VERMONT'S VOLUNTARY STERILIZATION STATUTES AND THE RIGHTS OF THE MENTALLY HANDICAPPED

The recent Vermont Supreme Court case, *In re Marcia R.*,[1] concerns a seriously retarded teenager whose parents desired that she be sterilized. In response to the parents' proposed course of action, the American Civil Liberties Union brought suit to prevent Marcia's sterilization.[2] The Superior Court of Rutland County temporarily enjoined the sterilization pending a hearing and appointed a guardian ad litem for Marcia.[3] An appeal was taken to the Vermont Supreme Court when the Superior Court refused to grant a permanent injunction.[4] In its decision, the Vermont high court issued a permanent injunction prohibiting Marcia's sterilization until the procedures called for in the Vermont voluntary sterilization statutes[5] were complied with and any judicial review of the statutes and their application to Marcia's case was completed.[6]

The Vermont voluntary sterilization statutes[7] are concerned

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1. 136 Vt. 47, 383 A.2d 630 (1978).
2. *Id.* at 48, 383 A.2d at 631.
3. *Id.* at 48, 383 A.2d at 630.
4. *Id.*
5. VT. STAT. ANN. tit. 18, §§ 8701-8704 (1968 & Cum. Supp. 1978).
6. 136 Vt. at 52, 383 A.2d at 633.
7. VT. STAT. ANN. tit. 18, §§ 8701-8704 (1968 & Cum. Supp. 1978):

§ 8701. Voluntary sterilization; construction

It is the policy of the state to prevent procreation of mentally retarded and mentally ill persons, when the public welfare and the welfare of those persons likely to procreate can be improved by voluntary sterilization under this chapter.

§ 8702. Examination and certificate; operation

When two physicians and surgeons legally qualified to practice in the state examine a person resident of the state, and decide:

(1) that that person is mentally retarded or mentally ill and likely to procreate mentally retarded or mentally ill persons if not sexually sterlized [sic];

(2) that the health and physical condition of that person will not be injured by the operation of vasectomy, if a male, or the operation of salpingectomy, if a female;

(3) that the welfare of that person and the public welfare will be improved if that person is sterilized as aforesaid; and

(4) whether that person is or is not of sufficient intelligence to understand that he or she cannot procreate children after the operation is per-

exclusively with the sterilization of mentally handicapped persons.[8] The statutes' stated policy is "to prevent procreation of mentally retarded and mentally ill persons, when the public welfare and the welfare of those persons likely to procreate can be improved by voluntary sterilization."[9] The statutes provide specific procedural and substantive requirements which must be satisfied before a mentally handicapped person may be sterilized.[10] The statutes, on their

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formed, and the examiners make and sign duplicate certificates setting forth those facts and make oath thereto before a justice of the peace or notary public, it shall be lawful for any other physician and surgeon, legally qualified to practice in the state, when presented with the certificate, to perform the operation, provided:

(A) he decides that the welfare of that person and the public welfare will be improved by the operation;

(B) that person has requested in writing on the certificates that the operation be performed, if the certificates show that that person is of sufficient intelligence to understand that he or she cannot procreate children after the operation is performed; or

(C) the natural or legal guardian of that person has requested in writing on the certificates that the operation be performed, if the certificates show that that person is not of sufficient intelligence to understand that he or she cannot procreate children after the operation is performed; and

(D) the person voluntarily submits to the operation.

§ 8703. Report of operation

After performing the operation, the physician and surgeon shall endorse on each of the duplicate certificates when and where he performed the operation, keep one of the certificates and mail the other, postage prepaid, to the commissioner.

§ 8704. Residents of state institutions; fee

When a person is being supported by the state in an institution in the state, the commissioner, with the approval of the board, may contract with two competent physicians and surgeons, not in the employment of the state, at a price not exceeding $10.00 for each physician and surgeon to examine those mentally ill or mentally retarded persons that he has reason to believe should be sterilized. If they so certify the commissioner may contract with a competent physician and surgeon, not in the employment of the state, to perform the operation at a price not exceeding $25.00 for males and $50.00 for females and to contract with a hospital for the necessary care and nursing of the person. Those expenses shall be paid by the state and charged against the appropriation for the support of the institution.

At present a set of voluntary and involuntary sterilization statutes, designed to replace the present statutes, is in the Health and Welfare Committee of the Vermont General Assembly. H.239 (1979).

8. *Id.* §§ 8701, 8702(1); *see In re* Marcia R., 136 Vt. 47, 51, 383 A.2d 630, 633 (1978).

9. VT. STAT. ANN. tit. 18, § 8701 (1968 & Cum. Supp. 1978).

10. *Id.* § 8702. The term "mentally handicapped" will be used throughout this note to refer collectively to the two statutory categories of "mentally retarded" and "mentally ill."

face, indicate a dual purpose: reduction of the incidence of mentally handicapped births and assurance that valid consent is obtained for those undergoing sterilization.

In attempting to further these purposes, the various statutory provisions appear to be in conflict with one another. Certain statutory requirements are directed toward assuring the voluntariness of consent;[11] yet, other requirements prevent the voluntary sterilization of certain mentally handicapped persons.[12] It is likely that this tension is a result of the involvement of multiple and conflicting social concerns in the sterilization of mentally handicapped persons.

The purpose of this note is to examine the Vermont voluntary sterilization statutes, focusing on an analysis of their policy, scope and required procedure, in light of the statutes' voluntary and compulsory aspects. Three specific questions will be addressed: (1) Do the statutes violate a mentally handicapped individual's right to choose sterilization, as a method of birth control, by requiring the finding of a likelihood that the individual will produce retarded offspring? (2) Do the statutes provide adequate procedural safeguards to insure that the consent to sterilization is, indeed, voluntary? (3) Do the statutes, in fact, allow for involuntary sterilization by permitting parental consent in the event the mentally handicapped person is found incompetent to personally consent?

Before attempting an analysis of these issues, it is helpful to understand how the statutes are designed to operate and their relationship to the general development of sterilization statutes in this country.

I. Scope and Procedural Operation

An initial concern with the operation of the Vermont statutes is to determine under what circumstances their provisions must be satisfied before a person can be sterilized. The Vermont Supreme Court in *Marcia R.* held that "the provisions of [the statute] are applicable whenever sterilization of the mentally defective or men-

11. *Id.* §§ 8702(4)(B)-8702(4)(D).
12. *Id.* § 8702(1).

tally ill are [sic] to be undertaken."[13] Though the court reserved comment on the "adequacy of the statutory treatment of consent and voluntariness,"[14] it did interpret the statutes to require that all mentally handicapped persons seeking sterilization fulfill the statutory provisions.[15] Thus it now appears that, regardless of the reasons for seeking a sterilization, a mentally handicapped individual is eligible to be sterilized only if he satisfies the requirements of the Vermont statutes. Conversely, it is clear that the statutes are not applicable once an individual is found not to be mentally handicapped.[16]

The statutes provide that two surgeons, legally qualified to practice medicine in Vermont, must examine the individual whose sterilization is sought and, based upon that examination, attest to three particulars: 1) the person is mentally retarded or mentally ill and if not sterilized is likely to procreate mentally retarded offspring;[17] 2) the health and physical condition of the person will not be injured by the operation;[18] and 3) the welfare of the general public and the welfare of the person will be improved by the sterilization.[19] A mentally handicapped person cannot be sterilized if these three criteria are not satisfied.[20] The doctors must also determine whether the person is of sufficient intelligence to understand that he or she cannot procreate after the sterilization operation is performed.[21]

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13. 136 Vt. 47, 51, 383 A.2d 630, 633 (1978).

14. *Id.*

15. *Id.*

16. Neither the statutes nor the *Marcia R.* decision address the serious question of when, if ever, a determination of the mental health of any given individual seeking sterilization should take place. Both *Marcia R.* and the statutes indicate the statutes are concerned solely with the sterilization of mentally handicapped persons. It may not always be obvious to a physician, however, that a particular individual seeking sterilization is or is not mentally handicapped. The statutes themselves make no reference to this screening problem. In other jurisdictions, sterilization statutes include provisions indicating possible application if an individual's capacity to consent to sterilization is questioned by a licensed physician. *See* MONT. REV. CODES ANN. § 69-6401 (1969).

17. VT. STAT. ANN. tit. 18, § 8702(1) (1968 & Cum. Supp. 1978). For text of statutes, see note 7 *supra.*

18. *Id.* § 8702(2) (1968).

19. *Id.* § 8702(3) (1968).

20. *See In re* Marcia R., 136 Vt. 47, 51, 383 A.2d 630, 633 (1978).

21. VT. STAT. ANN. tit. 18, § 8702(4) (1968).

If the individual is judged to be of sufficient intelligence to appreciate the consequences of sterilization, then a third doctor may perform the operation, provided he obtains written permission from the individual.[22] If the individual is deemed to be incapable of providing this consent, then a parent or guardian must give his consent before the sterilization may be performed.[23] In all cases the statutes require that the individual voluntarily submit to the operation.[24]

II. Historical Perspective: Eugenic Sterilization

As previously noted,[25] the court's decision in *Marcia R.* indicated that the Vermont statutes were applicable whenever sterilization of the mentally handicapped is undertaken. In light of this holding, the statutory requirement of a finding that the mentally handicapped individual, if not sterilized, is likely to procreate mentally retarded offspring,[26] poses a significant limitation of that individual's prerogative to choose sterilization for birth control or other medical purposes.

This requirement finds its roots in the theory of eugenics which gained much credence in the United States in the early part of this century.[27] The concept of eugenics is essentially that of selective breeding to improve the human race.[28] The basic underlying premise of eugenic sterilization is that human defects are transmissible from parents to children; and therefore, the improvement of the human race requires the sterilization of defective persons.[29]

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22. *Id.* § 8702(4)(B).

23. *Id.* § 8702(4)(C).

24. *Id.* § 8702(4)(D).

25. See text accompanying note 13 *supra.*

26. Vt. Stat. Ann. tit. 18, § 8702(1) (1968 & Cum. Supp. 1978).

27. *See* Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States,* 43 Chi.-Kent L. Rev. 123, 124 (1966) [hereinafter cited as *Sixty Years*].

28. *Id.* at 123.

29. The theory was implemented by the convictions of the eugenicists that defective human beings breed more frequently than normal persons and thereby threaten to flood society with inferior, criminal and unproductive children. Among the defects which the early eugenicists proposed to eliminate through sterilization were feeblemindedness, insanity, criminal tendencies,

Eugenics, together with then-newly discovered, simple medical techniques for sterilization of males and females,[30] was the catalyst responsible for the passage of a wave of compulsory eugenic sterilization statutes in this country during the years 1907-1937.[31]

The constitutionality of these statutes was in controversy until 1927 when the United States Supreme Court decided the case of *Buck v. Bell.*[32] In a nearly unanimous opinion,[33] the Court held that the forced sterilization of a woman, based on a Virginia compulsory eugenic sterilization statute providing for the sterilization of mentally defective persons with inheritable forms of mental deficiencies, was constitutional. Justice Holmes, in delivering the majority opinion, embraced without reservation the eugenic theory behind the Virginia statute while presuming the ability of the scientific community to apply the eugenic theory accurately to predict individual cases.[34]

In his opinion, Justice Holmes described the plaintiff as a feeble-minded woman, who "is the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble minded child."[35] Thus, the Buck family appeared to the Court as an undesir-

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epilepsy, inebriation, drug addiction, tuberculosis, syphilis, blindness, deafness, physical deformities, unproductive dependency such as pauperism, economic failure and orphanism.

Id. (footnote omitted).

30. Prior to the 1890's, the only surgical method available for producing sterility was castration. The relatively simple method of sterilization for males, called vasectomy, was developed near the end of the nineteenth century by a doctor associated with the Indiana State Reformatory. At about the same time, French and Swiss doctors perfected the now standard method of sterilizing females, referred to as salpingectomy, entailing the cutting or removal of the fallopian tubes. *See* Burgdorf and Burgdorf, Jr., *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995, 999 (1977) [hereinafter cited as *Wicked Witch*].

31. *See* O'Hara and Sanks, *Eugenic Sterilization,* 45 GEO. L.J. 20, 22 (1956) [hereinafter cited as *Eugenic Sterilization*]. *See also Wicked Witch, supra* note 30, at 999-1001. For a discussion concerning the present state of eugenic theory and its possible application, see Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics,* 1971 U. ILL. L.F. 190 (1971) [hereinafter cited as *Dawning of the Brave New World*].

32. 274 U.S. 200 (1927).

33. Justice Butler was the sole dissenter. *Id.* at 208.

34. *Id.* at 207.

35. *Id.* at 205.

able drain on the resources of the State of Virginia.[36] In rejecting equal protection and substantive due process objections, the Court declared:

> [i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.[37]

Though *Buck v. Bell* has not been expressly overruled, its vitality was substantially impaired by the 1942 Supreme Court case *Skinner v. Oklahoma.*[38] *Skinner* involved an involuntary sterilization statute which provided for the sterilization of habitual larcenists, but not habitual embezzlers.[39] The Court, in sustaining an equal protection challenge to the statute, held that the right to procreate is a fundamental constitutional right; and therefore any compulsory sterilization law must withstand strict scrutiny review.[40]

The precedential authority of *Buck v. Bell* has been further eroded by substantial medical evidence indicating that the funda-

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36. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

Id. at 207.

37. *Id.*

38. 316 U.S. 535 (1942). For a commentary discussing the validity of *Buck v. Bell* in light of the Skinner decision, *see Wicked Witch, supra* note 30, at 1010-11.

39. 316 U.S. at 539.

40. Justice Douglas described the right to procreation as follows: We are dealing here with legislation which involves one of the *basic civil rights of man.* Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects . . . . There is no redemption for the individual whom the law touches . . . . He is *forever deprived of a basic liberty.* We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups of types of individuals in violation of the constitutional guaranty of just and equal laws.

Id. at 541 (emphasis added).

mental eugenic premise, that mentally handicapped persons invariably bear mentally handicapped children, is simplistic and inaccurate.[41] Despite this tarnish on *Buck v. Bell* and the eugenic theory, the Vermont statutes are designed to further eugenic goals.[42] In fact, the statutes sanction only those sterilizations of mentally handicapped persons where the probability of mentally retarded offspring exists.[43]

III. The Right to Voluntary Sterilization

Generally speaking, a Vermont resident may obtain a sterilization for birth control purposes upon request.[44] In contrast, all mentally handicapped Vermont residents must fulfill the requirements set forth in Vermont's sterilization statutes.[45] As discussed in the previous section, the concept of eugenics has been used historically as a justification for the compulsory sterilization of mentally handicapped persons.[46] It is ironic, therefore, that the Vermont statutes' eugenic provision[47] operates as a limitation on the right of a mentally handicapped individual to choose sterilization.[48] The case of *Marcia R.* demonstrates how this provision may act as a serious obstacle to an arguably beneficial sterilization.

Marcia's sterilization was initially sought to protect her from

41. *See* Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 Yale L.J. 618 (1943). *See generally Sixty Years, supra* note 27; *Dawning of the Brave New World, supra* note 31, at 195-98.

42. *See* Vt. Stat. Ann. tit. 18, § 8702(1) (1968 & Cum. Supp. 1978). *Cf. In re* Marcia R., 136 Vt. 47, 51, 383 A.2d 630, 633 (1978) (although the court specifically recognized the eugenic requirement of the statute, it indicated that the statute was applicable to all sterilizations of mentally handicapped persons, regardless of whether the procedure was invoked for eugenic reasons).

43. Vt. Stat. Ann. tit. 18, § 8702(1) (1968 & Cum. Supp. 1978).

44. Telephone interview with Susan Murphy of Planned Parenthood of Barre-Montpelier, Vt. (May 30, 1979).

45. *In re* Marcia R., 136 Vt. 47, 51, 383 A.2d 630, 633 (1978). "The provisions of 18 VSA §§ 8701-8704 are applicable whenever sterilization of the mentally defective or mentally ill are [sic] to be undertaken. . . ."

46. *See Eugenic Sterilization, supra* note 31, at 22-23. *See generally Sixty Years, supra* note 27, at 123-25.

47. Vt. Stat. Ann. tit. 18, § 8702(1) (1968 & Cum. Supp. 1978). See note 7 *supra* for complete text.

48. See text accompanying notes 49-64 *infra*.

pregnancy while participating in a twenty-four hour a day behavior modification program at a state institution.[49] The program included nine males whose physical ages ranged from fourteen to twenty-eight.[50] Marcia was the only participating female.[51] Institution officials told Marcia's parents that the risk of Marcia becoming pregnant should not be ignored, and that the school could not guarantee that contacts leading to pregnancy would not happen.[52] Based on this advice, Marcia's parents sought to have their daughter sterilized, at which point the American Civil Liberties Union acted to block the sterilization.[53]

In directing the issuance of a permanent injunction prohibiting Marcia's sterilization, the Vermont Supreme Court indicated that she could not be sterilized without fulfilling the requirements of Vermont's sterilization statutes.[54] Accordingly, Marcia was examined by two doctors.[55] The doctors stated in their findings, however, that they could not predict whether Marcia was likely to procreate a mentally retarded child if not sterilized.[56] Thus Marcia did not appear to satisfy the statutes' eugenic requirement, although she satisfied all other statutory requirements.[57] Marcia's situation, therefore, raises the question whether the statutes' eugenic provision, if justifiable at all, is justifiable with respect to situations such as Marcia's.

The United States Supreme Court held in *Skinner* that procreation is a fundamental right,[58] grounded in the constitutional right of privacy which the Court has recognized in recent decades.[59] In light of the Court's use of the privacy theory to establish a consti-

49. *In re* Marcia R., 136 Vt. 47, 49, 383 A.2d 630, 632 (1978).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 50, 383 A.2d at 631-32.

54. *Id.* at 51, 383 A.2d at 633.

55. Interview with Patrick R. Berg, attorney for Marcia R., in Rutland, Vt. (Oct. 23, 1978).

56. *Id.*

57. *Id.*

58. 316 U.S. 535, 541 (1942). *See* note 40 *supra.*

59. Although the Supreme Court in *Skinner* did not expressly refer to a right of privacy, in light of subsequent "privacy cases," commentators have interpreted the right to procreate to be within this sphere of privacy. *See, e.g., Wicked Witch, supra* note 30, at 1010.

tutional right to abortion[60] and to contraception,[61] it is arguable that a similar right not to procreate or a right to be sterilized should also exist.

Sterilization, like abortion and contraception, appears to be directly within the sphere of privacy described by the Supreme Court in the contraception case *Eisenstadt v. Baird.*[62] "If the right of privacy means anything," the Court declared, "it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[63]

If it is assumed that a fundamental right not to procreate exists, encompassing the right to sterilization,[64] the statutes' eugenic requirement would raise significant constitutional considerations. Because the statutes define a class of persons, the mentally handicapped, and set that class apart from the general Vermont public with respect to sterilization, the statutes become especially vulnerable to the charge that they violate the constitutional mandate of equal protection. In order to survive such a challenge, the statutes would have to be proven necessary to fulfill a compelling state interest.[65]

Fundamental rights aside, it is difficult to imagine the social policy that is served by preventing a mentally handicapped individual from obtaining a sterilization based upon a finding that the sterilization will not further the eugenic goal of eliminating defec-

60. *See* Roe v. Wade, 410 U.S. 113 (1973).

61. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

62. 405 U.S. 438 (1972).

63. *Id.* at 453.

64. It is arguable that with respect to certain mentally handicapped individuals, the right not to procreate, practically speaking, is synonomous with the right to sterilization. In Marcia's case, for example, there was evidence that to deny her sterilization was to deny her the only effective means of preventing pregnancy while participating in the behavior modification program, because neither medication nor mechanical devices were feasible. *See In re* Marcia R., 136 Vt. 47, 49-50, 383 A.2d 630, 632 (1978).

65. For a discussion of the considerations and distinctions involved in a "compelling state interest analysis" under the equal protection clause of the 14th amendment of the United States Constitution, see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969); *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123 (1972).

tive births. Among the general population it is assumed sterilization may be used as an effective means of preventing unwanted births without regard to eugenic considerations. Undoubtedly, there are other mentally handicapped persons, in addition to Marcia, for whom sterilization would be an individual benefit without furthering eugenic goals. As the Vermont statutes stand, however, all sterilizations of mentally handicapped persons must be eugenically justifiable.

IV. Safeguards to Insure Voluntary Consent

The essential difference between a voluntary sterilization and a compulsory sterilization is that the former requires that the surgeon obtain valid consent from the patient prior to performing the operation,[66] while the latter is not concerned with consent at all.

There are three generally recognized elements of valid consent to sterilization.[67] First, consent must be informed; the individual patient must understand the nature, consequences, potential risks and possible alternatives to sterilization.[68] Second, consent must be given voluntarily, without any tinge of coercion.[69] Third, the individual giving consent must be capable of appreciating his or her decision and its ramifications.[70] This appreciation renders a person competent to consent.

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66. If a doctor performs a sterilization operation, or administers any other form of medical treatment without obtaining prior consent, he may be liable for civil damages in tort. *See, e.g.*, Banks v. Wittenberg, 82 Mich. App. 274, 266 N.W.2d 788 (1978); Shulman v. Lerner, 2 Mich. App. 705, 141 N.W.2d 348 (1966); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). Liability arises even if medical treatment is beneficial and skillfully performed. *See* Zoski v. Gaines, 272 Mich. 1, 260 N.W. 99 (1935); Rogers v. Sells, 178 Okla. 103, 61 P.2d 1018 (1936).

67. *See* Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974); Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974). For in depth discussions concerning the general issue of consent and the sterilization of mentally disabled persons, see Neuwith, Heisler, and Goldrich, *Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded*, 6 Colum. Human Rights L. Rev. 447, 447-53 (1974-1975) [hereinafter cited as *Capacity, Competence, Consent*]; Comment, *Sterilization of Mental Defectives: Compulsion and Consent*, 27 Baylor L. Rev. 174, 186-89 (1975) [hereinafter cited as *Compulsion and Consent*].

68. *See* Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974).

69. *Id. See also* Relf v. Weinberger, 372 F. Supp. 1196, 1201-02 (D.D.C. 1974).

70. *See* Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974).

Although some mentally handicapped persons have the requisite understanding, and therefore competence, to consent to sterilization, many others do not.[71] In addition to having these possible competency problems, it is generally recognized that mentally handicapped persons tend to be more vulnerable to the powers of suggestion than mentally healthy persons.[72] This vulnerability exposes mentally handicapped persons to subtle forms of coercion which could render their consent to sterilization less than voluntary.[73]

Recognizing the central importance of consent to voluntary sterilization, and the ever-present concern with a mentally handicapped person's competency to provide consent, a primary purpose of the Vermont statutes should be to provide procedural safeguards to insure that consent satisfies the three established elements outlined above.

Currently, certain requirements of the Vermont statutes appear designed to insure the validity of an individual's consent. One such requirement, relating to competency, is that the two examining doctors must detemine whether the individual whose sterilization is sought has the intelligence to understand that sterilization eliminates the ability to procreate.[74] If the doctors decide that the individual is capable of understanding the meaning of sterilization, the statute provides that the individual's written permission must be obtained to perform the operation.[75] This provision operates to insure that mentally handicapped persons found competent to consent are not involuntarily sterilized. If the examining doctors find an individual incapable of understanding that sterilization eliminates the ability to procreate, the statutes provide that consent must be obtained from that person's parent or legal guardian.[76]

Although the statute provides for a determination of an individual's competency to consent, there are inadequate procedural safe-

71. *See Capacity, Competence, Consent, supra* note 67, at 449.

72. *See* North Carolina Assoc. for Retarded Children v. North Carolina, 420 F. Supp. 451, 454 n.2 (1976). *See generally Capacity, Competence, Consent, supra* note 67, at 452-53.

73. *See generally Capacity, Competence, Consent, supra* note 67; *Compulsion and Consent, supra* note 67, at 188-89.

74. VT. STAT. ANN. tit. 18, § 8702(4) (1968). See text accompanying notes 17-21 *supra.*

75. *Id.* § 8702(4)(B).

76. *Id.* § 8702(4)(C).

guards to insure that the first and second elements essential to valid consent, the elements of knowledge and voluntariness, are satisfied.

There is no statutory requirement that information concerning the proposed sterilization or other relevant considerations, such as alternative methods of birth control, be divulged to the individual prior to his consent, or even prior to the operation itself. In fact, the statute does not expressly provide that the individual be told anything before consenting. In determining the issue of competency, the examining doctors may choose to discuss with the individual the nature and consequences of sterilization; but such a discussion is not statutorily required. The knowledge element of valid consent is not safeguarded by this mere possibility.

In contrast to the Vermont statutes' lack of disclosure requirements, the Model Voluntary Sterilization Act[77] explicitly provides that certain information must be made available to an individual prior to his consent to sterilization. The Act provides that:

> Consent shall be freely and intelligently given in writing. Free and intelligent consent shall require that a physician or appropriate expert inform such person as to
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> 1) Method of sterilization;
> 2) Nature and consequences of such sterilization;
> 3) Likelihood of success;
> 4) Alternative methods of sterilization;
> 5) Alternative methods of birth control;
>
> and be satisfied that such consent has been given after full and fair deliberation of these matters.[78]

The Vermont statutes offer no guarantee that a mentally handicapped individual judged competent to consent to sterilization will obtain such information prior to giving consent.

Similarly, there is no specific requirement, under Vermont's statutory scheme, that the mentally handicapped individual's consent be given voluntarily, although it is arguably implicit in the

77. The Model Voluntary Sterilization Act was drafted by the staff members of the Association for Voluntary Sterilization to effectuate the principles enunciated at the International Conference on Human Rights held in 1973. The full text of the Act is set forth in *Capacity, Competence, Consent, supra* note 67, at 464-69.

78. *Id.* at 464.

requirement that the individual's written permission be obtained.[79] The statutes do provide that the mentally handicapped individual must voluntarily "submit" to the operation.[80] There is, however, a significant distinction between voluntary submission and voluntary consent.[81] "Submission" indicates a willingness to abide by the decision or action of another:[82] a surrender or yielding of an individual to the power or authority of another.[83] "Consent," on the other hand, involves an exercise of independent judgment.[84] Vermont's statutes do not require that an individual voluntarily consent to sterilization, but rather that once the necessary consent is obtained, the individual voluntarily submit to the surgical operation itself.

There is an indication that the courts in other jurisdictions, when dealing with the voluntary sterilization of mentally handicapped persons, will require explicit and substantial procedural safeguards to insure that each element of valid consent is satisfied. In the 1974 decision of *Relf v. Weinberger*,[85] a federal district court in the District of Columbia held that federally funded sterilization could only be performed with the "voluntary, knowing and uncoerced consent of individuals competent to give such consent."[86] The *Relf* court was concerned that women were being coerced into accepting a sterilization operation under the threat that, unless they did submit, various federally supported welfare benefits would be withheld.[87] As a result of this concern, the court ordered that an individual seeking sterilization be orally informed prior to the solicitation or receipt of consent that federal welfare benefits could not

79. VT. STAT. ANN. tit. 18, § 8702(4)(B) (1968).

80. *Id.* § 8702(4)(D).

81. There is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. "Consent" differs very materially from "assent." The former implies some positive action and always involves submission. The latter means mere passivity or submission which does not include consent.

People v. Dong Pok Yip, 164 Cal. 143, ____, 127 P. 1031, 1032 (1912).

82. BLACK'S LAW DICTIONARY 1594 (rev. 4th ed. 1968).

83. BALLENTINE'S LAW DICTIONARY 1229 (3d ed. 1969).

84. BLACK'S LAW DICTIONARY 377 (rev. 4th ed. 1968).

85. 372 F. Supp. 1196 (D.D.C. 1974).

86. *Id.* at 1201.

87. *Id.* at 1199.

be withdrawn because of a refusal to undergo sterilization.[88] In addition, the court held that federal funds could not be used to sterilize persons judged incompetent to consent because of age or mental incapacity.[89] The decision was based upon the "congressional command that federal family planning funds not be used to coerce indigent patients into submitting to sterilization."[90]

In another 1974 decision, *Wyatt v. Aderholt*,[91] a federal district court in Alabama indicated that the consent obtained from an institutionalized, mentally retarded individual must conform to criteria similar to those established in the *Relf* decision. The court in *Wyatt* required that "all future sterilizations be performed only where the full panoply of constitutional protections has been accorded to the individual involved."[92] The full panoply of protections dictated that sterilization of a mentally retarded resident of a state institution, found competent to consent, could not be performed without his or her written, informed and voluntary consent.[93] In order to insure that the consent obtained would meet these requirements, the *Wyatt* court ordered the organization of a review committee, consisting of members selected for their ability to deal with the medical, legal, social and ethical issues involved in sterilization.[94] This committee was charged with the responsibility of determining, among other things, whether consent was voluntary and informed.[95]

Both *Wyatt* and *Relf* support the position that consent to sterilization must not only be given by an individual competent to make such a decision, but that consent must be voluntary and knowing as well. Commentators are in wholehearted agreement.[96] Although

88. *Id.* at 1203.

89. *Id.* at 1204.

90. *Id.* at 1201.

91. 368 F. Supp. 1383 (M.D. Ala. 1974).

92. *Id.* at 1384.

93. *Id.*

94. *Id.* at 1384-85. The suggestion of a review committee by the *Wyatt* court was not unique. In fact, the idea of a review board and hearing procedure has been expressly adopted by the Montana legislature. *See* MONT. REV. CODES ANN. §§ 69-6403 to 69-6406 (Cum. Supp. 1977). This idea was also adopted in the Model Voluntary Sterilization Act. *See Capacity, Competence, Consent, supra* note 67, at 465. Like the "Wyatt committee," the membership of these committees is composed of physicians, lawyers, and lay persons.

95. 368 F. Supp. at 1385.

96. *See, e.g., Capacity, Competence, Consent, supra* note 67, at 448; *Compulsion and Consent, supra* note 67, at 187-90.

the *Wyatt* and *Relf* decisions are in no way binding on Vermont courts, they do provide a standard against which the Vermont sterilization statutes may be judged. The Vermont statutes do not include specific requirements that consent be voluntary and knowing. By failing to provide that relevant information be divulged to the mentally handicapped individual, and that some type of impartial review mechanism be established, such as the review committee in *Wyatt,* the statutes fail to insure adequately that the consent obtained will be valid. Without such explicit safeguards, the danger exists that sterilizations performed pursuant to statutory requirements will amount to involuntary sterilization.

V. Parental or Guardian Consent

The Vermont sterilization statutes do not proscribe the sterilization of mentally handicapped persons found incompetent to consent. The statutes specifically provide that if the two examining doctors determine that a mentally handicapped individual is not capable of understanding the nature and consequences of sterilization, then substitute consent to the operation may be obtained from the individual's parent or guardian.[97] It is essential to consider whether there exists justification for permitting such substitute consent under a voluntary sterilization scheme such as Vermont's.

Generally speaking, parental consent is sufficient to authorize medical treatment for a minor child because it is presumed the parent is concerned with the best interests of the child.[98] One excep-

97. Vt. Stat. Ann. tit. 18, § 8702(4)(C) (1968).

98. *See* Bartley v. Kremens, 402 F. Supp. 1039, 1047 (E.D. Pa. 1975), *vacated and remanded on other grounds sub nom.* Kremens v. Bartley, 431 U.S. 119 (1977). It is important to recognize that the Vermont sterilization statutes impose no limitation upon the parent's or guardian's authority to consent to the sterilization of his incompetent child, regardless of whether the child is a minor or an adult. In the *Marcia R.* case, for example, Marcia's parents originally claimed that the sterilization statutes were inapplicable because Marcia was a minor, and that parental authority under the circumstances resolved the issue of consent. This issue became moot, however, when "the pace of natural events outran the speed of the litigation." 136 Vt. 47, 49, 383 A.2d 630, 631 (1978). The court noted:

> The . . . justification [for parental consent] was lost when . . . [Marcia] became of age, which has now happened. Since this reason is not now available for review here, this opinion cannot be taken as a validation or rejection of the underlying assumption that the statutory procedures do not apply to minors.

tion to this general rule is found where the circumstances indicate that the parents' and child's interests may not coincide. In such circumstances courts have, on numerous occasions, held parental consent insufficient.[99]

In a case involving a proposed organ transplant from a severely mentally retarded seventeen-year-old boy to his older sister, the Louisiana Court of Appeals held that neither the children's mother nor the court could authorize such a surgical invasion of a mentally incompetent minor.[100] This decision was based largely on the finding that "surgical intrusion and loss of . . . [an organ] clearly would be against . . . [the child's] best interest."[101]

When confronted with a situation presenting an analogous potential for a conflict of interests, a federal district court in Pennsylvania held that parents could not authorize the institutionalization of their child without a due process hearing to determine if commitment was actually necessary.[102] The court noted that unfortunately, "[i]n deciding to institutionalize their children, parents, as well as guardians . . . may at times be acting against the interests of their children."[103]

Consistent with this view that parental consent is not always the pivotal consideration regarding medical treatment, other courts have held certain personal rights to be so fundamental that a

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It should be noted, however, that natural guardians are referred to in 18 V.S.A. § 8702(4)(C). This is not to necessarily validate the underlying assumption, not now relevant, that the statute is now inapplicable to minors, particularly since it refers to natural guardians.

136 Vt. at 50, 383 A.2d at 632.

99. *See, e.g.*, Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds sub nom.*, Kremens v. Bartley, 431 U.S. 119 (1977) (parental consent to the institutionalization of child held insufficient without due process hearing to determine if commitment was necessary); *In re* Richardson, 284 So. 2d 185 (La. Ct. App. 1973) (parental consent to organ transplant from retarded boy to older sister held insufficient to authorize such surgical invasion). For further discussion, *see generally* Annot., 74 A.L.R.3d 1224 (1976); Annot., 35 A.L.R.3d 692 (1971).

100. *In re* Richardson, 284 So. 2d 185, 187 (La. Ct. App. 1973).

101. *Id.*

102. Bartley v. Kremens, 402 F. Supp. 1039, *vacated and remanded on other grounds sub nom.*, Kremens v. Bartley, 431 U.S. 119 (1977).

103. *Id.*

minor's ability to exercise these rights cannot be made contingent upon parental approval.[104]

In *Planned Parenthood v. Danforth,*[105] the United States Supreme Court held unconstitutional a Missouri statute proscribing abortions during the first twelve weeks of pregnancy unless certain consent requirements were satisfied. In addition to requiring the woman's consent, the statute provided that if the woman were unmarried and under eighteen years of age, parental consent would be necessary; and if the woman were married, her husband's consent would be necessary.[106] An exception was provided if the abortion was necessary to preserve the pregnant woman's life.[107] The Supreme Court reasoned that the parental and spousal consent provisions of the Missouri statute were unconstitutional because a woman's right to an abortion during the first stage of pregnancy could not be made conditional on the consent of another.[108]

Similarly, a minor's right to lifesaving treatment has been recognized in the absence of parental consent by a Missouri appellate court.[109] In that case the court held that a parent could not on religious grounds prevent lifesaving blood transfusions to his child.[110]

These cases indicate that a parent's or guardian's authority to decide the medical treatment his child is to receive is unquestionably limited. In each case a potential or actual conflict of interests existed between parent and child, and in each case the court found

104. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (parental and spousal consent requirements of abortion statute held unconstitutional when applied during first stage of pregnancy); Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968) (blood transfusion order held proper over parent's religious objections); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952) (blood transfusion order to save infant's life held proper over parent's religious objections); John F. Kennedy Mem. Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (blood transfusion to child held proper over parent's religious objections); *In re* Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (1933) (court did not abuse its discretion in ordering removal of child's eye, despite parents' refusal to consent).

105. 428 U.S. 52 (1976).

106. *Id.* at 58.

107. *Id.*

108. *Id.* at 69.

109. Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952).

110. *Id.* at 103.

that parental consent was either inadequate or irrelevant. Sterilization of a mentally handicapped "child"[111] poses the same potential for a conflict of interests.[112]

The issue of a parent's authority to consent, absent court authorization, to the sterilization of a mentally handicapped child was recently considered in an Indiana case.[113] The case involved a mother who sought to have sterilized her fifteen-year-old son whose I.Q. was described as seven points below the normal range and in the dull or borderline area.[114] In its decision, the Indiana Court of Appeals held that "the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."[115]

Several other cases have been decided concerning a court's jurisdiction to authorize the sterilization of a mentally handicapped individual found incompetent to consent.[116] The overwhelming majority of cases dealing with this question have held that, without an explicit compulsory sterilization statute, courts do not have the

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111. Recall that the Vermont statutes make no distinction between minor and adult children. See note 98 *supra*.

112. This potential for conflict was expressly noted in an article coauthored by several commentators:

> The interests of the parent and child vis-a-vis sterilization may not be congruent. In fact, it is likely that their interests may be directly opposed. A parent may genuinely believe that the mentally retarded individual cannot bear the emotional and physical strain of raising children. There may be concern, rational or irrational, that uncontrolled promiscuity will lead to an unwanted pregnancy. However, more self-interested concerns might prompt parental consent, such as fear that any offspring born to a mentally retarded child will eventually become the responsibility of the retarded person's parents. In order to "simplify" everyone's life, especially their own, parents may consent to a sterilization for the mentally retarded child.

Capacity, Competence, Consent, note 67 *supra*, at 455.

113. *See* A.L. v. G.R.H., ___ Ind. App. ___, 325 N.E.2d 501 (1975).

114. *Id.* at ___, 325 N.E.2d at 501.

115. *Id.* at ___, 325 N.E.2d at 502. The court emphasized that there was no Indiana statute permitting involuntary sterilization, and that the situation was not one in which parental consent to medical services on behalf of the child was necessary.

116. *See, e.g.*, Wade v. Bethesda, 356 F. Supp. 380 (S.D. Ohio 1973); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1969); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); Fraizer v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

power to authorize the sterilization of mentally handicapped persons who have been judged incompetent to consent for themselves.[117]

Typical of such cases is *Guardianship of Kemp*[118] in which the California Court of Appeals held that a California superior court, sitting in probate, did not have the jurisdiction to order a guardian to consent to the sterilization of an adult incompetent ward. The case concerned a father who had himself appointed by the probate court as the guardian of his adult daughter on the ground that she was incompetent.[119] Thereafter, the father filed a petition requesting authorization of his consent to his daughter's sterilization.[120] Although the petition was granted,[121] the appellate court held that the probate court's action exceeded its jurisdiction.[122] As *Kemp* exemplifies, courts are generally unwilling to authorize, or to permit parents to authorize, the sterilization of mentally handicapped persons who are judged incompetent to consent themselves.

Although the sterilization cases concerned with the issue of substitute consent have been decided in the absence of a state voluntary sterilization statute, these decisions have significance for Vermont. Implicit in these cases is the idea that sterlization of a mentally handicapped individual found incompetent to consent for himself is tantamount to involuntary sterilization. In *Relf v.*

117. *See* cases cited note 116 *supra*. *Contra, In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962), where a probate court authorized the sterilization of an 18-year-old woman found to be feebleminded and having an I.Q. of 36. The court noted that the woman had already had an illegitimate child for whom she could not provide adequate care, and that she continued to be sexually promiscuous. The child was being cared for by Simpson's mother, who had filed the affidavit alleging her daughter's feeblemindedness. It is significant that this case, while endorsing a court's power to authorize the sterilization of a mentally handicapped individual, has never been followed. In fact, one court in a subsequent case denying its own power to authorize sterilization stated: "The *Simpson* case apparently was not appealed. That it is of dubious persuasive or precedential value, however, may be inferred from a subsequent federal case involving the same judge. (Wade v. Bethesda Hospital (S.D. Ohio 1971), 337 F. Supp. 671, motion for reconsideration denied, 356 F. Supp. 380)." Guardianship of Kemp, 43 Cal. App. 3d 758, 764, 118 Cal. Rptr. 64, 68 (1974). (The *Wade* case held that an Ohio probate court in ordering sterilization had acted wholly without jurisdiction).

118. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

119. 43 Cal. App. 3d at 760, 118 Cal. Rptr. at 64.

120. *Id.*

121. 43 Cal. App. 3d at 760, 118 Cal. Rptr. at 66.

122. 43 Cal. App. 3d at 765, 118 Cal. Rptr. at 69.

Weinberger[123] the court indicated that such sterilizations are necessarily compulsory, stating that "[n]o person who is mentally incompetent can meet these standards [of voluntariness], nor can the consent of a representative, *however sufficient under state law,* impute voluntariness to the individual actually undergoing irreversible sterilization."[124]

The Vermont sterilization statutes purportedly provide for voluntary sterilizations only. The problem is that the term "voluntary" loses all meaning when an individual who has been found incompetent to consent may nevertheless be sterilized. By authorizing parental or guardian consent where the mentally handicapped individual is found incompetent to consent, the statute, in effect, permits involuntary sterilization. Moreover, the statutes do not provide an incompetent, mentally handicapped individual with any protections against sterilization, over and above those afforded a mentally handicapped individual found competent to give, and therefore withhold, consent. By requiring consent from *someone* before a sterilization may be performed, the Vermont statutes maintain the thin guise of being voluntary. The parental consent provision, however, belies the statutes' voluntary nature.

VI. Conclusion

As this note has demonstrated, there are major problems with the Vermont voluntary sterilization statutes. These problems stem, in large part, from the Janus-faced quality of the statutes. The statutes cling to the past by requiring that sterilization of mentally handicapped persons be performed only when eugenic goals are served. In this respect, the statutes resemble compulsory eugenic sterilization statutes, which were expressly designed for the purpose of implementing the now substantially discredited eugenic theory. The statutes' eugenic requirement unjustifiably denies persons who are mentally handicapped but competent to consent to sterilization the rights accorded the mentally healthy.

The statutes are forward looking in their attempt to establish

123. 372 F. Supp. 1196 (D.D.C. 1974).
124. *Id.* at 1202 (emphasis added).

consent requirements as an essential requirement for the sterilization of mentally handicapped persons. At least in theory, the statutes reject involuntary sterilization.[125] The need for a competency determination is also recognized. In reality, however, the statutes sanction involuntary sterilization in two ways. They fail to establish procedural safeguards to insure that valid consent[126] is obtained from those mentally handicapped persons who have been found competent to provide such consent. They also recognize parental or guardian consent in the event an individual is held incompetent to consent himself.

Given these fundamental flaws, the statutes fail to accomplish what should be the primary objective of a voluntary sterilization statute: to serve as a mechanism which gives mentally handicapped persons the opportunity to voluntarily consent to sterilization, while protecting such persons against compulsory and unnecessary sterilization.

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125. See text accompanying notes 22-24 *supra*.
126. See text accompanying notes 67-71 *supra*.