ABORTION: INFORMED CONSENT FOR THE MENTALLY INCOMPETENT

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INTRODUCTION

A great deal of attention is focused on the question of abortion in today's society. Courts, legislatures and the media are constantly dealing with the issue of abortion rights. Most of the questions focus on whether a woman has the right to obtain an abortion in a given situation. Little attention is given to the right to **not** have an abortion; it is generally considered absolute. The question often arises, however, in the case of an incompetent woman. When it does, those dealing with it will discover that there is little existing law on which they can rely. Consider, for example, the following scenario:

> Ann Smith is a twenty-year-old, mildly mentally retarded woman. Ann has lived in Virginia her entire life. She has always been dependent on her parents. When she reached the age of eighteen, Ann's parents, Mr. and Mrs. Smith, petitioned the court and successfully had her adjudicated incompetent. The Smiths have been appointed Ann's legal guardians. Ann has recently become pregnant. Her obstetrician believes that she is approximately sixteen weeks pregnant. The Smiths feel that Ann should have an abortion, and they have consented to the procedure. They are convinced that Ann would not be able to care for a child by herself. Although they are willing to help raise this grandchild, they are concerned that, should they die before the child reaches adulthood, the state would take the chid from Ann, devastating her. Ann, however, does not want an abortion. She is very excited about the possibility of having a baby and believes that, with the help of her parents, she could raise the child. She also believes that, once she proves that she can be a good mother, no one will be able to take her child away. Ann's physician is unwilling to perform the abortion because, although the Smiths, as her legal guardians, have consented to it, Ann herself has repeatedly refused to consent.

What is the physician to do in this situation? Which is the proper party to consent to an abortion for Ann? Does the court have any power to order the procedure?

This paper examines the current law in Virginia and its applicability to the situation presented here. It proposes a scheme which might potentially be enacted by the Virginia legislature, and examines it in terms of Constitutional propriety.

HISTORICAL PERSPECTIVE

In an earlier time, when less was understood about mental retardation, a decision regarding Ann's right to reproduce might have been influenced by the popular notion of eugenics. In the early twentieth century, the belief that mental illness was genetic was widely held. As a result, laws were passed which attempted to prevent procreation by the mentally ill or incompetent.[1]

Virginia law authorized involuntary sterilization of persons committed to state institutions for the mentally ill.[2] The Virginia Supreme Court explained that the purpose of the statute was "to protect the class of socially inadequate citizens named therein from themselves and to promote the welfare of society by mitigating race degeneracy and raising the average standards for intelligence of the people of the State."[3] In *Buck v. Bell*,[4] the court indicated that the interest of society in being free from "mental defectives" outweighed the interest of Carrie Buck, an institutionalized

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[1] Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R. 3d 960 (1973).

[2] For a discussion of Virginia sterilization law in the 1920s, *see* Buck v. Bell, 143 Va. 310, 130 S.E. 516 (1925).

[3] Buck v. Bell, 143 Va. 310, 318, 130 S.E. 516, 519 (1925), *aff'd* 274 U.S. 200 (1927).

[4] 143 Va. 310, 130 S.E. 516 (1925).

woman, in not being sterilized. The court noted that Buck was the "probable potential parent of socially inadequate offspring, likewise affected as she is."[5]

The United States Supreme Court affirmed the Virginia decision in *Buck v. Bell.*[6] Justice Holmes, writing for the Court, explained the goal (and propriety) of eugenics:

> 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 the lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[7]

Holmes' opinion reflects the view, widely held at the time, that the mentally retarded have no interest in nor understanding of procreation. Thus, the Court gave its approval to state policy designed to promote the interest and good of society by subverting the rights of the mentally incompetent.

Had Ann's situation been presented at the time, she would probably have been compelled to submit to the abortion. Evaluated under such a system, her right to make the abortion decision would probably have been ignored. The interests of society in preventing the birth of yet another "socially inadequate" individual would have outweighed her interest in having a child.

The decision of the United States Supreme Court in *Buck v. Bell* has never been officially overturned. Its validity, however, is questionable in light of current understanding of mental illness and retardation and recognition of rights of individuals so impaired.[8]

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[5] *Id.* at 315, 130 S.E. at 517.

[6] 274 U.S. 200 (1927).

[7] *Id.* at 207.

[8] Modern case law has focused not only on involuntary sterilization, but also on the right of the incompetent to choose sterilization as a method of contraception. The states are varied in their approach to these problems. For an explanation of

Consent and Abortion Law

Virginia's current statutory scheme is ambiguous regarding the dilemma presented by Ann's situation. Analysis of the statutes regarding abortion, mental incompetence, and consent to medical treatment reveals significant gaps in coverage of the topic by the legislature.

Abortion is a crime in Virginia, unless performed in strict compliance with the demands of the statutes.[9] The requirement most significant to the analysis of Ann's right to decide whether to have an abortion is the requirement of informed consent. The statute provides that the physician must obtain the informed written consent of any woman seeking an abortion; if the woman is incompetent, the doctor may legally perform the abortion only after consent has been given in writing by the woman's guardian.[10] Thus, the law requires two things: (1) consent by the pregnant woman, and (2) consent by the guardian if the woman is incompetent. The statute is silent, however, as to whether the consent of the guardian is required in addition to or in lieu of consent by the pregnant woman.

Section 37.1-134.4 of the Virginia Code[11] provides two means for surrogate decision-making regarding medical treatment for incompetents. The first allows persons in designated classes to make decisions on behalf of incompetents.[12] This law specifically excludes abortion from its operation, although the statute states that it is

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various theories and approaches, *see* S.J. BRAKEL, J. PARRY, & B.A. WEINER, THE MENTALLY DISABLED AND THE LAW 521-30 (1985).

[9] VA. CODE ANN. § 18.2-71 (1988).

[10] *Id.*

[11] VA. CODE ANN. § 37.1-134.4 (Supp. 1990)

[12] *Id.*

simply an "alternative to other statutory and common law authority for making medical decisions on behalf of adult persons unable to make informed decisions."[13] The surrogate decisionmaking statute is simply procedural; it does not alter the requirements for informed consent.[14] Medical treatment of incompetents may also be authorized by judicial order.[15] Authorization of abortion is, however, specifically excluded from the operation of this statute as well.[16] Although the statutorily prescribed means for substitute decisionmaking cannot apply to abortion, they demonstrate policy consideration by the Virginia legislature of the wishes of the incompetent individual. Prior to authorizing medical treatment, the decisionmaker is required to consider the incompetent's views regarding the proposed procedure, to the extent to which they can be ascertained. The surrogate decisionmaking statute states that action relating to treatment to which the incompetent person objects shall not be taken by the provider of care, nor shall the surrogate authorize treatment to which he knows the incompetent objects.[17] Similarly, in cases of judicial authorization of treatment, the court may not authorize a course of treatment which is shown to be contrary to the basic values or religious beliefs of the incompetent.[18] Thus, it is apparent that while Virginia allows substituted decisionmaking for incompetents, its policy is to consider the feelings and views of the incompetent who is to be subjected to the treatment.

The consent and abortion laws, therefore, shed little light on a solution to the dilemma presented by Ann's situation. The statutes require that a guardian or similarly situated person consent to an abortion for an incompetent woman, yet they provide no

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[13] VA. CODE ANN. § 37.1-134.4(A) (Supp. 1990).

[14] *Id.*

[15] *Id.* at § 37.1-134.5.

[16] *Id.* at § 37.1-134.5(H)(1).

[17] *Id.* at § 37.1-134.4(D).

[18] *Id.* at § 37.1-134.5(G)(4).

means by which the required authorization may be given. They provide mechanisms for consent to medical treatment for Ann, yet they specifically exclude abortion from the operation of these mechanisms. They do, however, leave open the option of other, non-statutory, means by which a substituted decision regarding medical treatment might be made. Additionally, the statutes illuminate Virginia policy choices reflecting a concern for the views of the incompetent individual. The abortion statute specifically requires consent of a guardian to an abortion for an incompetent, but does not specify whether such consent is controlling in the absence of consent by the incompetent.

Under the existing statutory structure, perhaps the strongest argument that can be made is one denying the authority of Ann's parents or the court to authorize the abortion to which Ann will not consent. The statutes do not specifically allow for such substituted consent in the case of abortion, and in fact explicitly deny the applicability of consent statutes to the abortion laws. Furthermore, the policy reflected in the existing law is to respect the wishes of the incompetent individual. Ann has made her objection to the abortion very clear, so compulsion of the procedure would apparently violate this state policy.

Sterilization Law

In light of the ambiguity in the abortion and consent laws, an examination of Virginia's law regarding sterilization of incompetents may be helpful in analyzing the law's appropriateness as an analogy to the abortion situation. Virginia law provides a procedure by which performance of a sterilization operation upon an adult incapable of giving informed consent can be judicially authorized.[19] The sterilization law provides clear procedural guidelines to the court in making the decision regarding sterilization. In addition to filing and notification requirements,[20] the court must determine that the

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[19] VA. CODE ANN. § 54.1-2976 (1988).

[20] *Id.* at §§ 54.1-2976(1), (2).

individual has been adjudicated incompetent in accordance with Virginia law and is unlikely to be competent in the foreseeable future to make the sterilization decision.[21] The physician must have explained to the person to be sterilized, to the best extent possible, the operation and its risks, as well as available alternative means of contraception.[22] The court must elicit and consider the views of the person regarding the sterilization.[23] If the court issues an order for sterilization, a thirty-day waiting period applies before the operation may be performed.[24]

The law also enumerates the requisite evidentiary findings, to be made through medical, social and psychological evaluation of the person, which must precede any authorization of sterilization by the court. Specifically, in order to authorize sterilization, the court must find that:

> 1. There is a need for contraception. The court shall find that the person is engaging in sexual activity at the present time or is likely to engage in sexual activity in the near future and that pregnancy would not usually be intended by such person if such person were competent and engaging in sexual activity under similar circumstances;
> 2. There is no reasonable alternative method of contraception to sterilization;
> 3. The proposed method of sterilization conforms with standard medical practice, and the treatment can be carried out without unreasonable risk to the life and health of a person; and
> 4. The nature and extent of the person's mental disability renders the person permanently incapable of caring for and raising a child. The court shall base this finding on empirical evidence and not solely on standardized tests.[25]

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[21] *Id.* at § 54.1-2976(4).

[22] *Id.* at § 54.1-2976(3).

[23] *Id.* at § 54.1-2976(5).

[24] *Id.* at § 54.1-2976(7).

[25] *Id.* at § 54.1-2977.

These procedures and required findings reflect a concern for the rights of mentally incompetent citizens on the part of the Virginia legislature. It is apparent that Virginia currently seeks to ensure that the reproductive capabilities of its citizens are protected and not removed unnecessarily or without due process of law. Perhaps similar provisions allowing substitute decisionmaking in the abortion context could be implemented as well.

Applying the standards for sterilization to the abortion problem seems logical; sterilization is the most closely analogous situation to abortion, although the two clearly differ in significant ways (most notably in that sterilization renders the woman permanently incapable of having a child, whereas abortion affects only a single pregnancy). Virginia could probably serve its legislative goals of protection of the mentally incompetent by enacting an abortion consent statute similar to that for consent to sterilization.

PROPOSED ABORTION CONSENT STATUTE

Applying the policy of Virginia's sterilization laws to the abortion consent decision, a statutory scheme for judicial consent to abortion for an incompetent might be as follows:

1. The guardian must file a petition in circuit court requesting authorization for the abortion;
2. The incompetent must be served with notice of the proceeding and an attorney must be appointed to represent her interests;
3. The court must determine that: (a) the woman has been adjudicated incompetent under Virginia law, and (b) she is unlikely to become competent to make the abortion decision in the foreseeable future;
4. The physician must explain to the woman, to the extent possible, the purpose of the abortion and the risks

associated with the procedure, the process of childbirth and the risks associated with it, and the availability of adoption as an alternative to aborting or raising the child;

5. The court must attempt to elicit and consider the views of the woman regarding abortion;
6. A short waiting period may be imposed (of course, the thirty-day period required in cases of sterilization may be unworkable in the abortion context);
7. Prior to authorizing an abortion, the court must make the following findings:

   a) The woman is currently pregnant, the pregnancy was not intentional, and the woman would not choose to give birth were she competent;

   b) Giving birth and placing the child for adoption is not a reasonable alternative for the woman;

   c) The proposed method of abortion conforms with standard medical practice and can be carried out without unreasonable risk to the life; and

   d) The woman is permanently incapable of caring for and raising a child.

Analyzed under this potential statutory scheme, Ann's desire to carry her pregnancy to term would have to be respected by the court and her parents. Although the adjudication of Ann's incompetence would allow the court to make the decision for her, the considerations mandated by the statutes would compel the court to deny any petition by the Smiths to order an abortion. The court would be required to consider Ann's wish to keep her child, although it would not be controlling. Prior to issuing any order authorizing the abortion, the court would be required to find that Ann is permanently incapable of raising a child, and that adoption would not be a reasonable alternative. Evidence of Ann's level of functioning would make such a finding virtually impossible. Ann is only mildly retarded, and she is obviously capable of understanding the process of childbirth. Giving birth and placing the child for adoption would therefore be a reasonable alternative for her. It is also quite possible that Ann

could learn to be an adequate parent and raise the child herself.

Although a substituted consent statute for abortion modeled after the sterilization statute might be workable in a practical sense, it remains to be seen whether Virginia could legally enact such a statute. The proposal must be examined in terms of constitutional requirements.

CONSTITUTIONAL ANALYSIS

Reproductive rights is a very volatile area of constitutional law. The United States Supreme Court has repeatedly addressed the issue in differing contexts. Although the extent to which the rights may be exercised varies in different situations, the Court has generally recognized that the right to procreate and the right to choose not to procreate are fundamental.[26] In *Skinner v. Oklahoma*,[27] the Court characterized the right to procreate as "one of the basic civil rights of man."[28]

The choice not to procreate generally receives more attention in litigation. The cases addressing this right usually deal with either contraception or abortion. Contraception is a basic right available to all. In *Eisenstadt v. Baird*,[29] the Court stated that an individual has a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[30] The right of a woman to secure an abortion, subject to certain permissible

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[26] *See, e.g.* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception for married persons); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraception for unmarried persons); Roe v. Wade, 410 U.S. 113 (1973) (right to choose to terminate pregnancy).

[27] 316 U.S. 535 (1942).

[28] *Id.* at 541.

[29] 405 U.S. 438 (1972).

[30] *Id.* at 453.

restraints imposed by the state, is also fundamental.[31]

The availability of these rights to mentally retarded or incompetent individuals, however, is less often addressed than their availability to competent individuals, and has never been addressed in Virginia. There are few reported cases dealing with the performance of abortions upon incompetent women. The United States Supreme Court has not addressed the issue. The state courts that have heard such cases have generally held that substituted decisionmaking is appropriate to authorize an abortion on an incompetent woman, but have differed in the determination of who should make the surrogate decision and what standards should be used in deciding.

A lower court in New York held that consent by the father to the performance of an abortion on his institutionalized, mentally retarded twenty-five year old daughter was adequate and judicial approval of the decision was unnecessary.[32] In addition, the father was not required to use the best interests of his daughter as the standard for making the decision.[33] An Illinois appellate court, on the other hand, held that in making the abortion decision, the guardian must use the best interests of the ward as the standard, although it was not necessary to demonstrate medical necessity for the procedure.[34] The Supreme Court of Rhode Island, in denying a stay of a trial court's order that a guardian ad litem consent to an abortion, noted that if the woman were competent she would have an absolute right to terminate her pregnancy.[35] The only question for the court, it reasoned, was whether the woman would choose abortion if

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[31] Roe v. Wade, 410 U.S. 113 (1973). The current status of this right is the topic of intense controversy. The basic right, however, still exists, having withstood, largely intact, the latest attack upon it in Webster v. Reproductive Health Services, ___ U.S. ___, 109 S. Ct. 3040 (1989).

[32] *In re* Barbara C., 101 A.D.2d 137, 474 N.Y.S.2d 799 (1984).

[33] *Id.* at 139, 474 N.Y.S.2d at 801.

[34] *In re* Estate of D.W., 134 Ill. App. 3d 788, 481 N.E.2d 355 (1985).

[35] *In re* Doe, 533 A.2d 523 (R.I. 1987).

she were competent.[36] In addition, the Supreme Court of California has indicated in dicta that a conservator would have power to choose an abortion for a ward.[37] Thus, several states have assumed the power to allow substituted decisionmaking in the abortion context and have apparently been unchallenged.

State court cases dealing with sterilization have included more in-depth analysis of the reproductive rights of the mentally retarded. In *In re Moe*,[38] a Massachusetts appellate court was asked, in the absence of an authorizing statute, to allow a guardian to consent to the sterilization of an incompetent woman. The court noted that "[t]he right to reproduce and the decision whether or not to beget or bear a child is at the very heart of the constitutionally protected right to privacy."[39] The inability of the incompetent to exercise this right to choose, the court felt, did not mean that the right was inapplicable to the incompetent.[40] It was necessary, therefore, to exercise the woman's right to choose sterilization in an alternate way. The court held that, due to the intrusiveness and permanency of the sterilization operation, the guardian must obtain a court order authorizing consent.[41] The court determined that, in deciding whether to issue a sterilization order, a court "should attempt to ascertain the ward's actual preference for sterilization, parenthood, or other means of contraception."[42] This decision emphasizes the importance to an incompetent woman of the right to make procreational choices, and identifies a means by which this right might be exercised.

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[36] *Id.* at 526.

[37] Mildred G. v. Valerie N., 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

[38] 385 Mass. 555, 432 N.E.2d 712 (1982).

[39] *Id.* at ___, 432 N.E.2d at 719.

[40] *Id.* at ___, 432 N.E.2d at 720.

[41] *Id.* at ___, 432 N.E.2d at 716-17.

[42] *Id.* at ___, 432 N.E.2d at 722.

This concern with the right of reproductive choice, and a means to exercise it, are similarly reflected in the proposed Virginia statute.

In *Mildred G. v. Valerie N.*,[43] the legality of a California statute prohibiting the sterilization of incompetent individuals was challenged. The California Supreme Court held that the law unconstitutionally deprived incompetent individuals of their liberty and privacy interests in procreative choice.[44] Incompetent women, according to the court, must have available to them the same contraceptive choices available to competent women, including sterilization. Nonetheless, the court recognized that an incompetent woman would be unable to realistically exercise the choice available to her. It concluded, therefore, that "[t]rue protection of procreative choice can be accomplished only if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservator who is unable to personally exercise this right."[45] As with the Massachusetts decision, the proposed Virginia law addresses the concerns of the court regarding reproductive choice and offers a potential solution.

Chief Justice Bird entered a strong dissent to the decision in *Valerie N.*.[46] She found serious problems with the majority's characterization of the possibility of substituted consent, writing as follows:

> Today's holding will permit the state, through the legal fiction of substituted consent, to deprive many women permanently of the right to conceive and bear children. The majority run roughshod over this fundamental constitutional right in a misguided attempt to guarantee a right of procreative choice or one they assume has never been capable of choice and never will be. Yet precisely because choice and consent are meaningless concepts when applied to such a person, the majority's invocation of the theory of procreative choice and the fiction of substituted consent cannot withstand constitutional scrutiny.[47]

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[43] 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

[44] *Id.* at 160-61, 707 P.2d at 771-72, 219 Cal. Rptr. at 399.

[45] *Id.* at 168, 707 P.2d at 777, 219 Cal. Rptr. at 404.

[46] *Id.* at 174, 707 P.2d at 781, 219 Cal. Rptr. at 408 (Bird, C.J., dissenting).

[47] *Id.* at 174-75, 707 P.2d at 781-82, 219 Cal. Rptr. at 408-09.

Bird disagreed with the majority's unsupported conclusion that the conservator could authorize an abortion for the conservatee.[48] She argued that abortion only occurs as a result of choice, which is meaningless to one incapable of choosing. She characterized the right to procreate, on the other hand, not as a result of choice, but rather as a deeper, constitutional right.[49] According to Bird, the right of an incompetent woman to procreate is not diminished by her incompetence because it is not a function of a capacity to make informed decisions; her right to make reproductive choices, on the other hand, is a function of the capacity to make informed decisions and is therefore diminished by incompetence.[50] Under Bird's analysis, a law allowing substituted consent for abortion would not be upheld because the incompetent's right to procreate is to be respected above any fictional attempt to allow choice to a woman incapable of exercising it. Bird's view, however, is not that of the majority.

Some commentators argue that the right to procreate is a function of mental capacity because it involves the exercise of an informed choice. Scott believes that the right to procreate involves the right to produce children to rear, and thus requires the intention and ability to parent.[51] She suggests that the right to bear a child is not available to a woman who is incapable of caring for a child, while a woman with adequate mental capacity to parent has a legally protected interest in procreation.[52] She would employ the standard used to terminate parental rights in determining whether the woman is capable of becoming a parent.[53] Her concerns regarding parenting capacity

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[48] *Id.* at 183, 707 P.2d at 787-88, 219 Cal. Rptr. at 414-15.

[49] *Id.* at 181-82, 707 P.2d at 786, 219 Cal. Rptr. at 413.

[50] *Id.* at 182, 707 P.2d at 786-87, 219 Cal. Rptr. at 414.

[51] Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 829 (1986).

[52] *Id.* at 831, 850.

[53] *Id.* at 833.

are addressed by provision 3 in the proposed statute requiring that the court find that a woman is permanently incapable of raising a child prior to issuing an order for an abortion.

Robertson similarly suggests that the right to procreate depends upon mental capacity. He argues that true reproductive choice encompasses both the right not to procreate and the right to procreate.[54] He believes that the right to procreate depends not upon the ability to parent, but upon the ability to comprehend the significance of procreation.[55] Under his model, compelling abortion upon a mildly mentally retarded woman capable of understanding the significance of procreation, whether or not she is fit to parent, would infringe upon her right of procreation.[56] The proposed statute allows procreational rights to all who deserve them according to Robertson's scheme. In order to authorize an abortion, the court is required to find that the woman is unfit to parent and that adoption is not a reasonable option for her. If the court finds that adoption is an option for the woman because, although she is incapable of parenting, she can comprehend the process of childbirth and wishes to experience it, it must allow her to give birth.

The general conclusion of most courts that have considered the issue of reproductive rights of the incompetent is that the right to procreate or not to procreate is a personal right which cannot be denied simply because the individual is mentally disabled. As a result, the right can be exercised for the person by another. The proposed statutory scheme provides a means to assure the mentally incompetent in Virginia the same reproductive choices available to competent women, and therefore, properly complies with constitutional requirements.

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[54] Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 406, 463 (1983).

[55] *Id.* at 413.

[56] *Id.*

CONCLUSION

Although significant changes in the law regarding the reproductive rights of incompetents have occurred since the days of *Buck v. Bell*,[57] Virginia's current law contains significant ambiguities regarding performance of abortions upon incompetent women. The statute requires consent of a guardian to the procedure, but provides no means by which such consent can be given. In addition, it fails to specify whether the consent of the incompetent woman or the consent of the guardian is controlling in cases in which there is conflict. No statute authorizes courts to resolve such conflicts. Virginia law does, however, allow substituted consent to sterilization and other medical treatment, but specifically excludes abortion from the operation of the authorizing statutes. Therefore, under current Virginia law, it is not legal to perform an abortion upon an incompetent woman who has not consented to the procedure regardless of consent by her guardian.

The Virginia legislature could, however, enact a statute allowing for judicial authorization of performance of abortions upon incompetent women. Were the law to be modeled after the current statute for involuntary sterilization, it would serve the state's policy goals of protection of the rights of the mentally incompetent. Although courts have expressed concern regarding the wishes of the incompetent, a statute which mandated consideration of the expressed views of the incompetent would likely be legal.

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[57] 274 U.S. 200 (1927).