thought, individuals might change their rhetoric for fear of being deemed politically incorrect).
6. See FEMINIST DISABILITY STUDIES 1-2 (Kim Q. Hall ed., 2011) (posing Ashley X as one example of the need for and relevance of feminist disability analysis to better understand gendered oppression).
7. See *Id.* at 1-2 (explaining the rationale for the procedures conducted on a six-year-old to ensure that she maintained the body of a child for the remainder of her life).
8. See *Id.* at 2-4 (discussing analyses of disabilities through of a feminist lens, adding that Ashley's treatment to ensure that she remains a young girl reflects cultural gendered expectations).
9. See DAVID R. CARLSON & DEBORAH A. DORFMAN, *INVESTIGATIVE REPORT REGARDING THE "ASHLEY TREATMENT"* 12-14 (2007), available at [https://www.disabilityrightswa.org/wp-content/uploads/2017/12/InvestigativeReportRegardingtheAshleyTreatment\\_May2007.pdf](https://www.disabilityrightswa.org/wp-content/uploads/2017/12/InvestigativeReportRegardingtheAshleyTreatment_May2007.pdf) (finding that a court order was required for the procedure).

10. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (establishing a constitutional privacy right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding unmarried individuals have a right to contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding a contraceptive ban violated the right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding unconstitutional a statute requiring sterilization of individuals convicted of crimes involving “moral turpitude”).
11. See *Bellotti v. Baird*, 443 U.S. 622, 622-23 (1979) (requiring an alternative to parental consent for a minor’s abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 53, 74 (1976) (holding unconstitutional a parental consent requirement).
12. See BARBARA A. WEINER & ROBERT M. WETTSTEIN, *LEGAL ISSUES IN MENTAL HEALTH CARE* 274-75 (1993) (explaining who is generally found to have diminished decision-making ability in a court).
13. See *Id.* at 292 (describing informed consent and the need for guardians to consent to, refuse, or withdraw from medical treatment on behalf of individuals under guardianship).
14. Due to the changing perceptions of capacity, the legal terminology for adults who are legally unable to consent differs between jurisdictions. See MARGARET C. JASPER, *GUARDIANSHIP, CONSERVATORSHIP, AND THE LAW* 3 (2008) (including terms such as “incompetent,” “incapacitated,” or “ward”); MARY JOY QUINN, *GUARDIANSHIP OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 35-36 (2005) (discussing the antiquated use of discriminatory and arbitrary labels). However, this article will refrain from referring to adults under guardianship as “incapacitated” or “incompetent.” See *UNIFORM HEALTH CARE DECISIONS ACT OF 2017*, Prefatory Note (adopting more precise language, such as “adult subject to guardianship”).
15. This article uses more inclusive terms, such as adults, people, or individuals who may bear children, as opposed to women, to ensure the identities of transgender men, intersex persons, non-binary persons, and other persons who may otherwise have a uterus or reproduce, are not erased from the conversation.
16. See *infra* Parts IV and V (arguing that courts must also maintain specific minimum standards in court proceedings to comport with due process).
17. See *infra* Part II (providing a background on the laws and rights discussed in this article).
18. See *infra* Part III (arguing that guardians making such decisions violates an adult under guardianship’s rights to choose, to refuse treatment, and to procreate).
19. See *infra* Part IV (discussing supported decision-making models, evidence standards, and factors states must adopt).
20. See *infra* Part V (concluding that states must change their policies to prevent constitutional violations).
21. See Jasper, *supra* note 15, at 2-3 (explaining the difference between a guardian and a conservator, who generally manages and disburses property for an individual with diminished decision-making ability; however, the terminology differs between jurisdictions).
22. See *In re Braaten*, 502 N.W.2d 512, 518 (N.D. 1993) (citing a legitimate and substantial government interest in appointing guardians to protect individuals with disabilities).
23. See *In re Colyer*, 660 P.2d 738, 742 (Wash. 1983) (discussing the state’s *parens patriae* responsibility to supervise individuals with disabilities and its role in the establishment of guardianships).
24. See WEINER & WETTSTEIN, *supra* note 13, at 282 (explaining adults can be found to have diminished ability to consent to medical or psychiatric care, or to parent a child, among other areas).

25. See *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 595 (2002) (recommending standard procedures to resolve interstate controversies).
26. See WEINER & WETTSTEIN, *supra* note 13, at 284, 287 (describing the possible areas over which a guardian can assist).
27. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741 (2002) (stating a plenary guardian can always make medical decisions, whereas a limited guardian can only do so if a court finds that an adult has diminished health-care capacity).
28. See WEINER & WETTSTEIN, *supra* note 13, at 287 (adding that in some jurisdictions, statutes specify decisions for which guardians must always seek court approval to consent or for which a guardian can never consent).
29. See *Id.* at 116-17 (discussing the requirements to provide informed consent and why guardians are sanctioned to provide consent for those under guardianship).
30. See JASPER, *supra* note 15, at 3 (explaining that a properly conducted guardianship allows the adult to participate in health care management and provides a certain amount of autonomy).
31. See QUINN, *supra* note 15, at 17 (describing guardianship's purpose to provide basic needs and protections for individuals with disabilities).
32. See WEINER & WETTSTEIN, *supra* note 13, at 292 (explaining that guardians are appointed to consent to medical treatment because individuals with diminished decision-making ability cannot provide informed consent).
33. U.S. CONST. amend. XIV § 1.
34. See, e.g., D.C. CODE §§ 21-2031, 21-2033, 21-2041(h), 21-2042 (2018).
35. These transgressions are ones that clients who wish to terminate guardianship have experienced in practice.
36. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that due process does not require an evidentiary hearing prior to termination of Social Security disability benefits).
37. See COERCIVE CARE: RIGHTS, LAW AND POLICY 72 (Ian Freckelton & Bernadette McSherry eds., 2013) (adding if no values are known and the adult cannot communicate, the guardian should act in the adult's best interest).
38. See James Bopp, Jr. & Richard E. Coleson, *A Critique of Family members as Proxy Decisionmakers without Legal Limits*, 12.2 ISSUES IN L. & MED. 159, 159 (1996) (arguing that family members caring for adult relatives do not inherently make better decisions).
39. See *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451 455-56 (M.D.N.C. 1976) (holding unconstitutional a statute compelling government institutions to initiate sterilization proceedings at the request of a guardian); Bopp, Jr. & Coleson, *supra* note 39, at 159.
40. See Jessalyn Gustin & Jonathan Martinis, *Supported Decision-Making as an Alternative to Overbroad and Undue Guardianship*, 60 ADVOCATE 41, 42-43 (2017) (arguing that those subjected to overbroad or undue guardianship lose self-determination).
41. See Robert D. Dinerstein, *Guardianship and its Alternatives*, in *ADULTS WITH DOWN SYNDROME* 239 (Siegfried M. Pueschel ed., 2006) (arguing that capacity is fluid over time).
42. See QUINN, *supra* note 15, at 3-4 (explaining that families, judges, attorneys, and social service providers are confused about generalized statutes, the functions of a guardian, and the inconsistent terminology used in each jurisdiction).
43. See *Frazier v. Levi*, 440 S.W.2d 393, 393 (Tex. Civ. App. 1969) (holding that the court also lacked statutory authority to order a sterilization on a guardian's application); Marsha L. Reingen et al., *Texas Abortion Law: Consent Requirements and Special*

- Statutes*, 18 HOUSTON L. REV. 835, 837-38 (1981) (explaining the consequences of the *Frazier* holding).
44. See D.C. CODE § 21-2047.01 (2015) (stating that express authority in the appointment order is required to consent to abortion or sterilization without further proceedings).
  45. See *In re Hayes*, 608 P.2d 635, 637 (Wash. 1980) (holding a mother of a minor with diminished decision-making ability failed to demonstrate by clear and convincing evidence that sterilization was in the minor's best interest).
  46. See *Id.* at 641 (holding that to sterilize an individual with diminished decision-making capacity, there must be clear and convincing evidence presented that there is a need for contraception and that the individual with diminished decision-making capacity cannot make his or her own decisions about sterilization).
  47. See *Id.* (holding that there is a heavy presumption against sterilization of an individual with diminished decision-making capacity that a person seeking the sterilization has the burden of overcoming due to the invasive and permanent nature of sterilization; the presumption against sterilization for a minor with diminished decision-making capacity is even heavier than that of an adult).
  48. See *Id.* (developing procedural standards for the state of Washington in cases determining whether an individual with diminished decision-making capacity should be sterilized, weighing the nature of the procedure with the minor's interest).
  49. See *In re Grady*, 426 A.2d 467, 475, 481 (N.J. 1981) (requiring clear and convincing evidence of the woman's best interest).
  50. See *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding a clear and convincing evidence standard was constitutionally required to involuntarily commit an individual for psychiatric care).
  51. See, e.g., *In re K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008) (establishing substituted judgment and best interest standards for sterilization of a woman with diminished capacity); *In re Foster*, 535 N.W.2d 677, 683 (Minn. Ct. App. 1995) (holding court approval is required for a conservator to consent to sterilization); *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) (establishing standards for determining whether an individual with diminished capacity should undergo sterilization).
  52. U.S. CONST. amend. XIV § 1 (extending a due process requirement to state, as opposed to simply federal, governments).
  53. See *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.7, 584 (1972) (noting that before an individual is deprived of a liberty interest, he must be afforded the opportunity to be heard, consistent with due process).
  54. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding the Fourteenth Amendment only prohibits actions that can be fairly said to have been taken by the state); *Mitchell v. Fleming*, 741 P.2d 674, 682 n.9 (Ariz. 1987) (finding a public fiduciary was a state actor).
  55. See *United States v. Morrison*, 529 U.S. 1740, 1758 (2000) (holding private, violent acts against women could not be punished under the Due Process Clause).
  56. See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (holding a state official can be fairly said to be a state actor); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (holding a private utility company was not a state actor); *In re Colyer*, 660 P.2d 738, 742 (Wash. 1983) (finding there was a sufficient nexus between the state and the action, such that the action may be fairly said to be state action).
  57. See U.S. CONST. amend. IX (stating the enumeration of certain rights must not be construed to deny others); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (explaining the Ninth Amendment creates a penumbra of rights, including privacy).
  58. See *Planned Parenthood v. Casey*, 505 U.S. 833, 835, 838 (1992) (affirming states may only regulate abortion in ways rationally related to a legitimate interest); *Cruzan v.*

- Missouri, 497 U.S. 261, 277, 282-83 (1990) (recognizing the right to refuse treatment); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding the right to privacy extends to abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding procreation is fundamental to the existence of humanity).
59. *See Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978) (finding a constitutional right to voluntary sterilization).
60. *See Doe v. District of Columbia*, 920 F. Supp. 2d 112, 125 (D.D.C. 2013) (holding performing an abortion on an individual found unable to consent violated due process); *In re Grady*, 426 A.2d 467, 473, 480, 482 (N.J. 1981) (citing due process and privacy penumbras); *In re Hayes*, 608 P.2d 635, 639-40 (Wash. 1980) (finding the court must exercise care to protect an individual's right to privacy).
61. *See Casey*, 505 U.S. at 833, 871 (holding Pennsylvania informed consent and 24-hour waiting period requirements for abortion did not violate the Constitution); *Cruzan*, 497 U.S. at 268 (holding no one could refuse life-sustaining treatment for a woman in a coma in the absence of a living will or without meeting the state's clear and convincing evidence standard); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (holding a state may require parental consent if there is an alternative option to the parent's absolute veto).
62. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (stating that, although the court was a state actor and due process applied in a case involving the enforcement of a discriminatory restrictive covenant, the Fourteenth Amendment does not prohibit private conduct, regardless of how wrongful or discriminatory).
63. *See Id.* at 14 (holding the actions of state courts and judicial officers in their official capacities is considered state action within the meaning of the Fourteenth Amendment).
64. *See Id.* at 18-19 (holding a state court's enforcement of a racially discriminatory restrictive covenant was sufficient to violate due process); QUINN, *supra* note 15, at 71 (explaining the pivotal role of the courts in the process, that guardians are only answerable to the court, and that only a court can appoint, supervise, or remove a guardian).
65. *Cf. United States v. Morrison*, 529 U.S. 1740, 1758 (2000) (holding the Violence Against Women Act could not be upheld by applying Congress' power to enforce the Fourteenth Amendment in § 5).
66. *Cf. Shelley*, 334 U.S. at 17-19 (finding that although placing a restrictive covenant was a private act, court enforcement of the covenant constituted a state action).
67. *See In re Foster*, 535 N.W.2d 677, 683 (Minn. Ct. App. 1995) (finding the court must balance the private interest, the risk of erroneous deprivation of rights, and the state's interests in procedural due process challenges in conservatorship cases).
68. *See Id.* at 680-81 (holding the statutory procedural safeguards for conservatorship were sufficient to permit the conservator to consent to provide the adult with diminished decision-making ability with neuroleptic drugs without further proceedings).
69. *See D.C. CODE* § 21-2045.01 (2017) (establishing mandatory court review of guardians every three years); *cf. Mitchell v. Fleming*, 741 P.2d 674, 682 n.9 (Ariz. 1987) (citing the court's supervisory role in guardianship as a factor to determine a public fiduciary was a state actor).
70. *Cf. Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (holding a utility company was not a state actor for the purpose of violating due process).
71. *See Mitchell*, 741 P.2d at 682 n.9 (finding a public fiduciary was a state actor due to the state's ability to license and regulate hospital and health care institutions, as well as the court's supervisory role in appointing guardians).
72. *Cf. Lugar v. Edmonson Oil, Co.*, 457 U.S. 922, 937 (1982) (providing a state official as an example of an individual that can be fairly said to be a state actor).



73. *Doe v. District of Columbia*, 920 F. Supp. 2d 112, 119 (D.D.C. 2013) (holding the institution failed to follow state procedures to obtain consent to protect substantive liberty interests).
74. *See* D.C. CODE § 21-2060(a) (establishing that guardians are entitled to reimbursement for room, board, and clothing provided to an adult under guardianship).
75. *See Lugar*, 457 U.S. at 937 (holding that an official can be fairly said to be a state actor if he has acted together with or has obtained significant aid from state officials).
76. *See In re Grady*, 426 A.2d 467, 472 (N.J. 1981) (citing due process requirements in affirming the court's job to balance the weight of the fundamental right to reproduce when considering sterilization).
77. *See* QUINN, *supra* note 15, at 71 (describing the judicial process for obtaining guardianship and determining its scope).
78. *See In re Colyer*, 660 P.2d 738, 742 (Wash. 1983) (finding there was a sufficient nexus between the state and prohibitions against withholding life sustaining treatment in a case surrounding the constitutional right to refuse treatment).
79. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 17-19 (1948) (holding that a court acted as a state actor in enforcing an unconstitutional restrictive covenant, which prohibited individuals of color from living in a particular area).
80. *See, e.g.,* D.C. CODE § 21-2047.01 (2017) (requiring a guardian to petition the court for approval for abortion or sterilization if it is not a power set out in the initial guardianship order); *In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (holding the decision regarding whether to sterilize a woman with diminished capacity must be made in a court proceeding).
81. *Cf. Shelley*, 334 U.S. at 16 (claiming state action in violation of due process is equally repugnant whether directed by state statute or absent of a statute).
82. *See In re Hayes*, 608 P.2d at 639-40 (setting specific standards to determine whether to sterilize a woman with diminished capacity); *In re Grady*, 426 A.2d at 473, 483 (establishing a clear and convincing standard to demonstrate that the individual to be sterilized lacks capacity).
83. *See In re Foster*, 535 N.W.2d 677, 683 (Minn. Ct. App. 1995) (holding that there is a right to privacy inherent in allowing a conservator to consent to neuroleptic drugs on behalf of an individual with an alleged diminished decision-making ability).
84. *See* ERICA WOOD ET AL., RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH AND RECOMMENDATIONS 6 (2017) (stating that some adults are also under guardianship beyond the time period necessary, leading to unnecessary restriction).
85. *See* Gustin & Martinis, *supra* note 41, at 42-43 (discussing the automatic presumption that any individual with a disability who turns eighteen requires a guardian, even if is unnecessary).
86. *Cf. Dinerstein, supra* note 42, at 235 (stating that even when statutes explicitly state that individuals with intellectual disabilities should be presumed to have capacity, they are, nonetheless, presumed to lack capacity).
87. *See* D.C. CODE § 21-2041(h) (2018) (codifying that an alleged incapacitated adult shall be present at hearings to determine the individual's capacity, in turn invoking guardianship, unless a judge determines that good cause for the absence is demonstrated).
88. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (explaining that a just and reasonable hearing is required to meet the demands of due process).
89. *See In re Grady*, 426 A.2d 467, 486 (N.J. 1981) (citing separate, and rigid, substantive and procedural criteria that must be satisfied in preventing potential abuse in sterilization of people with disabilities).

90. *Cf. Cruzan v. Missouri*, 497 U.S. 261, 303 (1990) (applying strict scrutiny to the constitutional right to refuse treatment); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (holding regulations limiting fundamental rights can only be upheld when there is a compelling state interest).
91. *See, e.g., D.C. CODE* § 21-2047.01 (2016) (excluding guardians from seeking abortion or sterilization without a further court proceeding or explicit mention of the guardian's right to do so in the initial guardianship order).
92. *See, e.g., Id.* (setting limits to the scope of guardianship).
93. *See Dinerstein, supra* note 42, at 239 (arguing that capacity can vary over time, particularly with interventions and training).
94. *See, e.g., D.C. CODE* § 21-2047(6)-(8) (2015) (codifying that a guardian must include the adult in the decision-making process and allow the adult to act on her own behalf whenever possible).
95. *Cf. WOOD, supra* note 86, at 9 (outlining the conditions under which restoration succeeded, while leaving questions about situations under which no petition is filed or the guardian opposes the petition for removal); *Dinerstein, supra* note 42, at 239 (arguing that the right kinds of habilitative programs and interventions could lead to the development of capacity in other areas).
96. *See D.C. CODE* § 21-2045.01 (mandating three-year reviews that need only include updated medical statements, a statement of the expressed preferences of the individual under guardianship, and statements by any other interested party).
97. *Cf. WOOD, supra* note 86, at 10-15 (describing lack of access to courts, lack of understanding of procedures, lack of counsel, and guardian opposition, among other factors, as barriers to guardianship removal).
98. *See NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE 15* (4th ed. 2013), *available at* [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf) (requiring court authorization or a living will to allow guardian consent to abortion or sterilization).
99. *See In re Grady*, 426 A.2d 467, 472-73 (N.J. 1981) (stating the court must remain mindful of the atrocities committed against humans with disabilities within the same century).
100. *See, e.g., D.C. CODE* § 21-2011(11A) (2017) (requiring unequivocal communication and understanding of procedures and requirements to provide informed consent).
101. *Cf. Gustin & Martinis, supra* note 41, at 41-42 (explaining that guardianship is often overbroad, restricting more rights than necessary).
102. *See In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (holding that, to the greatest extent possible, the court must consider the preferences of a person with disabilities in its decision to allow for sterilization).
103. *See Cruzan v. Missouri*, 497 U.S. 261, 315 (1990) (holding the state had a compelling interest in the accuracy of the determination of the wishes of a woman in a coma).
104. *See Id.* at 267-70 (holding it followed logically, given notions of informed consent, that a patient could generally refuse treatment).
105. *See Id.* at 277, 282-83 (recognizing a constitutional right to refuse treatment); *Roe, v. Wade*, 410 U.S. 113, 153 (1973) (holding that there is a constitutional right to have an abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing a constitutional right to procreate).
106. *See Skinner*, 316 U.S. at 541 (establishing the right to procreate as a fundamental privacy right); *In re Grady*, 426 A.2d 467, 472 (N.J. 1981) (noting that any legal discussion of sterilization of women with disabilities must begin by acknowledging that procreation is a fundamental right).

107. See *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976) (holding that a statute compelling government institutions to initiate sterilization proceedings at the request of a guardian was unconstitutional); Bopp, Jr. & Coleson, *supra* note 39, at 159.
108. See Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 127-30 (2016) (arguing that policy decisions about the fitness of parents with disabilities must be informed by social science).
109. Cf. *Cruzan v. Missouri*, 497 U.S. 261, 315 (1990) (acknowledging Missouri's *parens patriae* interest in providing a woman in a coma with the most accurate determination of how she would exercise her right to refuse life-sustaining treatment); *In re Braaten*, 502 N.W.2d 512, 518 (N.D. 1993) (citing a legitimate and substantial government interest of protecting individuals with disabilities that must be balanced with the individual's liberty interests).
110. Cf. *In re Braaten*, 502 N.W.2d at 518 (holding guardianship should be narrowly tailored and as minimally restrictive as necessary to protect the fundamental liberty interests of individuals with disabilities).
111. See *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 455-56 (M.D.N.C. 1976) (stating a statute permitting a guardian or next of kin to request that the state file an action to institute sterilization proceedings was "irrational and irreconcilable" with the remainder of the statute); Bopp, Jr. & Coleson, *supra* note 39, at 159.
112. See Dinerstein, *supra* note 42, at 239 (asserting that capacity is a fluid concept that may vary over time and between topic areas).
113. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating the power to sterilize may cause individuals of certain races or different types of persons that a dominant group fears to disappear).
114. See, e.g. D.C. CODE § 21-2011(11A) (2017) (defining capacity for the purpose of guardianship proceedings); UNIFORM HEALTH CARE DECISIONS ACT OF 1993, 1994, § 1(3) (defining of capacity in a universal act, which states can adopt).
115. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a law that allowed for the involuntary sterilization of women in institutions). There is also evidence that Carrie Buck was not actually disabled, but rather, she was labeled as such for giving birth while unmarried, as well as her poverty, perpetuating harmful sexism, classism, and ableism in one fell swoop. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 53, 61 (1985),
116. See *Id.* at 207; *In re Hayes*, 608 P.2d 635, 637 (Wash. 1980) (explaining the finding of inheritability of disability to uphold a compulsory sterilization statute is no longer accepted science).
117. See *In re Hayes*, 608 P.2d at 637 (citing both the evolution of understanding of and perception of disability to require higher standards of proof and additional factors to demonstrate a minor with disabilities should be sterilized).
118. See *Skinner v. Oklahoma*, 316 U.S. 535, 543-45 (1942) (Stone, J., concurring) (writing that appropriate steps to safeguard liberty are paramount prior to undergoing an irreparable harm such as sterilization).
119. See *Id.* at 545 (Stone, J., concurring) (explaining that, at a minimum, due process would require a hearing and opportunity to demonstrate that the criminal does not possess inheritable tendencies).
120. See *Id.* at 541-42 (finding Oklahoma could not have explained the distinction between enforcement for individuals convicted of larceny versus embezzlement beside targeting

- a specific race); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (holding regulations limiting fundamental rights can only be upheld when there is a compelling state interest).
121. See *In re Grady*, 426 A.2d 467, 472-73 (N.J. 1981) (holding the right to procreate is also important among “incompetent” individuals); *In re Hayes*, 608 P.2d 635, 639-40 (Wash. 1980) (finding the court must exercise care to protect the individual's right to privacy).
  122. See *In re Grady*, 426 A.2d at 472-73 (noting current doubts about the scientific validity of eugenic sterilization half a century after *Buck v. Bell*).
  123. See *In re Hayes*, 608 P.2d at 639-40 (finding that sterilization touches upon the individual's right of privacy and the fundamental right to procreate).
  124. See *In re Grady*, 426 A.2d at 472 (claiming a court must protect the rights of an adult with disabilities to reproduce).
  125. See *Id.* (holding that, although parents do have standing to bring a claim to assert a person's right to sterilization, the court must make the final determination by balancing the factors involved in such a decision, including past abuse of the sterilization of people with disabilities).
  126. See *Id.* at 474-75 (stating that implicit in these complementary liberties is the right to make a meaningful choice between them).
  127. See *Id.* (stating the right to procreate, which is a valuable incident of the right to privacy, should not be discarded based solely on a person's condition to exercise a choice).
  128. See *Id.* at 473 (discussing the history of the right to privacy under due process, and the expansion of such rights to control one's own body).
  129. See *Cruzan v. Missouri*, 497 U.S. 261, 277, 282-83 (1990) (holding that there is a constitutional right to refuse treatment under the due process clause of the Fourteenth Amendment).
  130. See *QUINN*, *supra* note 15, at 71 (explaining that guardians are responsible for making any decisions for which an individual is deemed to have an alleged diminished decision-making ability).
  131. See *Id.* at 17 (discussing the possible lack of appropriate health care and abuse that can result without employing guardianship as a protective measure).
  132. See *Id.* at 72 (listing the duties of guardians of the person, including creating care plans and making medical decisions).
  133. Cf. *Cruzan*, 497 U.S. at 277, 282-83 (stating a woman in a coma had the right to refuse treatment, but the state also had a compelling interest in the accuracy of the determination of her wishes and her self-determination).
  134. See *Id.* at 261 (explaining the woman sustained severe injuries after an automobile accident, and that while she exhibited motor reflexes, she displayed no significant cognitive function).
  135. See *Id.* at 268, 280 (declining to hold unconstitutional a Missouri state procedural requirement favoring the preservation of life).
  136. See *Id.* at 268-69 (describing Missouri's Living Will Statute as a proper legislative response to the policy questions bearing on life and death).
  137. See *Id.* at 280 (describing the Missouri statute as a procedural safeguard to ensure the surrogate's action to withdraw treatment conforms with the wishes the patient expressed while “competent”).
  138. See *Roe v. Wade*, 410 U.S. 113, 152-154 (1973) (establishing that the constitutional right to privacy applies to the decision to obtain an abortion, while asserting that the right is not absolute due to a compelling state interest to protect potential life, among others).
  139. See *Cruzan v. Missouri*, 497 U.S. 261, 280 (1990) (explaining that an “incompetent” person is unable to make an informed and voluntary choice regarding the right to refuse treatment, and a surrogate must act on that person's behalf).

140. *See Id.* at 280 (holding that the U.S. Constitution did not forbid Missouri from requiring clear and convincing evidence that an incompetent individual would have wished to be withdrawn from life-sustaining treatment).
141. *See Id.* at 277, 282-83 (holding a state may decline to judge the quality of life in its assessment of whether a life must be preserved).
142. *Cf. Id.* (claiming the state has a compelling interest in ensuring the accuracy of an individual's wishes in determining whether she would want to refuse life-sustaining treatment).
143. *See Id.* (holding Missouri's clear and convincing evidence standard was constitutional to determine the preferences of a woman in a coma in regard to life-sustaining treatment due to the high risk of error).
144. *Cf. Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (recognizing a statute would give parents arbitrary and absolute veto power to decline consent to a minor's abortion, regardless of the reason).
145. *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (establishing the privacy right to undergo abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding unmarried individuals have a constitutional privacy right to contraception).
146. *See Roe*, 410 U.S. at 163-64 (holding the end of the first trimester marks the beginning of the compelling point at which the state has a legitimate interest in protecting the health of the mother, and states may proscribe abortion at that point, except when necessary to preserve the life of the mother).
147. *See Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978) (holding the right to voluntary sterilization is also entitled to due process protections).
148. *See Cruzan v. Missouri*, 497 U.S. 261, 277, 280 (1990) (stating an "incompetent" individual is not able to make an informed and voluntary choice to exercise any hypothetical rights).
149. *See Planned Parenthood v. Casey*, 505 U.S. 833, 833, 871 (1992) (holding informed consent and twenty-four-hour waiting period requirements did not violate the Constitution); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (holding a state may require parental consent if there is an alternative option to the parent's absolute veto).
150. *See Casey*, 505 U.S. at 881-83 (holding informed consent requirements that involve providing truthful and non-misleading information about the nature of the abortion procedure do not place an undue burden on a person's privacy right to undergo abortion).
151. *See Roe v. Wade*, 410 U.S. 113, 155 (1973) (applying a strict scrutiny standard to the fundamental right to undergo abortion); *In re Grady*, 426 A.2d 467, 472-73 (N.J. 1981) (describing eugenic attitudes in informing the court's decision regarding whether to sterilize a woman with an intellectual disability); *In re Hayes*, 608 P.2d 635, 639-41 (Wash. 1980) (citing former eugenic practices in establishing sterilization standards for adults with diminished decision-making capacity).
152. *See Bellotti v. Baird*, 443 U.S. 622, 643, 651 (1979) (holding that abortion statutes may not 1) permit judicial authorization for an abortion to be withheld from a minor found to be mature and fully competent to make this decision or 2) require parental consultation in every instance); *Planned Parenthood v. Danforth*, 428 U.S. 52, 53, 74 (1976) (holding unconstitutional a blanket parental consent requirement).
153. *See Danforth*, 428 U.S. at 74-75 (finding no significant state interest in requiring a blanket veto power by a minor's parents if seeking an abortion).
154. *See, e.g., D.C. CODE § 21-2047.01* (2017) (requiring a guardian to petition the court for approval for abortion or sterilization if it is not a power set out in the initial guardian-

- ship order); *In re Hayes*, 608 P.2d at, 641 (holding the decision regarding whether to sterilize a woman with diminished capacity must be made in a court proceeding).
155. See *Danforth*, 428 U.S. at 74-75 (holding that parents cannot have an absolute, arbitrary veto over whether a minor can undergo an abortion).
  156. See *Frazier v. Levi*, 440 S.W.2d 393, 393 (Tex. Civ. App. 1969) (holding the court did not have explicit statutory authority to order sterilization of a woman under guardianship, and could therefore not act); Marsha L. Reingen, *supra* note 44, at 838 (applying *Frazier*'s analysis to a guardian's ability to consent to an abortion).
  157. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (holding that, prior to viability, a person has a constitutional right to undergo abortion); *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978) (protecting the right to voluntary sterilization under due process).
  158. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 73-74 (1976) (holding unconstitutional a blanket parental consent requirement in which the parent has an absolute, arbitrary veto).
  159. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (holding the fundamental right to privacy extends to include abortion); *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978) (holding that individuals have a constitutional right to voluntary sterilization).
  160. See, e.g., *In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (holding only a court can determine whether sterilization is appropriate, and that the court must apply specific standards in determining whether the sterilization is appropriate).
  161. See, e.g., D.C. CODE § 21-2047.01 (2016) (requiring further judicial proceedings should a guardian wish to petition for sterilization or abortion); *In re Grady*, 426 A.2d 467, 475, 475 (N.J. 1981) (holding that in sterilization cases, the court's judgment must substitute for the consent of the person).
  162. See D.C. CODE § 21-2047.01 (2016) (excluding situations in which abortion or sterilization are medically necessary).
  163. See *In re Grady*, 426 A.2d at 475, 481 (citing *parens patriae* jurisdiction of courts to hold a court may determine whether a person under guardianship should undergo sterilization); *In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (holding a court must authorize sterilization of a "mentally incompetent" woman).
  164. Ableist is a term describing discrimination or prejudice against individuals with disabilities. Ableism need not be intentional; paternalism, for example, is one form of ableism that may be unintentional.
  165. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444 (1985) (citing the passage of the Rehabilitation Act of 1973, among other legislation, as evidence that discrimination against individuals with disabilities exists).
  166. See *Id.* at 442-47 (holding that a zoning ordinance requiring a special permit to open a group home was based on an irrational prejudice).
  167. See *Id.* at 442-47 (basing its decision not to create a quasi-suspect class for individuals with disabilities on the fact that 1) protective statutes existed, and thus persons with disabilities were not politically powerless; 2) legislators would refrain from assisting if there were a higher standard; and 3) the "variation in disabilities" would have to lead to varying rights and treatment).
  168. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (relying on the assumption that a "feeble-minded" woman would bear a "feeble-minded" child).
  169. Cf. *In re Grady*, 426 A.2d 467, 482 (N.J. 1981) (explaining the court was compelled to adopt stricter evidentiary standards and factors to consider for sterilization of a woman with diminished capacity to prevent abuse of judicial authority).

170. *See, e.g.*, D.C. CODE § 21-2011(1) (defining best interest as determining what is proper for the well-being of the individual under guardianship while applying the least intrusive, least restrictive, and most normalizing course of action possible under the circumstances); D.C. CODE § 21-2011(25A) (2017) (explaining beliefs, values, and preference of the individual should be considered in substituted decision-making).
171. *See Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (stating further the proceedings must be anonymous and expedited to allow an effective opportunity for the minor to obtain an abortion).
172. *See, e.g.*, D.C. CODE § 21-2011(11A) (2017) (defining incapacitated individual for health-care as an adult who cannot (1) appreciate the nature and implications of the decision, (2) make a choice, and (3) unambiguously communicate that choice).
173. *See Bellotti*, 443 U.S. at 643-44 (applying a best interest standard for minors who are not found to be mature enough to decide whether to undergo an abortion).
174. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 72 (1976) (reiterating the law may properly subject minors to more stringent limitations than are permissible for adults).
175. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (establishing the constitutional right to procreate); *In re K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008) (holding the application of the substituted judgement standard must be attempted before proceeding to determine whether sterilization is in the person's best interest); *In re Hayes*, 608 P.2d 635, 637 (Wash. 1980) (holding judges must consider the person's wishes to the greatest extent possible).
176. *See In re Hayes*, 608 P.2d at 637 (establishing minimum procedural requirements for proceedings to whether an individual with diminished capacity may undergo sterilization).
177. *See Id.* at 641 (holding the petitioner for sterilization must demonstrate these factors by clear and convincing evidence).
178. *See, e.g.*, D.C. CODE § 21-2011(11A) (2017) (defining incapacity to make health care decisions as the inability to effectively evaluate or communicate decisions).
179. *See, e.g.*, D.C. CODE § 21-2011(8) (2017) (providing that guardianship can only be granted over incapacitated individuals).
180. *See, e.g.*, D.C. CODE § 21-2049(a)(1)(A) (2017) (providing for the removal of a guardian should the guardian fail to conform as closely as possible to a substituted judgment standard in making decisions on the person's behalf).
181. *See In re K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008) (applying Illinois probate law to determine the substituted judgement standard must be attempted before proceeding to determine whether sterilization is in the woman's best interest).
182. *See Id.* at 720 (finding that the law states guardians should pursue the best interest of the person under guardianship if the person's preferences cannot be discerned).
183. *See In re Hayes*, 608 P.2d 635, 639, 641 (Wash. 1980) (citing the fundamental right to procreate in its decision to establish strict factors for sterilization proceedings).
184. *See Id.* (holding that to sterilize an individual with diminished capacity, there must be clear and convincing evidence presented that there is a need for contraception and that the individual cannot make his or her own decisions about sterilization).
185. *See Id.* (holding that there is a heavy presumption against sterilization of an individual with diminished decision-making capacity that a person seeking the sterilization must overcome due to the invasive and permanent nature of sterilization).
186. *See In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) (establishing standards for determining whether an individual with diminished capacity should undergo sterilization).



187. *See Id.* at 1382 (holding that the guardian must demonstrate that sterilization is in the person's best interest by clear and convincing evidence).
188. *See Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding a clear and convincing evidence standard is required prior to involuntary psychiatric commitment to prevent a violation of the Fourteenth Amendment).
189. *See Id.* at 426-27 (holding a preponderance of the evidence standard in civil commitment proceedings failed to meet constitutional due process requirements due to the extent of the harm and the possibility for erroneous determinations).
190. *See Id.* at 427-30 (finding civil commitment allows for correction of erroneous commitment, and the inquiry in a civil commitment proceeding differs from that of a criminal proceeding).
191. *See Id.* at 427-30 (declining to require states to adopt a "beyond a reasonable doubt" standard of proof for civil commitment cases).
192. *See Id.* at 430-31 (finding that, even though some states have adopted the "beyond a reasonable doubt" standard for commitment, due process did not require that such a standard be met).
193. *See Skinner v. Oklahoma*, 316 U.S. 535, 543-45 (1942) (Stone, J., concurring) (writing that the Court must take appropriate steps to safeguard liberty prior to undergoing sterilization).
194. *See In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (developing procedural standards for the state of Washington in cases determining whether an individual with diminished decision-making capacity should be sterilized, weighing the nature of the procedure with the minor's interest).
195. *See, e.g., Turner v. Rogers*, 564 U.S. 431, 444-45 (2011) (holding the due process right to counsel is determined by the nature of the interest affected, the comparative risk of erroneous deprivation without such safeguards, and the nature and magnitude of countervailing interests in not providing the safeguard).
196. *See, e.g., Id.* at 444-45 (applying the *Mathews* test to determine whether counsel was required by due process in a specific civil contempt case); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31-33 (1981) (neglecting to require representation for an indigent client in a case regarding the termination parental rights).
197. *Lassiter*, 452 U.S. at 31-32.
198. *See, e.g., D.C. CODE* §§ 21-2031, 21-2033, 21-2041(h), 21-2042 (2018).
199. *See, e.g., D.C. CODE* § 21-2011(11A) (2017) (including inability to effectively evaluate or communicate decisions in the requirements to determine that an individual lacks capacity to make health care decisions).
200. *See, e.g., D.C. CODE* § 21-2011(8) (2017).
201. *See, e.g., Id.*
202. *See, e.g., D.C. CODE* § 21-2049(b) (2017) (providing that an interested party may petition for an order that the individual under guardianship is no longer incapacitated, and that the individual is entitled to the same rights and procedures as the appointment proceedings).
203. *See In re Braaten*, 502 N.W.2d 512, 518 (N.D. 1993) (holding the legitimate and substantial government interest of protecting individuals with disabilities must be balanced with the individual's liberty interests in guardianship proceedings).
204. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding there is a constitutional right to procreate); *In re Hayes*, 608 P.2d 635, 637, 641 (Wash. 1980) (establishing requirements for sterilization petitions for persons under guardianship).

205. See *In re K.E.J.*, 887 N.E.2d 704, 720 (Ill. App. Ct. 2008) (holding the substituted judgment standard is preferred over the best interest standard); *In re Hayes*, 608 P.2d 635, 641 (Wash. 1980) (stating a the individual's preferences should always be considered to the greatest extent possible).
206. See *In re Hayes*, 608 P.2d at 639-40 (discussing the history of eugenics in its establishing guidelines for sterilization); *In re Grady*, 426 A.2d 467, 472 (N.J. 1981) (discussing eugenics in the court's finding that judges must take particular care to protect individuals with disabilities in considering sterilization).
207. See D.C. CODE § 21-2047.01(1); Dinerstein, *supra* note 42, at 239 (stating capacity is fluid over time and on particular subjects).
208. See *In re Hayes*, 608 P.2d 635, 637, 641 (Wash. 1980) (applying a clear and convincing evidence standard to specific factors to determine the best interest of the individual with diminished capacity, only after his or her wishes are considered).
209. See CARLSON, *supra* note 10, at 7, 12-14 (describing a doctor's involvement in performing a sterilization of a young girl with an intellectual disability despite not obtaining a court order).
210. See *Id.* at 14, 17-22 (finding that, despite state laws requiring guardians to seek permission to sterilize their daughter, Ashley X's parents circumvented the law to sterilize their daughter).
211. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) (holding that an undue burden standard is appropriate to balance the state and individual's interest in obtaining an abortion prior to viability).
212. See *Id.* at 877 (defining an undue burden as a substantial obstacle imposed by the state that hinders an individual's ability to seek abortion of a nonviable fetus).
213. Cf. WOOD, *supra* note 86, at 14-15 (describing opposition by guardians as a barrier to guardianship removal).
214. See *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972) (noting that before an individual is deprived of a liberty interest, he or she must be afforded the opportunity to be heard, consistent with due process).
215. See *In re Grady*, 426 A.2d 467, 482 (N.J. 1981) (explaining the court was compelled to adopt stricter standards for sterilization of a woman with diminished capacity to prevent abuse of judicial authority).
216. See D.C. CODE § 21-2044 (2017) (claiming the decision as to the least restrictive alternative involves the individual's current state, potential for improvement of condition, and other factors).
217. See Frolik, *supra* note 28, at 741 (arguing that there is a judicial preference for plenary guardianship).
218. Gustin & Martinis, *supra* note 41, at 41-42 (suggesting supported decision-making as a less restrictive alternative to overbroad and over-applied guardianships).
219. See *Id.* at 41-42 (describing supported decision-making as a framework that empowers individuals with disabilities to be more self-determined).
220. See *Cruzan v. Missouri*, 497 U.S. 261, 277, 282-83 (1990) (recognizing the right to refuse treatment); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (finding a constitutional privacy right to abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding procreation is a fundamental right).
221. See Robert D. Dinerstein, *Sexual Expression for Adults with Disabilities: The Role of Guardianship*, IMPACT (Inst. on Comty. Integration & Research and Training Ctr. on Comty. Living, Minneapolis, MN), Spring/Summer 2010, at 13 (discussing the

need to provide assistance, rather than control, over the sexuality of individuals under guardianship).

222. See Gustin & Martinis, *supra* note 41, at 42 (arguing that guardianship is appropriate in some circumstances, and that the call is solely to end undue and overbroad guardianship).
223. See *Cruzan v. Missouri*, 497 U.S. 261, 267-70 (1990) (explaining that bodily autonomy is ingrained in common law via the concept of battery and informed consent).
224. See *In re Grady*, 426 A.2d 467, 472 (N.J. 1981) (finding a court must take particular care to protect the rights of persons with intellectual disabilities in sterilization proceedings).
225. See *Cruzan*, 497 U.S. at 277, 282-83 (recognizing the right to refuse treatment); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (finding a constitutional right to abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding procreation is a constitutionally-protected right).
226. See *Cruzan*, 497 U.S. at 267, 277, 282-83 (recognizing the right to refuse treatment as an extension of the right to bodily autonomy); See *Skinner*, 316 U.S. at 543-45 (Stone, J. concurring) (claiming appropriate steps must be taken to safeguard liberty in sterilization proceedings).
227. See *In re Grady*, 426 A.2d 467, 482 (N.J. 1981) (adopting stricter standards for sterilization of a woman with diminished capacity to prevent abuse of judicial authority).
228. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) (holding a state cannot place an undue burden on individuals seeking abortion); *Roe*, 410 U.S. at 163-64 (finding a constitutional right to abortion prior to fetus viability).
229. See, e.g., *In re Hayes*, 608 P.2d 635, 639 (Wash. 1980) (considering the fundamental right to procreate in its declaration that specific factors must be addressed in sterilization proceedings).
230. See Gustin & Martinis, *supra* note 41, at 41-42 (offering supported decision-making as an alternative to overbroad guardianship).
231. See, e.g., *Casey*, 505 U.S. at 876 (holding the state cannot place an undue burden on individuals seeking abortion prior to viability); *In re Hayes*, 608 P.2d 635, 639 (Wash. 1980) (establishing strict standards and factors for sterilization of individuals with disabilities, particularly given the fundamental nature of the right).



## **Does your library have *National Lawyers Guild Review*?**

Over two hundred law school and county law libraries do. If yours does not, take this copy with you and request that your library subscribe to ***National Lawyers Guild Review***, now in its 79th year. Issued quarterly. Library subscription rate \$75.00 per year, ISSN 0017-5390. You may order through the library's subscription agent or directly from: **NATIONAL LAWYERS GUILD REVIEW**, 132 Nassau Street, # 922, New York NY 10038.

**Brendan T. Beery,  
Sarah Roberge  
& Jason Terry**

**NATIONAL LAWYERS GUILD  
AMICUS BRIEF: THE STATE  
LACKS JURISDICTION OVER  
REPRODUCTIVE DECISIONS**

This template for a legal argument in favor of women seeking to protect the right to control their bodies is adapted largely from an article in the *National Lawyers Guild Review*: Brendan T. Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It's Not about Individual Rights, But State Power and the Social Compact*, 75 NAT'L LAW. GUILD REV. 1 (2018). Both the author and National Lawyers Guild Review grant permission to use this work product in any legal brief advocating the right of a woman to terminate a pregnancy. A general citation to the article referenced above in acknowledgements, citations, or a table of authorities will suffice as attribution for purposes of using any or all of the material that follows.

**Summary of Argument**

Individual rights are not discrete and narrowly drawn licenses gifted by the state to the citizen; they are limits on the power of government to meddle where it has no business. Questions about individual rights are questions about jurisdiction—and whether, as to the certain components of citizen life, it is the citizen or the state who has jurisdiction. The doctrine of substantive due process, although a useful means of effectuating the Ninth Amendment's promise that the people retain unenumerated rights (power and dominion over their own lives as citizens), has grown too complicated with its inconsistent approaches to issue framing, its various factors and tiers, and its misguided focus on discrete personal activities rather than the limited jurisdiction of the state.

Understanding the textual divide between the jurisdictions of the government and the jurisdiction of the people requires understanding John Locke's theories of government. The state has only the power ceded to it by individual people, none of whom may have given to the government more power than he or she had in himself or herself. People cede only such power as they must to ensure their peaceful enjoyment of their property and their citizen lives; thus, the government is limited in its jurisdiction to those matters that require common decision making or a common enterprise for the public good.

---

Brendan T. Beery is an attorney (Michigan P59464) and professor at Western Michigan University Cooley Law School in Lansing, Michigan. Sarah Roberge and Jason Terry are J.D. candidates at WMU Cooley Law School. Special thanks to David Gespass for leading the effort to coordinate this work and for his thoughtful review and edits.

People retain, as any rational beings would, a vast swath of jurisdiction over their own lives and affairs. An honest and informed understanding of the philosophical underpinnings of our Constitution yields an inescapable conclusion: as to any component of citizen life that realizes a person's own destiny and affairs rather than the course of society or the state, a person retains jurisdiction of her own body, her own mind, her own conscience, her own morality and dogmas, and her own decisions. A woman's decision whether to terminate a pregnancy during pre-viability cannot reasonably be supposed to be a matter over which any rational person would have ceded jurisdiction to the state, for it is a matter of a person's own course in life. The question is not whether a woman has license from the state to make such a decision. The question is whether the state has jurisdiction of a woman's uterus, her body, and her decision whether to beget a child.

### **I. Individual rights are about jurisdiction.**

Constitutionally speaking, abortion is a question of jurisdiction. The Tenth Amendment lays out three spheres of jurisdiction, not two. It provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. And "the people" cannot be the same as "the States," lest there would have been no need for the disjunctive conjunction *or* between the two. *Id.* "The people," therefore, must mean something more than merely a collective body politic that joins together to make laws for the common good, since that is the definition of a state. See *State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 444 (1989) (explaining, "It cannot be gainsaid that the ordinary meaning of 'body politic' encompasses States.") Since the issue of individual rights is entirely a matter of who has jurisdiction over certain components of citizen life and behavior, and since the Constitution provides that much jurisdiction over citizen life is retained by the people (belonging, therefore, neither to the United States nor to any state), it is rather an essential charge that we clarify what power is reserved exclusively to the people.

There are matters, mostly enumerated in Article I § 8, over which the United States has jurisdiction. There are other matters involving health, safety, and the public welfare over which states have jurisdiction. See *Consolidated Rail Corp. v. City of Bayonne*, 724 F.Supp. 320, 323 (1989). And there are matters over which power is reserved to the people, and not ceded to any government or lawmaker. See U.S. CONST., amend. X.

Despite the elegant simplicity of this proposition, courts have struggled with the issue of unenumerated individual rights. Over the decades since *Griswold v. Connecticut*, 381 U.S. 479 (1965), courts have settled on a doctrine called "substantive due process" to wade through discrete "fun-

damental” liberty interests that carry a special rank and, when they are substantially burdened by the government, warrant the application of rigorous scrutiny by courts. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing the right of family members to cohabitate); *Loving v. Virginia*, 388 U.S. 1 (1967) (stating that traditional marriage is a fundamental constitutional right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that adults have a right to use contraceptives); *Troxell v. Granville*, 530 U.S. 57 (2000) (recognizing the right of a competent parent to direct the care, custody, and control of his or her child or children).

The idea behind substantive due process is that the constitutional guarantee of due process embodies two promises, not one: first, the procedural promise that one’s person or property will not be plundered by the government without some kind of notice and the chance to plead one’s case before an impartial arbiter (see generally, *Matthews v. Eldridge*, 424 U.S. 319 (1976)); and second, that there are certain personal freedoms so fundamental to life in a free country that the government may generally not (substantively) meddle with those freedoms at all. See *U.S. v. Salerno*, 481 U.S. 739, 746 (1987). The doctrine of substantive due process breathes life into the Ninth Amendment’s promise that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST., amend. IX. Since both of the Constitution’s due-process provisions use the word liberty (U.S. CONST., amend. V; U.S. CONST., amend. XIV), courts have regarded those clauses as the textual homes for the unenumerated (retained) rights whose existence was memorialized in the Ninth Amendment.

Under substantive due process principles, courts must undertake elaborate analyses. First, a court must define discrete liberty interests at an unspecified level of generality. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n 6 (1989) (discussing the different levels of generality that might be used in defining discrete individual rights). A court must then discern whether such an interest is fundamental or merely low-level by asking whether the right is “deeply rooted in our Nation’s history and tradition” (see *Bellotti v. Baird*, 443 U.S. 622, 638 (1979)) or “implicit in the concept of ordered liberty” (see *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969); *Moore*, 431 U.S. at 537; *Griswold*, 381 U.S. at 500; *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

A court must then apply these factors under varying and inconsistent interpretive approaches like originalism, textualism, living constitutionalism, and “text and principle.” See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); David A. Strauss, *Constitutional Law Symposium: Debating the Living Constitution: Symposium Article: Do*

*We Have a Living Constitution?*, 59 DRAKE L. REV. 973 (2011); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). Finally, a court must apply, sometimes rigidly and sometimes loosely, one among various levels of judicial scrutiny. See generally Brendan T. Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal-Protection Quiver*, 69 SYRACUSE L. REV. 69 (2019).

The analysis need not be this complicated or this controversial. It is not necessary to argue about the moral, psychological, religious, philosophical, or emotional dimensions of such culturally and sociologically loaded issues as contraceptives, sodomy, sexuality, or—as is at issue here—abortion. It is especially unnecessary to argue about these matters as discrete and narrowly defined interests in relation to an individual's privacy when the issue, constitutionally speaking, is not whether the individual has a constitutionally mandated right to undertake a specific act, but rather whether the United States or any state has jurisdiction over matters of body and mind that do not implicate a collective, public project.

## **II. An originalist interpretation of the Constitution must reflect an understanding of John Locke's political philosophy.**

Jurists, lawyers, and citizens across the spectrum of political and philosophical viewpoints might at least agree on this: one should be suspicious, in any civilization that styles itself a free society, of the power a government claims for itself. See Jim Talent, *Conservatism and the National Defense*, NATIONAL REVIEW (November 11, 2015). And we might also all agree that the original meaning of constitutional text is at least a starting point for analyzing constitutional questions. See Antonin Scalia, *Common-Law Courts in Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37-38 (Amy Gutman ed., 1997) (explaining originalists should look for “the original meaning of the text, not what original draftsmen intended”).

On both counts (the common concern about the proper place of government in an ostensibly free society and the concern with the original understanding of constitutional text), an appeal to John Locke is in order. John Locke was a leading political thinker of his time, and there is no doubt as a historical matter that his philosophy undergirds some of the words in the nation's basic charter. See generally Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J. L. & LIBERTY 1 (2010). So there can also be no doubt that some words of the Constitution were understood by any lettered reader at the time of the Constitution's inception to mean what John



Locke meant by them. This is especially so of the word “retained” in the Ninth Amendment and the word “reserved” in the Tenth. See *Id.*, at 11-12.

**A. The government derives its power from the people, so it only has that power which any individual person may have ceded to it.**

Controversial social issues, including the issue of abortion, usually involve state legislative power; it is generally state legislatures that have trespassed into the personal lives of citizens, enjoining the reign of the autonomous soul over its own self. See *An Overview of Abortion Laws*, GUTTMACHER INSTITUTE (updated June 1, 2018), available at <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>. State legislatures, when left unbounded by any supervising check, will intrude into the most private and intimate components of the lives of their subjects. Jurisdiction over matters such as sex, marriage, family, contraception, and the choice whether to abort a pregnancy drifts from the individual to the master state. So Locke’s writing on the nature of a free society is most helpful where it relates to legislative power. In his *Second Treatise on Government*, Locke wrote,

The great end of men’s entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power . . . [for] the preservation of the society and (as far as will consist with the public good) of every person in it. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 134.

One sees here Locke’s emphasis on peace and safety. This emphasis runs through all of Locke’s thinking and teachings: the individual, in a state of nature, is autonomous and sovereign over himself or herself,<sup>1</sup> and an individual sovereign forms a government over himself or herself only to secure peace and prosperity—not to cede dominion over matters that require no collective decision-making or projects that require no communal cooperation. In other words, governments exist, as Locke said, for the public good, not the individual’s subjugation.

Locke also wrote,

Though the legislative [power], whether placed in one or more, whether it be always in being or only by intervals, though it be the supreme power in every commonwealth, yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the

state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power in the utmost bounds of it is *limited to the public good* of the society. *Id.* at § 135 (emphasis added).

The Lockean notion that the government possesses only that power which a singular person has to give undercuts the idea that “the people” is simply some collective body politic. “The people” are, rather, a collection of discrete individuals, each of whom has jurisdiction over his or her own affairs.

So the state may not possess power that must necessarily have been ceded to it by its subjects, the people, if that power did not belong to any person to begin with. In a state of nature, a person might have the right to defend herself, secure her property, and enjoy her life peacefully and without nuisance or bother put upon her by others, but she has no jurisdiction of neighbors’ property or peaceful enjoyment of their own lives and personal affairs. So although a person may cede to the government the authority to secure her property rights and protect her against unwanted intrusions, she cannot have ceded to the government—and neither can any of us have ceded to it—any authority or jurisdiction over the intimate and private lives of fellow citizens.

As Professor Michael W. McConnell noted in his article about John Locke and his influence on our Constitution, “During the Bill of Rights debates, reference was made to the right to wear a hat and to go to bed when one pleases.” McConnell, *supra*, at 19 (citing 1 ANNALS OF CONGRESS 732 (Joseph Gales ed., 1834) (1789)). The framers of the Bill of Rights understood that a sphere of life exists about which there is no public concern implicated—with regard to which no government, no legislature, has any business. In other words, they understood John Locke.

**B. The people cede only that power that they must to live in an ordered society and secure peace and prosperity; they do not cede power over their decisions as free citizens.**

People enter into the social compact (submit to the authority of government) not so that it may limit their freedom, but so that it might help them to preserve it. Locke explained,

If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict

observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name—property. Locke, *supra*, at § 123.

Thus, people do not, merely by existing in society and availing themselves of its protections, thereby expose themselves to arbitrary intrusions by the government into areas such as the choice whether to procreate. Rather, people join together under one government, Locke said, “*only* with an intention in every one the better to *preserve* himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse) . . . .” *Id.* at § 131 (emphases added). That is why “the power of the society or legislative constituted by them can *never be supposed to extend farther than the common good* . . . .” *Id.* (emphasis added).

### **C. The state may only regulate as to matters of public concern, not matters involving the choices of citizens in a free society.**

It follows that the state may only regulate for the public good: matters that require collective rather than individual decision-making, or matters that require a collective rather than individual effort. As to collective decision-making, no person should, for example, be a judge in his or her own case against another in matters involving contracts or property or civil wrongs (this idea is widely attributed to Sir Edward Coke. *See* D.E.C. Yale, *Judex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80 (1974)); society must have common rules for resolving such disputes, and there must be neutral magistrates to resolve them—not in the name of the magistrates, but in the name of all society. As to matters that require a collective undertaking, it is not reasonable to expect individuals to install their own utilities or fight a common enemy individually. We join together to achieve objectives that cannot be achieved without our joining together.

If governments had the authority to do more than this—more than to require people’s submission to rules that exist to preserve property and liberty; and require participation in common projects like public highways and the provision of public services and benefits—then the people would have quitted their dominion over their own affairs with, as Locke put it, “an intention to [make their own condition] worse.” Locke, *supra*, at § 121. No rational creature would enter into such a compact.

This thinking marked much of the dialogue in the United States around the adoption of the Constitution, and especially the Bill of Rights. A famous Constitution-era commentator who wrote as “Brutus” put it this way:

The common good, therefore, is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved: how great a proportion of natural freedom is necessary to be yielded by individuals, when they submit to government, I shall not now enquire. So much, however, must be given up, as will be sufficient to enable those, to whom the administration of the government is committed, to establish laws for the promoting [sic] the happiness of the community, and to carry those laws into effect. But it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc. Others are not necessary to be resigned, in order to attain the end for which government is instituted, these therefore ought not to be given up. To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are *not necessary to be parted with*. McConnell, *supra*, at 11-12 (quoting BRUTUS, ESSAY OF BRUTUS II (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 372-77 (Herbert J. Storing ed., 1981))(emphasis added).

### **III. There are rights not enumerated in the Constitution that the people retain and over which the government has no jurisdiction.**

Under the axiom *expressio unius est exclusio alterius*, lists in legal documents are generally interpreted as being exhaustive. See *Id.* at 10. Some of the framers of the Constitution feared that creating a list of rights bore serious risks. James Madison even warned that creating such a list would be perilous since oppressive governments in the future might point to such a list in an attempt to extinguish any right not listed. See *Id.* at 14.

With this in mind, the drafters of the Bill of Rights (the first Congress) included the Ninth Amendment, ostensibly to foreclose this mischief: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST., amend. IX. Notice the word “retained.” This reflects the thinking of John Locke: the government only has the power ceded to it by the people; all the remainder—a huge chunk of jurisdiction over the lives and affairs of the people—must be presumed to have been retained, for there would have been no reason for any rational person to give up more than might be necessary for the public good.

The Ninth Amendment explicitly neuters the *expressio unius* rule and instructs that it not be applied in interpreting the Bill of Rights. There is a sphere of life where no government may tread, and a right need not be

enumerated in the Constitution for the government to lack any jurisdiction over it. Indeed, it would be pointless to list every component of a citizen's daily life where the government has no jurisdiction; one need not indulge lofty musings about which "rights" are "deeply rooted in our nation's history and traditions" or "implicit in the concept of ordered liberty" when it is clear enough that no government at any level may decide what side of the bed one sleeps on or whether one snuggles with a cat at night or whether one takes one's coffee black.

Then there is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X. First of all, *reserved* is much like the word *retained*: it reflects the philosophy of John Locke. But power is not merely reserved to states. As would be expected in an amendment that has Locke running through it, power is also—and more importantly—reserved to the people. So states occupy a sort of nether-region where Congress has no power and the people have ceded theirs—for, and only for, the public good. As noted above, courts call this the police power, which properly has been defined as a general authority to regulate with regard to the health, safety, and general welfare of the populace—in other words, the public good. See *Police Powers*, LEGAL INFORMATION INSTITUTE, available at [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers).

Proponents of governmental control over all components of citizen life sometimes place the word *morals* into that equation: police power, they say, is the authority of the state over the health, safety, *morals*, and general welfare of its people. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). The problem here, of course, is that if a state has jurisdiction over a person's moral choices, then the *or* part of the Tenth Amendment—the part about power reserved to the people—is a dead letter, because there is nothing left to the individual citizen after the state has greedily consumed every bit of the residual jurisdiction not claimed by Congress. If a state may decide whether a woman must make religious and moral choices in accord with majoritarian dogmas instead of her own, for example, then there is nothing that a state may not decide for a citizen, and there is no power at all reserved to the people.

If the Tenth Amendment is to mean what it clearly says about the people and their reserved power, then, again, state legislative power may only extend to the common good. And the drafters of the Constitution seemed singularly concerned that this form of government would indeed exist in the states; Article IV of the Constitution provides, "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST., art. IV § 4. Republican, in this context, means represen-

tative (see *Parker v. Merlino*, 493 F.Supp. 381, 388 (D.N.J. 1980)), which in turn means that every state must have a structure of government that reflects the Lockean compact: the people cede whatever power they must to the state, which may then regulate for—and only for—the public good.

The text of the Constitution, as it was understood when it was drafted and as it should still be understood today, does not invite or require thorny fights about which parts of citizen life implicate such profound concerns that they warrant some kind of special rank. As to personal privacy and moral autonomy, the Constitution is concerned only with whether power is reserved to the people, which is to say that it is not the business of any other person and is therefore necessarily not the business of any government. How a woman chooses to manage her own pregnancy is not the business of any other person, and it is therefore not the business of any government.

**A. The Constitution's audience is the government, whose power it limits—not the people, whose rights exist independently of the government.**

Rights, like those enumerated in the first eight amendments to the U.S. Constitution, are not about the individual people whom they protect. The Constitution is not addressed to citizens as individuals and seems agnostic as to whether they exercise any of those rights—like speech or religious exercise. See U.S. CONST. amend. I. The audience for the Constitution is the government; the Constitution creates the system of government, empowers it, and also limits its reach and jurisdiction. That is where rights come in: a right is not a license created by the Constitution to encourage certain behavior by citizens; it is a *limit* on the power of the *government*. McConnell, *supra*, at 12.

The First Amendment does not say that a citizen should speak; it says (although not in so many words) that if she has something to say on a matter of public concern (a right citizens had even before the Constitution was drafted), then *the government may not stop her*. U.S. CONST., amend. I. Constitutional rights are not there to be exercised; they are there to restrain governmental intrusions into their exercise (or, in the case of positive rights like the right to a jury trial or the right to counsel, to require the government to interact with its subjects in ways that are not arbitrary and capricious). See U.S. CONST., amend. V; U.S. CONST., amend. VI.

Consider this question: Does a person have a constitutionally enumerated right to shave in the morning? Under any interpretive model, it is preposterous. The question answers itself, and the answer is no. But the wrong question has been asked. Since the Constitution is not about what the people as individuals may do, but rather what the government may do, the constitutional questions are these: Were governments instituted among men and

women to decide whether a person should shave in the morning? Is personal shaving something that the government should be allowed to regulate? Is it something that any government has the authority to regulate? Is it something that requires collective decision-making for the public good? Under any interpretive model, this question, too, answers itself: the answer is no.

**B. A person has jurisdiction over her own moral choices—  
not the government.**

Oddly enough, originalists and textualists find little trouble declaring the traditional unitary family and traditional opposite-sex marriage to be fundamental liberty interests even though neither right is enumerated in the Constitution. See *Michael H.*, 491 U.S. 110; *Zablocki v. Redhail*, 434 U.S. 374 (1978). The same jurists tend to balk when whatever private choice is at issue does not comport with their own personal agendas and beliefs: when a woman wants to abort a pregnancy, for example, or when a gay person wants to enjoy a full and pleasurable sex life. Justice Anthony Kennedy led the way toward ending this personal-preference-based approach to individual rights, declaring (implicitly, at least) that a majoritarian moral objection to certain conduct is not, in and of itself, a legitimate state interest as required even on rational-basis review. See *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Kennedy's opinion in *Lawrence* invalidating a Texas anti-homosexual-sodomy law might be the closest the Supreme Court has come to honoring the plain meaning of the Constitution's reservation of jurisdiction over citizen-life to the people rather than the state.

As reproductive choice comes under attack in many states, it may be time for courts to consider a decidedly *conservative* approach—a narrow take on what parts of citizen life are properly regarded as having been ceded by the people to any supervising civic overlord, be it secular or sectarian. In matters where no one citizen would have jurisdiction over the choices of another citizen, the state has no power to regulate citizen life. In such cases, courts should apply rigid scrutiny, invalidating laws designed to undercut the free will of the individual.

Does a person have a constitutionally enumerated right to wear a hat or decide when to go to bed at night? Of course not. Were those choices nonetheless reserved by the people as outside the reach and competence of the government? Of course. The question is not whether such decisions are important or compelling or foundational, but whether they constitute a public project or require collective decision-making. At the risk of being repetitive (which might be in order), since the Constitution explicitly addresses itself to governments rather than the individual, it is the scope of the government's jurisdiction that is the issue.



The individual should not be asked to explain how it is so that she *has* jurisdiction over shaving or hat-wearing or bedtime when the government so obviously *lacks* jurisdiction in those areas. If the government is incompetent to regulate in these areas, areas about which no person could or would have ceded authority to society, then what difference does it make whether the “right” at issue is the right to free thought or the right to go to bed? In either case, it’s a “right” against which the state may not trespass—regarding which a person has the “right to be let alone.” See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that “[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.”).

It is not for a woman to explain how she has jurisdiction of her own uterus and body and reproductive choices. It is for the state, rather, to explain the remarkable proposition that a woman’s uterus and body and reproductive choices are the province of the state as matters of public concern—as matters that are the business of neighbors and strangers rather than the individual.

#### **IV. The choice to terminate a pregnancy is a personal decision over which no other person has jurisdiction; therefore, it is the woman and not the state who has jurisdiction over such a choice.**

Consider an illustration. Smith is talking to her neighbor, Jones. Smith, who has never had children, confides in Jones that she is pregnant, but she is planning to terminate the pregnancy. Smith and her husband decided before getting married not to have children. Jones, who takes great joy in motherhood, is appalled that another woman would consider terminating her pregnancy; it is also strictly against Jones’s deeply held beliefs to terminate a pregnancy, as she believes that life begins at conception.

Obviously, Jones’s beliefs about when life begins and about religion are her business alone. No neighbor could insist that she change her beliefs or live a life inconsistent with her own wishes. But the same is true for Smith. Her beliefs about when life begins and what religious doctrine she follows (including a belief in no religion) are not the business of Jones, even if she disagrees with Smith. These are matters of individual conscience.

When Jones talks to another neighbor, Murphy, she discovers that Murphy, too, is shocked and upset that Smith would terminate her pregnancy. Now that Jones and Murphy both agree that Smith is considering what they

consider an immoral choice, do they acquire jurisdiction simply because there are two of them? Obviously not. If neither had power over Smith's choice to begin with, then they do not acquire that power by joining together. What about when a third neighbor also is put off? And a fourth and fifth, and then a tenth and then a twentieth? If the whole block finds Smith's plan immoral and distasteful, have intrusive neighbors swelled in number such that *now* they have jurisdiction over Smith's pregnancy and her body and her choice? Of course not. If no single one of Smith's neighbors individually has any power over her personal life, then their joint opprobrium is of no more moment than Jones's alone, or any combination of neighbors one might conjure.

Those who argue that the neighbors magically acquire jurisdiction over Smith's body and pregnancy and choice once they number 50 percent plus one of the body politic are left holding an empty sack, and this is Locke's point: the government only has that power which the people (a collection of persons) may give it, and they may not give what they do not have. It makes no difference that 50 percent plus one of the body politic condemns Smith; there is no power in their legislature to bind her up if no person within the body politic had that power to give the legislature to begin with. It's a funny thing about zero: no matter how many times you add it to itself, you still get zero. So in a community of 100, even when 51 people decide on the personal choices and destiny they would prefer for Smith, they still have no jurisdiction—zero—to impose their will.

It is a strange proposition indeed that something that is not the business of anyone is nonetheless the business of everyone.

A woman's decision to terminate her pregnancy is not a public project and does not call for collective decision-making. It is not a matter of public concern. A woman's choice whether to terminate a pregnancy—and all its attendant philosophical, moral, medical, and emotional implications—is well outside the jurisdiction of the state. As the Supreme Court stated in *Roe v. Wade*, 410 U.S. 113 at 159 (1973), "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." No government, therefore, has authority over such a private decision, at least in any commonwealth that holds out any pretense of being a society of free citizens.

---

#### NOTES


1. While women were not considered equal at the time that Locke wrote, his ideas obviously apply equally to women and men today.



Ditkowski sheds light on the medical and legal needs of intellectually disabled adults, who are typically denied their right to bodily autonomy and reproductive self-determination. Instead, these fundamental, irrevocable, life-changing decisions are made for them in opposition to their wishes. Ditkowski makes a compelling case that adults with legal guardians retain their dignity as persons under the constitution such that they have the right to pursue abortions and sterilization and that justice requires that certain procedural processes must be established to adequately protect this right.

With his deftly written amicus brief, available to NLG litigators nationwide, Brendan Beery and his co-authors have crafted a gift to reproductive justice lawyers everywhere. Using the Lockean language of natural rights and limited government, it is designed to appeal to a newly constituted Supreme Court hostile to the constitutional right to terminate a pregnancy. The brief uses classical liberal legal and philosophical arguments (of the kind conservatives themselves are wont to deploy) to make the case against any further intrusion into this protected area of privacy and conscience.

—Meredith O'Harris, *editor-in-chief*



# #Law4thePeople

*Save the date!*

## October 16-20, 2019

5 days of movement law & organizing

**Durham, NC**  
[nlg.org/convention](http://nlg.org/convention)



NATIONAL LAWYERS GUILD REVIEW  
132 NASSAU STREET, SUITE 922  
NEW YORK, NY 10038

PERIODICALS  
POSTAGE PAID

## National Lawyers Guild Review

### Submission Guidelines

*National Lawyers Guild Review* is published quarterly by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of *NLGR* generally contain about 425 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. For reference, we use the *Chicago Manual of Style*. Citations should appear as **endnotes** and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

Manuscripts should be sent to the Articles Editor at [nlgreview.articles@nlg.org](mailto:nlgreview.articles@nlg.org), whereupon they will be forwarded to the Editor-in-Chief for review by members of the *NLGR*'s editorial board. If accepted, manuscripts will be edited, and the edited manuscripts will be returned to the author for review; however, because of production schedules, late changes are prohibited and authors generally do not see typeset proofs. We make every effort to clear any changes with the author.