Institute of Comparative Law,
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McGill University

CERTAIN LEGAL ASPECTS OF MODERN MEDICINE
(SEX REASSIGNMENT AND STERILIZATION)

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of

DOCTOR OF CIVIL LAW

by Robert P. Kouri

CERTAIN LEGAL ASPECTS OF MODERN MEDICINE

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(Sex Reassignment and Sterilization).
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Thesis Abstract:

This thesis, which is divided into two parts, deals with the medico-legal aspects of the interruption of man's procreative capacity by surgical means, either as an unavoidable consequence of "sex reassignment" surgery practised upon a transsexual, or else through an operation performed for the express purpose of inducing sterility.

The first part describes transsexualism, its treatment through conversion surgery, and the distinctions between the notions of "sex" and "gender". It also examines the legality of the surgery from a criminal and civil point of view, the legal sex of the post-surgical transsexual, and the repercussions of conversive surgery on marriage.

The second part examines the legality, in light of both the criminal and civil law, of therapeutic, eugenic (voluntary and forced), and purely contraceptive sterilization. The effects of voluntary sterilization on marriage are also discussed.

Of a comparative nature, this dissertation examines English, Anglo-Canadian, American, French, and Quebec law.

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Résumé de la thèse:

Divisée en deux grandes parties, cette thèse porte sur les aspects médicaux-légaux de l'interruption de la faculté procréatrice de l'homme, soit en raison d'une opération dite de "changement de sexe", soit à la suite d'une intervention stérilisante.

La première partie décrit le transsexualisme, son traitement chirurgical, et la distinction entre les notions de "sexe" et de "genre" (gender). L'auteur examine également la légalité de ce type d'opération sur les plans pénal et civil. Enfin est analysé le sexe légal du transsexué et les conséquences du "changement de sexe" sur le mariage.

L'étude de la deuxième partie concerne la légalité de la stérilisation thérapeutique, eugénique (volontaire et forcée), et à but purement contraceptive, tant sur le plan pénal que sur le plan civil. Sont égalements abordés les effets de la stérilisation volontaire sur le mariage.

De nature comparative, cette thèse envisage les droits anglais, anglo-canadien, américain, français, et québecois.

PREFACE:

The basic goal of this dissertation is to examine in a comprehensive fashion the topics of sex-reassignment and sexual sterilization which, except for occasional publications and judicial decisions of mainly American origin, have not been explored in detail. It is our intention to suggest solutions in order to at least partially remedy a general lack of jurisprudential authority expressly dealing with the myriad problems which often crop up with regards to these aspects of modern medicine.

We also discuss the policy considerations which should prevail in matters of conversive surgery for transsexuals and in regard to sexual sterilization based on therapeutic and non-therapeutic indications, with a view to formulating specific recommendations on these subjects.

In presenting our thesis, we have adopted a somewhat original approach in that we compare these two topics and their ramifications from both a common law (England, the Anglo-Canadian provinces, and the United States) and a civil law (France, the Province of Quebec) point of view. (The originality resides of course, in the subjects examined comparatively and not in the comparative method itself). For the student of Quebec Law, a comparative study is almost de rigueur since Québec stands at the cross-roads of two major legal systems and two cultures.

Except where otherwise indicated, we seek to present the legal situation as of the 1st of January 1975. Needless to say, we will on occasion refer to publications and judicial pronouncements which have appeared subsequent to said date, in the hope of reflecting as far as is possible, the actual state of the law.

In the preparation of this dissertation, we have been struck by one fact above all others - that a doctoral thesis is not the product of one person working in isolation, and accordingly, we feel it proper to acknowledge the substantial contributions made by others: First and foremost, we wish to thank our thesis superviser, Professor Paul-André Crépeau of McGill University for his unfailing kindness and patience in leading us safely through the hazards of researching and writing this paper. His perspicacious comments and guidance were doubly enriching in that they not only reflected the wisdom of a jurist whose learned publications stand as authority before the courts, they also gave us some valuable insight into the preoccupations of the person responsible for overseeing the complete revision of Quebec's Civil Code.

We must also express our gratitude to Professor H.R. Hahlo, who, until June of this year, was Chairman of the Institute of Comparative Law of McGill University, for his judicious advice and encouragement during our attendance at the Institute.

Likewise, we are much indebted to Professor Ethel Groffier-Atala of McGill, for having provided documentation pertaining to transsexualism which we did not possess, and for allowing us the privilege of consulting the manuscript of a paper on transsexualism which she has prepared for presentation at a meeting of l'Association Henri-Capitant to be held in Brussels this September.

We extend our deepest appreciation to the librarians (Miss Marianne Scott and Me Guy Tanguay) and staffs of the law libraries of McGill University and the Université de Sherbrooke for their unstinting technical help during the researching of this thesis, and to the Université de Sherbrooke and the Canada

Council for their generosity in having financially underwritten our doctoral studies.

Finally, to Mme Louise Routhier (*) of the Faculté de droit de l'Université de Sherbrooke for her patience and devotion in converting an illegibly written manuscript into typewritten form, we must extend our heart-felt gratitude. The rapidity and accuracy of her work as well as her willingness to please have gone far in reducing much of the anxiety which generally attends the preparation of a thesis.

Robert P. Kouri
July 1975.

(*) We would be amiss if we did not acknowledge the excellent work accomplished by Mlle Sylvie Racine, a new-comer to the Université de Sherbrooke, who took over for Mme Routhier during the vital period just prior to deposition of this thesis.

ABBREVIATIONS

A.	Atlantic (National Reporter System, U.S.A.)
A.C.	Appeal Cases
All E.R.	All England Reports
Alta L.R.	Alberta Law Review
Am. Bar Ass. J.	American Bar Association Journal
Am. J. Nurs.	American Journal of Nursing
Am. J. Obst. & Gyn.	American Journal of Obstetrics and Gynecology
Ann. Stat.	Annual Statutes
Ark. L.R.	Arkansas Law Review
art.	article
B.M.J.	British Medical Journal
Bull. N.Y. Acad. Med.	Bulletin of the New York Academy of Medicine
c.	chapter
Cal. App.	California Appeals
Cal. L.R.	California Law Review
Cal. Rptr.	California Reporter
Cass. ch. réun.	Cassation (chambres réunies)
Cass. civ.	Cassation (chambre civile)
Cass. crim.	Cassation (chambre criminelle)
Cass. req.	Cassation (chambre des requêtes)
C.B.R.	Canadian Bar Review
C.C.	Civil Code (Quebec)
C.C.F.	Code civil français
C.C.P.	Code of Civil Procedure (Quebec)
C. de D.	Cahiers de Droit (Université Laval)
ch.	chapter
chron.	chronique
C.I.L.S.A.	Comparative and International Journal of South Africa
C.M.A.J.	Canadian Medical Association Journal
C.M.P.A.	Canadian Medical Protective Association

Cr. C.	Criminal Code
Crim. L.Q.	Criminal Law Quarterly
Crim. L.R.	Criminal Law Review
D.	Dalloz
DePaul L.R.	De Paul Law Review
Dist. Ct.	District Court
D.L.R.	Dominion Law Reports
D.P.	Dalloz Périodique
Duquesne L.R.	Duquesne University Law Review
Eng. Rep.	English Reports
Fam. L.Q.	Family Law Quarterly
F.	Federal (National Reporter System, U.S.A.)
G.P.	Gazette du Palais
Hastings L.J.	Hastings Law Journal
Int. Surgery	International Surgery
J.A.M.A.	Journal of the American Medical Association
J.C.P.	Juris-Classeur Périodique (La Semaine Juridique)
J. Nerv. Ment. Dis.	Journal of Nervous and Mental Disease
J. of Fam. L.	Journal of Family Law
J. of Urology	Journal of Urology
K.B.	King's Bench
Ky. St. Bar J.	Kentucky State Bar Journal
Law and Soc. Rev.	Law and Society Review
L.C.J.	Lower Canada Jurist

Man. B. News	Manitoba Bar News
McG. L.J.	McGill Law Journal
Md. L.R.	Maryland Law Review
Med. Leg. et Dommage corp.	Revue de médecine légale et de dommages corporels
Med. Leg. J.	Medico-Legal Journal
Mel. U. L.R.	Melbourne University Law Review
Mod. L.R.	Modern Law Review
N.B.R.	New Brunswick Reports
N.E.	North East (National Reporter System, U.S.A.)
no.	number
N.W.	North West (National Reporter System, U.S.A.)
N.Y.S.	New York Supplement
Ohio St. L.J.	Ohio State Law Journal
O.R.	Ontario Reports
P.	Pacific (National Reporter System, U.S.A.)
P.	Probate Division
par.	paragraph
p., pp.	page (s)
P.R.	Practice Reports (Quebec)
P.U.M.	Presses de l'Université de Montréal
Q.B.	Queen's Bench
R. de J.	Revue de Jurisprudence (Quebec)
R. du B.	Revue du Barreau
R.L.n.s.	Revue légale, nouvelle série
Rob. Ecc.	Robertson's Ecclesiastical Cases
R.S.A.	Revised Statutes of Alberta
R.S.B.C.	Revised Statutes of British Columbia
R.S.C.	Revised Statutes of Canada
R.S.M.	Revised Statutes of Manitoba

R.S.N.B.	Revised Statutes of New Brunswick
R.S. Nfd.	Revised Statutes of Newfoundland
R.S.N.S.	Revised Statutes of Nova Scotia
R.S.O.	Revised Statutes of Ontario
R.P.	Rapports de Pratique
R.S.P.E.I.	Revised Statutes of Prince Edward Island
R.S.Q.	Revised Statutes of Quebec
R.S.S.	Revised Statutes of Saskatchewan
Rev. Stat. Ann.	Revised Statutes Annual
Rev. Trim. Dr. Civ.	Revue Trimestrielle de Droit civil
S.	Sirey
S.A.	Statutes of Alberta
S.A.L.J.	South African Law Journal
S.B.C.	Statutes of British Columbia
S.C.	Superior Court (Quebec)
S.C.R.	Supreme Court Reports (Canada)
S. Ct.	Supreme Court
S.E.	South East (National Reporter System, U.S.A.)
Sec.	Section
So.	South (National Reporter System, U.S.A.)
Sol. J.	Solicitor's Journal
som.	sommaire
S.Q.	Statutes of Quebec
Sup. Ct.	Supreme Court
S.W.	South West (National Reporter System, U.S.A.)
t.	tôme
T.L.R.	Times Law Reports
Trib. civ.	Tribunal civil
Trib. gr. inst.	Tribunal de grande instance
U. of Cin. L.R.	University of Cincinnati Law Review
U. of Colo. L.R.	University of Colorado Law Review
U. of Fla. L.R.	University of Florida Law Review

U. of Missouri K. C. L.R.	University of Missouri at Kansas City Law Review
U. of Pa. L.R.	University of Pennsylvania Law Review
U. of San F. L.R.	University of San Francisco Law Review
U. of T. L.J.	University of Toronto Law Journal
U.S.	United States Supreme Court Reports
vol.	volume
W.L.R.	Weekly Law Reports
W.W.R.	Western Weekly Reports

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PART 2 - STERILIZATION

"What a piece of work is a man! How noble in reason! How infinite in faculty! in form, in moving, how express and admirable! in action, how like an angel! in apprehension how like a god! the beauty of the world! the paragon of animals!"

Wm. Shakespeare; Hamlet, Act II, scene 2

INTRODUCTION

Until about the Nineteenth Century, man's destiny was subject for the most part to the inscrutable workings of Divine Providence. Indeed, it was not mere coincidence that throughout most of civilized man's existence on earth, the art of healing formed part of the priestly function, since it was firmly believed that diseases were of divine origin (1). In light of present day medical knowledge, it may be surmised that the bulk of ancient medical treatment was unknowingly or at least unconsciously devoted to fostering in the patient, mental attitudes propitious to healing so that nature could accomplish its task. As a result, the highly questionable therapeutic value of treatments such as blood-letting or the application of leeches probably aided healing by improving the patient's morale, just as the elaborate dances, chants and potions of the tribal witch-doctor could literally scare the victim of a curse to death. In the majority of situations, the patient could count himself lucky that the "physician" did not actually aggravate the disease or injury, so that the innate healing powers of the body could be allowed to act without hindrance. As for the more serious disorders, the ministrations of a well-intentioned but ignorant practitioner probably had little adverse effect on the patient's status, since the prognosis was inevitably fatal in any case. Consoled by his religious faith and the promise of a better life in the Hereafter, man generally resigned himself to the fact that his fate was in the hands of a sometimes merciful but mainly tyrannical Supreme Deity.

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(1) Joseph FLETCHER, Morals and Medicine, Boston, Beacon Press, 1954, p. 3.

Happily, man's insatiable curiosity provided the catalyst for his increasing liberation from sickness and premature death. With the teachings of Darwin on evolution, Mendel on genetics, and the discoveries of Simpson, Lister, Pasteur, Koch, Fleming, Banting, Salk and the many others who have made substantial contributions to the medical and biological sciences (2), physicians gradually were able to better understand and thus better combat the diseases which once peremptorily took life. Man eventually gained an increasing amount of control over his future even though this acquisition of knowledge often occurred in the face of religious hostility or obstructionism (3).

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(2) Naturally we do not wish to minimize the earlier equally significant contributions of celebrated men as Hippocrates, Celsus, Soranus, Galen, Vesalius, Paracelsus, Paré, Harvey, Boerhaave, Morgagni, Mesmer and Jenner, to name a few.

(3) Several examples of the conflict between religious conservatism and medicine come to mind: For instance, the Edict of Tours (1163 A.D.) which forbade the shedding of blood greatly hindered the progress of surgery, and the doctrine of the bodily resurrection of Christ discouraged the use of dissection as a method of teaching anatomy (cf. FLETCHER, op. cit., pp. 21-22). A more recent instance was the controversy concerning the use of anaesthesia during childbirth inspired by Genesis 3:16 which states that because of original sin, women must give birth "in sorrow". Only when Queen Victoria had delivered her eighth child, Prince Leopold in 1853, under the effects of what she termed "that blessed chloroform" administered by Dr. John Snow, was the issue laid to rest (cf. Cecil WOODHAM-SMITH, Queen Victoria, London, Hamish Hamilton, 1972, vol. 1, p. 328).

Although many diseases remain the scourge of humanity, man, through his ingenuity has developed several actual and potentially applicable scientific procedures which pose basic threats to what is commonly called the "natural order of things": For instance, "life", if we may use this term, can now be maintained for substantial lengths of time through mechanical means even though the brain may have ceased to work (4), persons without functional kidneys may survive through periodic contacts with a renal dialysis unit, and foetuses may be destroyed by means of simple aspiration, without any ill-effects to the patient. The very essence of the family structure will become increasing subject to serious incursion through techniques of artificial insemination, by which a woman may bear a child not of her husband's creation (5), or where exact physical copies of a person may be made through cloning, a procedure which does not require the intervention of male sperm (6). Even the miracle of virginal birth could one day become commonplace through a process of parthenogenesis, which has already been successfully applied to turkeys, sea urchins and rabbits (7). Likewise, just as

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(4) Of course, we are treading in the area of the "brain death" controversy. However, the pumping of the heart and the breathing of the lungs may be continued with artificial aid.

(5) Wilfred J. FINEGOLD, Artificial Insemination, Springfield Ill., Charles C. Thomas, 1964.

(6) J.G. CASTEL, Legal Implications of Biomedical Science and Technology in the Twenty-First Century, (1973) 51 C.B.R. 119 at p. 127.

(7) Albert ROSENFELD, The Second Genesis, Englewood Cliffs N.J., Prentice-Hall Inc., 1969, pp. 110-113. In cloning, the genetic material of the egg nucleus is removed and replaced by the genetic material of one cell of the person we wish to copy. In the case of parthenogenesis, the egg chromosomes double and the child which results possesses only the genetic traits of the mother (homozygosity).

man possesses the capability of blasting every living creature into oblivion by means of a nuclear arsenal which is no longer merely quantified as to killing capacity, but is now measured in terms of "over-kill", he also is beginning to gain control over the potential of altering his very nature through genetic engineering (8) and mind-bending techniques such as prefrontal lobotomy (9) and the use of psychochemicals (10). These are all very exciting ideas and one must confess, the way in which they provoke the imagination surely renders scientific restraint quite difficult. It is not hard to visualize the impatience with which researchers anticipate for example, the production of the first human clone.

Nevertheless, the basic question which impresses itself upon all persons the least bit preoccupied by the future of mankind is to what extent we should allow ourselves to interfere with the natural order of things. The administration of antibiotics, the wearing of false teeth, the transplantation of organs from cadavers, or the implantation of pace-makers for instance, are all artificial interferences with the human body and its ordinary destiny, but they provoke no great controversy as to their moral, ethical or legal acceptability. Yet, could we be as categorical if it came down

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(8) Ibid., at p. 53 ROSENFELD gives an example of the modification of violent sexual behavior through surgery on the amygdala.

(9) Hudson HOAGLAND, Potentialities in the Control of Behavior, in Man and His Future, edited by Gordon Wolstenholme, Boston, Little, Brown and Co., 1963, pp. 309-310.

(10) Ibid., pp. 306-309.

to applying to humans, the same artificial insemination programs which farmers have used for decades to improve the quality of their herds? At least one Nobel laureate has recommended this (11). In the same vein, since animal producers geld inferior bulls or stallions to allow only the best to transmit their strain to future generations, would not these and similar eugenic measures be equally efficacious for humans? Hitler thought so. Obviously, on questions of this nature, a clear consensus is much more difficult if not impossible to attain. As for the more exotic developments such as genetic manipulation and personality modification, attitudes other than of vague apprehension have not yet begun to crystallize.

In the past any moral questions raised were often authoritatively settled by the church, and these religious fiats were usually accepted by the faithful without much resistance. With a general diminution of theological belief (12), and an even more accelerated growth of the biomedical sciences, the void created by the rejection of many religious articles of faith by iconoclasts (13) has created a spiritual malaise, because man has always sensed a need for higher guiding principles by which he could give some direction to his life.

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(11) Herman J. MULLER, Genetic Progress by Voluntary Conducted Geminal Choice, in Man and His Future, op. cit., 247, at pp. 256-261.

(12) Edward SHILS, The Sanctity of Life in Life or Death, Ethics and Options, edited by Daniel Labby, Seattle, U. of Washington Press, 1968, p. 7.

(13) Ibid., p. 4.

Even the law, like religion, has failed to keep abreast of these new medical developments.

Yet in spite of an almost complete absence of formal legal or religious guidance as to proper standards of behavior in the scientific context under discussion, the human animal still seems to possess a vague, almost instinctual sense of what is normal or natural and what is abnormal or contrary to nature (14). According to one writer: "Much of this conception of the 'normal' or the 'natural' centers on heterosexuality, lineage ties, and the integrity of the human organism and its memory" (15). Unfortunately, many would contest this statement. If we take the issue of heterosexuality, for example, not only are we faced with the historical fact that in many societies (including that of ancient Greece), love between men was viewed as a sign of refinement, we are presently confronted with the so-called "gay liberation" movement which, with insistent and sometimes articulate arguments, seeks to obtain societal acceptance of homosexuality. As regards lineage, the disjunction of blood-ties from caste or social standing and the decline of the hereditary aristocracy in Europe have removed much of the stigma attached to donor inseminations and other deviations from true consanguinity. An upsurge in the practice of homotransplantation between living persons and a similar increase in the number of purely cosmetic operations point to a less rigid view of the inviolable nature of the human body. Finally, even the human mind and personality are no longer immune to manipulation since mind-altering drugs and surgery are now important weapons in the fight against mental illness and neurological abnormality.

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(14) Ibid., p. 9.

(15) Ibid., p. 10.

Perhaps we must retreat even further, back to the notion of the sanctity of human life in order to find a common ground for agreement. Indeed, except for the periodic, but all too frequent aberrations of history such as war, policies of genocide and religious persecutions in which human lives were snuffed out literally by the millions in pursuance of "nobler" or patriotic goals, man has always prized and sanctified his own vitality. In protecting this vital spark we call "life", profound adjustments have, and are still being made to accept as morally valid, those unnatural acts or measures which serve to perpetuate and enhance our existences. Thus, we do not often witness any ethical debates as to the legitimacy of truly therapeutic measures. When we move into the more esoteric branches of medicine which are not actually therapeutic, but which could have a tremendous impact on what man has always perceived as his"essential" form or nature, a general agreement is much more difficult to reach. It has been predicted that:

> "The situation will surely not be made easier by the ambiguity and the inherent tensions and contradictions of the idea of the sanctity of life. By its very structure, this fundamental moral principle cannot provide an absolutely unambiguous guide which will indicate infallibly what is not permissible in any particular case. Nonetheless, it provides the only ultimate foundation for the protection by public and professional opinion and by legislatures and courts against sadism in its more crude and brutal forms, or in the more refined form of allegedly 'scientific' curiosity" (16).

(16) Ibid., p. 37.

As we have once mentioned, it is quite rare that jurists dealing with the legal aspects of modern medicine, can determine the moral consensus on any given topic due to an absence of pertinent legislation or jurisprudence. Consequently much effort has to be expended in speculation as to the public policy or public order considerations which come into play (17). The major difficulty involved is that the law and the moral consensus are not always congruent with the result that either the law is not respected or is observed only in the breach, or else that the law does not truly represent a moral standard. We need only cite the great American experiment with Prohibition, as an example of a law not in step with the public outlook. Closer to home, various considerations including difficulty in enforcement and the equally imposing idea that homosexuality constitutes a victimless crime, have caused our own Parliament to de-criminalize homosexual behavior between consenting adults. Yet, no one would seriously attempt to argue that homosexuality now enjoys society's blessing. Another element of no little importance is the fact that as attitudes evolve, the moral consensus also undergoes a transition, often outdistancing the law, which, in many controversial situations, tends to lack dynamism. The abortion debates raging in many countries are probably the most obvious instances one can cite in this connection. At best:

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(17) Prof. R.Dierkens expressed the opinion that:

> "... les normes de la civilisation constituent en fait et en droit la véritable pierre de touche de l'étendue et des limites du droit de l'homme sur son corps". Cf. Les droits sur le corps et le cadavre de l'homme, Paris, Masson et Cie, 1966, p. 44, no 52.

> "The law is nothing less nor more than the collective conscience of the community on those issues which it is felt cannot be left to individual choice. It cannot provide infallible rules of moral guidance" (18).

Our brief but temerarious foray into the field of ethics in order to determine the extent to which man may interfere with his own integrity, leads us unmistakably to the conclusion that all too often, the nebulous notion of conventional morality or moral consensus determines all in the medico-legal context. Unfortunately, the solution seems to lie in the problem and the problem in the solution since, as one writer, Abraham Kaplan points out:

> "Conventional morality ... is a tyranny tempered by hypocrisy. We pretend that our moral standards embody eternal truths, and that our values remain always unchanged. In fact, we accomodate continually to the changing circumstances, individual and societal, of moral action.
>
> The fact is that moral problems ... are essentially and inescapably contextual in character. If only there were a definite set of rules in accord with which we could apply to these vexed questions the moral consensus of society!" (19).

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(18). Norman ST. JOHN-STEVAS, Law and the Moral Consensus in Life or Death, Ethics and Options, op. cit., 40, at p. 44.

(19) Social Ethics and the Sanctity of Life, in Life or Death, Ethics and Options, ibid., 152 at p. 163.

In addition, it must be anticipated that as advances are made in the field of medical science and technology, so will our moral responsability increase, since a growing capability of controlling our physical destiny necessarily implies a diminishing need for us to be blindly fatalistic (20).

Indeed, the two main topics to which we will be devoting our efforts in this text are precisely cases in which man has attained the capability of circumventing what were believed to be, until fairly recently at least, inexorable rules of nature. As we will discover, these topics have one major element in common - they both involve elimination of the human procreative function although the indications for induced sterility may vary greatly depending upon the hypothesis under scrutiny.

In a first part, we will examine the controversies sparked by the surfacing of a condition known as "transsexualism", and the attempts to rectify or at least attenuate the anguish of its victims through so-called "sex-reassignment" surgery. Naturally, the greatest difficulty surrounds the legal repercussions which devolve from the substantial modification of a person's external sexual morphology. The basic and heretofore unquestioned distinctions between males and females are no longer as self-evident as once presumed and the whole institution of marriage as a truly heterosexual relationship certainly warrants re-examination (although not necessarily rejection).

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(20) FLETCHER, Morals and Medicine, op. cit., p. 11.

The second part of our paper is devoted to the subject of sexual sterilization, a procedure through which medicine has been able to free mankind from the sometimes harsh effects of the copulation - procreation causal relationship. Unlike sex-reassignment surgery however, (which we may qualify as essentially therapeutic in nature), sterilizations may be practised either for therapeutic, eugenic or purely contraceptive purposes, with the result that the public policy or ethical considerations are far from identical in each case. Likewise, since the production of children traditionally has been given an important role in matrimony, the capability of inducing permanent sterility in one of the consorts obviously could have serious repercussions on the marital union.

From these studies of the artificial alteration of man's fundamental status in the biological order of things, (either as a member of a determined sex or as a natural progenitor of his own species), we hope to be able to trace and perhaps define the ethico-legal considerations which have been and which should be followed as acceptable standards of conduct.

For several reasons, we believe that the best approach in our analysis of these problems must be comparative in nature, taking into account not only the English, the Anglo-Canadian and the American legal systems, which find their source in the Common Law, but also France and of course, Quebec, which both enjoy a common civilian background. Professor Paul-André Crépeau best describes our primary motivation in taking this approach when he writes:

> "L'étude comparée du droit civil français et du Common Law comporte ... pour le juriste québécois, un très grand intérêt, du fait que le droit civil de la Province de Québec constitue un point de rencontre de ces deux mondes juridiques" (21).

Furthermore, the fact that Quebec forms part of a confederation and shares a substantial amount of legislation (22) and a common Supreme Court with the other nine provinces, constitutes an almost ideal situation for a comparative study (23). Finally, our close physical proximity to the United States coupled with our almost complete adoption of the American way of life, not only in our consumer habits but also in our outlook and mores renders an examination of American law imperative. In addition, it is of no small import that most of the more recent medical innovations have been introduced and practised more widely in the United States than in the other jurisdictions, with the result that the American courts have already had opportunities to build up bodies of jurisprudence on these matters (24).

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(21) La responsabilité civile du médecin et de l'établissement hospitalier, Montreal, Wilson et Lafleur, 1956, p. 40.

(22) As regards this paper, the most important include the Criminal Code and the Divorce Act.

(23) The efforts of the Conference of Commissioners on Uniformity of Legislation in Canada, of which Quebec forms part, is another reason why a comparative approach is indicated.

(24) As we shall see, this is certainly the case with regards to sexual sterilizations.

In a recent article published in the Canadian Bar Review, Professor J.-G. Castel clearly defined the challenges for jurists arising out of the "new biology":

> "The law must be sensitive to the need for medical progress, it cannot expect to steer biomedical science and research but it must try to hold them in bound. As biomedicine presents a wide range of legal problems for which there is no general consensus as to solutions, it is for the law to structure the compromises which man will make in adapting to the new science and the new technology" (25).

In exploring the fields of sex-reassignment surgery and sexual sterilization, it will be our goal to contribute in some small measure to this quest for a workeable relationship between the law and modern medicine.

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(25) (1973) 51 C.B.R., loc. cit., p. 119.

SEX REASSIGNMENT

I- The transsexual syndrome

A- Introduction

Ever since Adam and Eve had partaken of the forbidden fruit and discovered the interesting differences between their respective anatomies, sex has been a preoccupation of the human species. Man appeared generally satisfied with what God had created (if one makes allowance for the occasional small bust or crooked nose), and taking for granted Freud's assertion that anatomy is destiny, concentrated on sex as an activity rather than questioning it as an identity. However, unrestrained sexuality led to certain abuses and the process of constraint which began with the seventh commandment prohibiting adultery, eventually reached its nadir in St. Paul's First Epistle to the Corinthians in which he wrote: "It is good for a man not to touch a woman" (1). (One may presume that he also meant the converse to be equally true). Societies adhering to the Judaeo-Christian ethic readily embraced the prinoiple that sex was tolerable only within the confines of marriage and solely for purposes of procreation. This smug facade of self-righteousness was maintained for almost two thousand years until Henry Ford provided us with mobile boudoirs and Dr. Kinsey made us admit the fact that "nice" girls sometimes did it before marriage, and that certain "unnatural" practices were more common than we thought. Sex for its own sake

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(1) I Corinthians 7:1.

has become so important that in many young households today, the marriage manual is considered as indispensable as the cookbook. Women's magazines enlighten their readers on the physiology of intercourse and assure the ladies that multiple orgasms are theirs for the asking if certain simple steps are followed. In short, society (as opposed to the law) is prepared to countenance almost all sexual behavior including "sequential polygamy", otherwise known as divorce and remarriage, provided always that such behavior takes place in a normal heterosexual context.

Oddly enough, changes in attitude regarding sexual deviations have not been nearly as rapid. One can well anticipate the reply if one asked the father of a teenage girl which of the following statements made by his daughter he could accept more readily: (a) "my boy-friend got me pregnant", or (b) "I am a lesbian". Likewise a mother would be somewhat less shocked when catching her college-aged son in bed with his sweetheart than she would if she came upon him mincing in front of a full-length mirror wearing his sister's underwear and high heels. In each case the parents' choice is relatively straight-forward – they have to choose between the somewhat unrestrained fulfillment of a "normal" impulse and the manifestation of deviancy. The prejudices of society would also play a not-so-subtle influence in their choice since the average person fears censure by his peers, almost as much as nature abhors a vacuum.

Although the homosexual and the transvestite are received with the same enthusiasm by the community as are lepers, the burden of the transsexual is even greater for three reasons: Firstly, the transsexual is, in the eyes of

the layman, both homosexual and transvestitic, thus falling under society's taboo surrounding sexual deviance (2). Secondly, the transsexual violates custom by wishing to switch gender roles. As Money and Schwartz explain:

> "In our society, the stage, carnival, or masquerade are the only places where a male is by custom tolerated to play the female role, or a female the male role" (3).

And finally, the transsexual constitutes an embarrassment to the commonalty since he questions the age-old dichotomous distinction between male and female (4), and puts in doubt something which humans have accepted without question from the time we were still living in caves.

Nevertheless, efforts are being made by several prestigious medical centres such as Johns Hopkins, U.C.L.A., Charing Cross, not to mention in Canada, the Toronto General Hospital and the Centre Hospitalier Universitaire of the Université de Sherbrooke, in order to bring about some alleviation to the misery of a category of persons who are often driven to suicide or self-mutilation. The method commonly employed is the so-called "change of sex" operation which adapts the transsexual's external morphology to his gender identity, thus permitting the patient to be seen by others as he perceives himself.

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(2) N. KNORR, S. WOLF, E. MEYER, Psychiatric Evaluation of Male Transsexuals for Surgery, 271 at p. 272 in R. GREEN, J. MONEY editors, Transsexualism and Sex Reassignment, Baltimore, The Johns Hopkins Press, 1969.

(3) J. MONEY, F. SCHWARTZ, Public Opinion and Social Issues in Transsexualism: A Case Study in Medical Sociology, p. 253 in R. GREEN, J. MONEY, Transsexualism and Sex Re-Assignment, ibid.

(4) Ibid.

Unfortunately, upon entering the hospital, the transsexual's problems are far from resolved since he must overcome three major legal obstacles before emerging as an integrated member of the opposite sex: To begin with, the legality of the operation is questioned in many jurisdictions due to its experimental nature (5) as well as due to the fact that the law frowns upon the mutilation of an otherwise healthy body (6). Next, the post-operative transsexual must convince the courts that his sex has in fact been transformed. This,in itself,is no mean task since medical opinion is divided on the question (7). Finally, the third step consists of goading an often reluctant bureaucracy into amending drivers' permits, educational diplomas, passports and all the other paraphernalia one spends a life-time accumulating.

Our goal during the next few pages will be to cast some light on the legal problems alluded to above which plague the transsexual. Before concentrating on legalities however, it would be useful to describe transsexualism and its treatment.

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(5) J.B. PAULY, The Current Status of the Change of Sex Operation, (1968) 147 Journal of Nervous and Mental Disease 460; H. BENJAMIN, Should Surgery Be Performed on Transsexuals?, (1971) 25 American Journal of Psychotherapy 74,at p. 82.

(6) E.g. "Mayhem" statutes in the Common Law jurisdictions; see also R. DIERKENS, Les droits sur le corps et le cadavre de l'homme, Paris, Masson & Cie, 1966, p. 32, no 37. "La mutilation volontaire est, en soi, un acte de disposition partielle du corps. Si elle ne poursuit pas une plus-value du corps et, par là même, de la personnalité tout entière, elle est immorale au même titre que le suicide".

(7) The medical reports and the testimony given in Corbett v. Corbett (otherwise Ashley), (1970) 2 W.L.R. 1306 (Ormrod, J.) are examples of this conflict.

(a) Transsexualism defined and described

The word "transsexualism" appears to have been coined by Dr. Harry Benjamin, a noted American endocrinologist known primarily for his vast experience with persons experiencing problems of gender identity and transvestism. Employed for the first time in 1953 in an article published in the August issue of the International Journal of Sexology (8), his expression soon received universal approval. As for the condition itself:

> "The term 'trans-sexual' refers to a person who is said to believe firmly, in spite of all physical or genetic evidence to the contrary, that he (or she) is inherently of the opposite sex. The trans-sexual has a fixed and apparently unalterable belief that he is of one sex 'trapped' in the body of the other" (9).

Money develops this generally accepted definition by stating that:

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(8) H. BENJAMIN, The Transsexual Phenomenon, New York, The Julian Press Inc., 1966, p. 16. Benjamin frankly admits that he may have unconsciously retained the expression from a 1949 article published in Sexology Magazine by Dr. David O. Cauldwell who employed the term "psychopathia transsexualis" in order to describe a woman who wished to become a man, cf. Benjamin in the introduction to Transsexualism and Sex Reassignment, GREEN, MONEY eds., 1, at p. 4.

(9) D.H. RUSSELL, The Sex-Conversion Controversy, (1968) 279 New England Journal of Medicine 535. See also R.J. STOLLER, Sex and Gender, New York, Science House, 1968, at p. 132: "In an oversimplified way, I consider a transsexual to be a person who feels himself (consciously and unconsciously) to belong to the opposite sex while not denying his sexual anatomy". Likewise see I.B. PAULY's comments in his article Adult Manifestations of Male Transsexualism in GREEN, MONEY Transsexualism and Sex Reassignment, op. cit., at p. 37.

> "In eonistic transsexualism, there is no known discrepancy between the sex assigned at birth, and the appearance of the external genitals. Typically, also, there is no discrepancy between assigned sex and the other measurable somatic criteria of sex. This is not to say that transsexuals are physiologically and morphologically all identical, but simply that the vast majority fall within the limits of normal variation" (10).

On more human terms, the victims of this syndrome, which affects both men and women, may be found in every socio-economic or cultural level of society. They share in common such a deep feeling of despair provoked by the dissonance between psyche and physical appearance that:

> "... the patient insists that God cheated him, and there is a tremendous undercurrent of resentment toward the Deity and authority. In scaling the patient's behavior, one finds an intense spitefulness in almost all the persons studied..." (11).

Many transsexuals are known to marry normal heterosexuals in order to solve their problems of gender identity, but, as in the case of homosexuals, these unions usually fall apart (12). It is not a rare occurrence for children to result from the match even though marital intercourse is often

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(10) J. MONEY, Sex Reassignment as Related to Hermaphroditism and Transsexualism 91, at p. 111 in GREEN, MONEY, Transsexualism and Sex Reassignment, ibid.

(11) H. GUZE, Psychosocial Adjustments of Transsexuals and Theoretical Formulation: An Evaluation, 171, at p. 174 in GREEN, MONEY, Transsexualism and Sex Reassignment, ibid.

(12) W. POMEROY, Transsexualism and Sexuality: Sexual Behavior of Pre- and Post-operative Male Transsexuals, 183, at p. 186 in GREEN, MONEY, Transsexualism and Sex Reassignment, ibid.

nearly non-existent. Some transsexuals attempt suicide or self-mutilation in sheer frustration, while others become alcoholics, drug addicts or indulge in criminal behavior (13). However, since Christine Jorgensen's greatly publicized change of sex operation performed in Denmark in 1952 (14), the typical transsexual lives only for the day when he or she may undergo this type of surgery, without regards to any of the legal, social, economic and emotional problems occasioned thereby (15). Prostitution and theft are not unknown as methods of raising the money necessary to finance trips to certain foreign countries where, for a fee, unscrupulous surgeons perform the operations without careful screening or psychological evaluation.

A certain amount of difficulty may exist in differentiating the transsexual from the homosexual and the transvestite since the boundaries separating these conditions are somewhat vague and tend to overlap (16). The homosexual

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(13) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 47.

(14) Described by C. HAMBURGER, G. STÜRUP, E. DAHL-IVERSON, in Transvestism, (1953) 152 J.A.M.A. 391.

(15) D. HASTINGS, Inauguration of a Research Project on Transsexualism in a University Medical Centre, 234, at p. 247, in GREEN, MONEY, Transsexualism and Sex Reassignment, op. cit.

(16) R. GREEN, Psychiatric Management of Special Problems in Transsexualism, 281, at p. 282 in GREEN, MONEY, Transsexualism and Sex Reassignment, ibid.; R. GREEN in the Conclusion to Transsexualism and Sex Reassignment, 467, at p. 469. See also BENJAMIN, The Transsexual Phenomenon, op. cit., at p. 21.

is a person sexually attracted to members of his own sex (17), whereas transvestism indicates the desire of some individuals to dress in clothes of the opposite sex (18). Oddly enough, according to Stoller, this latter condition affects only males (19). On a psychiatric basis, transvestism apparently includes certain features of homosexuality, fetishism and exhibitionism (20).

Objectively speaking, transsexuals are both homosexual and transvestitic since their sexual desires are directed towards members of their own sex and cross-dressing

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(17) J. ACCARD, J. BRETON, J. CHARBAUT, P. HIVERT, M. PHILBERT, S. SCHAUB, S. TROISIER, Problèmes médico-légaux et déontologiques de l'hermaphrodisme et du transsexualisme, (1969) 2 Med. Lég. et Dom. Corp. 342.

(18) T. JAMES, Legal Issues of Transsexualism in England, 441 in GREEN, MONEY, Transsexualism and Sex Reassignment, op. cit. BENJAMIN, in The Transsexual Phenomenon, op. cit., at pages 11-12 gives the following information about transvestism: "Transvestism as a medical diagnosis was probably used for the first time by the German sexologist, Dr. Magnus Hirschfeld, about forty years ago when he published his book Die Transvestiten ... Havelock Ellis proposed the term 'eonism' for the same condition, named after the Chevalier d'Eon de Beaumont, a well-known transvestite at the Court of Louis XV. In this way, Ellis wanted to bring the term into accord with sadism and masochism, also named after the most famous exponents of the respective deviations, the French Marquis (later Count) Donatien de Sade, and the Austrian writer, Leopold von Sacher-Masoch".

(19) Sex and Gender, op. cit., p. 205.

(20) JAMES, loc. cit., p. 441.

is prevalent as a means of having an appearance congruent with their gender identity (21). Unlike the homosexual however, transsexuals do not derive pleasure from their sexual organs; viewing them rather as objects of disgust since they conflict with their self-identity. Transsexuals also feel that their attraction towards persons of the same sex is heterosexual in nature due to their being psychologically members of the opposite sex (22). As regards the distinction between transsexuals and transvestites, Pauly writes:

> "Whereas transsexuals cross-dress, they differ from transvestites who have a compelling desire to wear female clothes because it is sexually exciting and not because they look upon themselves as belonging to the female gender. The true transsexual does not become sexually aroused when dressed as a woman, but does so in order to feel more comfortable and natural" (23).

In addition to this factor, one could add that transsexuals unlike transvestites, yearn for surgical modification of their genitals (24).

A more accurate picture of the manner in which the peculiarities of each sexual deviation often blend or overlap may be seen in the table hereunder (see overleaf) dealing with

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(21) PAULY, The Current Status of the Change of Sex Operation, loc. cit., p. 463; BENJAMIN, The Transsexual Phenomenon, op. cit., pages 13 and 27.

(22) PAULY, ibid.; GREEN, Psychiatric Management of Special Problems in Transsexualism, loc. cit., p. 282.

(23) Ibid.; BENJAMIN, Should Surgery Be Performed on Transsexuals?, loc. cit., p. 77.

(24) L. KUBIE, J. MACKIE, Critical Issues Raised by Operations for Gender Transmutation, (1968) 47 Journal of Nervous and Mental Disease 431, at p. 436.

a biologic male and the various sexual orientations to which he may be subject. As one may note upon examination of the table, the subtle distinctions between the transvestitic homosexual and the fetishistic transvestite (or even ordinary transvestite for that matter) may facilitate misdiagnosis unless a very cautious psychological evaluation is made. Even more serious in its implications however, is the superficial similarity between the pseudo-transsexual and the transsexual proper. In these cases, if the pseudo-transsexual obtains the "sex change" operation he often seeks, such a move is almost always subsequently regretted, and followed by requests by the patient that he be enabled to revert to his former status (25). As regards transsexualism itself, it is almost superfluous to add that this condition exists in varying degrees of intensity (26).

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(25) R. STOLLER, A Biased View of "Sex Transformation" Operations, (1969) J. Nerv. Ment. Dis. 312, at p. 314.

(26) BENJAMIN, Introduction, loc. cit., p. 9 in Transsexualism and Sex Reassignment, op. cit.

SEXUAL ORIENTATIONS OF THE MALE *

ORIENTATION	GENDER IDENTITY	DRESS	SEX OBJECT CHOICE	SATISFACTION WITH GENDER IDENTITY
Normal heterosexual	male	masculine	female	satisfied
Latent homosexual	male	masculine	female with inclinations towards males	satisfied
Homosexual	male	masculine	male	satisfied
Transvestitic homosexual	male	employs feminine dress as means of attracting homosexuals	male	satisfied
Latent or pseudo-transvestite	male	masculine (cross-dresses very rarely)	female	satisfied
Fetishistic (or intermittent or narcissist) transvestite	male	masculine except periodically employs articles of women's clothing as object for sexual arousal	female	satisfied
Transvestite	Effeminate male (even when cross-dressed, still maintains core gender identity of a male)	feminine	female (except when dressed as woman in certain cases)	satisfied
Pseudo transsexual	ambivalent male/female	usually feminine	asexual	occasionally desires sex change
Transsexual	female	feminine	male	constantly desires sex change

* This table was inspired in some measure by BENJAMIN's Sex Orientation Scale (The Transsexual Phenomenon, op. cit., p. 22). He in turn was influenced by the "Kinsey Scale". Note that with appropriate modification, this table could apply to females except as regards transvestism, which seems to be a purely male preserve.

Before continuing our examination of transsexualism, it would be useful to clarify the distinctions between transsexualism and hermaphroditism which tend to be confounded by sections of the lay public. The hermaphrodite (or intersexed) is a person who possesses both male and female biological characteristics and whose sexual status is consequently ambiguous. Hermaphrodites are divided into two basic categories, true hermaphrodites and pseudo-hermaphrodites. The true hermaphrodite has both testicular and ovarian tissue in the gonads, whereas the male pseudo-hermaphrodite possesses testes but is more or less feminized, and the female pseudo-hermaphrodite has ovaries but is virilized (27). The basic difference between the transsexual and the hermaphrodite reposes upon the fact that the former is physically normal and before conversion surgery at least, enjoys a harmonious grouping of the somatic variables of sex. The hermaphrodite, on the other hand, exhibits contradictory elements as regards his biological sex. On a psychological level, hermaphrodites, unlike transsexuals, do not have any special tendency to request sex change. They seem to be usually satisfied with their sex of assignment (28). As we shall see shortly, the importance (legally speaking) of the distinction between these two conditions, is the apparent ease with which the courts will justify an operation reassigning sex in cases of hermaphroditic transsexualism, as opposed to the conversion

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(27) P. BISHOP, Intersexual States and Allied Conditions, (1966) 1 British Medical Journal 1255. In addition to this article, one wishing to obtain a detailed description of hermaphroditism may also consult ACCARD, BRETON, CHARBAUT ET AL, Problèmes médico-légaux et déontologiques de l'hermaphrodisme et du transsexualisme, (1970) 3 Méd. Lég. et Dom. Corp. 123; MONEY, Sex Reassignment as Related to Hermaphroditism and Transsexualism, loc. cit., pp. 91 et seq., in GREEN, MONEY, Transsexualism and Sex Reassignment, op. cit.

(28) MONEY, ibid., at p. 99.

of eonistic transsexuals (29).

Until now we have avoided a question which is of vital significance to the jurist before he can express any opinion concerning the legality of the "change of sex" operation - to wit - is the transsexual psychotic and can he consequently give an informed consent? At first glance, one would be inclined to place in doubt the sanity of persons seeking removal of their sexual organs and the artificial creation of new genitalia (30). The conclusion is unavoidable that amongst the candidates for sex reassignment, there must certainly be some who are schizophrenic or who manifest transsexual symptoms forming part of a fully developed psychosis otherwise unrelated to transsexualism (31). Nevertheless, as regards the sanity of transsexuals, there appears to be two opposing points of view. The first places in doubt the mental capacity of persons suffering problems of gender identity since, by definition, they must necessarily be somewhat unstable and maladjusted (32). Likewise:

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(29) Ibid., at p. 111.

(30) PAULY, Adult Manifestations of Male Transsexualism, loc. cit., p. 43.

(31) KNORR, WOLF, MEYER, loc. cit., p. 277; BENJAMIN, Should Surgery Be Performed on Transsexuals?, loc. cit., p. 75.

(32) J. RANDELL, Preoperative and Postoperative Status of Male and Female Transsexuals, 355 at p. 380 in GREEN, MONEY, Transsexualism and Sex Reassignment, op. cit.

> "For those who are affronted by the notion that an individual wishes to change sides sexually, it is easy to jump to the conclusion that anyone who desires this must be sick: to wit, neurotic or psychotic. This may be true but the conclusion should not be reached without evidence. Nor can we assume that this particular desire or compulsion is free of psychopathological determinants, merely because in other aspects of the subject's life he seems to be operating within the range of what we ordinarily speak of as normal behavior. To make this assumption would be to deny elementary facts of psychiatry, such as the fact that a full-blown, classical paranoia may so completely circumscribe pathology within a tightly systematized series of delusions that the patient may function well in every other aspect of his life..." (33).

Partisans of the opposing point of view energetically reject the notion that transsexuals are psychotic, pointing out the fact that according to standard diagnostic criteria, these patients are not victims of a psychosis (34). They also observe that aside from the question of gender identity, the transsexual functions normally (35).

Even if the latter view-point is accepted, the criticism can always be levelled that "conversion" surgery is "collaboration with a psychosis", a delusion, a mania or any other term one chooses to describe transsexualism. To the uninformed, the excision of genitals makes as much sense as

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(33) KUBIE, MACKIE, loc. cit., at p. 434.

(34) GREEN, Conclusion, loc. cit., p. 471 in GREEN, MONEY, Transsexualism and Sex Reassignment.

(35) KNORR, WOLF, MEYER, loc. cit., pp. 277-278.

blinding a person suffering from hallucinations or amputating a compulsive masturbator's hands (36). And yet, the facts are unavoidable; when the candidates for sex reassignment are chosen with care after exhaustive evaluation and preparation, they often adapt to their new roles without serious difficulty and become absorbed in the mainstream of society (37).

(b) Historical highlights of transsexualism (38)

Dr. Benjamin properly points out that a chronology of transsexualism hardly merits the title "history", not only because of a lack of information on this topic but also due to a general tendency on the part of the less recent commentators to group all activity involving confused gender identities under the general rubric "homosexuality" (39). Nevertheless, the deportment of certain historical personages would likely qualify them as transsexuals in the eyes of a modern clinician.

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(36) GREEN, Conclusion, loc. cit., p. 470.

(37) STOLLER, Sex and Gender, op. cit., p. 248; BENJAMIN, The Transsexual Phenomenon, op. cit., pp. 135 and 157.

(38) For a mythological discussion of transsexualism, see R. GREEN, Mythological, Historical and Cross-Cultural Aspects of Transsexualism, in GREEN, MONEY, op. cit., pp. 13-14 and ACCARD, BRETON et al, loc. cit., pp. 343-344. An anthropological description of certain cultural groupings in which transsexualism is socially accepted, is given by GREEN, ibid., pp. 17-22; GUZE, loc. cit., pp. 171-173 and ACCARD, BRETON et al, ibid., pp. 344-346.

(39) Introduction in GREEN, MONEY, loc. cit., p. 1.

Lucian, in his work De Dea Syria described the ancient Syrian custom for novice priests worshipping Astarte to perform autocastration while in a state of religious ecstasy. According to his account, each priest then ran through the streets until he chose a doorway into which he would throw his severed privates. As a result of this gesture, an obligation then devolved upon the occupants of the premises to furnish their "benefactor" with female clothing which he would then wear in his new sex role (40).

Although he is better known for his more notorious actions, Emperor Nero (37-68 A.D.) also deserves mention in any account discussing the history of transsexualism, since he was the instigator of one of the earliest "sex change" operations recorded. According to one version, Nero sought to replace his pregnant wife whom he had beaten to death, but unfortunately, the only person having any resemblance to her was a young man named Sporus. Suffice it to say that after surgery had been completed, Nero formally took Sporus as his wife (41).

Origines Adamantius, otherwise known as Origen (185-254 A.D.), was a priest deprived of his order because he had practised and advocated self-castration (42). It would appear likely that his actions were meant more as a religious gesture in order to avoid the temptations of the flesh rather than as a true desire to effect conversion of sex. In spite of this possibility, Origen still serves as an example of a person who voluntarily sought eunuchism.

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(40) RANDELL, loc. cit., p. 355.

(41) GREEN, Mythological, Historical and Cross-Cultural Aspects of Transsexualism, loc. cit., p. 15; ACCARD, BRETON et al, loc. cit., p. 344.

(42) GUZE, loc. cit., p. 172.

Roman Emperor Elagabalus Heliogabalus (circa 205-222 A.D.) who was ultimately killed during an Army revolt was a transsexual in the true sense of the word. He was known to walk in the streets of Rome dressed as a woman and ordered everyone to address him as "imperatrix" (43). Heliogabalus eventually married a male slave and assumed the role of wife. Green cites certain writers who quoted the Emperor as having offered half of the Roman Empire to any surgeon who could provide him with female sexual organs (44).

Other lesser known luminaries who were victims of cross-gender inversions include Pope John VIII who died in childbirth in 855, King Henry III of France who, in 1577 appeared before parliament dressed as a woman, and François Timoléon Abbé de Choisy (1644-1724) who was Louis XIV's ambassador to Siam. De Choisy was noted for his Mémoires which described in some detail, his amorous encounters (in a female role) with members of the King's entourage (45). We could also add to this list Lord Cornbury, the first Governor of New York who was just as likely as not to be seen dressed as a woman, Mlle Jenny Savallette de Lange, an intimate of the King of France who was permitted to reside at Versailles (where "she" died in 1858), as a sign of affection and who was in fact a man; and Mary Walker, a physician who served during the American Civil War and who was authorized by Congress to dress as a man (46).

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(43) ACCARD, BRETON et al, loc. cit., p. 344.

(44) Mythological, Historical and Cross-Cultural Aspects of Transsexualism, loc. cit., p. 15.

(45) Ibid., pp. 15-16.

(46) Ibid., p. 17.

Dr. Georg Stürup of Denmark relates the rather extraordinary story of a girl called Karen, whose transsexualism eventually brought her before the courts in one of the oldest recorded cases of this nature. In a nutshell, Karen gave birth to an illegitimate child whom she gave up for adoption. She then got married in 1722 to another girl, Maren, who was employed as a servant in the royal household. After some marital dispute, Karen joined the navy and upon discharge, worked as a farmhand. However, the couple never reconciled and by invoking the desertion of her "husband" Maren managed to obtain a decree of divorce. While in the navy, Karen had loaned some money to a fellow crewman whose wife was friendly with Maren and who eventually learned the truth of the marriage. When Karen threatened legal action to recover the money owed, her debtor denounced her to the legal authorities. Karen was arrested and sentenced to prison for life for her unnatural actions (47).

A happier tale perhaps, is that of Charles, Geneviève, Louis, Auguste, André, Timothé, Comte D'Eon de Beaumont (1728-1810) who, dressed as a woman, was able to rival Madame de Pompadour for the affections of Louis XV. The ease with which the Comte D'Eon could switch from one gender role to another was put to good use when the king sent him in disguise to Russia in order to perform certain sensitive tasks. After the death of the King, he spent the remainder of his life in England as a woman (48).

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(47) Legal Problems Related to Transsexualism and Sex Reassignment in Denmark, in GREEN, MONEY, op. cit., pp. 453-454.

(48) GREEN, Mythological, Historical and Cross-Cultural Aspects of Transsexualism, loc. cit., p. 16.

Generally speaking, the scientific treatment of transsexualism began in the twentieth century. Already in 1901, there was created in France the Association pour l'aide aux malades hormonaux in order to protect men who took estrogen and who dressed as women (49). Article 2 of its charter states the goals of the Association as follows:

> "Cette association aura pour objet de grouper et de venir en aide aux malades hormonaux, d'assurer leur défense, de promouvoir l'étude de ces maladies et de leur traitement, de favoriser les soins médicaux donnés à ses adhérents, de leur permettre d'obtenir les papiers nécessaires leur permettant de travailler d'une façon honnête et correcte et de conserver le vêtement correspondant à leur personnalité, de faire toutes démarches en vue d'assurer aux victimes de ces maladies le respect de leur personne ou la défense de leurs libertés, enfin de leur fournir l'aide morale, médicale et juridique leur permettant d'assurer leur avenir dans la société" (50).

The first publicly acknowledged attempt to change the sex of a male took place in Denmark during the 1920's. It involved the castration and penectomy of a Danish painter, Ernar Wegener, subsequently known as "Lile Elbe" and was described in a book by Niels Hoyer entitled Man Into Woman: An Authentic Record of a Change of Sex (51). A few

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(49) ACCARD, BRETON et al, loc. cit., p. 130.

(50) Ibid., p. 151.

(51) New York, E.P. Dutton and Co., 1933, mentioned by BENJAMIN, in The Transsexual Phenomenon, op. cit., p. 14. Pauly claims that the first operation took place in Germany in 1931, Current Status of the Change of Sex Operation, loc. cit., p. 460.

isolated operations were made during the ensuing years but with generally indifferent results and without publicity. This continued until 1952 when Christine (né George) Jorgensen underwent surgery in Denmark. When her team of doctors headed by Christian Hamburger reported the case in the Journal of the American Medical Association (52), the reaction of the medical profession was very negative and two adverse editorials were subsequently published in the same volume of the Journal (53). As regards laymen, a magazine account of the operation by Jorgensen gave rise to two surprising results: Her operation unleashed a flood of bigotry and irrationalism of such magnitude that Benjamin even reports an occasion on which Christine was barred from a New York supper club (54). The other, perhaps more positive result was to bring out into the open literally hundreds of people who had suffered psychosexual inversion in silence and to place before them an admittedly imperfect yet concrete solution to their problem . Once aware that conversion surgery could be performed with some measure of success, transsexuals around the world began to clamor for similar treatment.

Efforts to change both lay and professional attitudes towards problems of cross-gender identification received

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(52) Transvestism; Hormonal, Psychiatric and Surgical Treatment, (1953) 152 J.A.M.A. 391-396.

(53) M. OSTOW, Transvestism, (1953) 152 J.A.M.A. 1553; G. WIEDEMAN, Transvestism, (1953) 152 J.A.M.A. 1167.

(54) The Transsexual Phenomenon, op. cit., p. 15.

substantial impetus when Johns Hopkins Hospital issued a press release on the 21st of November 1966 announcing the establishment of a gender identity clinic (55). This did much to mollify public opinion which reasoned that if a prestigious institution such as Johns Hopkins was involved in conversion surgery, there was small chance it would lend itself to accommodating the wild urges of sex perverts and freaks. The courage of the authorities of this institution in willing to undertake the treatment of transsexualism was very instrumental in substituting rationalism for emotionalism in face of this deviation.

In Canada, the first "change of sex" operation took place the 20th of April 1970 at the Toronto General Hospital (56). The story of this male transsexual called "Dianna" was subsequently described in a book entitled Behold, I am a Woman (57). In the Province of Quebec, a similar operation, also involving a male to female transformation was performed at the Centre Hospitalier Universitaire of the Université de Sherbrooke during the month of March 1971 (58). This would seem to be the first such operation performed in the Province.

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(55) The text of the press release is reproduced in GREEN, MONEY, Transsexualism and Sex Reassignment, op. cit., pp. 267-269.

(56) Felicity COCHRANE, The Canadian Man Who Became a Woman, Chatelaine November 1971, vol. 44, no 11.

(57) As told to Felicity Cochrane, New York, Pyramid Books, 1972. A more sensitive treatment of the subject of transsexualism is contained in Jan MORRIS' book, Conundrum, New York, Harcourt Brace Jovanovitch Inc., 1974.

(58) Liaison, April 1st, 1971, vol. 5, no 28, p. 9.

Today, there appear to be centers involved with the study and treatment of transsexuals at the following institutions: University of Michigan, Maimonides Hospital (Brooklyn, New York), Johns Hopkins, University of Minnesota, University of California at Los Angeles, Stanford University, Charing Cross Hospital (London, England), University of Toronto, Laval University, University of Sherbrooke (58a), University of Oregon, University of Washington at Seattle, and the University of Virginia. Operations have, and are being performed in England, Canada, Mexico, United States, Morocco, Japan, Denmark, Holland, Germany, Ethiopia, South Africa, Italy, Norway, Argentina and Sweden.

B- Etiology and treatment of transsexualism

(a) Prevalence and etiology

Statistically speaking, an accurate picture of the prevalence of transsexualism is impossible due to factors which include a general reluctance on the part of a fairly substantial number of transsexuals to reveal their problem, especially women (59). The other factor results from the

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(58a) According to a paper presented by J. BUREAU, J.P. TREMPE, L. JODOIN to a colloquy on Transexualité: implications médicales, psychologiques et juridiques organised by the Département de Sexologie de l'U.Q.A.M. held the 18th of April 1975 in Montreal, the following hospital centers in Quebec have facilities for handling transsexuals, cf. Ste-Justine, C.H.U. Laval, C.H.U. Sherbrooke, Notre-Dame, St-Luc, Ste-Marie de Trois-Rivières.

(59) PAULY, The Current Status of the Change of Sex Operation, loc. cit., p. 462.

relatively small number of patients suffering from this disorder. Unless these patients present themselves to centers specializing in gender identity problems, they usually remain statistically anonymous since the rarity of this syndrome precludes an individual practitioner from making a statistical study of his own dossiers.

Nevertheless, certain figures made available in medical literature can permit us to derive some idea of the overall situation. Benjamin expresses the opinion that there are ten thousand cases of transsexualism in the United States (60). He adds that his estimate includes borderline transvestites. Pauly is more conservative with a figure of two thousand five hundred, and he states that as a minimum, there is one transsexual for every one hundred thousand of the population (61).

All available opinions are unanimous in affirming that male transsexualism is significantly more common than female transsexualism although estimated ratios vary between 2:1 to 8:1 (62). Pauly originally set the figure at 4:1 or one male per one hundred thousand and one female for every four hundred thousand (63). He recently revised his figures and now estimates that there is one male transsexual per sixty-five thousand population, and one female transsexual for every one hundred and thirty thousand population (63a).

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(60) Introduction, loc. cit., p. 9 in GREEN, MONEY.

(61) Adult Manifestations of Male Transsexualism, loc. cit., p. 58 in GREEN, MONEY.

(62) J. PAULY, Adult Manifestations of Female Transsexualism, in GREEN, MONEY, Transsexualism and Sex Reassignment, 59,at p. 61.

(63) The Current Status of the Change of Sex Operation, loc. cit., p. 462.

(63a) These figures are cited by BUREAU, TREMPE, JODOIN, in their report to the colloquy on Transexualité held the 18th April 1975, loc. cit., mimeographed text, p. 3.

Wälinder of Sweden advances the ratio 2.8:1 and estimates the presence of one male transsexual in thirty-seven thousand persons and one female transsexual in every one hundred and three thousand of the population. These figures are perhaps inflated since Wälinder used as denominator only males over the age of fifteen rather then the total population (64).

If one accepts the median male-female ratio of 4:1 and the prevalence rate of one for every one hundred thousand population, then it would be reasonable to estimate about two hundred and twenty male and fifty-five female transsexuals in Canada, and approximately sixty-five male and sixteen female transsexuals in the Province of Quebec (64a). Obviously, the number of persons suffering gender inversion is small indeed.

As regards the etiology of transsexualism, there is even greater uncertainty. Except for very rare cases in which an organic cause can be positively identified (e.g. tumour on the adrenal gland, pathology in the brain corrected by temporal lobectomy) (65), medical researchers are only able to make educated guesses. Pauly mentions the high percentage of electroencephalographic abnormalities (28%)

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(64) PAULY, ibid.

(64a) If we take the more recent ratio advanced by PAULY supra, i.e. 1.92:1 (male-female) then the statistics advanced would have to be revised upwards as follows: For Canada, the prevalence rate would be approximately 339 male and 169 female transsexuals, and for Quebec 100 male and 50 female transsexuals.

(65) PAULY, Adult Manifestations of Male Transsexualism, loc. cit., p. 51 in GREEN, MONEY.

found in diagnosed transsexuals and feels that a physical determinant is quite probable in many cases (66).

Benjamin suggests two other biological sources of transsexualism; genetic and endocrine (67). The genetic determinant would explain his experience with two sets of identical twins, all of whom suffered cross-gender inversion (68). Green disputes this by giving the example of two similarly hermaphroditic children who adopted different gender identities according to their sex of rearing (69). Yet Green admits that the use of hermaphrodites as the basis of this hypothesis may be incorrect because intersexuals are not morphologically normal and as such, may be more receptive to outside influences as regards their gender identity (70). Money likewise doubts genetic causality since studies usually fail to reveal chromosomal abnormality (71). However, he qualifies his affirmation by saying that it is made in light of the present state of the art and could eventually be proved wrong by more refined testing methods (72).

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(66) Ibid., p. 52.

(67) The Transsexual Phenomenon, op. cit., p. 72.

(68) BENJAMIN, Should Surgery Be Performed on Transsexuals?, loc. cit., p. 75.

(69) Childhood Cross-Gender Identification, in GREEN, MONEY 23, at p. 34.

(70) Ibid.

(71) Sex Reassignment As Related to Hermaphrodism and Transsexualism, loc. cit., p. 111.

(72) MONEY, SCHWARTZ, Public Opinion and Social Issues in Transsexualism: A Case Study in Medical Sociology, loc. cit., p. 264.

In discussing endocrinological causative factors, Benjamin points out that forty percent of his male transsexual patients showed signs of hypogonadism. He also gives other examples gleaned from medical literature where abnormal hormonal output or deficiencies were noted. Yet in spite of this, a report prepared by Accard, Breton et al and presented to the XXXII^{e} Congrès International de Médecine Légale et de Médecine Sociale de Langue Française (Gênes 1969), was categorical in concluding that there is no hormonal anomaly which may provide an organic basis for psycho-sexual perturbation (73).

Research into the backgrounds of transsexuals has induced a sizeable segment of medical opinion to attribute to transsexualism, a psychological etiology (74). The patients usually come from unhappy homes in which one of the parents is absent or has abandoned his or her role in the marriage thus leaving the child in the hands of a domineering mother or father. Consequently, said child is deprived of the countervailing presence of the other parent of the same sex upon whom he may pattern his own gender identity. Thus, the typical male transsexual comes from a home controlled by a strong-willed or overwhelming mother to whom all responsibility is relinquished by a submissive, a busy or an alcoholic husband. In many cases, the mother is somewhat masculine and may be slightly ambivalent with regards to her own gender identity. She tends to be overprotective of her child and attempts, psychologically at least, to keep her boy in her womb by perceiving him as an extension of her body. Naturally, all babies need coddling and affection but

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(73) Loc. cit., p. 144.

(74) GREEN, Childhood Cross-Gender Identification, loc. cit., p. 23; HAMPSON, G., Trahsexualism (sic), (1970) 12 Canadian Journal of Corrections 549 at p. 550; PAULY, Current Status of the Change of Sex Operation, loc. cit., p. 460; STOLLER, Sex and Gender, op. cit., p. 140.

as the child develops, he must be permitted to assert his own independence. It is during this formative period that the child should be made aware of his gender and encouraged to assume the role normally attributed. Thus, boys play with toy trucks, etc..., and girls with dolls; boys wear trousers and girls (usually) have frilly dresses. Gender identity, as with most other types of learning, can only be obtained through emulation of an ideal which is embodied (in most cases) in the parents. The importance of this fact is apparent when we are told that gender identity is usually fixed by the age of four, and unless the child demonstrating ambivalence is treated before this age, then psychotherapy thereafter is generally to no avail (75).

Analogies have been made between this learned behavior and the "imprinting" phenomenon described by the recent Nobel laureate K.Z. Lorenz of Austria. In his studies of animal behavior, Lorenz discovered that animals raised with other species learn to relate only to the "species of adoption" rather than to its own species. As an example, a peacock raised with Galapagos turtles was sexually drawn only to the turtles. More recently (1968) when a Panda bear from the Soviet Union was loaned to the London Zoo in order to breed with its female counterpart, nothing occurred. Being raised separately due to the rarity of these animals, they could not relate to each other. According to reports however, the bears would make sexual overtures to their human keepers in relation to whom they were imprinted (76).

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(75) GREEN, Childhood Cross-Gender Identification, loc. cit., pp. 23-24.

(76) HAMPSON, loc. cit., p. 551.

With regards to transsexualism, even this hypothesis is not beyong reproach. Benjamin quite accurately points out that if imprinting, rearing, environment or whatever, was the sole cause of gender inversion, then by all accounts the world would be filled with transsexuals, transvestites or homosexuals raised from infancy by their widowed or divorced parents (77). Consequently, learning or conditioning in itself is not the only answer. Unless there is a constitutional weakness rendering the person receptive to this type of influence, then it will be successfully resisted (78).

Perhaps the final word should be given to Money who outlines the situation in the following terms:

> "In the present state of knowledge, the only sensible way to conceptualize the etiology of transsexualism is as the end product of the process of psychosexual differentiation which may begin to go awry at different times in the course of its developmental history, not at some fixed point alone. The process begins when the chromosomes of the egg and sperm unite. It continues, incipiently, during the fetal events of sexual differentiation. Its period of maximum development is after birth, especially in the early years. During this time, psychosexual differentiation is particularly responsive to and depends upon social stimulation and interaction. The special events, if any, upon which a transsexual gender identity is contingent cannot at the present time be specified" (79).

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(77) The Transsexual Phenomenon, op. cit., p. 82.

(78) Ibid.

(79) Sex Reassignment As Related to Hermaphroditism and Transsexualism, loc. cit., pp. 112-113; see also STOLLER, Sex and Gender, op. cit., p. 23.

(b) Treatment

The two basic avenues of approach which have and are being employed in order to treat transsexualism include psychotherapy and conversion surgery.

i) Psychotherapy and chemotherapy

Almost every method known to modern psychiatry has been fruitlessly resorted to in the hope of aiding transsexuals, including psychoanalysis, hypnosis and behavior therapy (80). Even aversion therapy, either faradic or employing apomorphine (which induces vomiting) has produced no effect on the true transsexual even though it has had some success with transvestites (81). Similar results, (or lack of same) have been obtained with electroconvulsive treatment or with chemotherapy (consisting of the administration of homologous gonadal hormones) (82). The picture, however, is not totally bleak since Stoller has reported success in treating children five years and under manifesting ambiguous or confused gender orientations (83). With research continuing in this area of psychiatry, there is obviously some hope of an eventual break-through, but at present, this type of treatment is considered ineffectual (84).

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(80) GREEN, Conclusion, loc. cit., p. 470 in GREEN, MONEY; PAULY, The Current Status of the Change of Sex Operation, loc. cit., at p. 465; ACCARD, BRETON et al, loc. cit., p. 34.

(81) M. GELDER, G. MARKS, Aversion Treatment in Transvestism and Transsexualism, 383, at p. 403 in GREEN, MONEY, op. cit.

(82) J. VOGT, Five Cases of Transsexualism in Females, (1968) 44 Acta Psychiatrica Scandinavia 62, at p. 67.

(83) ACCARD, BRETON et al, loc. cit., p. 134.

(84) GREEN, Conclusion, loc. cit., p. 470 in GREEN, MONEY.

This frustration of medical efforts to get the mind to accept the body has led to the opposite alternative; adapt the body to suit the mind (85).

ii) Conversion surgery

It is only after much hesitation and simply because of the unavoidability of practicable alternatives that conversion surgery is undertaken by the reputable physician (86). Interestingly enough, the actual operation is only one part of a lengthy process created to ensure post-operative success and the smooth reintegration of the "new" man or woman into society. The fourfold procedure consists of (1) selection, (2) hormone therapy, (3) surgery, and finally (4) the post-operative counselling and follow-up.

(1) Selection

Naturally, this basic step requires that the candidate for surgery be accurately diagnosed as a transsexual since misguided transvestites often seek conversion. Among the factors to be considered before contemplating the irreversible surgery may be included the following: The age of the patient with a preference for older persons (minors being excluded as a matter of course), the absence of psychosis, emotional instability or immaturity, a physique or appearance which readily lends itself to assimilation into the

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(85) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 91.

(86) PAULY, Adult Manifestations of Female Transsexualism, loc. cit., p. 80 in GREEN, MONEY.

opposite sex (87). For example, a large frame, a deep voice, a prominent Adam's apple and hirsuteness would preclude a male transsexual from passing as a woman. In addition, certain hospital centers such as the Minnesota Hospitals will refuse any patient with a criminal record unless it is directly related to his deviation. By the same token, married patients are excluded, the rationale including not only possible medico-legal repercussions but also the doubts some experts entertain that a person who has courted and who has had a heterosexual relationship is truly transsexual (88). On the other hand, a patient suffering some anatomical abnormality connected to sex will have less difficulty in obtaining surgery. Apparently, hospitals feel more secure when the necessity for the operation can be hung on a physical rather than a purely psychogenic peg (89). In summary, doctors are understandably conservative in advocating this type of surgery since only a small minority of those requesting "changes of sex" are in fact suitable candidates (90).

(2) Hormone therapy

The administration of hormones to transsexuals of either sex serves a double purpose; Suppression of existing sexual features (hormonal castration) and the development of sexual features of the opposite sex (paradoxical hormone therapy) (91).

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(87) BENJAMIN, Should Surgery Be performed on Transsexuals?, loc. cit., p. 78.

(88) HASTINGS, loc. cit., p. 249 in GREEN, MONEY.

(89) PAULY, Adult Manifestations of Female Transsexualism, loc. cit., p. 71.

(90) R. STOLLER, A Biased View of "Sex Transformation" Operations, (1969) 149 Journ. of Nerv. and Ment. Dis. 312, at p. 315; BENJAMIN, Introduction, loc. cit., p. 6 in GREEN, MONEY.

(91) C. HAMBURGER, Endocrine Treatment of Male and Female Transsexualism, 291, at p. 303 in GREEN, MONEY, op. cit.

Male transsexuals receiving the female hormone estrogen, soon develop gynecomastia (breast growth) with pigmentation and enlargement of the nipples. The subcutaneous fat is also redistributed, thus imparting the rounded curves typical of the female habitus. Body hair may be reduced somewhat, but facial, pubic and axillary hair will remain. Oddly enough, the growth of scalp hair is increased with even bald spots showing growth (92). Libido decreases, the number of erections becomes smaller and ejaculation is rare, possibly due to shrinkage of the prostate (93). The voice remains unchanged.

As a result of taking testosterone, female transsexuals soon stop menstruating and develop distinctly masculine features such as hairiness, a deeper voice and occasionally baldness (94). Side effects of this type of therapy include acne, increased libido, and hypertrophy of the clitoris.

An added bonus of hormonal therapy is that it provides a waiting period prior to surgery and enables the potential surgical candidate to live in the opposite gender role, secure in the knowledge that if a change of heart occurs, cessation of the endocrine treatment will permit a

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(92) Ibid., p. 297.

(93) BENJAMIN, The Transsexual Phenomenon, op. cit., pp. 93-94.

(94) HAMBURGER, Endocrine Treatment of Male and Female Transsexualism, loc. cit., p. 298.

reversion to the original gender. Consequently, when the ultimate step is taken, there will be less likelihood of regret and recrimination (95).

It should be pointed out that even if conversion surgery is performed, the patient will have to continue to take hormone for the rest of his or her life, since the operation will modify only the external morphology of the sex organs, leaving the general bodily appearance unchanged unless hormones are administered.

(3) Surgery

Conscientious surgeons do not undertake this irreversible step until a year of evaluation and hormone therapy has been completed, although some European doctors have performed conversion surgery on request.

In transforming a male transsexual, the surgery consists essentially of a penectomy and orchidectomy (removal of the testicles). Christine Jorgensen's conversion terminated at this point, with labia-like folds being created out of the scrotal skin (96). Today, surgeons have many techniques at their disposal in order to construct a sexually functional vagina, which include; using the skin from the

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(95) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 94.

(96) HAMBURGER, STURUP, DAHL-IVERSEN, Transvestism, loc. cit., p. 394.

thighs, back or buttocks cut in thin strips, placed on a form and inserted in the vaginal pouch; taking a loop of ileum from the abdominal cavity to form the vagina; or taking the skin of the amputated penis and inverting it into the vaginal cavity (Burou's technique). The first method's disadvantages include the presence of hair in the skin and the absence of natural lubrication. Although the second requires major abdominal surgery with gastro-intestinal interference, the new vagina does not contract and natural lubrication is present. The third technique is the most popular since the nerve endings in the penis are preserved and sexual feelings may be experienced during intercourse (97).

No matter which method is utilized, the cosmetic and functional results are often disappointing with constriction of the vaginal canal and poor healing being the most common difficulties (98). The formation of a recto-vaginal fistula is also not an unknown complication.

Additional procedures may include breast enlargement by way of implants, rhinoplasty, and electrolysis in order to get rid of a beard and other superfluous body hair.

As with males, the female transsexual may obtain partial or "total" conversion. The basic procedure includes mastectomy, oophrectomy (removal of the ovaries), hysterectomy and obliteration of the vagina (99). Some patients are satisfied having only a hormonally enlarged clitoris as a

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(97) BENJAMIN, The Transsexual Phenomenon, op. cit., pp. 102-103.

(98) GREEN, Psychiatric Management of Special Problems in Transsexualism, loc. cit., p. 284 in GREEN, MONEY.

(99) G. HOOPES, Operative Treatment of the Female Transsexual, 335, at p. 336 in GREEN, MONEY, op. cit.

substitute for a phallus since female transsexuals tend to be somewhat sexually inactive after surgery (100). However, for those whose requirements are greater, surgery offers a phallus created from "bilateral inquinal skin flaps" or an abdominal tube pedicle which is grafted to the pubic area and severed from the donor sites. Silastic testicular prostheses may be placed in a constructed scrotum (101). This phallus may be given a urinary function but the procedure is difficult and complication-prone. Often, a urinary opening is preserved beneath the phallus which then serves a purely "cosmetic" function. Attempts have been made to make the phallus a sexually functional organ by means of autogenous rib cartilage grafts but with very limited success (102).

In a nutshell, the inconveniences of male to female conversion surgery include multiple discomforting surgical procedures with much scarring, poor functional capacity of the new organ, and indifferent genital appearance (103).

Needless to say, in both male and female conversion surgery, the patients are permanently sterile.

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(100) BENJAMIN, The transsexual Phenomenon, op. cit., p. 155.

(101) HOOPES, loc. cit., p. 344.

(102) Ibid., p. 343.

(103) GREEN, Psychiatric Management of Special Problems in Transsexualism, loc. cit., p. 284.

(4) Post-operative follow-up

Aside from standard post-operative care all patients need after more or less extensive surgery, the transsexual is also in particular need of psychologic guidance for many reasons. Obviously, a person plagued by a confused gender identity since childhood is not likely to turn into a paragon of emotional stability overnight. Transsexuals have an almost childlike faith in the results of surgery, often to realize only later that perfection, or a reasonable facsimile thereof, is beyond their reach. Thwarted ambitions may often turn into resentment, depression, or doubt that the right decision was made (104). The patients will also have to learn to adapt to their new role and to tolerate the frustrations of coming up against an uncomprehending bureaucracy in their dealings with the State. Likewise, just as kidney patients cannot stray far from a dialysis machine, transsexuals will always have to maintain their hormonal intake; a constant reminder of the slim threads which bind them to their gender of choice.

After all this expenditure of time, effort and resources, what are the net results of conversion surgery? The general consensus of opinion seems to be favorable in that the majority of transsexuals are subjectively and objectively improved (105). From a statistical view-point, the

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(104) GUZE, loc. cit., p. 178.

(105) RANDELL, loc. cit., p. 379; BENJAMIN, The Transsexual Phenomenon, op. cit., p. 135.

figures vary, but a compilation by Pauly arrives at an average of 68% of all male transsexuals showing satisfactory results (106). As for female transsexuals, the outcome is substantially superior with satisfactory results in over 90% of the reported cases (107). This is astounding indeed when one considers that surgery has less to offer female transsexuals in the way of functional sexual organs than it does males (108). To all these statistics should be added the proviso that these results are only short-term, since transformation surgery is a comparatively recent innovation not yet in widespread use. More reliable results will be available only over the long-run (perhaps twenty years according to Benjamin (109)), and until more certainty is provided, the procedure will have to remain experimental in nature (110).

In spite of this clearly optimistic outlook, there are many doubts expressed as to the validity of sex-reassignment procedures. For example, evaluations of the results of

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(106) The Current Status of the Change of Sex Operation, loc. cit., p. 464.

(107) PAULY, ibid., p. 465; RANDELL, loc. cit., p. 378; PAULY, Adult Manifestations of Female Transsexualism, loc. cit., p. 81, in GREEN, MONEY.

(108) PAULY, ibid., in GREEN, MONEY, at pp. 86-87.

(109) The Transsexual Phenomenon, op. cit., p. 117.

(110) An important by-product is the great technical progress in the field of reconstructive genital surgery which may benefit persons suffering defects through accident or birth; MONEY, SCHWARTZ, loc. cit., p. 264.

surgery are made by the same individuals who recommend and perform the operations. Consequently, "by evaluating their own patients, their own handiwork and their own results, they (place) themselves in the position of applauding or condemning their own judgment and technical proficiency" (111). In such a situation, scientific detachment is very difficult to attain and inflated results may be the consequence. Another factor which inhibits the cause of conversion surgery seems to be the post-surgical behavior of many transsexuals, especially males. A substantial number drift into lives of promiscuity, prostitution or addiction (112). Many are plainly exhibitionistic and exploit their situations by becoming entertainers or by telling "all" to any newspaper reporter or magazine writer who is willing to listen. Canada's first sex-conversion patient has written a book which describes in great detail all her sexual experiences, normal and deviant; whereas Quebec's first was said to have become a topless dancer in Montreal. Truthfulness and reliability appear to be other characteristics sadly absent in many transsexuals (113). All in all, this type of behavior makes it much more difficult for the ethical physician to avoid the charge that reassignment surgery is "collaboration with the psychosis". Perhaps the most pessimistic opinion expressed publicly is that of Stoller in an editorial of the Journal of Nervous and Mental Diseases in which he bluntly states:

> "Although there is still no evidence for the following, I fear that, as the years pass, some of these operated patients will get tired, and never free of the knowledge that they still

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(111) KUBIE, MACKIE, loc. cit., p. 438.

(112) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 126.

(113) STOLLER, Sex and Gender, op. cit., p. 248.

are not truly female, will commit suicide" (114).

Most importantly, a fact never brought out in any legal discussion of transsexualism and only mentioned in passing in certain medical treatises, is that there exists at least three reported cases in which post-operative transsexuals have recanted and have insisted on being restored to their original status. The first involved a male who had undergone castration and penectomy (115). The second case is similar to the first, yet in spite of the loss of his male organs, he nevertheless reverted to his original status (in dress and appearance, not surgically) (116). The third transsexual, a young female, had submitted to hysterectomy (without removal of the ovaries) and mastectomy. After having decided to abandon a male gender identity, she had her breasts restored by mammoplasty. This last case is especially interesting from a legal point of view in that the young lady was married prior to her first "sex-change" operation (117). These examples are worth mentioning as a simple reminder to jurists that after a spouse has been disposed of, birth certificate, passport, permits, diplomas, etc..., modified, and in general all vestiges of a former sexual status eliminated, it is not inconceivable that they be retained once again in order to restore a vacillating transsexual to his original status.

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(114) A Biased View of "Sex Transformation" Operations, loc. cit., p. 316.

(115) RANDELL, loc. cit., p. 373.

(116) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 124.

(117) Ibid., p. 158.

From experience accumulated to date, Pauly summarizes a number of recommendations which should serve as criteria for reassignment surgery:

> "1) Psychiatric evaluation to determine that cross-gender identification is of long standing duration and irreversible, and not the result of an acute psychosis; 2) physical appearance, mannerisms and behavior to indicate that the individual can simulate the opposite gender to such a degree that he can 'pass' or preferably the indication that the individual has 'passed' and is already living and functioning as a member of the opposite gender; 3) sufficient intelligence to understand the limitations and possible hazards of the operation; 4) an agreement to participate in the preoperative evaluation and long term follow-up studies necessary to evaluate the procedure more thoroughly; and 5) an agreement not to ... publicize, notorize or capitalize on his unique sexual status" (118).

C- Sex and Gender

Long before the sexual status of post-operative transsexuals became an issue, scientists were already preoccupied with problems of sex determination in cases of hermaphroditism. Acknowledging that society was immutably bound to the binary grouping of persons into males and females with no provision for intersexes, specialists elaborated a number of criteria in order to assign the sexually ambiguous to one category or another. These factors include (119):

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(118) The Current Status of the Change of Sex Operations, loc. cit., p. 469.

(119) For a detailed discussion of these factors see generally K. MOORE, Recent Developments Concerning the Criteria of Sex and Possible Legal Implications, (1959) 31 Manitoba Bar News, pp. 104-114 and K. MOORE, C. EDWARDS, Medico-Legal Aspects of Intersexuality: Criteria of Sex, (1960) 83 C.M.A.J. 709-714.

(1) Chromosomal sex

Females possess XX chromosomes which can be detected microscopically by dark bodies called sex chromatin whereas the male XY chromosomes are chromatin negative.

(2) Gonadal sex.

Females have ovaries and males have testes. The ovaries produce eggs (ova) and the testes are responsible for the production of spermatozoa.

(3) Sex hormone pattern

The types of hormones produced by the glands can be determined through the analysis of urine. The ovaries produce the hormones (inter alia estrogen) necessary to provoke the development of feminine secondary sex characteristics, and the testes do likewise (testosterone) in order to give rise to masculine characteristics. In the embryonic stage of development, an absence of male hormone will cause a genetically male child to be born looking like a female. On the other hand, female embryos exposed to male hormone will be masculinized.

(4) Internal sex organs

The presence of a uterus, fallopian tubes and a vagina is typical of the female whereas the male has a sperm duct necessary to bring the spermatozoa from the testes to the urethra.

(5) Genital sex

This factor depends upon the presence of external sex organs, consisting of the penis and scrotum for the male, and labia and clitoris for the female.

(6) Habitus

Sex is also determined by the nature of manifested secondary sex characteristics such as body structure, hair distribution, voice pitch, etc...

(7) Assigned sex

This consists of the sex in which a child is reared.

(8) Sex role

The deportement of a person may be masculine or feminine regardless of the sex of assignment.

. . .

At first glance, one is inclined to affirm that the determination of sex depends on both somatic (gonads, chromosomes, genitals, etc...) as well as psychological (sex role, sex of assignment) factors, but this is inaccurate. In actual fact, sex applies only to biology, while gender has a psychological or cultural connotation (120). Although these elements of human sexuality are usually congruent, they are not always so, as in the case of a transsexual. In this situation, a biologic male will have a feminine gender identity and a female, a masculine identity. Consequently, when determining sex, only physical factors may be considered, provided they are consonant. If the physical factors are contradictory, as in cases of hermaphrodism, then the scales may be tipped to either side by calling into play the person's gender role. In short, if an intersex has to be assigned to one sex or another, then the assignment is made in light of the patient's psychosexual orientation (121).

Obviously, a pre-operative male transsexual demonstrating no congenital sexual abnormalities, is properly categorized by the law and society as a man, but does he become

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(120) STOLLER, Sex and Gender, op. cit., p. 9.

(121) J. TETER, K. BOCZKOWSKI, Errors in Management and Assignment of Sex in Patients with Abnormal Sexual Differentiation, (1965) 93 American Journal of Obstetrics and Gynecology 1084, at p. 1086.

female after conversion surgery? The answer is definitely no. Although the descriptions employed by the experts may vary in vehemence from "mutilated, non-marriageable eunuch" (122) to "neutered feminized males" (123), virtually all agree that no actual change of sex is ever possible (124).

As we shall see, this uncontroverted scientific fact is of paramount importance in the interpretation of our laws and institutions (as they presently stand) involving sex. Nevertheless, this does not imply that provision should not be made in order to reintegrate these unfortunates into society.

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(122) MOORE, Recent Developments Concerning the Criteria of Sex and Possible Legal Implications, loc. cit., p. 112.

(123) RANDELL, loc. cit., p. 367 in GREEN, MONEY.

(124) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 46.

II- Legal Aspects of Sex Reassignment Surgery

As we have seen above, the failure of psychotherapy has forced a sizeable segment of medical opinion to adopt the position that the only appropriate manner in which to help transsexuals is by submitting them to conversion surgery. From an ethical (let alone legal) point of view, the implications of this type of approach would necessarily place the medical practitioner on the horns of a dilemma: On the one hand, normal tissue is destroyed or altered and a procreative function terminated, whereas on the other, an untreated transsexual is all too often a candidate for suicide or self-mutilation. Attitudes also play a forceful role since "the administration of physical harm as treatment for mental or behavioral problems - as corporeal punishment, lobotomy for unmanageable psychotics and sterilization of criminals - is abhorrent in our society" (124). After weighing the alternatives, should we accept that it is worse to abandon the patient rather than to emasculate him, the first and most obvious difficulty is to determine the legality of the operation in light of current criminal and civil law. In the event this obstacle is overcome, the next step is to see whether, in view of an apparently immutable law of nature pertaining to the unchangeability of sex, the law is willing to be satisfied with a reasonable facsimile of a "new" sex or whether it insists upon a rigorous adherence to the dictates of nature. Yet another aspect worthy of scrutiny involves the effects which the surgical modification of transsexuals may

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(124) D.H. RUSSELL, The Sex Conversion Controversy, (1968) 279 New England Journal of Medicine 535, at p. 536.

have upon the institution of marriage both before and after conversion (125).

These are, in essence, the problems over which a transsexual must prevail in order to become, at least from a legal point of view, a fully integrated member of the opposite sex. During the next few pages, we shall endeavour to see whether these difficulties can in fact be overcome or whether they inevitably consign post-operative transsexuals to a type of sexual purgatory or limbo.

A- The legality of conversion surgery

In most jurisdictions, the presence of serious doubts as to the legality of the "change of sex" operation is in great part due to a natural reluctance to remove healthy organs in the absence of somatic pathology. Interestingly enough, we shall see that objections to the surgery are often based upon laws or precedents which were intended to sanction totally different circumstances. In the State of

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(125) Other difficulties involved which are somewhat secondary to those already alluded to but which also merit consideration include insurance (both life and liability, since women live longer and are supposedly "better" or at least safer drivers), work laws (e.g. maternity leaves or limits to physical labour), laws pertaining to the family (e.g. adoption -- as a rule Quebec law for instance, forbids adoption by a single person of a child of the opposite sex. Cf. Adoption Act, S.Q. 1969 c.64 s.3(d),- and legislation of an administrative nature (passports, drivers' permits, etc...). Even the 1976 Olympiad in Montreal will likely be a continuation of the debate already raging in amateur athletic circles concerning the sex of some extraordinary female athletes who, strangely enough, look and perform like men.

New York for example, it appears that cross-dressing transsexuals are often arrested under section 887 subdivision 7 of the New York State Code of Criminal Procedure which provides for the arrest of:

> "A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or enclosure".

This nineteenth century law was originally intended to protect persons enforcing rent laws. Apparently, in order to avoid being identified while attacking the police, farmers used to disguise themselves as indians (126).

To our knowledge, there is no legislation which expressly forbids sex-reassignment procedures in cases of transsexualism, yet surgeons performing this controversial operation may run the risk of running afoul of both the criminal and the civil law, because even if the penal laws in a given jurisdiction are inapplicable to the problem at hand, there is still the possibility of civil liability being incurred through considerations of public order, public policy or good morals. Difficulty may also arise due to the experimental nature of the surgery involved.

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(126) SHERWIN, loc. cit., at p. 418.

A third area in which some snags could also be encountered is that of informed consent. We have seen (supra p.28) that the general consensus of medical opinion appears to be to the effect that the "average" transsexual is not psychotic and is thus apparently capable of giving an enlightened consent to any surgical intervention. In order to avoid problems of this nature, the more reputable institutions do not perform surgery until exhaustive evaluations have been made, and only after a "cooling-off" period has elapsed, thus permitting the candidate for surgery to "try on" his or her new gender role (127). In addition, the consent forms are often explained and witnessed by an independent attorney retained by the patient. In some hospitals such as Johns Hopkins, the next of kin is also required to consent (128). Due to the delicate legal situation, it is probably safe to surmise that, in cases of transsexualism, greater precautions are observed to ensure a valid consent than would normally occur in ordinary medical situations. In any case, this question of informed consent is governed by the standard rules in force in matters of medical liability and thus requires no further elucidation.

Consequently, we will examine the legality of conversion surgery, first from a criminal law point of view and then in light of the civil law.

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(127) This period varies between six months to one year.
(128) SMITH, loc. cit., pp. 973-974.

1. Conversion surgery and the criminal law

(a) Criminal law and the legality of conversion surgery in the Common law jurisdictions

i) England

From a criminal law view-point, England does not, at first glance, appear to be very congenial towards "change of sex" operations for reasons which originate in the ancient common law felony of mayhem, defined by Sir William Blackstone as:

> "... the violently depriving another of the use of such of his members as may render him the less able in fighting either to defend himself, or to annoy his adversary. And therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems" (129).

The essential purpose of this law was to ensure that the Crown would not be deprived of a fighting man if the need should have arisen (130). For example, there are two old celebrated cases in which convictions for mayhem were handed down: The first involved a "young strong and lustie rogue"

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(129) Commentaries on the Laws of England, ed. by W.N. Welsby, New York, Harper and Bros., 1847, p. 213. At p. 214 express mention is made of castration.

(130) RUSSELL, On Crime, 12th ed., by J.W. Cecil Turner, London, Stevens and Co. Ltd., 1964, vol. 1, p. 629.

who had a friend cut off his left hand in order to avoid work and live on begging. The second case dealt with a Victorian soldier who had his front teeth extracted. At that time riflemen had to bite the ends off paper cartridges in order to load and fire their weapons (131).

Mayhem or maiming was subsequently incorporated into the statute law under the provisions of the Offences Against the Person Act (1861) (132), which stated that:

> "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, ... shall be guilty of felony, and being convicted thereof shall be liable ... to be (imprisoned) for life...".

Two comments should be made concerning this section: Although the term "maim" retains its traditional meaning, bodily harm must be considered grievous only in cases of interference with health or comfort, without any requirement that its effects be dangerous or permanent (133). Thus, in

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(131) These cases are cited and described by DENNING, L.J. in Bravery v. Bravery, (1954) 3 All E.R. 59, at p. 67.

(132) 24-25 Vict., ch. 100, sec. 18, amended by the Criminal Justice Act (1948), 11-12 Geo. VI, c. 58, sec. 1.

(133) Kenny's Outlines of Criminal Law, 19th ed., by J.W. Cecil Turner, Cambridge, Cambridge University Press, 1966, at p. 213, no 159.

a strict sense, if one excepts the therapeutic aspects of surgery, each operation constitutes grievous bodily harm since for a time at least, there necessarily exists a certain amount of discomfort. The second constitutive element of violations of said section 18 is malicious intent, which does not necessarily connote a wicked state of mind but rather the actual intention to cause the particular kind of harm occasioned (134). Consequently, it is conceivable for a surgeon specializing in conversive surgery to be held guilty of violations of the law above-quoted, even though he should act with the best of intentions. Naturally, the crux of the whole matter would obviously be the necessity of this type of surgery, which does not seek to cure but only to render the patient more comfortable. It is easier to doubt the validity of such interventions by a dogmatic adherence to a necessity - legality equation; but if this were to be the case, then all operations for example, having as object the blocking of certain nerves in order to relieve the unremitting pain of a terminal cancer patient, would bring the attending physician into conflict with the law. However, neither medicine nor the law for that matter, can be so heartless as to permit this state of affairs to exist. Nevertheless, between the cancer patient slowly dying racked with pain and a transsexual being driven by despair to the brink of suicide, what distinction may be made?

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(134) Ibid., p. 211, no 158A. See also J.C. SMITH, B. HOGAN, Criminal Law, 2nd ed., London, Butterworths, 1969, at p. 267: "Where, under s. 18, the change is causing grievous bodily harm with intent to do grievous bodily harm, the word 'maliciously' obviously has no part to play. Any mens rea which it might import is comprehended within the ulterior intent".

The question can now be asked: Would the consent of a competent transsexual remove any subsisting doubts surrounding the operation and protect the surgeon from criminal prosecution? Happily, the Court of Appeal in the matter of The King v. Donovan (135) had occasion to express an opinion on the validity of consent as a defence to criminal liability. This case involved an appeal from convictions for indecent assault and common assault arising out of an episode of flagellation in which the accused had caned a seventeen year-old girl in his garage in order to satisfy his perverted sexual desires. The evidence clearly established that the victim's consent was freely given and therefore, according to appellant, would constitute sufficient grounds for exonerating the accused. Speaking for the court in its reception of the appeal on grounds of misdirection, Swift J.A, expressed the following opinion:

> "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected" (136).

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(135) (1934) 2 K.B. 498.

(136) Ibid., p. 507.

The upshot is that the most enlightened possible consent will not legalize assaults prohibited on public policy grounds (malum in se), i.e. involving health. Glanville Williams questioned the wisdom of the broad principle quoted above on two grounds: Firstly, adult, capable people are usually the best judges of their own self-interest and if they wish to submit to damage, why should the state intervene (137)? Secondly, what public interest would be served by preventing adults from voluntarily inflicting discomfort on each other provided they do not cause permanent damage (138)?

Only once has the English Court of Criminal Appeal been called upon to decide the legality of castration as a form of treatment and this was in the case of R. v. Cowburn (139). Cowburn was a sexual psychopath with a criminal record for rape. The present appeal stemmed from a subsequent conviction for assault with intent to rape, and dealt inter alia with the legality of castration, which physicians recommended in order to control the accused's impulses. Cowburn readily acquiesced to the operation but prison officials sought the blessing of the court due to the questionable legality of the procedure, even though it was intended to be curative in nature. The court refused to express an opinion since it felt that what took place in prison was not of its concern (140).

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(137) The Sanctity of Life and the Criminal Law, New York, Alfred A. Knopf, 1957, p. 106.

(138) Consent and Public Policy, (1962) Crim. L.R. 74 at p. 159. The rationale here appears to be that the participants must not become burdens upon the public through their injuries.

(139) (1959) Crim. L.R. 590.

(140) Ibid., p. 591.

In light of current knowledge concerning the transsexual syndrome, is one entitled to conclude that surgical "changes of sex" are lawful in England? James concludes that they are not because he feels that the therapeutic purpose of this type of operation has not been sufficiently established (141). Meyers likewise adopts the position that a valid therapeutic purpose would legitimate the procedure, but also doubts that this can be established in cases of transsexualism (142). Ormrod J. mentions in passing in the Corbett case that if surgery is "... undertaken for genuine therapeutic purposes, it is a matter for the decision of the patient and the doctors concerned in his case" (143). Glanville Williams flatly states that "change of sex" operations have "...not been thought of as raising legal problems...", although one is inclined to think that his optimism is somewhat unfounded (144).

It would only be fair to point out that these opinions were expressed a few years ago; normally a very short time for jurists who often quote with relish, writings and cases which date back to the last century and sometimes earlier. In the area of modern medicine, five to ten years can be an eternity (e.g. the heart transplant boom), and what was orthodoxy in the sixties could well be viewed as scientific heresy today. Thus if hospitals like Charing Cross in England and Johns Hopkins in the U.S.A. (to mention a few)

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(141) Loc. cit., p. 451.
(142) Op. cit., p. 54.
(143) Loc. cit., p. 1318.
(144) MEYERS, op. cit., p. 53.

feel willing to recommend conversive surgery in certain cases, it is obvious that its therapeutic value must be acknowledged, at least to some extent. In England therefore, the criminal courts will not likely interfere with the aftermaths of the decision to operate provided the purpose or goal sought is therapeutic in nature (144a). This of course is a medical decision made in light of enlightened current medical practice. Who can say, perhaps the Harley Street physician will one day become as famous as the man on the Clapham omnibus in this respect.

ii) Anglo-Canadian Provinces

As in the other jurisdictions, the absence of formal legislative provisions authorizing conversive surgery raises some uncertainties as to the legal repercussions if such interventions are in fact performed (144b). Although the Canadian Criminal Code formally abolished all so-called "offences at Common law" (145), the original crime of mayhem was retained as part of the broader crime of "causing bodily harm with intent" under sec. 228 Cr.C.:

(144a) P.D.G. SKEGG in Medical Procedures and the Crime of Battery, (1974) Crim. L.R. 693 at p. 697 suggests that all operations intended to benefit the health of the person on whom they are performed, have a just cause or excuse for them. As regards "sex-changes", he regards these situations as "borderline" (p. 700).

(144b) It should be noted that at least two provinces formally provide for the modification of birth records following conversive surgery and this is some indication of legislative attitudes favorable towards the surgical treatment of transsexuals, cf. An Act to Amend the Vital Statistics Act, 1973 S.B.C., c. 160 and The Vital Statistics Amendment Act, 1973 S.A., c. 86.

(145) Sec. 8(a).

> "Everyone who, with intent (a) to wound, maim or disfigure any person, (b) to endanger the life of any person, or (c) to prevent the arrest or detention of any person, discharges a firearm, or gun or air pistol, at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraphs (a), (b) or (c) is guilty of an indictable offence and is liable to imprisonment for fourteen years".

Since the word "maim" is employed without qualification in said section, this would imply that one would have to retain the meaning of this term according to its traditional significance i.e. any mutilation which renders the victim less able or inclined to fight or defend himself. Although this acceptance of the word "maim" would signify that only male victims (the "fighting" sex) were protected, women would also be shielded under the all-embracing terms "wound" and "disfigure".

If a surgeon were sued under section 228 for causing bodily harm with intent following sex reassignment, what kind of defence could he raise? Two possibilities are offered, the first of which being the defence based on the consent of the victim. According to Lagarde:

> "Les dispositions du présent article sont-elles assez larges pour couvrir les cas de mutilations volontaires, c'est-à-dire les cas où une personne se mutile elle-même ou permet à une autre de se mutiler? En Angleterre, on a décidé qu'en vertu du 'common law' une personne commet un acte criminel ('indictable offence') lorsqu'elle se mutile elle-même. Au Canada, depuis le présent code, le 'common law' n'est plus générateur d'infractions. Une

> mutilation est produite par des voies de fait (sec. 244 C.Cr.). Or il ne peut - en droit - y avoir 'voies de fait' si la victime ou le 'patient' y consent, les autorise ou les réclame" (146).

He further adds (147) that the English case of R. v. Donovan (148) would not apply in Canada in matters of bodily harm. Lagarde's reasoning appears faulty since he bases his argument on an analogy drawn from the crime of assault (sec. 244 Cr.C.). In this latter offence, an essential element of guilt requires that force be applied without the consent of the victim or with a consent obtained by fraud (149). Yet, assault may be charged either as an indictable offence penalized by two years of imprisonment, or as an offence punishable on summary conviction (sec. 245 Cr.C.); whereas bodily harm with intent is punishable by a prison term of fourteen years. We are able to note that these two crimes are not considered to be of the same degree of seriousness and this is obviously why the legislator felt that assault should only be punishable when consent is absent. It would be clearly contrary to the public interest to permit all types of intentional mutilations to be performed merely be-

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(146) I. LAGARDE, Droit Pénal Canadien, Montreal, Wilson & Lafleur Ltée, 1974, vol. I, p. 561.

(147) At page 654.

(148) (1934) 2 K.B. 498.

(149) Section 244 Cr.C. reads as follows: "A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud, (a) he applies force intentionally to the person of the other, directly or indirectly, or (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose". See also R. v. Walton, (1973) 7 N.B.R. (2d) 32 (N.B. Supreme Court, Appeal Division).

cause the victim consented. Indeed,we could even go so far as to say that all crimes involve public order and unless a formal provision of law so authorizes, the victim's acquiescence to some culpable action or gesture would not bar the state from seeking retribution. Moreover, since the criminal law is a law of strict measure, any inferences drawn from similitudes are speculative at best. Thus the defence of consent permitted particularly in cases of assault cannot be held to have general applicability to all crimes.

A second defence which would probably furnish greater protection to the medical practitioner is that based upon section 45 Cr.C.:

> "Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if,
>
> (a) the operation is performed with reasonable care and skill and,
>
> (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case".

Would this provision protect the surgeon? Moore and Edwards feel that if the psychological pressures upon transsexuals are so great that they are on the verge of self-mutilation or suicide, then any "changes of sex" performed would likely be "for the benefit of the patient" (150). This opinion seems quite reasonable provided one qualifies it somewhat. Indeed

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(150) K. MOORE, C. EDWARDS, Medico-Legal Aspects of Intersexuality: Criteria of Sex, (1960) 83 C.M.A.J. 756, at p. 759; also published in (1959) 31 Man. Bar News 101 et seq.

if the surgery is undertaken for serious reasons following careful psychiatric and physical evaluation, then criminal liability will be avoided. If, on the other hand, the surgical intervention is performed upon simple request without any other work-up confirmative of a diagnosis of transsexualism, then the surgeon runs a great risk of falling afoul of the law without enjoying the benefits of section 45 Cr.C. Sex re-assignment operations are too serious in their repercussions to be permitted to be performed indiscriminately.

iii) United States

In the United States, as in the case of the other jurisdictions considered, there appears to be no formal provision of law which governs the legality of conversion surgery in cases of transsexualism (151). In one sense, this could be seen as an absence of any barriers to this type of initiative provided that the psychiatric indications are well established. However, the prevailing attitude appears to be one of hesitation due to the existence of "mayhem" statutes in most of the American states.

Contrary to what some writers state (152), castration constituted mayhem at common law (153), and was even extended by legislative enactment to cover the reproductive organs

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(151) MEYERS, op. cit., p. 60.

(152) SHERWIN, in GREEN, MONEY, loc. cit., at p. 421; J. HOLLOWAY, Transsexuals - Their Legal Sex, (1968) 40 U. of Colo. L.R. 282 at p. 284; MONEY, SCHWARTZ in GREEN, MONEY, loc. cit., p. 258.

(153) People v. Kopke, (1941) 33 N.E. (2d) 216, at p. 217 (Ill.), Gunn C.J.

of women (154). The common law crime of mayhem was soon superceded or at least enlarged by law to become the "maiming, disfiguring and disabling" statutes known today. Nevertheless, the new statutes retained the requirement that in order to be guilty of mayhem, a permanent injury is necessary (155).

Broadly stated, the mayhem statutes could fall into two basic categories, the first of which includes those laws which only refer to mayhem as being a punishable crime. In these cases, the determination as to what type of injury constitues mayhem can only be ascertained by referring to the common law criterion dealing with the protection of a man's fighting ability. Thus, in this situation, the rule of strict construction in matters of statute law (and especially criminal law) would not apply (156). The second category of statutes generally refers to those legislative provisions which formally define "mayhem", in which case only the type of injury mentioned in the definition would constitute mayhem. In both situations, the statutes are usually broad enough to encompass all types of bodily injury not normally included in the narrowly defined common law crime of mayhem. As a result, one is safe in affirming that the present day mayhem statutes sanction all injuries which would disable, mutilate or disfigure (157).

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(154) Kitchens v. State, (1888) 7 S.E. 209 (Ga.), Bleckley, C.J.

(155) Ronald ANDERSON, Wharton's Criminal Law and Procedure, Rochester N.Y., The Lawyer's Co-Operative Publishing Company, 1957, vol. 1, p. 728, no 268.

(156) Pritchett v. State, (1959) 117 So. (2d) 345 at p. 346 (Ala.) Cates J.; Corpus Juris Secundum under the title Mayhem, Brooklyn N.Y., The American Law Book Co., 1948, vol. 57, p. 465, no 3.

(157) ANDERSON, op. cit., p. 729, no 368

The argument has been advanced in certain quarters that the mayhem statutes would not apply to "change of sex" operations since the specific intent to maim or disfigure would be required and in cases of "well-considered surgery", such intent would be lacking (158). It is a fact that the statutes commonly require that the accused have acted maliciously or wilfully. In many instances, the specific intent to maim, disfigure or injure is a vital element. Malice implies the intent to injure another person without justification, or the intent to do a wrongful act (159). In ordinary situations, malice is basically a question of evidence, whereas in matters relating to radically new surgical techniques, the problem is much more profound. In essence one must almost determine which comes first, the egg or the chicken: On the one hand, transformation surgery is lawful unless malice in a legal sense is proved. And yet, malice may be established by the wilful performance of an illegal act. If, for example, a sympathetic surgeon accedes to a compulsive masturbator's request that his hands be amputated (or that his penis be removed for that matter), mayhem would be established without hesitation because of the ultimate aim of the operation. If the patient had gangrene in his hands following severe frost-bite, no eyebrows would be raised nor would criminal liability lie following the amputation. In both cases the physician would probably have been acting with the highest motives and yet the legal consequences would be different. The true solution would appear to rest upon a determination by the medical profession and ultimately the courts, that conversive surgery is both an ethical and a recognized form of treatment in light of the current state of the art.

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(158) SMITH, loc. cit., p. 988.

(159) People v. Bryan, (1961) 12 Cal. Rptr. 361, at p. 364 (Cal.) Bray J.; ANDERSON, op. cit., p. 137, no 62.

The mayhem imbroglio cannot be resolved through a defence of consent on the part of the patient (since this type of mutilation is outlawed in order to protect the victim from himself or his agents) (160) nor can an accused invoke the purity or unselfishness of his motives (as often occurs in "mercy" killings) (161).

This brings us back to the fundamental question, to wit, are "changes of sex" licit in the U.S.A. in light of the current mayhem statutes? Kennedy (162) and Smith (163) feel that although the legal situation is uncertain, the operation should be considered lawful in situations where, after extensive investigation, surgery is the only possible means of aiding the patient. The University of Minnesota Hospitals, upon the advice of counsel, felt free to perform "changes of sex" mainly because the State of Minnesota had no mayhem statute on its books (164).

On the other hand, in the matter of one G.L., a court authorized surgical conversion to be performed upon a delinquent minor whose anti-social behavior was provoked by his psychosexual problems. This case was originally called to the attention of the Johns Hopkins Hospital Psychiatry Department since the boy was constantly drawing nude women and was

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(160) ANDERSON, ibid., p. 272, no 126.
(161) Ibid., p. 402, no 169.
(162) Loc. cit., p. 117.
(163) Loc. cit., p. 989.
(164) HASTINGS, in GREEN, MONEY, loc. cit., p. 243.

known to molest his female classmates. His psychiatric difficulties became greater, leading to drunkenness, the wearing of female cosmetics, and the theft of women's clothing and wigs. Upon the recommendation of the Gender Identity Clinic and the probation officer, Judge James K. Cullen of Baltimore issued a court order permitting that the operation be performed. In point of fact, although said operation was never undertaken for various reasons, this case demonstrates that at least on one occasion, the courts have considered conversive surgery licit, notwithstanding the existence of a Maryland mayhem statute (165).

Another point raised which would place in doubt the applicability of the mayhem statutes in situations involving transsexuals, is the fact that at least three jurisdictions, Louisiana (166), Arizona (166a) and Illinois (167), have formally provided for changes to birth records following surgery. As Smith points out, it is unlikely that this legislation would have been enacted if "change of sex" operations were considered illicit (168).

We feel that the surgery would likely be held lawful in the U.S.A. provided that it were established that the patient operated upon was in fact a genuine transsexual. This

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(165) MONEY, SCHWARTZ, in GREEN, MONEY, loc. cit., p. 254.
(166) La. Rev. Stat. Ann. 40:336 Supp. 1971.
(166a) Ariz. Rev. Stat. Ann. 36-326A4: Supp. 1969.
(167) Ill. Ann. Stat. ch. 111.5, 73-17, Smith-Hurd Supp. 1970.
(168) Loc. cit., p. 988.

would imply very detailed and cautious screening in order to "weed-out" the misguided transvestite or transvestitic homosexual who would soon regret the loss of his sexual organs. Perhaps in this regard, if a post-surgical patient filed a complaint of mayhem, this in itself would be some indication that an improper diagnosis and evaluation were made, since no matter how poor the results, the genuine transsexual never questions the wisdom of having his organs removed. For the time being at least, and until experience demonstrates otherwise, conversive surgery should be placed on the same footing and enjoy the same immunity from the criminal law as any other recognized forms of surgical treatment, and this, notwithstanding its innovative nature and the rather radical results.

(b) Criminal law and the legality of conversion surgery in the civilian jurisdictions

i) France

In France, the legal provision one is most likely to encounter with regards to transsexualism is article 316 of the Code Pénal which reads as follows:

> "Toute personne coupable du crime de castration subira la peine de la réclusion criminelle à perpétuité.
>
> Si la mort en est résultée avant l'expiration des quarante jours qui auront suivi le crime, le coupable, subira la peine de mort".

There are two basic elements of this crime, including the material fact of castration coupled with the culpable intention of removing the capacity to procreate. According to Jean Robert's comments in the Juris-Classeur Pénal, the motive is not important and may include vengeance, jealousy, an intention to populate a choir with castrati, to create passive pederasts, or even to provide guards for a harem (169). The actual crime consists of any mutilation or removal of an organ necessary for reproduction (as opposed to sterilization, in which the organs are not removed or mutilated) (170). Thus it is conceivable that a woman may be a victim of the crime of castration by way of an ovariectomy.

The possible application of the above quoted provision to conversion surgery was mentioned in a judgment of the Tribunal de Grande Instance involving a transsexual seeking a change of sex on his birth certificate (171). The court stated that it would refuse to take into consideration certain artificial modifications "... obtenues par des procédés dont certains pourraient même tomber sous le coup de la loi pénale..." (172). More recently, the Cour d'appel de Paris in its decision of the 18th of January 1974, reaffirmed this finding in almost identical terms (172a).

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(169) Under the rubric Castration, art. 316, p. 2, no 7.

(170) Cass. crim. 1 juillet 1937, S.1938.1.193 note Tortat, D.1937.1.537.

(171) Seine 1^{e} Ch. 18 jan. 1965, J.C.P. 1965.11.14421.

(172) Ibid.

(172a) Paris 18 jan. 1974, D.S. 1974.196 (concl. Granjon). The Court stated (at p. 198): "... qu'il ne saurait être tenu compte des changements apportés artificiellement à sa morphologie par l'ingestion de certaines substances, encore moins par une opération comportant des mutilations réprimées par la loi pénale" (emphasis added).

Although the consent of the victim does not constitute a valid defence to this charge (173), it would appear that castration is a crime when performed "... dans l'intention de nuire..." (174). Consequently:

> "... c'est pourquoi le médecin qui procéderait sans impérieuses raisons médicales, à une castration, même demandée par un malade, serait responsable civilement et pénalement" (175).

Obviously, a physical ailment of a gynecological or urological nature would constitute valid grounds for surgical intervention, but can the same be said for psychiatric disorders as in the case of transsexualism? A priori it is not for the courts to adopt or reject this attitude unless they are guided by the medical profession. If this question were put in the United States, there is strong probability that the courts would admit psychological grounds for a sex alteration but in France, the Conseil de l'Ordre des Médecins in a statement issued the 12th of January 1962 clearly indicated the attitudes of French physicians by affirming that it could only condemn any mutilating surgical intervention aimed at transforming a well-defined sex (176). Unless this statement is retracted or rendered more amenable to "changes of

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(173) Cass. crim. 1 juillet 1937, loc. cit. Although this case deals with the "stérilisés de Bordeaux" who submitted to vasectomies sanctioned by the crime of "coups et blessures", the rejection of the defence of consent would apply by analogy to castration.

(174) Cass. crim. 1 mars 1929, D.1929.301 at p. 302.

(175) R. SAVATIER, J. SAVATIER, J.M. AUBY, H. PEQUIGNOT, Traité de droit médical, Paris, Librairies Techniques, 1956, p. 248, no 274.

(176) ACCARD, BRETON et al, loc. cit., p. 248; J. DUBOIS, J. MARCEL, Un cas de transexualisme opéré: considérations psychologiques et juridiques, (1969) Annales médico-psychologiques 677, at p. 682.

", or unless specific legislation is passed concernin g this problem, one is safe in asserting that any physician in France undertaking the surgical alteration of a person's genitalia, will be subject to criminal charges.

ii) Province of Quebec

Since the criminal law falls under federal jurisdiction, the solution in the Province of Quebec is identical to that of the Common Law provinces in Canada (177).

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(177) It should be noted that several other civilian jurisdictions have been the scene of criminal actions dealing with the legality of conversion surgery. In the Argentinian case of Dr. Ricardo San Martin, (1966), a biological male with a mental age of twelve was emasculated by the defendant. Accused of causing grievous bodily injury, the defendant raised a plea of medical necessity based upon a purported cancer of the penis but this was not accepted by the court, especially in view of the fact that a pseudo vulva was created and that no other treatment was proffered. Aside from the obvious absence of a valid consent, the Fiscal de Camara in reviewing the case was of the opinion that:

"There is no scientific reason for the removal of a healthy penis from a physically healthy man. No aesthetic reasons, nor the satisfaction of an unhealthy sociological interest, nor the desire to placate the perverted sexual craving of the victim can justify such a removal. The experience of qualified medical staff, the use of proper instruments and medical technique during the operation do not suffice to licitly condone the fact that it is a grievous bodily injury recognized as a crime by the Penal Code..." (quoted by MEYERS, op. cit., p. 63).

This finding was confirmed in appeal by the Podor Judicial de la Nacion. In 1969, this same court decided an appeal against the three convictions of Dr. Francisco Defazio for aggravated assault arising from surgery performed on three intersexuals. In all three cases, the accused was acquitted of the stated charges

2. Conversion surgery and the civil law

(a) Conversive surgery and civil liability under the Common Law (England, the Anglo-Canadian provinces and the U.S.A.)

As a general rule, the intentional application of physical force to the body of another either directly or indirectly, constitutes the tort of battery (178). The gist of this type of offence is that there is an absence of consent

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(177) Cont'd
on the grounds that the medical decision to operate was arrived at in good faith based upon contradictory medical evidence. In light of the specialized technical ability of the defendant, the court felt that Defazio had not acted irresponsably (cf. S.A. STRAUSS, Transsexualism and the Law, (1970) 3 C.I.L.S.A. 348, at pp. 354-356). In the 1969 Belgian case of Dr. Fardeau et al, (1969 Journal des Tribunaux 635, reported in STRAUSS, ibid., pp. 353-354), the death of a transsexual due to pulmonary emboli following a "change of sex" operation led to criminal charges being brought against the surgeon. Before operating, the candidate for surgery was examined by a team of physicians, all of whom concurred in a finding of transsexualism. The prosecution sought to establish inter alia that this surgery was merely palliative and was performed only to appease the patient. Nevertheless, the court accepted the view-point of the defence that the operation would have been of distinct psychological and sociological benefit to the patient had he lived. In view of the medical controversy concerning the efficaciousness of this type of treatment, the court felt that it could not interfere and apparently granted the benefit of the doubt to the accused.

(178) John FLEMING, The Law of Torts, 4th ed., Sydney, The Law Book Co. of Australia Ltd., 1971, p. 77; CLERK and LINDSELL, On Torts, 13th ed., by A.L. Armitage general editor, London, Sweet and Maxwell, 1969, p. 340, nos 672, 673.

on the part of the victim (179). Carried over into the realm of medical law, this would imply that surgical interventions carried out in the absence of consent on the part of the patient would render the surgeon liable without any need to prove negligence or even material damages. Although there has been a noticeable dearth of precedents on this point in England, American jurisprudence has provided many celebrated illustrations of the relationship between the principle of inviolability of the human body and liability for trespass to the person. The two most celebrated cases include Mohr v. Williams (180) and Schloendorff v. New York Hospital (181). The Mohr case, which established the rule that a surgical operation performed without consent constitutes assault and battery, arose out of the following circumstances: Anna Mohr complained to her physician, Williams, of earache in her right ear. An examination revealed that a polyp in the middle ear of the right ear would have to be removed surgically and to this effect, consent was given. Once the patient was anesthetized, Dr. Williams noticed that the left ear was in a much more serious condition and thus decided to operate on it rather than on the right ear. A malpractice action having been brought, the court found for the patient on the grounds that:

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(179) William PROSSER, Handbook of the Law of Torts, 4th ed., St. Paul Minn., West Publishing Co. 1971, p. 36.

(180) (1905) 104 N.W. 12 (Minn.).

(181) (1914) 105 N.E. 92 (N.Y.).

> "If (the surgery) was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence" (182).

In the Schloendorff case, consent to treatment was given, but only within specified limits. Mary Schloendorff authorized her physician to conduct an examination under anesthesia but under no circumstances would she permit surgery to be performed. Once the patient was unconscious, the surgeon removed a fibroid tumor and subsequently, gangrene developed in her left hand which occasioned the loss of several fingers. Cardozo, J. expressed the now-famous dictum to the effect that:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages" (183).

Nevertheless, the law is somewhat problematical with regards to "changes of sex" from a double point of view: Firstly, is the operation unlawful on the grounds of public policy? Secondly, if the courts of a given jurisdiction feel that con-

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(182) Loc. cit., at p. 16.

(183) Loc. cit., at p. 93. In Canada, the Halushka v. U. of Saskatchewan case, (1965) 53 D.L.R. (2d) 436 (Sask. Court of Appeals) affirms the same principle.

version surgery is contrary to the public interest and therefore cannot be consented to by the patient, will the transsexual have a recourse in tort against the surgeon?

The answer to the first question cannot be affirmed categorically since the courts of England, the United States and the English-Canadian Provinces have not had occasion to adjudicate this issue. Indeed only in the Corbett case (184) has the opinion been expressed in passing that if the operation was undertaken for a therapeutic purpose, then it would concern only the patient and his physician (185). Yet, this obiter of Ormrod J. would appear to contain the key to the legality of the operation (186). If, in light of current experience and knowledge, conversion surgery holds out the greatest potential for improving the psycho-social situation of transsexuals, then it should not be perceived as being in conflict with the interests of society. Furthermore, one could even go so far as to state that a failure to provide some aid to transsexuals would be contrary to the public interest. However, if and when it should be established after long-term observation and research that the initial glow of successful adaptation following surgery was but a flash in the pan, then this type of procedure would be set aside as constituting poor medical practice as well as an unwarranted mutilation of a healthy body (187). Until that moment, the courts should not interfere in what is essentially a medical decision.

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(184) (1970) 2 W.L.R. 1306 (Ormrod J.).

(185) Ibid., p. 1318.

(186) See also SMITH, loc. cit., p. 976.

(187) One may remember the famous method of curing ulcers by way of the gastric freeze, i.e. a treatment in which the stomach is literally frozen for a few hours. At first the results were very favorable since improvement would be noted for the first six months but then the ulcers would return with even greater complications or in an aggravated state. Cf. William A. NOLAN, A Surgeon's World, New York, Random House, 1970, pp. 242-246.

Let us pass to the second situation in which an enlightened consent is given but the operation is viewed as being illicit either due to the applicability of criminal laws or due to public policy considerations (188). Will said consent have any effect upon the civil liability of the medical practitioner or will it be merely set aside since it forms part of an illegal transaction?

Two hypotheses are possible depending on whether or not the "change of sex" operation is held to be in violation of the pertinent criminal laws: To begin with, if the surgery is held to be a criminal offence, can the consenting patient sue for damages on the basis of assault and battery?

As far as criminal liability in England is concerned, the basic rule expounded in The Queen v. Coney et al (189) and R. v. Donovan (190) is to the effect that "no person can license another to commit a crime" (191). Although there is very little guidance as to whether this consent to a crime will bar the civil action arising out of the same circumstances, Fleming (192) feels that since the interests involved are quite different, therefore this should imply distinctive solutions. Criminal prosecutions are concerned with the in-

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(188) It is almost superfluous to mention that if conversive surgery is not held to be a violation of the criminal law nor contrary to public policy, there is no civil recourse if consent has been given, unless the surgeon is "guilty" of negligence.

(189) (1882) 8 Q.B. 534.

(190) (1934) 2 K.B. 498.

(191) Ibid., at p. 507. See Williams' critique of this opinion in Consent and Public Policy, loc. cit., p. 159.

(192) Op. cit., p. 79.

terests and welfare of the public at large, whereas civil actions pertain to the rights and liabilities of the individuals directly involved (193). Consequently, the defendant surgeon sued by a transsexual would at least enjoy a defence based on volenti non fit injuria. In addition, since public policy would likely be involved, an action in tort could also be successfully answered by a plea of ex turpi causa non oritur actio (194). Although cases where an action in tort has been defeated by the said maxim are very rare (195), its relevance was examined in the fairly recent case of Lane v. Holloway (196). In this matter, the plaintiff Lane, aged 64 and somewhat frail, called the wife of the 23 year-old defendant a "monkey-faced tart" and then struck the first blow on Holloway's shoulder. Holloway replied by smashing his fist into the older man's eye causing him severe injury. Lord Denning M.R. wrote:

> "It has been argued before us that no action lies because this was an unlawful fight: that both of them were concerned in illegality; and therefore there can be no cause of action in respect of it. Ex turpi causa oritur non actio. To that I entirely demur. Even if the fight

(193) Ibid.

(194) CLERK and LINDSELL, op. cit., p. 343, no 676; FLEMING op. cit., p. 80. Fleming applies this reasoning to cases of illegal abortions and if "change of sex" operations are likewise adjudged illegal, the rationale would be similar.

(195) Per Lord Asquith, in National Coal Board v. England, (1954) A.C. 403 at p. 428.

(196) (1968) 1 Q.B. 379.

> started by being unlawful, I think that one of them can sue the other for damages for a subsequent injury if it was inflicted by a weapon or savage blow out of all proportion to the occasion. I agree that in an ordinary fight with fists there is no cause of action to either of them for any injury suffered" (197).

The significance of this majority opinion would appear to be that participants in a criminal act will have no recourse against each other due to their own turpitude, provided they remain faithful to the degree of illegality agreed upon. Thus, a combatant in a fencing duel cannot complain of a slash to the face but he would be entitled to sue for a gun-shot wound. Transposed to the problem of transsexualism, this would necessarily lead to the conclusion that a surgeon performing conversive surgery within the consentaneous limits established by the patient would enjoy protection from civil liability. The only situation in which a transsexual's action would succeed would be if the physician went beyond the bounds of consent. For example, if a physician, authorized to remove the breasts of a female transsexual, also decided to perform a hysterectomy on his own initiative, then the patient would be entitled to recover.

As for Canada, two "fighting" cases similar to Lane v. Holloway likewise provide jurists with a fair indication of the way the courts would lean if faced with the tort recourse of a post-operative transsexual. In Wade v. Martin (198), which was subsequently referred to and approved in the matter of Hartlen v. Chaddock (199), Winter J. held that the parties

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(197) Ibid., p. 386.

(198) (1955) 3 D.L.R. 635 (Newfoundland).

(199) (1957) 11 D.L.R. (2d) 705 (Nova Scotia), Isley, C.J.

were fighting in anger following a quarrel and therefore:

> "... in such a case neither party can complain of any injury suffered by him, unless, of course, his opponent has used excessive and unnecessary force or a weapon of some sort. I think that the principle of volenti non fit injuria puts him out of court, especially since the plaintiff has not merely been 'willing' to take what comes but may even be said to have invited it" (200).

Much like England therefore, the Canadian Common law jurisdictions would likely refuse any action in tort following an illegal operation provided that the alterations (or mutilations according to one's opinion) were kept within the limits agreed upon by the parties involved (201).

In the United States, the solutions above-suggested would only apply in about half of the American states due to different interpretations of the general rule relating to matters of consent. It may be stated that consent constitutes a valid defence to the tort of assault and battery provided that no breach of the peace is involved, and that the action consented to does not amount to an infringement of public policy or the public interest.

The two areas which provided the greatest number of occasions for judicial interpretations of this rule were the

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(200) Loc. cit., p. 638.

(201) Allan M. LINDEN, in his book Canadian Negligence Law, Toronto, Butterworths, 1972, at p. 381 states that as a rule, the defence of volenti cannot be invoked following violations of a statute. This usually occurs in matters of worker safety. Nevertheless, violations of the Criminal Code would not render inapplicable this defence. Cf. Miller v. Decker, (1957) S.C.R. 624 at p. 634, Kellock J.

mutual combat and the abortion cases. In the fighting cases, the majority of the states would appear to have followed the principle enunciated in the 1693 English precedent of Matthews v. Ollerton (202) to the effect that consent would not bar a civil suit based upon a crime. The reasoning reposed on the notion that civil liability would deter fighting and thus protect the public interest (203). This view-point was and is still greatly criticized since it "... puts a premium upon criminality by giving to one who has joined in a breach of the peace a remedy for injuries for which he could not recover were he innocent" (204).

The abortion cases are potentially an even more fruitful source of guidance in regards to the particular problem of transsexualism, since surgical interventions (unlike fights) do not constitute breaches of the peace but rather possible violations of the public interest (205). The problem so often submitted for decision was whether a mother consenting to an illegal abortion could subsequently sue the abortionist.

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(202) 90 English Rep. 438.

(203) William L. PROSSER, Handbook of the Law of Torts, 4th ed., St. Paul Minn., West Publishing Co., 1971, p. 107.

(204) Francis H. BOHLEN, Consent as Affecting Liability for Breaches of the Peace, (1924) 24 Columbia Law Review 819 at page 835.

(205) It should be noted however, that analogies between "changes of sex" and abortion are quite dangerous since the policy considerations may be different due to the fact that the life of a foetus is involved in abortion. It should also be noted that many of the abortion statutes involved in the cases discussed hereunder, would likely be considered unconstitutional since Roe v. Wade and Doe v. Bolton (1973) 93 Sup. Ct. 705and p. 739. In spite of these aspects dealing with the legality of abortion, the points of view which are of some aid in our examination of transsexualism are those discussing the civil consequences of an act adjudged a crime.

Those states refusing recovery following consent to an illegal act based their attitudes on a refusal to lend aid to persons participating in illegal acts (206). On the other hand, the courts which permitted action to be taken did so due to the fact that the "life or person of a citizen (is) involved" (207). Here, the argument is predicated upon the proposition that since public policy forbids any unwarranted injury to the human body, and any consent given in furtherance of this type of illegal act would be null and void, therefore the way would be open to a claim based on assault and battery.

Consequently, if conversive surgery were held illegal in each American state, the civil liability of the surgeon would depend upon the state in which the operation was performed. In other words, he would be liable only in those states not admitting the ex turpi causa defence. It is nonetheless safe to assert that the point of view refusing a tort recourse in favor of a sane, capable, consenting adult

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(206) E.g. Hunter v. Wheate, (1923) 289 F 604 (D.C.); Herman v. Turner et al, (1925) 232 P. 864 (Kans.); Goldnamer v. O'Brien, (1896) 33 S.W. 831 (Ky.); Nash v. Meyer, (1934) 31 P. 2d 273 (Idaho); Joy v. Brown, (1953) 252 P. 2d 889 (Kans.) except as regards the actions of the next of kin; Henrie v. Griffiths, (1964) 395 P. 2d 809 (Okl.); Sayadoff v. Warda, (1954), 271 Cal. Rptr. 2d 140 (Cal.); Szadiwicz v. Cantor, (1926) 154 N.E. 251 (Mass.); Miller v. Bennett, (1949) 56 S.E. 2d 217 (Va.) but not the action of the next of kin for wrongful death; Andrews v. Coulter, (1931) 1 P. 2d 320 (Wash.); Bowlan v. Lunsford, (1936) 54 P. 2d 666 (Okl.); Castranova v. Murawsky, (1954) 120 N.E. 2d 871 (Ill.).

(207) Per Matthias, J. in Milliken v. Heddesheimer, (1924) 144 N.W. 264 (Ohio) at p. 266; Hancock v. Hullett, (1919) 82 S. 522 (Ala.); Gaines v. Wolcott, (1969) 169 S.E. 2d 165 (Ga.); Rickey v. Darline, (1958) 331 P. 2d 281 (Kans.).

appears to be increasing in acceptance since this attitude seems more popular with American legal writers (208), and especially due to the fact that the Restatement of the Law of Torts (209) urges the following rule:

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort resulting from such conduct".

In a nutshell, we now have a general idea how the courts would react if conversive surgery were held to be a crime. Now the question remains as to whether a civil recourse by the transsexual would lie against a surgeon even though transformation surgery were not held criminal per se but merely contrary to public policy considerations (if indeed such a situation is possible).

It is submitted that the solutions already advanced relating to criminal acts would apply with equal force in matters of public policy. In those jurisdictions which admit of it, the maxim ex turpi causa non oritur actio, would be "... sufficient to defeat a plaintiff whose consent to a tort is invalidated on the grounds of public policy" (210).

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(208) See references cited in PROSSER, op. cit., p. 101, note 99.

(209) Vol. IV, St. Paul Minn., American Law Institute Publishers, 1939, p. 486, no 892.

(210) WINFIELD and JOLOWICZ, On Tort , 9th ed., by J.A. Jolowicz with T.E. Lewis and D.M. Harris, London, Sweet and Maxwell, 1971, at p. 631. Note however, that public policy itself may, in certain circumstances require that the ex turpi defence be rejected as for example in cases of legislation adopted for purposes of worker safety. Cf. Lord Cohen in Cakebread v. Hopping Brothers (Whetstone) Ltd., (1947) KSB. 641, at p. 654 cited with approval by Lord Porter in National Coal Board v. England, (1954) A.C. 403, at p. 419.

Indeed, Winter J. had occasion to state in Wade v. Martin that:

> "(The plaintiff) is also met, and I think more directly and strongly, by the principle ex turpi causa non oritur actio. Indeed, I am inclined myself to go further and give it as my opinion that even if the law did not regard such occasions as unlawful, or a turpis causa, the plaintiff still would not have a civil right of action. If in an action for personal injuries through negligence the contributory negligence of the plaintiff was a complete defence until recently, and still is up to a certain proportion, it seems to me that similarly, and a fortiori in a case such as this his deliberate attempt to injure the other party should disentitle him to claim any sort of damages or compensation. I will confess that I have not found this last principle enunciated in any textbook or decided case, in these general terms, but that may well be because the occasion has never arisen" (211).

Perhaps the strongest argument in favor of the applicability of the solutions broached when crimes are involved may be founded upon the maxim in se quod plus sit semper inest et minus. In broader terms, since crimes per se are violations of public policy, it would appear reasonable to hold that mere transgressions to the notion of public policy without any concomitant criminality could, at the very least, admit the same defences against the action of a participating, consenting, adult. This would imply that if conversion surgery were found repugnant to public policy, the transsexual patient would be barred from recovery in England, the English-Canadian provinces and in most of the

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(211) (1956) 3 D.L.R. 635, at p. 638.

American states due to his freely expressed consent or his own turpitude.

(b) Conversive surgery and civilian law

i) France

French civil law has always adhered to the precept that matters pertaining to the corporeal integrity of the human body are of public order (212). As a rule all infringements of said integrity are held to be illicit notwithstanding the consent of the patient, unless medical necessity dictates otherwise (213). Consequently, the surgical modification of a person in order to permit him to appear in freak shows or bust enlargements for strippers seeking more impressive measurements than their competitors would be considered illicit.

The traditional requirement that interventions be performed only for the physical welfare of the patient soon came to be questioned in cases of aesthetic or plastic surgery. Originally, plastic surgery was viewed as illegal since it was not, as a rule, based upon physical necessity (214).

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(211) ACCARD, BRETON et al, loc. cit., p. 348; Cass. crim. 1 juil. 1937, S 1938.1.193 note Tortat.

(212) R. DIERKENS, Les droits sur le corps et le cadavre de l'homme, Paris, Masson et Cie, 1966, p. 53, no 66.

(213) DIERKENS, ibid., p. 54, no 67; Paris 22 jan. 1913, D. 1919.2.73 note Denisse; Cass. civ. 29 nov. 1920, D.1924.1.103; Seine, 25 fév. 1929, G.P. 1929.1.424.

However, in a remarkable judgment of the Cour d'appel de Lyon dated the 27th of May 1936, aesthetic surgery could be considered lawful provided that the risk incurred was proportional to the advantage sought. The Court also added that improved mental health could be acceptable as the ultimate purpose of the operation:

> "Attendu que certaines anomalies physiques qui n'altèrent pas la santé de ceux qui en sont frappés sont susceptibles d'avoir une grave influence sur la vie sociale, sur leur état mental; qu'il n'est possible qu'une intervention chirurgicale, pour n'être pas imposée par un besoin physique se justifie néanmoins, même si elle n'est pas exempte de tous risques, par un besoin moral, qu'elle reste le seul remède capable de mettre fin à un état morbide de l'esprit, aussi dommageable à celui qui l'éprouve, que l'infirmité de son corps" (215).

In said case, roentgenologic treatments were utilized in order to depilate a female patient's legs. More recently, the Paris Court of Appeal applied the "proportionality rule" to a case involving a professional nude dancer who sought to have abdominal stretch marks following pregnancy removed. The Court decided that under the circumstances, the advantages to be obtained did not warrant the risk assumed and consequently condemned the surgeon (216).

In light of these developments, would one be safe in affirming that conversion surgery would be allowed on

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(215) D. 1936.465.

(216) Paris, 20 juin 1960, G.P. 1960.2.169. For other cases dealing with this problem, see Seine 16 jan. 1938, D.1938.11 (Sommaire); Paris 13 jan. 1959, J.C.P. 1959. 11.11142 note R. Savatier.

purely psychological grounds (as opposed to physical grounds as in cases of intersex)? Decocq implies that such an opinion would be very risky since:

> "Le fait que l'intérêt dont la satisfaction est poursuivie soit d'ordre esthétique et non curatif, tend forcément à contenir la licéité de ces opérations dans des limites assez strictes... Certains risques (variables en fonction de l'état de la science) ne doivent jamais être pris, quelle que soit la gravité de l'imperfection à faire disparaître. La santé étant supérieure à l'esthétique, il ne peut y avoir équilibre, juste proportion entre les atteintes à la santé et des imperfections physiques d'intensité égale" (217).

For the present, the success of any efforts in the direction of assimilating "changes of sex" to esthetic surgery can be considered eliminated by the celebrated arrêt of the 18th of June 1965 which categorically affirmed that conversion surgery was "non justifiée par les nécessités d'un traitement légitime" (218). The regrettable aspect of this

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(217) A. DECOCQ, Essai d'une théorie générale des droits sur la personne, Paris, Librairie Générale de Droit et de jurisprudence, 1960, pp. 317-318, no 458. He also states that: "... les risques graves ne peuvent être pris, en chirurgie esthétique, que s'il s'agit de faire disparaître des troubles psychiques caractérisés" (p. 309, no 443). Obviously he did not have transsexualism in mind when writing on this topic, but an analogy could be made between a transsexual being greatly disturbed by the presence of unwanted sex organs and a person psychologically plagued by a prominent scar or physical imperfection.

(218) Seine 18 jan. 1965, J.C.P. 1965. II.14421 conclusions Fabre. In the Paris decision of the 18th of January 1974 (D.S. 1974.196) a similar conclusion is also reached (at p. 198): "Que les inconvénients que peut présenter pour l'appelant, sur le plan psycho-social, la conservation du sexe qui est le sien et dont il aurait pu maintenir l'apparence ne peuvent être considérés comme déterminants".

decision is that it implicitly retains the "proportionality rule" in the narrow context of surgical risks vis-à-vis the immediate results sought, i.e. a change in external appearance. In cases of transsexualism, could not one go deeper and consider balancing the dangers of surgery with a more general view of the welfare of the patient. It is a known fact, confirmed time and time again, that many transsexuals become so desperate and frustrated with the hopelessness of their situation that they resort to suicide or self-mutilation? Indeed, even in this arrêt the plaintiff Jean Roland J. had initiated self-castration by applying home-made clamps to his scrotum in order to cause necrosis of the testicles. As a matter of fact, he succeeded since his testicles had to be removed due to gangrene (219). (It is only later that the patient went to Casablanca for the penectomy and construction of a vagina). In light of the futility of present psychiatric methods, would it not be making the best of a bad situation by allowing surgeons to mollify transsexuals? In this way by facilitating their social integration, these deviates would at least become useful to society.

Thus in resumé, French civil law is definitely oriented against the legality of the "change of sex" operation. Aside from the criminal law aspect, the French surgeon would almost certainly be condemned before the civil courts no matter how technically flawless an operation he had performed and in spite of a genuine desire to help an unfortunate. This state of affairs will persist, according to Nerson,

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(219) Marcel DUBOIS, loc. cit., p. 678. J's case is described in great detail in this article.

until a change in social policy occurs and liberal legislation is adopted (220).

ii) Province of Quebec

As in France, Quebec doctrine has traditionally held the integrity of the human body to be a matter pertaining to public order (221). This rule was formally embodied in the Civil Code the 1st of December 1971 in the following terms:

> "19. The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so".

Would we be entitled to interpret this provision as providing a "carte blanche" for conversion surgery provided only that an enlightened consent were obtained? If one answers in the affirmative, then at first glance one could also authorize any other type of mutilation provided that no criminal laws were violated. Such a conclusion would be inaccurate since it neglects the fundamental rule of civil law requiring

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(220) R. NERSON, Rectification de l'acte de naissance: changement de sexe, (1966) 64 Revue trimestrielle de droit civil 74, at p. 76.

(221) J.L. BAUDOUIN, L'incidence de la biologie et de la médecine moderne sur le droit civil, (1970) 5 Thémis 217, at p. 219; L. BAUDOUIN, La personne humaine au centre du droit québécois, (1966) 26 Revue du Barreau 66, at pp. 67-69; L. MAZEAUD, Les contrats sur le corps humain, (1956) 16 Revue du Barreau 157, at pp. 164-168.

that public order and good morals be observed in all dealings (222). Any intervention not having as goal an improvement in the life or health of a patient would prima facie be contrary to public order and good morals as well as a direct infringement of the principle of inviolability (223). In this context, the law often serves to protect man against himself. As a result, this clearly implies a value judgment in cases of transsexualism since physical integrity will necessarily have to be weighed against psychological contentment.

The debate which occurred in French jurisprudence concerning the validity of psychiatric grounds as the basis for aesthetic or corrective surgery never arose in Quebec. In the only reported cases dealing with plastic surgery (224) the courts merely examined the situations to see if, in fact, the defendant-surgeons had given competent, conscientious and attentive care. At no time was there any question of distinguishing between "plastic" surgery and

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(222) Art. 13 C.C.

(223) E. DELEURY, Le sujet reconnu comme objet du droit, (1972) 13 Cahiers de Droit 529, at p. 537: "Certes l'homme ne peut aliéner totalement son corps, et une convention par laquelle l'homme consentirait à sa mort ou à sa mutilation, serait nulle, comme contraire à l'ordre public. Mais on ne peut condamner systématiquement toute aliénation volontaire du corps humain. Ce serait interdire les conventions qui portent sur la réparation des atteintes corporelles, ou qui tendent à l'amélioration de l'état physique de la personne".

(224) Mlle Bordier v. S., (1934) 72 S.C. 316, Lachance v. B., (1961) S.C. 625, Dulude et Al. v. Gaudette, (1974) S.C. 618, Dame Déziel v. Régneault, (1974) S.C. 624.

ordinary operations. Consequently, there presently exists no judicial indications of the direction in which the courts would lean, if faced with such a decision.

However, one must not overlook the fact that the "change of sex" operation is still generally considered experimental in nature (225), and as such would be subject to the legal guidelines in force for experimental procedures. The Civil Code at article 20 states that a person who consents in writing may submit to an experiment "... provided that the risk assumed is not disproportionate to the benefit anticipated". The original draft project actually stated that the experiment could be undertaken for "therapeutic or scientific purposes" (226). In commenting this project, the explanatory notes spelled out that:

> "The signification of the words 'therapeutic' and 'scientific' is very extensive. The article will however be applied within the general law of contract and, accordingly, the end sought by the alienation or the experiment must not be contrary to public order" (227).

Consequently, this would mean that an experimental operation performed for the purpose of inserting silicone

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(225) STOLLER, A Biased View of 'Sex Transformation' Operations, loc. cit., p. 316; JAMES, in GREEN, MONEY, loc. cit., pp. 449 and 451.

(226) Committee on the Law of Civil Rights and Duties, Report on the Recognition of Certain Rights Concerning the Human Body, Montreal, Civil Code Revision Office, 1971 p. 5, art. 1.

(227) Ibid., p. 10.

implants in the breasts of a professional female impersonator would be illegal both due to an absence of therapeutic grounds as well as because of the requirements of public policy. The differences between a person surgically modified for the purpose of presenting cabaret entertainment and a beggar who has his hand amputated in order to provoke sympathy are small indeed.

The explanatory notes also go on to elucidate the manner in which the risk-benefit proportion should be viewed:

> "Between the inconvenience assumed by the person undergoing the operation and the anticipated or hoped for advantage, some balance must be created or, better still, any imbalance should lie on the side of the advantage to be gained. It is thus for the doctor or the experimentalist to judge the situation and to refuse to proceed with the operation if the risk to be assumed is disproportionate to the advantage to be gained" (228).

In the final analysis, what this boils down to is that the decision whether or not to operate on a transsexual is purely medical. As Jean-Louis Baudouin wrote, "la science

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(228) Ibid. Even if one did not accept Bowker's (W.F. BOWKER, Experimentation on Humans and Gifts of Tissue: Arts 20-23 of the Civil Code, (1973) 19 McGill Law Journal 161, at pp. 166-167), interpretation of the word "experiment" as meaning scientific or "pure" experimentation as opposed to experimental therapy, the result would probably be the same as regards transsexualism.

médicale dit, la science juridique constate" (229). If the phycisians involved in a particular case do decide to embark upon surgery, they should bear in mind that the law will be satisfied with their decision provided it is one that the reasonable and competent specialist in that field would have reached. In other words, the standards to be applied would be those of the medical profession at large or rather of physicians having special competence in the field of gender inversion, instead of the particular standards of one or more individual practitioners. The other important point to be retained is that if, in the case of experimental surgery, the reasonableness of the decision taken by the experimentalists is questioned before the courts, then the burden of proof as to the validity of their decision will rest upon them. The reason derives from the fact that since, as a rule, human physical integrity must be respected, derogations to the general rule must be interpreted or viewed in a strict manner. In cases of doubt (an extensive interpretation of the word "therapeutic" notwithstanding) the principle must be reaffirmed. Nevertheless, in carefully selected cases, one cannot help but feel that the surgical transformation of a transsexual would be greatly advantageous for the patient both on negative and positive grounds. Not only would the transsexual be very much less inclined to take matters into his own hands and attempt some form of self-injury or else revert to criminal behavior, his emotional satisfaction would also enable him to function as a useful member of

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(229) Loc. cit., p. 225.

society (229a). Although all surgery implies risk, if the non-psychotic adult, genuine transsexual is willing to assume this risk, should not society as a whole (230)?

(229a) Albert MAYRAND, in his book L'Inviolabilité de la personne humaine (Wainwright Lectures of McGill U.), Montreal, Wilson et Lafleur Ltée, 1975, par. 27 writes: "Vu les risques qu'elle comporte et la gravité des problèmes qu'elle suscite, l'opération ne peut être justifiée qu'exceptionnellement pour fin thérapeutique. Elle est licite, si elle est le seul moyen de mettre fin à des troubles psychiques sérieux et de sortir le malade de son état obssessionnel"..

(230) It may be interesting to point out that the legality of the "change of sex" operation has been determined in many jurisdictions not examined in the present paper. For example, in the case of In re Leber, the Swiss Neuchâtel Chantonal Court decided, the 3rd of July 1945, that the operation was legal if performed for a therapeutic purpose, (SMITH, loc. cit., p. 988 and MEYERS, op. cit., pp. 58-59). In Scandinavia, the general outlook is favorable to the legality of conversion surgery. In Sweden, even though the problem of transsexualism has not been treated systematically, the approach to each case has been pragmatic in nature with an attitude of liberalism (J. WALINDER, Medico-legal Aspects of Transsexualism in Sweden, in GREEN, MONEY, op. cit., 461 at p. 462). Norwegian law does not allow sterilization except for "honorable" motives. According to the criminal law, mutilating operations are not permitted except in cases of disease. However, it has become customary for the Secretary of Justice to give this provision a broader interpretation and permit mutilations in order to "help the patient out of a situation of precarity" (J.H. VOGT, Five Cases of Transsexualism in Females, (1968) 44 Acta Psychiatrica Scandinavia 62, at p. 70). For Denmark, Stürup (loc. cit., p. 456) writes: "In accordance with Danish law (no 176 of 1935 concerning Permission to Sterilize and Castrate, Amalienborg, 1st May 1935, section 2, part 1), permission to castrate a person may be granted by the Ministry of Justice, after the matter has been approved by the Medico-legal Council, when the sexual instincts of the person in question either make him liable to commit crimes, thus constituting him a menace to

B- The legal sex of the postsurgical transsexual

Submitting to the pain and discomfort of conversion surgery is but one of many difficulties facing the transsexual. As many soon discover, they are often handicapped by an inability to secure a legal change of sexual status, and this, in certain circumstances may compound their troubles (231). Can one imagine the number of innocuous, everyday happenings which are not given a second thought by a normal person, but which can be a source of great embarrassment or worse to the converted transsexual? Small matters such as receiving a traffic ticket, applying for a job, or buying life insurance are all situations fraught with the risk of exposure and ridicule. At least, prior to the "change of sex" operation, these hazards would not have cropped up except when the patient was cross-dressing.

Even without an amended birth certificate, many transsexuals are able to obtain the alteration of various documents such as passports, Social Insurance registrations

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(230) Cont'd
society, or cause him appreciable mental anguish and injury to his standing in society". In Holland, an official Commission of Inquiry concluded in 1965 that there were insufficient grounds for transforming transsexuals, (conclusions reported by STRAUSS, in Transsexualism and the Law, loc. cit., p. 350). SMITH (loc. cit., p. 987) mentions that the surgery is nevertheless considered legal since a castration law similar to that of Denmark, exists in Holland. As for South African law, STRAUSS (loc. cit., pp. 350-351) expresses the opinion that these operations are to be presumed lawful unless and until it is proved that they are harmful to the patients.

(231) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 159.

(or the equivalent according to the country involved), etc..., under the questionable authority of administrative policies subject to change according to the attitudes or prejudices of the incumbent head of the agency concerned. Yet, in most cases, without a new birth certificate, the bureaucracy will refuse to budge.

This then is the key to resolving an apparent impasse - once a transsexual is able to obtain modification of his or her sex designation in the birth certificate, the rectification of the other documentation becomes immensely simplified. Consequently, it may be of some interest to ascertain how various jurisdictions react to legal sex changes.

1. The determination of sex

(a) Common Law jurisdictions

i) England

In England, any inscription concerning matters required to be entered under the Births and Deaths Registration Act (1953) (232), (which includes sex), constitutes prima facie evidence of the facts therein mentioned (233).

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(232) 1-2 Eliz. II, c. 20 and the Registration of Births, Deaths and Marriages Regulations 1968 and 1969, S.I. 1968, no 2049; 1969, no 1811; 1971, no 1218.

(233) Brierley v. Brierley and Williams, (1918) P. 257 at p. 260 (McCardie J.): "I desire to add that neither the register nor the certificate are in any way conclusive, but only prima facie evidence of the facts to be established in a case such as the present. Evidence, however, can clearly be given to contradict them...".

Nevertheless, in regards to changes in registration, section 29 of said statute provides that:

> "(1) No alteration shall be made in any register of live-births, still-births or deaths except as authorized by this or by any other act.
>
> (2) ...
>
> (3) An error of fact or substance in any such register may be corrected by entry in the margin (without any alteration of the original entry) by the officer having the custody of the register ... upon production to him by that person of a statutory declaration setting forth the nature of the error and the true facts of the case made by two qualified informants of the birth or death with reference to which the error has been made, or in default of two qualified informants then by two credible persons having knowledge of the truth of the case".

Up to the present, the registrar has refused to interpret this legislation as extending to post-surgical changes of sex (234), and said refusal has never been challenged in the courts.

However, this does not imply that this type of difficulty has never been subject to judicial appreciation. Indeed, the English case of Corbett v. Corbett (orse Ashley) (235) is noteworthy in that it provided the only opportunity to date for the courts of that country to determine the sex of a person. The action itself sought to have a marriage declared null and void on the grounds that the "wife" of the

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(234) Corbett v. Corbett (orse Ashley), (1970) 2 W.L.R. 1306 at p. 1313.

(235) Ibid.

union was male, and alternately, that a decree of nullity be granted due to non-consummation.

This litigation arose out of the following circumstances: The respondent, April Ashley, was registered at birth as a male under the name of George Jamieson. While in the merchant marine, George attempted suicide and was placed under psychiatric care. A clinical evaluation categorized the patient as a "constitutional homosexual who says he wants to become a woman" although there was no obvious physical abnormality (236). George apparently joined a troupe of female impersonators and began taking estrogen in order to enlarge his breasts and to round out his appearance.

Subsequently (in 1960) George underwent a "sex change" operation performed by Dr. Burou in Casablanca, which consisted of the amputation of the testicles and most of the scrotum, as well as the creation of an artificial vagina (by inverting the skin of the removed penis into an opening prepared forward of the anus). George became known as April.

The petitioner, who was then married and had four children, met April about six months after her transformation. Corbett had always had a history of transvestism coupled with a taste for homosexual activities, and these proclivities eventually brought him into contact with April. Once divorced from his wife, Corbett prevailed upon April to marry him in Gilbraltar. The union turned out to be somewhat less than a success since the couple stayed together for no more than fourteen days in all, and according to the findings of the trial judge, never had intercourse due to a refusal on

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(236) Ibid., at p. 1310.

the part of the "wife".

At the hearing, virtually all the expert medical witnesses (a total of nine) were unanimous in affirming that the biological sexual constitution of an individual is determined at birth and except in cases of hermaphroditism where sex can be "assigned" by medical intervention, surgery cannot affect a person's true sex (237).

In arriving at a decision in favor of Corbett, Ormrod J. examined various legal relationships and stated that they could be divided into three categories according to the relevance of sex. In some situations, sex was irrelevant (e.g. ordinary contracts or torts), in others it was relevant (e.g. life insurance, pensions), and in yet other cases, sex was an essential determinant. In this last category, Ormrod J. included marriage. Consequently:

> "Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly and ignore any operative intervention... My

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(237) Ibid., p. 1323.

> conclusion therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth" (238).

He also added the following comments:

> "In any event, however, I would, if necessary be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse using the completely artificial cavity constructed by Dr. Burou, can possibly be described in the words of Dr. Lushington in D-E v. A-G (falsely calling herself D-E) (1845) Rob. Ecc. 279, 298, 299) as 'ordinary and complete intercourse' or as 'vera copula - of the natural sort of coitus'. In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it and anal or intra crural intercourse is in my judgment to be measured in centimeters" (239).

Naturally, findings of this nature were to provoke many partisans of a more liberal attitude towards transsexuals and their difficult situation. Aside from their reactions to the opinion that post-operative transsexuals could not legally marry in their adopted sex role (240), critics

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(238) Ibid., pp. 1324-1325. At the trial, the medical witnesses put forward four criteria for assessing the sexual condition of the individual including chromosomal factors, gonadal factors, genital factors and psychological factors. Some witnesses even added a fifth element, i.e. hormonal factors. See also Sir Roger ORMROD, The Medicolegal aspects of Sex Determination, (1972) 40 The Medico-Legal Journal 78 at p. 88.

(239) Loc. cit., p. 1326.

(240) Of which more will be stated infra in the chapter on marriage.

of the Corbett decision have attacked its validity from a double point of view: First of all Kennedy (241) felt that the psychological factors should not have been rejected in determining sex even though current medical opinion retains this element as an important facet of a person's sexuality:

> "Ormrod J. in ignoring the psyche of the individual seems to assume that the distinction between the criteria is effectively one between that which is ordained (biological) and that which is chosen (psychological). But this overlooks two points: First that the transsexual is living proof that in actuality the psyche may operate in defiance of biological truths whatever the law says it should do; second that the psyche is not necessarily formed by choice, but may instead be ordained for the individual by reason of forces operating on him during its development. The judge therefore, sets up a legal scale for weighing the relative importance of solely medical criteria without giving any justification for his choice, without advancing sound non-medical criteria and despite the fact that expert opinion would have him avoid such an inflexible position" (242).

Kennedy argued in effect that in matters of marriage and other relationships in which sex plays a leading role, persons should be distinguished in conformity with their gender identity rather than according to sex. However, could a judge reasonably adopt this attitude in the face of medical opinion affirming that sex cannot be changed? Likewise,

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(241) Transsexualism and Single Sex Marriage, loc. cit., p. 121.

(242) Ibid.; see also p. 115.

could he honestly arrive at the conclusion that a marriage solemnized between a "normal" male (if one overlooks Corbett's transvestism), and an emasculated effeminate male was valid? For Ormrod J. to have so decided would have constituted usurpation of decisional rights more properly left to society at large through its legislators.

A second criticism levelled against the Corbett decision holds that a post-surgical male transsexual could not commit adultery when having relations with a man nor could "she" be the victim of rape, notwithstanding a feminine appearance and external anatomy (243). To take Ormrod's judgment to its logical conclusion, one is forced to admit that these shocking results are indeed true and for the most part can only be remedied by legislation. Yet, is it equally very disturbing to know for instance, that according to the Canadian Criminal Code (sec. 147) that a boy under fourteen years of age cannot be accused of rape (except as an accomplice), or that in Quebec, only children born within one hundred and eighty days of the celebration of marriage, or within three hundred days after its dissolution are presumed the legitimate offspring of the husband, in spite of scientific proof that legitimate children can and indeed have been born outside these limits (244)?

Nevertheless, Benjamin's comments on the judgment are unduly harsh and do little to advance the cause of enlightenment or sympathy towards victims of transsexualism when he writes:

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(243) See Gail BRENT's excellent artiele Some Legal Problems of the Post-Operative Transsexual, (1972-73) 12 Journal of Family Law 405, at p. 414; KENNEDY, loc. cit., p. 123.

(244) Art. 218 C.C. Cf. J.L. BAUDOUIN, loc. cit., at p. 217 note 2.

> "The recent decision of an English court (in the April Ashley case) that even an operated transsexual who has lived as a woman for many years, must still be considered a man on account of the invisible XY chromosomal constellation, shows to what extent medical and legal technicalities and pedantry can go, and how ordinary common sense can be sacrificed, together with the welfare of a human being" (245).

One may only conclude that in English law, the transsexual is an oddity whose present status cannot be rectified by the courts in light of contemporary law and jurisprudence. A post-surgical transsexual cannot obtain a change in birth registration and is forced to live in contradiction with his or her legal status in spite of a most convincing physical appearance to the contrary. Consequently, this difficulty will ultimately have to be resolved by Parliament.

ii) The Anglo-Canadian provinces

If we except Alberta (245a) and British Colum-

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(245) Should Surgery Be Performed on Transsexuals?, loc. cit., p. 77.

(245a) The Vital Statistics Amendment Act, 1973 S.A., c. 86 s. 2 allows any person whose anatomical sex structure has been changed, to apply for a change of sex in his birth certificate, provided that his application is supported by two affidavits of qualified medical practitioners who attest that the anatomical sex of the applicant has been modified, and that sufficient proof as to the identity of the person is made. It is interesting to note that the Act provides not only for the alteration of birth records in Alberta, it also orders that the proof of the change of sex be sent to the officer in charge of registration, in the case of a person whose birth was registered outside Alberta.

which
bia (245b), have adopted legislation formally permitting post-surgical sex changes, in the remaining English-Canadian provinces, the situation of transsexuals remains somewhat ambiguous due to an absence of any court decisions permitting alteration of birth certificates following conversion (246). This is likely due to the fact that the various Vital Statistics Acts (247) (or their equivalent) only provide for alterations following adoption, change of name or correction of errors committed either at the time of original registration or which exist today. Moore and Edwards submit that a

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(245b) Under An Act to Amend the Vital Statistics Act, 1973 S.B.C., c. 160, s. 3, an unmarried person who has undergone conversive surgery may apply for a change of sex designation on his birth certificate. The application must be accompanied by the certificate of the surgeon who performed the surgery, if it took place in one of the Canadian provinces. In the case of conversive surgery performed outside Canada, the application must be accompanied by evidence that the surgeon in question was duly licensed to practice medicine in the jurisdiction where the surgery took place, and the certificate of the attending surgeon attesting that a sex-change had been performed. There must also be included a certificate emanating from a duly qualified B.C. physician approved by the Deputy Health Minister, which must state that he has examined the applicant, that his examination substantiates the certificate of the foreign surgeon, and that the results of the surgery are in accordance with the requirements of the regulations. Upon approval of the application, birth certificates issued thereafter must appear as though the original registration had been made showing the new sex designation.

(246) BRENT, loc. cit., p. 407.

(247) The Vital Statistics Act, 1951 R.S.P.E.I., c. 172, s. 24; The Vital Statistics Act, 1970 R.S. Manitoba, c. V60, s. 23; Health Act, 1973 R.S.N.B., c. H-2, s. 53, 64; Vital Statistics Act, 1967 R.S.N.S., c. 330, s. 23; The Vital Statistics Act, 1970 R.S.O., c. 483, s. 30; The Vital Statistics Act, 1965 R.S. Sask., c. 47, s. 23; The Registration (Vital Statistics) Act, 1970 R.S. Nfld., c. 329, s. 24.

transsexual can hardly invoke error in the initial registration of the child's sex unless one is prepared to argue that there was a psychological basis for the error (248). The obvious weakness in this argument arises from medical findings that transsexuals are made and not born. Also, Stoller reports good results in helping children suffering from gender identity problems provided they are brought to professional attention at a young age (249). The implication here is that the "error" in registration is corrected by psycho-therapy and the "wrong" sex becomes the "right" sex. Of course this is disputable. Consequently, the restrictive nature of the legislation would obviously exclude any amendment to the original birth certificate following a change of sex operation (250).

However, at least in a third province, some attention has been officially devoted to this problem. Indeed, Mr. Frank Muldoon, chairman of the Manitoba Law Reform Commission declared in a statement to the Press that the Commission would recommend legislation permitting a change in gender designation on birth certificates following surgical sex-change (251). In order to protect Manitoba from becoming a "mecca for gender-change procedures", he added that the

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(248) Medico-Legal Aspects of Intersexuality: Criteria of Sex, loc. cit., p. 759.

(249) ACCARD, BRETON et al, loc. cit., p. 134.

(250) MOORE, EDWARDS, Medico-Legal Aspects of Intersexuality; Criteria of Sex, loc. cit., p. 759. Nevertheless, evidence of the facts contained in the birth certificate can be rebutted. Cf. Kabatoff v. Popoff et al, (1939) 3 D.L.R. 807 (K.B. Sask).

(251) Cf. Montreal Star, Friday, August 18th 1972.

proposed legislation would apply only to residents of that province. Regrettably, these recommendations appear to have been put aside at the Cabinet level since no legislation to this effect has yet been adopted.

In summary therefore, aside from the provinces of Alberta and British Columbia, the English solution would appear to be equally valid in Canada.

iii) The United States

Very few of the American States have chosen to make legislative provision for sex-changes on birth certificates even though conversive surgery has, and is still being performed within their borders without any eyebrows being raised as to the legality of this type of operation. Louisiana, Arizona, and Illinois, however, are the rare exceptions in which the problem was broached by statute in favor of a post-operative change of sex designation on birth certificates (252).

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(252) Louisiana Rev. Stat. Ann. no 40:336 (Supp. 1971). The Louisiana statute allows persons born in that state who have undergone sex-reassignment surgery to petition the court of competent jurisdiction for a new certificate of birth. Before granting the petition, the court must be satisfied that the petitioner was properly diagnosed as a transsexual or a pseudo-hermaphrodite, that sex-reassignment surgery had been properly performed upon him, and that as a result of the surgery and subsequent medical treatment, the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated upon the original birth certificate. A copy of the petition and the judgment are sent to the concerned registrar of Vital Statistics and the original birth certificiate is sealed. Thereafter, only the new certificate may be issued unless the individual concerned requests it or the court so orders otherwise. Arizona Rev. Stat. Ann. no 36-326A4 (Supp.

Of the remaining states, at least thirteen have granted modifications to birth certificates, including Alabama, California, Colorado, Hawaii, Iowa, Maryland, Minnesota, New Jersey, North Carolina, Pennsylvania, Virginia, Tennessee and Texas (253). This would appear to be the result of administrative generosity or a working arrangement between the administration and the institutions referring the patient, rather than legislative authorization (254).

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(252) Cont'd.
1969); Illinois Ann. Stat., ch. 111.5, no 73-17 (Smith-Hurd Supp. 1970). The Illinois legislation requires only an affidavit from the surgeon performing the sex-change whereas the Louisiana statute, which applies only to residents of that state requires the patient to petition the competent court and to prove that he or she is a transsexual, that surgery has been performed, and that the "anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate...". Once such proof is made, a court order provides for issuance of a new certificate. SMITH (loc. cit., p. 996) describes the unreported case of Ex Rel. A.D.M. v. New Orleans which applied the Louisiana statute despite the objections by the New Orleans city attorney that it is impossible to change the sex of a person.

(253) SMITH, ibid., p. 994, note 213. Some of the California cases are mentioned in K. BOWMAN, B. ENGLE, Sex Offences: The Medical and Legal Implications of Sex Variations, (1960) 25 Law and Contemporary Problems 292, at pp. 307, 308.

(254) SMITH, ibid., p. 997.

In fact:

> "Statutes governing birth record changes in the remaining states can be classified into three general categories: those that do not specifically allow or prohibit corrections, changes, alterations, or amendments to birth certificates, those that permit only 'corrections' and those that allow 'alteration' or 'amendment'. In the 'correction' states, changes are allowed only where it is shown that there was an error in the original registration. This usually precludes registration of a change by surgery since the registration was technically 'correct' at birth ... the 'alteration' or 'amendment' statute seems to give the agency charged with public record-keeping greater latitude in allowing a change based on future events" (255).

In spite of this array of legislation, rarely have the courts been called upon to adjudicate a requested modification of sex designation in a birth certificate. In one of the few reported cases pertaining to this type of problem, the Supreme Court of New York refused to reverse an administrative decision denying a change of sex in a birth certificate. In said case of Anonymous v. Weiner (256) the circumstances may be described as follows: The petitioner had submitted to conversive surgery in Casablanca and in order to consummate his change in gender, requested that the Director of the Bureau of Records and Statistics of the Department of Health of the City of New York issue a new birth certificate. Although the Board of Health had previously acceded at least three times to similar requests, it decided to defer

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(255) SMITH, loc. cit., p. 996. See also HOLLOWAY, loc. cit., in GREEN, MONEY, pp. 432-434.

(256) (1966) 270 N.Y.S. (2d) 319.

action until a policy could be formulated with regards to transsexuals. Accordingly, the Board called upon the New York Academy of Medicine to issue recommendations after examination of the problem by a select panel composed of many medical experts as well as a lawyer. This special committee finally published its findings and concluded by opposing any changes of sex on birth certificates in cases of transsexualism. The members of the committee based said conclusion upon the following arguments:

> "1) Male to female transsexuals are still chromosomally males while ostensibly females.
>
> 2) It is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically-ill persons in their social adaptation.
>
> 3) The change of sex of a person named in a birth certificate would have no evidentiary or probative value in court.
>
> 4) There are other ways to help these persons, including relief by court order to change name and sex, or amendment of the birth certificate by showing the new sex but still showing the original sex and the change of sex. The desire of concealment of a change of sex by the transsexual is outweighed by the public interest, in protection against fraud.
>
> 5) Federal agencies have indicated their preference for a court order preceding the change of sex on a birth certificate, and for designation of the change on the records. Thus the continuity of a person's record is ensured, and the court action provides an invaluable linkage between records created before and after the event" (257).

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(257) Report by the Committee on Public Health, The New York Academy of Medicine, Change of Sex on Birth Certificates for Transsexuals, (1966) 42 Bull. N.Y. Acad. Med. 721 at pp. 723-724, reported in HOLLOWAY, (1968) 40 U. of Colorado Law Rev., loc. cit., at pp. 292-293.

The Board of Health approved the recommendations and issued a statement that sex could only be changed in cases of error (e.g. hermaphroditism), and not in situations where the psychological orientation of the individual was in conflict with his or her anatomical sex.

The transsexual applicant then sought a reversal of the Board's decision by way of mandamus. However, Sarafite, J. refused to order a change to the birth certificate on the grounds that article 207 of the Health Code provided for amendment of a birth certificate only when an error was committed at the time of filing or when a name change by court order had been obtained. Also the court found that the Board had not acted in an arbitrary, capricious or otherwise illegal manner, especially in light of the recommendations by the specialists.

Reactions to this decision were not long in forthcoming and many criticisms were voiced, not against the judgment itself (which appears to constitute impeccable administrative law), but rather against the Academy of Medicine report which provoked the Board of Health's refusal to amend the certificate. Firstly, some felt that the desire to prevent any fraud being perpetrated was rather ill-directed since fraud implies an intent to deceive in order to secure an unjust advantage. Also, in most ordinary transactions, sex is immaterial to the contracting parties (258).

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(258) ANONYMOUS, (1971) 31 Maryland L.R., loc. cit., p. 242. The author adds (at p. 243): "... in those cases in which the individual's sex is material, deception is more likely if society relies on the original sex designation than if it uses an amended description coinciding with the transsexual's surgically acquired sex".

A second criticism is based upon the apparent reliance placed by the Committee on the chromosomal test as a sole deciding factor for determining sex rather than on laying as much emphasis on the many other criteria (e.g. gonadal, genital, psychological factors, etc...) used by the medical profession (259). It may be assumed that most or all of the acknowledged factors have been retained in arriving at a decision and that poor judgment was employed in the drafting of the recommendations. Brent (260) accurately points out that sex change is a misnomer since it cannot be scientifically accomplished and that this was the primary consideration behind the Report's conclusions.

A third line of contention involves the recommendation that if some type of relief were to be granted, then both the "old" and the "new" sex should be mentioned on the amended certificate. The objection in this case is based upon questions of privacy and basic consideration for the feelings of others (261). This type of amendment, according to some, could be placed in the same category as the situation of an illegitimate child subsequently legitimated by the marriage of his or her parents, or a person undergoing adoption or a change of name. It would be senseless to mention both the original and the acquired status of the persons concerned for reasons which do not require explanation.

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(259) HOLLOWAY, in the U. of Colorado L.R., loc. cit., p. 293; SMITH, loc. cit., p. 999; BRENT, loc. cit., p. 411; MONEY, SCHWARTZ, loc. cit., in GREEN, MONEY, at p. 260.

(260) Ibid., p. 411.

(261) BRENT, ibid., p. 410; HOLLOWAY, loc. cit., p. 294; Transsexuals in Limbo, (Maryland Law Review); loc. cit., p. 243.

As a fourth objection, some writers wonder why changes in birth records cannot be used to help psychologically-ill persons in their social adjustment (262). However, it must be pointed out that this type of "collaboration with the psychosis" (according to some opinions) could be far-reaching in its implications. Perhaps we should indeed use changes in records to help transsexuals but where does one stop? What is sauce for the goose could also be sauce for the gander, and another patient suffering from some other psychological disorder could also seek the same type of help through modification of a public document which is the source of some discomfort or displeasure to him. Here, a value judgment must be made weighing the interests of an individual with the interests of society - between a person wanting to live a lie (objectively speaking) and the need for society to maintain accurate records. If the birth certificate were merely a document stating the fact of birth under the circumstances described therein, then nobody could possibly object. Unfortunately, the birth certificate is a fundamental document from which flow many important repercussions in everyday life (e.g. marriage, insurance, military service, etc...). These are factors one cannot lightly set aside.

In rebuttal, one may put forward a final demurral raised by Brent and inspired somewhat by Ormrod's comments in the Corbett case (263). In essence she writes that since an individual's sex is relevant to different persons for

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(262) HOLLOWAY, ibid., p. 293; SMITH, loc. cit., p. 999.

(263) Loc. cit., at p. 1324.

different reasons, then tests for the determination of sex should also vary according to the situation (264). Thus, the life insurance companies would rely on biological sex whereas the passport office would depend more or less on external appearance and psychological sex. Yet perhaps this solution would also be contrary to the interests of society at large since the sex of a person would be highly uncertain, depending only upon external circumstances: For example, a converted male transsexual talking to a life insurance agent would be considered a male whereas if the agent forced his attentions upon this unique client, he could be convicted of rape.

Interestingly enough, in addition to the above, Sarafite's decision was also commented upon by Pecora, J. in the case of In the matter of Anonymous (265). In said case, the petitioner sought both a change of name as well as modification of his birth certificate to reflect a change of gender. To the change of sex designation, the court declined that part of the petition on the grounds of lack of jurisdiction, (this case being brought before the Civil Court of the City of New York). On the other hand, the change of name was granted and a copy of the judgment was ordered attached to the original birth certificate.

This case warrants examination in that the judge took the trouble to offer a formula for the test of gender, which he outlined as follows:

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(264) BRENT, loc. cit., p. 412.
(265) (1968) 293 N.Y.S. 2d 834.

> "Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made" (266).

He subsequently added:

> "This Court is in complete disagreement with the conclusion reached by the learned committee (in Anonymous v. Weiner, loc. cit.). A male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact" (267).

Judge Pecora's conclusion was based upon the premise that a pseudo-hermaphrodite incorrectly described in a birth certificate is not irretreivably condemned to living out his or her life in the sex of attribution. If this is true for the pseudo-hermaphrodite, he reasoned, would it not also be true for a transsexual whose anatomical sex is made to conform to his psychological sex? Unfortunately, an inaccuracy crops up in this reasoning in that the hermaphrodite or pseudo-hermaphrodite especially, is the victim of an error in designation due to the confusing appearance of the external genitalia and as such is entitled to rectification of this error under the terms of the New York Health Code.

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(266) Ibid., p. 837.

(267) Ibid., p. 838.

The transsexual, on the other hand, is not the victim of such an error. Quite the contrary, one may state that anatomically, his birth certificate is totally accurate. It is only after conversion surgery that some discrepancy may be noted. As we can see, the situations are totally different and analogies between the transsexual and the hermaphrodite are at best speculative.

In yet another petition brought before the Civil Court of the City of New York, a post-operative male transsexual asked only for a change of name (268). In granting the request, Evans J. affirmed that although the application was made to gain societal acceptance as a female, the Court did not have jurisdiction to discuss the legal repercussions of being viewed as a member of the opposite sex. The Court also directed that:

> "... the order shall not be used or relied upon by petitioner as any evidence or judicial determination that the sex of the petitioner has in fact been changed" (269).

Subsequent to the above cases, the Board of Health amended the New York City Health Code the 16th of December 1971, by adding to section 207 the following:

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(268) In the Matter of Anonymous, (1970) N.Y.S. 2d 668.
(269) Ibid., p. 670.

"A new birth certificate shall be filed when:

...

The name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone conversive surgery".

This amendment was soon subjected to judicial scrutiny in the matter of Hartin v. Director of the Bureau of Records of the City of New York (270), involving a male transsexual seeking a female sex designation on a new birth certificate. The Bureau had merely issued a new certificate changing only the first name of the petitioner to "Deborah" and omitting any identity of sex. In reviewing this administrative decision, Helman, J. referred to the New York Academy of Medicine Report (already described in Anonymous v. Weiner) and to the minutes of the Board of Health meeting which adopted the above-mentioned amendment. Said minutes reiterated the Board's position that a change of sex could not occur through surgery since the cell chromosomes always remained the same. The Board was also of the opinion that the surgery was "an experimental form of psychotherapy" (271).

Consequently, the court found no arbitrariness or capriciousness in the implementation of Rule 207, and as such could not vary the administrative decision objected to.

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(270) (1973) 347 N.Y.S. 2d 515.

(271) Ibid., p. 518.

For the time being therefore, the State of New York does not appear to be disposed towards any further concessions in favor of transsexuals.

As we have seen, there is no uniform approach on the part of the American States. Some have provided formal legislation permitting sex-change, some others allow this sex-change to be obtained through administrative generosity, and finally still other jurisdictions such as New York steadfastly refuse to permit any complete changes of sex to be made on birth certificates. Obviously this situation invites a form of "forum-shopping" by American transsexuals which can only add to their problems.

(b) The Civilian jurisdictions

i) France

Although the French Code Civil at article 57 paragraph 1 requires that the acte de naissance mention the sex of the child, no definition of sex is provided. Consequently, in matters pertaining to the determination of sex, French jurists have traditionally had recourse to a celebrated Cour de Cassation arrêt of the 6th of April 1903 involving an action in nullity of marriage (272). The wife, in this case, lacked internal sex organs although the external genitalia

(272) D.1904.395 (concl. Baudouin).

appeared normal. In accepting the wife's pretentions, the Cour de Cassation stated that marriage requires two persons of different sexes and that these sexes have to be recognizable and not necessarily perfectly formed (273). Consequently, the principle was established that external morphology determined sex, or in other terms, that apparent sex was equivalent to legal sex.

In light of this arrêt de principe (274), one would have been justified in presuming that at first glance, a post-operative transsexual would be entitled to claim official recognition of his "new" sex. Yet, this was not to be because on the two occasions presented to the French courts to decide this very point, the requested modifications were refused (275). The first case involved a certain Jean Rolland J. who underwent surgery at Casablanca and who wished both a name change as well as modification of his birth certificate. The Tribunal de Grande Instance held that although the plaintiff possessed female secondary sexual characteristics and was able to have relations as a woman, the affirmations in a birth certificate, including sex, enjoyed a presumption of accuracy until proof to the contrary. In order to rebut this presumption one would have had to prove that at the time of the declaration of birth to the officer of civil status, Jean Rolland J. was not truly male and that at present he had "... les attributs essentiels et naturels de l'autre sexe". As to the second element, the court refused to take into consideration:

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(273) Ibid., p. 400.

(274) NERSON, Rectification de l'acte de naissance: changement de sexe, loc. cit., p. 75.

(275) Seine, 18 jan. 1965; J.C.P. 1965.II.14421.

> "... des modifications corporelles, artificielles, obtenues par des procédés dont certains pourraient même tomber sous le coup de la loi pénale, et qui en tous cas auraient eu pour effet de dénaturer le sexe normal et primitif d'un individu, sans lui conférer pour autant véritablement le sexe opposé" (276).

In the final analysis, the French court retained as a primary factor for determining gender, the presence or absence of sex-chromatin.

The fact situation of the second case (276a) had much in common with the first: Pierre Charles G., a dancer by profession, began taking feminizing hormones in 1962 and finally, in 1968, underwent a male to female "sex-change" in Casablanca. A year later, he brought an action en réclamation d'état in order to obtain the rectification of his act of birth. After examinations by two groups of experts named by the Court, the Tribunal de Grande Instance de Paris decided to deny the requested alteration of sex designation and suggested instead that he petition the Court for a change of name. G. appealed this decision but without much success. In refusing to overturn the inferior court, the Cour d'Appel de Paris laid great emphasis on the fact that from a genetic point of view at least, both expertises categorized the appellant as a male possessing the 46 XY karyotype. In terms reminiscent of the language used in the 18th of January 1965 decision above-described (276b), the appellate court also set

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(276) Ibid.

(276a) Paris 18 jan. 1974, D.S.1974.196 (concl. Granjon).

(276b) Trib. de Gr. Inst. Seine 18 jan. 1965, J.C.P.1965.II. 14421.

out an obviously impossible obstacle for converted trans-sexuals seeking legal sex-changes, to overcome:

> "Attendu, en droit, que tout individu même s'il présente des anomalies organiques, doit être obligatoirement rattaché à l'un des deux sexes masculin ou féminin, lequel doit être mentionné dans l'acte de naissance (art. 57 C.C.); que cet acte fixe définitivement cet élément de l'état de l'intéressé: qu'il ne peut être rectifié que si la mention du sexe procède d'une erreur, celle-ci pouvant toutefois se révéler plusieurs années après; qu'il appartient au demandeur en rectification d'établir l'existence de cette erreur; qu'il ne saurait être tenu compte des changements apportés artificiellement à sa morphologie par l'ingestion de certaines substances, encore moins par une opération comportant des mutilations réprimées par la loi pénale" (276c).

Adding insult to injury, the Court took the trouble of affirming that any adverse psycho-social effects which its decision could have for the appellant were not taken into consideration (276d).

In cases of hermaphroditism on the other hand, the courts have been quite willing to grant the relief sought, mainly on the grounds that an error as to sex designation had indeed occurred at the time of birth. For example, in the case of one B., the Paris Cour d'appel reversed a judgment of the Court of first instance refusing the rectification (277).

(276c) Loc. cit., p. 198.

(276d) Ibid.

(277) Paris, 31 mai 1966, J.C.P. 1966.II.14723.

The inferior court had rejected the request due to the fact that in matters such as sex designation which reflect on the legal status of the person involved (l'état des personnes), all discussions of a contentious nature would have to be carried out in the form of an action d'état with the state as "légitime contradicteur". A simple request for rectification under article 99 C.C.F. per contra extended only to material errors in the act of birth. The Cour d'appel agreed with these principles but felt that they had been wrongly applied - that a material error had indeed occurred in recognizing the true sex of the petitioner at birth. Accordingly, it was ordered that a panel of experts be constituted in order to determine:

> "1o si le sieur B. ... possède un appareil génital féminin apte à la fécondation;
>
> 2o si les constatations physiologiques présentes, abstraction faite tant des dires invérifiables de l'intéressé que des transformations chirurgicales qui ont été opérées sur la morphologie de son sexe, font apparaître qu'une erreur sur le sexe apparent de l'enfant a été possible au moment de la déclaration de naissance" (278).

In submitting their report to the court, the experts stated that although the subject "... ne possédait pas d'appareil féminin apte à la fécondation..." (279) (a condition which was somewhat frequent in women), they were convinced that at birth, B. was female and that an error had occurred in mention-

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(278) Ibid.

(279) Paris, 8 déc. 1967, J.C.P. 1968.II.15518 bis.

ing the sex of the child in the act of birth. Consequently, the court ordered rectification (280).

As in the 6th of April 1903 Cour de Cassation decision and the more recent 18th of January 1965 and 18th of January 1974 judgments involving transsexuals, we may note that the Paris Cour d'appel re-emphasized (by implication) that psychological elements had absolutely no role to play in sex determination. Also, that although natural external morphology enjoyed an important role in establishing sex, perfect or complete organs were not required. Finally, in spite of a total absence of mention in the 1965 case as to how the experts arrived at a conclusion regarding the sex of the patient, it is probably safe to presume that the ultimate deciding factor was chromosomal sex. Indeed the 1974 decision clearly emphasized this aspect (280a).

In discussing this jurisprudential approach, Nerson once concluded that "... en ce qui concerne la détermination du sexe, c'est un esprit, insoucieux de vérité objective qui paraît animer les tribunaux" (281). One cannot help but feel

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(280) Rectification had also been granted in the following cases: Chateau-Thierry 26 jan. 1940, D.1940.123; Soissons 25 juillet 1945, G.P. 1945.2.141. Both cases involved pseudo-hermaphrodites.

(280a) In a comment on the 1974 case in the Revue Trimestrielle de droit civil (Rectification de l'acte de naissance: changement de sexe, (1974) 73 R.T.D.C. 801) R. NERSON wrote (at p. 802: "Le critère tiré de l'apparence extérieure est 'simpliste' et il est intéressant de noter que dans l'affaire soumise à la Cour de Paris, G., l'intéressé a été examiné sous divers aspects, dont l'aspect génétique; la Cour d'appel de Paris, dans son arrêt, prend appui sur les conclusions des experts-généticiens. Avec raison, croyons-nous...".

(281) Influence de la biologie et de la médecine moderne sur le droit civil, loc. cit., p. 70.

that his attitude is unduly harsh. Once one eliminates the question of surgical transformation of transsexuals to which the French courts are implacably opposed, the problem of sex determination is left to the appreciation of scientists whose findings are subsequently legally confirmed. One could even go further: In not one of the cases cited have the courts arrived at a biologically inaccurate solution. In spite of the fact that one may immediately attack the 18th of January 1965 and the 18th of January 1974 decisions as manifesting a lack of humanity towards obviously unhappy persons, the fact still remains that the Tribunal de Grande Instance as well as the Cour d'appel insisted on a strict application of the law and refused to be drawn into a form of social activism more properly left to legislative bodies (282).

ii) Province of Quebec

With regards to post-surgical transsexuals, the situation in Quebec is quite similar to that of France. In effect, the Quebec Civil Code (article 75) states that:

> "Any error or omission in an act or register of civil status may be rectified in the manner prescribed in the Code of Civil Procedure" (283).

According to article 54 C.C. one of the essential enunciations of an act of birth is the sex of the child. Therefore, it is logical to assume that any error as to sex will enable the parties concerned to seek the relief mentioned above (284). Yet according to Marie-Louis Beaulieu, error

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(282) NERSON, 'Rectification de l'acte de naissance: changement de sexe, loc. cit., p. 76.

(283) Arts 864-865 C.C.P. mention that a rectification must be requested by way of a motion before the Superior Court.

(284) H. ROCH, Actes et registres de l'état civil et rectification, Montreal, 1949, p. 169.

under the terms of article 75 C.C. occurs "... quand l'inscription aux registres n'est pas conforme aux déclarations, ou quand on a omis de mentionner un fait essentiel ou qu'on a inclu des faits dont l'écriture est prohibée, ou encore dans les cas d'informalités" (285). Under these terms, it is easy to admit that in cases of hermaphroditism, an incorrect assignment of sex at birth could occur and that a simple request for correction of the birth certificate would lie. As for the converted transsexual, the situation would not be the same since no error as to sex would have occurred at birth.

If, for the sake of argument, one presumes that a case could be made for determining sex according to external physical appearance coupled with a congruent psychological attitude, would rectification be the appropriate measure? The answer is definitely negative due to the fact that this type of request would in fact constitute an indirect means of obtaining conclusions belonging more properly to an action en réclamation d'état (286). Indeed, a similar debate arose in matters relating to the legitimacy of children and the declarations made to the officer of civil status drafting the act of birth. Quebec jurisprudence properly decided that in matters directly related to civil status rather than to simple correction, an action would be the appropriate procedure:

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(285) Rectification des registres de l'état civil, légitimité, requête en vertu de l'art. 75 C.C. Action. Qui doit être défendeur?, (1959) 19 R. du B. 24, at p. 27.

(286) P. AZARD, A.F. BISSON, Droit civil québécois, Ottawa, Editions de l'Université d'Ottawa, 1971, t. 1, p. 58, no 46. See also Soucy v. Curé de Grand Remous, (1958) R.L. 383 and L. BAUDOUIN, Droit civil de la Province de Québec, Montreal, Wilson et Lafleur, 1953, p. 136.

> "Considérant que cette requête, dans l'opinion de ce tribunal, et en raison de la preuve qui a été effectivement faite, n'est point de celles tombant sous l'art. 75 C.C., permettant de rectifier une entrée au registre de l'état civil constituant une erreur mais que cette requête concerne la légitimité de l'enfant impliqué en icelle et que, conséquemment, elle a trait à la filiation et que c'estpar action qu'il faudrait procéder;
>
> Considérant que, si le tribunal acquiesçait à la prétendue rectification demandée, il commettrait un faux..." (287).

Procedural matters aside, would the Quebec courts be authorized to grant a change of sex to a transsexual applicant? In the absence of any reported cases on this particular problem it is probably safer to observe the law as written, which requires that the sex of the person be mentioned in the act of birth. In light of the present scientific impossibility of changing sex, the courts cannot logically grant such a change. As Beaulieu states:

> "Il ne faut pas être formaliste, mais on ne doit pas non plus faire dire aux textes de la loi ce qu'ils ne disent pas et demander aux tribunaux de les faire servir à un usage qui n'est pas le leur" (288).

It would appear that at present, the only legal means of relief for the transsexual would be recourse to the

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(287) McNicoll, J. in Vachon et Martin et al, (1968) P.R. 283 at p. 285; see also Dame Crépeau et L.R. alias Ralph Gareau et al, (1916) 19 R.P. 323; Tanguay v. Pouliot et al, (1958) R.L. 382, (this case is commented by Marie-Louis BEAULIEU, loc. cit., p. 24); C. v. R., (1970) P.R. 337.

(288) Ibid., p. 29.

legislative branch by way of a private bill (288a). Not-

(288a) At the time of writing, it appears that as an interim measure, many converted transsexuals have made application for a name change under the Change of Name Act, S.Q. 1965, c. 77. See for example Q.O.G. May 25th, 1974, vol. 106, no 21 (Marie-Ange F. to Alphonse F.O.; Q.O.G., August 3rd, 1974, vol. 106, p. 5508 (Maurice Richard C. to Anne-Marie C.); Q.O.G. Sept. 21st, 1974, vol. 106, p. 6906 (Réal M. to Marie-Josée M.); Q.O.G. July 13th, 1974, vol. 106, p. 5086 (Serge G. to Line G.); Q.O.G. May 25th, 1974, vol. 106, p. 3965 (Raymond B. to Raymonde B.); Q.O.G. May 25th, 1974, vol. 106, p. 3965 (Gérard Norman Hébert B. to Lise B.). In all cases, since the Change of Name Act, allows modification only if serious reasons so indicate, to date, the government service concerned has seen fit to exclude "sex-change" surgery as a serious reason, cf. the paper presented by Me Monique OUELLETTE-LAUZON to the Colloque organisé par le Dept. de Sexologie de l'U.Q.A.M. sur la Transexualité, loc. cit., p. 4.

In a remarkable paper entitled De certains aspects juridiques du transexualisme dans le droit québécois, which will be presented to the Congrès Henri-Capitant at Brussels in September 1975, and published in (1975) 6 Revue de Droit de l'Université de Sherbrooke, Professor Ethel Groffier-Atala makes a detailed analysis (at pp. 41-44 of her typewritten manuscript which she has so kindly forwarded to the author) of the problem of post-surgical changes of sex in birth certificates in light of legislation on civil status proposed by the Civil Code Revision Office. According to article 6 of the Report (Committee on Civil Status, Report on Civil Status, Montreal, C.C.R.O., 1973), the modification of an act of civil status may occur following rectification, a declaratory judgment of death, a judgment reconstituting or replacing a record of civil status, a judgment of repudiation of paternity, an admission of paternity or maternity, adoption, divorce or an annulment of marriage, and a legal change of name. As Mme Groffier-Atala points out (at p. 41): "... il est à craindre que l'énumération qu'il contient ne soit interprétée limitativement. Il vaudrait mieux qu'il se borne à une référence générale aux jugements d'état, ou qu'il mentionne (as regards transsexuals) spécifiquement le jugement en réclamation de sexe". Admitting that provision for such a change is eventually made by the legislator, will there have to be added precautions as regards protecting the transsexual's privacy?

withstanding the ancient and often quoted rule to the effect that parliament can do all except change a man into a woman or vice versa (289), it appears incontestable that this type of measure would fall within the legislative authority of the National Assembly. Naturally, the greatest hurdle to overcome (other than time and expense) would be the attitudes or prejudices of our legislators (290). In

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(288a) Cont'd.
According to Mme Groffier-Atala (ibid., p. 43), the system proposed by the Report on Civil Status would suffice as is. Under article 18 of the Project, every declaration of birth mentions the name, sex, place and date of birth of the child, the names and domiciles of the father and mother, and the degree of relationship between the declarant and the child. Art. 13 provides that only those persons mentioned in the record or who justify their interest in it may obtain a copy of that document. In such case, the record indicates all changes made or entries attached to it (except for adoption). On the other hand, anyone who applies for a certificate of civil status may obtain one (art. 10). The certificate, unlike the record, does not indicate information which has been changed (art. 12). The certificate mentions only the names, sex, the place and the date of birth of the child (art. 19). Consequently: "Il se pourrait que ce système réponde - au moins en partie - à la double nécessité d'assurer un certain secret de la modification en même temps que la protection des tiers. D'une part, le transsexué serait en possession d'un document officiel - le certificat de naissance - établissant une identité conforme à son apparence. D'autre part, lui-même et ses proches parents auraient accès à l'acte de l'état civil original muni de sa correction. Ils seraient ainsi à même de faire la preuve des liens de parenté les unissant ainsi que du 'changement de sexe' intervenu" (GROFFIER-ATALA, loc. cit., pp. 43-44).

(289) A.V. DICEY, Introduction to the Study of the Law of the Constitution, 10th ed., by E.C.S. Wade, London, MacMillan and Co. Ltd., 1961, p. 43.

(290) This would be one good reason for post-surgical transsexuals to avoid the notorious publicity they are often known to seek. It is easier to rationalize a measure aimed at helping an unfortunate person than it is to enable a "kinky" night-club performer to reap free publicity or a new gimmick for an act.

the final analysis, one can only hope that they view serious applications with an open mind (291).

2. Recommendations regarding the determination of sex

As we have noted, except for the legislation of three of the American states and two of the Canadian provinces, post-operative transsexuals have been given short shrift legislatively, judicially and in most cases, administratively. Yet commentators on the subject all manifest the attitude that:

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(291) It could be of some interest to examine the attitudes of other jurisdictions towards post-surgical changes of sex-designation. For instance in 1969, the West German Oberlandesgericht refused to reverse a lower court decision denying modification of the birth certificate on the grounds that the etiology of transsexualism is unknown and as such does not permit classification of the person as a member of the opposite sex. (STRAUSS, Transsexualism and the Law, loc. cit., p. 358; SMITH, loc. cit., p. 994). Two other German cases involving changes to a passport and prosecution for homosexuality likewise rejected the possibility of sex-change, (described in MEYERS, op. cit., p. 58). In the Scottish case of In re X, (1957 Scots L.T.R. 61), the sheriff held that from chromosomal studies, the petitioner had not changed sex and thus the birth certificate could not be modified (SMITH, loc. cit., p. 993; MEYERS, ibid., p. 55). Meyers describes a Swiss case in which a newly-acquired female status was sanctioned by a court of law (ibid., p. 59). According to Smith (loc. cit., p. 994), changes to birth certificates were also allowed in South Africa, Sweden and Italy (concerning South Africa, see also S. STRAUSS, The Sex-Change Operation: Two Interesting Decisions, loc. cit., (1967) 84 S.A.L.J. 214). In his article Transsexualism and the law (loc. cit., p. 350), Strauss quotes the findings of an official Dutch Commission of Inquiry which concluded in 1965 that there were insufficient grounds for treating transsexualism surgically.

> "Once a person undergoes sex conversion surgery and fully assumes the gender role of the sex to which he or she has been converted, society has an obligation to furnish such person with the legal documentation to live in this role" (292).

In seeking to implement methods of acknowledging sex-change, two basic points of view emerge among the proponents: The first urges that in place of the present legal definition of sex or absence of same, a new definition should be adopted in which the psychological attitude of the subject would play a leading role. In terms very reminiscent of the dicta of Pecora J. in the case of Anonymous (293), the argument goes as follows:

> "Because the law is primarily concerned with human relationships, only those biological factors which influence person-to-person interactions should be criteria used in determining a person's legal sex. Medically it can be argued that in making any sexual determination, the chromosomal composition and the internal anatomical structure should be taken into consideration as well as the psychology and outward appearance of the individual. However, since only the latter two factors have any direct effect upon society, it is those factors, not microscopic cell studies which should determine a person's legal sex" (294).

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(292) HOLLOWAY, Transsexuals - Their Legal Sex, loc. cit., p. 294.

(293) (1968) 293 N.Y.S. 2d 834, especially at p. 837.

(294) ANONYMOUS, Transsexuals in Limbo, (1971) 31 Md. L.R. 236, at p. 241; see also SMITH, loc. cit., pp. 968-970; BRENT, loc. cit., p. 412; KENNEDY, loc. cit. p. 127.

Of course, in the case of a converted transsexual, outward appearance would conform with the desired gender role whereas the normal person's psyche would naturally harmonize with his or her physiognomy without the necessity of any surgical intervention.

As we may surmise, this approach would please everyone, with only scientific realities being occasionally sacrificed. The other inconvenience involves very young children and babies - how will one be able to judge sex when the person involved is incapable of expressing a preference? Could this mean that birth certificates would omit any mention of sex until sufficient time has elapsed allowing the child to assert his or her gender preference? Hardly likely. It seems more reasonable to presume that a child will be registered according to physical sex, and if a gender choice is made which is contrary to biological sex, then conversion with modification of the birth certificate may be obtained without further complication.

Exponents of a second point of view feel that while no new definition of sex is necessary, converted transsexuals so desiring should be entitled to have their birth certificates altered (295). The original records would be kept on file thus avoiding deception, fraud or confusion. While modalities may vary from writer to writer, a central idea is constant in requiring that some form of special legislation, incorporating the scientific fiction that a change of sex is possible, be passed.

The advantages of this second alternative are striking - firstly and more important, it constitutes a humane,

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(295) MEYERS, op. cit., pp. 67-69; HOLLOWAY, Transsexuals - Their Legal Sex, loc. cit., p. 294; BRENT, loc. cit., p. 412.

pragmatic solution, yet it does not disturb a simple and perhaps archaic system which has been very satisfactory to the overwhelming majority of the population. The designation of sex of a child at birth by a superficial examination of the genitalia seems highly arbitrary to those who are subsequently discovered to be hermaphroditic or transsexual, but it seems to be both effective and rapid. For the hermaphrodite, the present legislation in all jurisdictions would appear broad enough to permit alteration of birth certificates since an error would have indeed been made as to the proper sex of the person involved at the time of registration. However, for the one transsexual in every one hundred thousand of the population, some exceptional provision would be made to secure his emotional well-being.

A second advantage to this point of view is that it permits the law to be in conformity with biology regarding sex. For those rare cases of gender inversion, a legal fiction of an extraordinary nature will enable these persons to acquire a stable modus vivendi without disturbing a basic scientific truth, i.e. that sex is a physical rather than an emotional notion.

As for the manner in which to implement these measures, it is felt that a solution resembling that of Brent's is perhaps the simplest (296). Briefly stated, she recommends that legislation resembling or perhaps incorporated into the various Change of Name statutes would be the most convenient vehicle for legal conversion since the policy considerations which seek to protect both the individual as well as the public are similar. In order to respect the privacy of the per-

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(296) Loc. cit., pp. 410-412.

sons involved, all requirements of public notice would be eliminated, and once a change of sex designation is authorized (after sufficient medical proof of conversion), a new birth certificate would be annexed to the original. Naturally, the depositaries of the original act would only be authorized to issue copies of the new document without mention of said original unless so ordered by a directive of the court in each particular case (297). This would still protect the integrity of birth records, and in cases of necessity (such as for inheritances, academic records, etc...), the connection between "John Doe" and "Jane Doe" would be easily established. Analogies between this procedure and changes of name and/or adoption are quite suitable - in both cases, privacy is secured without compromising accuracy in the public records.

Although it has not been mentioned, there is of course a third alternative which has the merit of being the least troublesome of those heretofore mentioned - and that is nothing. After surgery, we could let these unfortunate people "stew in their own juices" and be viewed as freaks. A cynic could even say that this disorder usually takes care of itself since its victims often commit suicide quickly or else do so slowly through the abuse of alcohol and drugs. Many avoid offending our sensibilities by being sent to jail. Need one say that this alternative does no honor to the society which retains it?

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(297) BRENT, ibid.; HOLLOWAY, Transsexuals - Their Legal Sex, loc. cit., p. 294.

C- The repercussions of conversive surgery on marriage

Any legal discussion of transsexualism must inevitably include an examination of the law of husband and wife since matrimony at one point in time or another usually figures in the personal history of the transsexual patient. Indeed, it is not unusual for a large proportion of candidates for "sex-change" to be or to have been married, and in many cases to have produced children. These patients often enter into marriage in the hope of arousing a dormant or concealed gender identity more in keeping with their biological sex (298). All too soon it becomes apparent that these initiatives are fruitless and an already low rate of marital intercourse can be expected to decrease to the vanishing point (299). However, while their libido may diminish, these patients are far from sterile and nature occasionally is afforded the opportunity to take its course. Consequently, when the patient's psychological sex eventually surfaces in the form of impotence, homosexuality (objectively speaking), transvestism and other forms of abnormal behavior, the marriage becomes unbearable for both consorts and some escape is desired. In addition, the presence of a parent suffering from gender inversion can only have a detrimental effect on young

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(298) GREEN, loc. cit., in GREEN, MONEY at p. 31.

(299) POMEROY, loc. cit., in GREEN, MONEY at p. 186.

children (300), and for this reason also, the parents are impelled to seek a severing of the marital bonds.

On the other side of the coin, there is also the problem of post-surgical marriage in the new gender role. Since the victims of transsexualism have the feeling that they are imprisoned in bodies of the opposite sex, and that surgery merely corrects an error of nature, it is not an unexpected development that they wish to marry according to their new status. Converted male transsexuals are able to adopt the female role in the sex act without any difficulty since the artificial vaginae with which they are provided are sexually functional (301). In the case of female transsexuals, although the artificial organs are for appearance only and

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(300) As GREEN writes (loc. cit., in GREEN, MONEY at p. 287): "The concept of sex change is bewildering enough for adults. Young children are better told that their parents are divorcing and that daddy will be living far away and probably unable to see them. They need assurance that he still loves them and that the separation is not their fault. At best, this will be difficult". Interestingly enough, divorce and the concealment of the transsexualism from the children is not an absolute rule. For example, the celebrated English band leader Wally Stott continued to live with his wife and adult children after surgery (cf. Montreal Gazette, Friday May 19th, 1972). Likewise Paula Miriam Grossman of New Jersey, stayed with "her" wife and three daughters aged 18 and 12 (twins), (cf. Montreal Star, Wednesday, April 12th, 1972).

(301) BENJAMIN, The Transsexual Phenomenon, op. cit., p. 50. He also writes: "The 'husband' in such a union offers an interesting psychological study. Are there actual or latent homosexual inclinations in him so that he can be attracted to a transsexual man? Naturally, the attraction is to the 'woman' in this man, but could completely normal, heterosexual men be able to forget the presence of male sex organs, or, if an operation has been performed, even their former existence?".

are not considered functional due to an inability to erect, the possible desire to marry for companionship or affection is not necessarily excluded.

Therefore, it would not be without interest to scrutinize the effects that transsexualism can have on an existing marriage prior to the transformation of one of the consorts. Likewise, we will also examine the legality of post-surgical marriages with the patient assuming the new sex role.

1. The Common Law jurisdictions

i) England

From a matrimonial point of view, there are two critical periods in the life of a transsexual: The first occurs when the patient wishes to be freed of a marriage perhaps hastily entered into and subsequently regretted since the transsexual spouse's psyche inevitably rebels at the sex role imposed. What forms of relief may be invoked in order to terminate this generally unhappy situation under English law?

One option which may be envisioned is that of annulment of marriage under the terms of the recent Matrimonial Causes Act (302). Of the grounds which said statute provides for the voidability of marriage (section 12), the

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(302) (1973) c. 18.

two more pertinent grounds include either the incapacity to consummate (12(a)) or the wilful refusal to consummate (12(b)). It should be noted that only in the rarest of cases could the consort of a transsexual successfully invoke these reasons since pre-operative transsexuals are physically capable of consummation albeit with little enthusiasm. In those few situations where an absence of consummation could come into play, the incapacity to consummate would obviously be based on psychological factors which render "normal" heterosexual intercourse abhorrent to the persons suffering from gender inversion. As for wilful refusal not amounting to incapacity (psychological or otherwise), a natural distaste for coitus in any role other than that amenable to the psychological sex of the patient would be conducive to a refusal of intercourse (303).

More realistic grounds for terminating the marriage of a transsexual may be found in the provisions of the Matrimonial Causes Act (1973) concerning divorce (304). Although

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(303) As to what would constitute wilful refusal, see Horton v. Horton, (1947) 2 All. E.R. 871 (H.L.); S. v. S. (orse C.), (1954) 3 All. E.R. 736; RAYDEN's Law and Practice in Divorce and Family Matters, 11th ed. by Joseph Jackson, London, Butterworth's, 1971, p. 167, no 75. Of the other grounds for annulment mentioned in the statute, two others may appear to be pertinent at first glance, to wit, a lack of valid consent and suffering from a mental disorder within the meaning of the Mental Health Act (1959), (7-8 El. II, c. 72, sec. 4(1)). Further examination quickly reveals that the "average" transsexual is not psychotic and is capable of a valid consent. Likewise, gender inversion is not a disorder mentioned in the Mental Health Act (1959).

(304) (1973), c. 18, s. 1.

in reality, the sole ground for divorce is the irretrievable breakdown of the marriage (305), the Act permits granting the petition only in the following situations:

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent (s. 1 (2)a));

(b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (s. 1(2)b));

(c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceeding the presentation of the petition (s.1(2)c));

(d) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted (s. 1(2)d));

(e) That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (s. 1(2) e)).

The provisions of this act governing desertion,

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(305) Ibid., s. 1(1).

adultery and living apart are fairly self-evident and could be employed according to circumstances. However, the question may be asked whether the original concept of "cruelty" would apply to the above quoted hypothesis of behavior which would entitle the consort to not be expected to live with the "guilty" party. It may be recalled that, under English law, cruelty was set out as "... conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger" (306). Under the broad terms of the new statute, it is obvious that the just cited Russell rule is no longer applicable, and consequently, relief is more easily obtained.

Nevertheless, certain situations which could be enountered in a marriage involving a transsexual spouse, have been the subject of scrutiny by the courts. Since these decisions pre-date the Divorce Reform Act (1969) (307) and the subsequent Matrimonial Causes Act (1973), the courts decided each issue in light of the traditional rule that the danger of harm to the health of the "innocent" party must have been alleged and proved before divorce was granted. For example, lesbianism or unnatural relationships could be considered a course of conduct amounting to legal cruelty (308).

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(306) Russell v. Russell, (1895) P. 315; (1897) A.C. 395.

(307) Which came into effect the 1st of August 1971 (s. 7 (5)). As regards divorce, the Matrimonial Causes Act (1973) generally adopts the same grounds as those introduced by the Divorce Reform Act (1969).

(308) Gardner v. Gardner, (1947) 1 All. E.R. 630. In this case the husband knew of the wife's propensities before the marriage but he did all that was possible to prevent them. In the matter of Spicer v. Spicer, (1954) 3 All. E.R. 708 , although lesbianism was alleged but not proved, the wife admitted that her persistent friendship with another woman amounted to cruelty.

In the case of Bohnel v. Bohnel (309), the Court of Appeal examined the problem of a woman married to a man, who, according to the symptoms described in the evidence, was at best a transvestite and more probably, a pseudo-transsexual. In deciding an admittedly "borderline" case (310), the court refused to grant divorce since the husband tried to conceal his cross-dressing from his wife, and thus it was inferred that no intent to injure existed. Under the terms of the new legislation, there can be no doubt that the wife would have succeeded (311).

Since pre-operative married transsexuals soon lose all inclination for "straight" or heterosexual coitus, another group of circumstances giving rise to grounds for divorce would involve a persistent refusal of sexual intercourse. In Sheldon v. Sheldon (312), the Court of Appeal held that this would amount to cruelty (due to the grave injury to the health of the other consort).

What would occur if a married transsexual underwent conversive surgery before resolving his or her marital situation? Although most reputable centers refuse to consider surgical transformation until this aspect is clarified, some physicians have been known to proceed without paying any heed to this type of problem. Would the consent of both

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(309) (1960) 2 All. E.R. 442.
(310) Ibid., p. 447 (Wilmer L.J.).
(311) RAYDEN, op. cit., p. 207, no 29.
(312) (1966) 2 All. E.R. 257.

spouses (rather than the sole consent of the patient) modify the legal situation, or would unanimous consent obviate any possible divorce based on the circumstances surrounding the sex-change? The celebrated matter of Bravery v. Bravery (313) may be considered as having furnished some guidance in this area. The facts may be resumed as follows: After the birth of a child fairly early in marriage, the husband sought and obtained sterilization. His wife apparently did not give a formal consent to the operation but some opinion was expressed that she, being aware of the impending surgery, acquiesced to it. Thirteen years later, she petitioned for divorce, pleading cruelty (injury to her health) caused by the sterilization. The majority of the Court of Appeal (Evershed, M.R., and Hodson L.J.) felt that the wife, through her actions, had consented to the operation and they also expressed the opinion (contrary to that of Denning L.J. diss.) that sterilization without just cause or excuse was not injurious to the public interest. As for the effect of consent, they stated:

> "As between husband and wife for a man to submit himself to such a process without good medical reason (which is not suggested here) would, no doubt, unless his wife were a consenting party, be a grave offence to her which could, without difficulty be shown to be a cruel act..." (314).

Denning L.J., on the other hand, reasoned that since sterilization was (in his opinion) illicit per se unless undertaken for therapeutic or eugenic purposes, even if the wife consented (315), said consent would not preclude her

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(313) (1954) 3 All. E.R. 59.

(314) Ibid., p. 61 (emphasis added).

(315) Ibid., p. 67.

from complaining of its ill-effects in later years, if and when it did in fact injure her health (316). Since it would appear today that conversive surgery is not illegal in English law (317), condonation could well furnish a sufficient defence to an action for divorce (provided naturally that the transsexual partner in fact wished to defend himself). Indeed, in the unreported case of Dolling v. Dolling (318), an English court "... held that a husband's change of sex did not amount to cruelty in law" (319).

Before going further, one is somewhat justified in saying that in enlarging the traditional grounds for divorce the English Parliament will have enabled the spouses of transsexuals to be freed from an obviously difficult situation without having to stoop to the narrow definition of cruelty. Actually it takes no great stretch of the imagination to determine that a consort cannot be reasonably expected to live with a confirmed transsexual who may display all or many of the behavior patterns (such as transvestism, refusal to have intercourse, etc...), which, taken individually, would furnish each in its own right, sufficient grounds for divorce.

Let us turn now to the second critical period in a transsexual's life, to wit, when the post-operative patient seeks to marry in the new sex role. Before even discussing any other aspect involved, one must naturally determine whether this type of marriage is a priori lawful.

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(316) Ibid.

(317) Supra, pp. 63-69 and 82-94.

(318) Mentioned in SMITH, loc. cit., p. 1008. The case is undated.

(319) Ibid.

Historically, one of the traditional grounds for obtaining an annulment of marriage was non-consummation and it would appear that the persons seeking this means of escape were usually the husbands. In the oft-cited case of D-e v. A-g (320), dealing with a woman having a two-inch deep vagina, the Court was obliged to enter into a "most disgusting and painful inquiry" (321) concerning the meaning of the words "sexual intercourse". Dr. Lushington opined that:

> "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character... If there be a reasonable probability that the lady can be made capable of vera copula - of the natural sort of coitus, though without power of conception- I cannot pronounce this marriage void. If on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, I would pronounce this marriage void" (322).

In the more recent case of D. v. D. (323), dealing with a female pseudo-hermaphrodite whose male organs were removed and an artificial vagina provided, Commissioner Grazebrook felt that an artificial organ prevented consummation

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(320) (1845) 1 Rob. Ecc. 279 reprinted in 163 E.R. 1039.

(321) According to Dr. Lushington.

(322) D-e v. A-g, loc. cit., pp. 298-299. It was subsequently confirmed that sterility in itself would not prevent consummation. Cf. L. v. L. (orse D.), (1922) (June 23rd) 38 The Times Law Reports 697.

(323) (1954) 2 All. E.R. 598.

in light of Dr. Lushington's dicta. On the other hand, the Court of Appeal in the matter of S. v. S. (orse W.) (no. 2) (324), did not follow the lead of Commissioner Grazebrook in D. v. D. The circumstances of the case involved a woman who had virtually no vagina nor uterus but whose condition could be rectified somewhat by constructing an artificial organ. The question asked was whether an artificial vagina would preclude consummation. In a unanimously approved opinion, Willmer L.J. wrote:

> "For myself, I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing. The operation involved in either case is substantially the same.
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> ...
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> If neither the ability to conceive nor the degree of sexual satisfaction to be obtained is a determining factor, what else, it may be asked, remains to differentiate between intercourse by means of an artificial vagina and intercourse by means of a natural vagina artificially enlarged" (325).

Thus it would appear that the way was clear for approval of a marriage consummated between a post-surgical transsexual and a person whose physical integrity has not been disturbed. However, the leading case of Corbett v. Corbett (orse Ashley) (326) soon put this hope to rest.

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(324) (1962) 3 All. E.R. 53.

(325) Ibid., p. 62.

(326) (1970) 2 W.L.R. 1306.

As one may recall, the Corbett affair involved an action in nullity of marriage following a marriage celebrated between a male and a post-surgical male transsexual. After reviewing the evidence proving that the "wife" of this match could never change her biological sex, Ormrod J. held that this kind of marriage could never be valid due to the essentially heterosexual nature of matrimony. Even if this reasoning were to be placed in doubt, the judge mentioned a subsidiary argument in favor of not recognizing this kind of union:

> "In any event, however, I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse using the completely artificial cavity constructed by Dr. Burou, can possibly be described in the words of Dr. Lushington in D-e v. A-g. (falsely calling herself D-e) (1845) Rob. Ecc. 279, 298, 299 as 'ordinary and complete intercourse' or as 'vera copula - of the natural sort of coitus'. In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse and anal or intra-crural intercourse is, in my judgment, to be measured in centimeters" (327).

However, this latter reasoning may not be as forceful as one may presume at first glance since it appears somewhat pleonastic. Ormrod J. states that marriage cannot be celebrated between persons of the same sex. He then affirms that, in any case, such a union cannot be validly consummated by way of an artificial vagina created in a male. Would this imply that an artificial vagina could never be used for vera copula or "a natural sort of coitus", or does it mean that

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(327) Ibid., p. 1326 (emphasis added).

no matter what methods or artifices are employed, they can never legitimize a homosexual union? Through Ormrod's comments on the Court of Appeal judgment in S. v. S. (orse W.) (328), it would appear that the former proposition is the subject of his remarks. He felt entitled to comment adversely (p. 1326) on the artificial vagina observations of the Court of Appeal since they were obiter in the case in question. In any case, the discussion on artificial vaginae in males (or on artificial penises for women) would appear to be academic since the possibility of same-sex marriage is eliminated (329).

Following this decision, and in spite of the attitude of the Law Commissioners, the House of Commons decided to give legislative form to the principle affirmed in Corbett v. Corbett. Consequently, it is now formally stated that a marriage which takes place after July 1971 is void on the grounds, inter alia:

> "c) that the parties are not respectively male and female" (330).

Therefore, the only way in which a transsexual marriage could ever become valid in England is through adoption of a new definition of "male" and "female", that is to

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(328) (1962) 3 All. E.R. at p. 55.

(329) Likewise the marriage celebrated between two women was held nul and void in the case of Talbot (orse Poyntz) v. Talbot, (1967) 3 Sol. J. 213-214 (Ormrod J.). It should be stated that in this matter, no change of sex had been performed nor had the wife of the union known of the true state of affairs until the day after the ceremony.

(330) Matrimonial Causes Act (1973), s. 11(c). See also KENNEDY, loc. cit., at p. 125.

say, a notion which would be based on psychology rather than on biology. It would then be but a short step to the recognition of single-sex marriages (331). Since this is precisely the type of situation which the British parliamentarians sought to avoid, it will not likely occur before the courts unless Parliament itself determines otherwise.

As for the question of divorce, it is obvious that a marriage which is void ab initio would preclude any further discussion on this topic. At least, this would certainly be the case today following the Corbett decision and the Matrimonial Causes Act (1973).

In English law therefore, there can be no question of a valid post-surgical marriage involving a transsexual, which for all intents and purposes, is assimilated to a marriage between homosexuals.

ii) The Anglo-Canadian provinces

What recourse is there for the spouse of a pre-operative transsexual who wishes to dissolve the marriage? Although transsexuals do not have much taste for ordinary heterosexual coitus (objectively speaking) but generally manage to have relations, there may exist the possibility in rare cases that the transsexual's aversion to sex prevents even a pro forma consummation. In such cases, the other spouses could avail themselves of an annulment based upon these

(331) This is the thesis which KENNEDY advances, loc. cit., p. 127.

grounds. It should be noted that a mere capricious refusal would not suffice; only an invincible repugnance or aversion to the act of consummation would satisfy the courts (332). It could also be stated that the practice of coitus interruptus would suffice as consummation since the sex act, according to jurisprudence, requires only penetration and not necessarily emission into the body of the wife (333).

Other, more flexible, alternatives furnishing relief may be found in the Canadian Divorce Act which came into force the 1st of July 1968 (334). Of the grounds for divorce therein mentioned, those likely susceptible of less immediate application fall under the general rubric of "permanent marriage breakdown" (sec. 5) and include imprisonment, drug or alcohol addiction or separation according to the modalities set out in the act. Even non-consummation during a period of one year following the celebration of marriage may avail as grounds for divorce (335). The advantage of a divorce rather than an annulment lies in the fact that the Divorce Act allows a simple refusal to consummate to suffice without any inquiry into the psychological motivations involved. Obviously, a divorce obtained due to a permanent marital breakdown would tend to be less brutal on both parties than would be a recourse based upon the conjugal offences enumerated in section 3 of the Act.

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(332) Heil v. Heil, (1942) 1 D.L.R. 657, at pp. 660, 661 (Supreme Court of Canada); E. v. C., (1924) 2 W.W.R. 207 (B.C. Sup. Ct.); see generally H.R. HAHLO, Nullity of Marriage in Mendes DA COSTA ed., Studies in Canadian Family Law, Toronto, Butterworth's 1972, vol. 2, at pp. 678 et seq.

(333) Wilkinson v. Wilkinson, (1950) 3 D.L.R. 296 (B.C. C.A.).

(334) (1970) R.S.C., c. D-8, sections 3 and 4.

(335) Charest v. Denis, (1971) S.C. 307.

For the spouse seeking immediate relief (and a more "messy" divorce), the grounds more readily available would probably include participation in a homosexual act (section 3(b)), or physical or mental cruelty (section 3(d)). The homosexual act would appear to refer to conduct other than sodomy, since sodomy per se is mentioned as specific grounds for divorce in the statute (section 3(b)) (336). Rather, this whole question of homosexuality (or lesbianism) (337) would seem to deal with a person's deportment towards members of his or her own sex, and would probably be measured against a standard of behavior which is generally manifested only towards members of the opposite sex. Consequently, the age, ethnic background and social standing of the persons involved would have to be taken into consideration. For example, it is not rare to see male immigrants or first generation naturalized citizens from Mediterranean regions, walking arm in arm or kissing in public. The greatest problem is to determine where normal affection stops and where homosexual behavior begins (338).

Larger grounds for divorce may be founded upon the notion of cruelty which, according to law, requires that the respondent have "... treated the petitioner with a physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses" (section 3(d)). The

(336) Richard W. REVILLE, The Divorce Act Annotated, Agincourt Ont., Canada Law Book Ltd., 1973, p. 17.

(337) M. v. M., (1972) 24 D.L.R. (3d) 114 (P.E.I. S.C.).

(338) D. MENDES DA COSTA, The Divorce Act 1968 and Grounds for Divorce Based on Matrimonial Fault, (1970) 7 Osgoode Hall Law Journal 111 at pp. 141-142.

standard set up in order to appreciate the gravity of the cruelty alleged, requires that the acts (or abstentions) complained of must be serious or continuous, and that said actions render intolerable the continued cohabitation of the spouses (339). In would appear that the Russell v. Russell (340) doctrine of cruelty (conduct which causes "... danger to life, limb or health, bodily or mentally, or a reasonable apprehension thereof...") would not form part of Canadian divorce law due to the language of the Act which has set out a more liberal criterion (341).

Of the various situations which have arisen before the courts and which would possibly be pertinent to a marriage in which one of the spouses is transsexual, the following "cruelty" cases would likely be of some interest: For instance, the courts have held that a refusal to continue normal sexual relations could justify a finding of mental cruelty (342). Likewise, transvestism in certain circumstances could amount to cruelty according to two Canadian judgments.

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(339) Pierre AZARD, Alain-François BISSON, Droit civil québécois, Ottawa, Editions de l'Université d'Ottawa, 1971, t. 1, par. 139 quater, pp. 241-242.

(340) (1897) A.C. 395.

(341) REVILLE, op. cit., pp. 19-20 and jurisprudence therein cited. See also J. PINEAU, La Famille, Montreal, P.U.M., 1972, pp. 282-283; G. CHALLIES, Cruelty as a Ground for Divorce, (1970) 16 McGill Law Journal 113; G. BRENT, loc. cit., p. 415; D. MENDES DA COSTA, The Divorce Act and Grounds for Divorce Based on Matrimonial Fault, loc. cit., (1970) 7 Osgoode Hall L.J. 111 at p. 151.

(342) Delaney v. Delaney, (1972) 1 O.R. 34 (C.A.); Ebenal v. Ebenal, (1970) 15 D.L.R. (3d) 242 (Q.B. Sask.); Webster v. Dame McKay, (1969) S.C. 132 (Que.). In this matter Challies J. retained the RUSSELL v. Russell standard of cruelty. It appears likely that this case would be decided otherwise today (since the action was rejected originally).

In the case of C. v. C. (343) and that of I.C. v. G.C. (344), the opinion was expressed that transvestism in itself might not necessarily amount to cruelty of a degree that would entitle one to a divorce. Nevertheless, if the practice of this aberration progressed beyond a point of "... being a habit or antic or anything else..." (345), then cohabitation could become intolerable. Indeed, Dickson J. in the case of I. C. v. G.C. (346) even expressed some fear as to the adverse effects the husband's transvestism could have on the children. Thus, some insight is provided as to the attitudes which the courts would adopt in custody proceedings involving transsexuals.

What about the situation of a transsexual who wishes to take the initiative in divorce proceedings, perhaps due to the religious or moral scruples of the other partner, which refuse to admit the dissolution of the matrimonial tie except by death (or ecclesiastic annulment)? Can the transsexual claim that a refusal to acknowledge or accept his or her condition can render the marriage intolerable? Brent suggests that:

> "Although theoretically possible, no such case has arisen. The only obstacle may be the court's reluctance to put itself in the shoes of the transsexual, and its feeling that by find-

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(343) (1969) 7 D.L.R. (3d) 35, Morand J. (Ont.).

(344) (1969) 9 D.L.R. (3d) 632, Dickson J. (N.B.).

(345) I.C. v. G.C., ibid., p. 633.

(346) Ibid., p. 634.

> ing cruelty, it would be somehow granting relief when it may really characterize the cruel spouse's actions as normal and reasonable" (347).

However, one must seriously question whether this point of view is valid, especially in light of the attitudes adopted by the Canadian Parliament in voting the Divorce Act. For instance, homosexuality and alcohol or drug addiction are characterized as matrimonial "offences" and yet no self-respecting physician would qualify these afflictions as anything other than an illness or psychiatric disorder. This being the case, how could a judge make any special finding in favor of a transsexual, whose esoteric affliction shares some resemblance with homosexuality? In fact, as long as all divorce legislations remain judgmental in nature, (i.e. seek to establish fault or guilt and pronounce a divorce against or for someone), transsexuals have small hope of successfully invoking only their condition as grounds for divorce.

In the final analysis, the least destructive grounds for divorce would be separation or desertion for the required periods of time (348). However, since most medical centers performing sex-changes usually refuse surgery until the

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(347) BRENT, loc. cit., p. 416. She also advances the thesis that a simpler solution would be found in an extension of the doctrine of frustration of contract, i.e. that due to circumstances beyond the control of the parties, performance is impossible, ibid. However, this would require considerable legal soul-searching and it is doubted whether an analogy (in this particular situation, as opposed to patrimonial rights) can be made between marriage and an "ordinary " contract.

(348) Three years or five if the petitioner pleads his own desertion, section 4(e)(i) and (ii).

matrimonial situation of the patient has been resolved, there is little chance that this type of person would have the patience to simply wait.

Let us now presume for the sake of discussion that the transsexual has been "liberated" from a preexistent marriage and has undergone conversion. Will this person be able to remarry in the new sex role? It is submitted that in light of the present state of the law, the Corbett v. Corbett (349) decision refusing to acknowledge same-sex marriages would apply with equal force in Canada. Naturally, this presupposes that the distinction between the sexes would be predicated on biological rather than on psychological factors. Nevertheless, if and when more liberal definitions of "male" and "female" are recognized and transsexuals are able to circumvent the Corbett case, this does not necessarily imply that the post-surgical marriage would be unassailable. Indeed, aside from the usual grounds for annulment or divorce which would avail in any marriage, the greatest sources of danger would arise from the imperfect state of the art surrounding "changes of sex". For male to female conversions, the complications may include the closing of the vaginal introitus, the formation of vaginal abscesses or else a recto-vaginal fistula, each of which would necessarily preclude intercourse. For female to male changes, the greatest obstacle yet to be overcome is the creation of a penis capable of a coital function.

It should first be stated that the sterility of the

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(349) (1970) 2 W.L.R. 1306.

post-surgical patient will not affect the marriage provided that the party is otherwise capable of performing the sexual act (350). In one case, it was even held that this principle would apply even though the sterility of the wife was caused by an operation performed prior to the marriage without the knowledge of the intended husband (351).

On the other hand, impotence, whether psychological or physical will be adequate grounds for an annulment of marriage (352). If the spouse's impotence results from some form of physical defect which can be remedied by medical or surgical means, the annulment will not be granted unless said spouse refuses to undergo corrective treatment (353). Furthermore:

> "Marriage is a contract but, while it is not necessarily to be construed analagous to a commercial contract or other civil bilateral undertakings, the capacity to consummate is an integral part of the implied covenants that form part of the formal marriage ceremony and an impotent party thereto must of necessity be in default. Stating it otherwise, a

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(350) Tice v. Tice, (1937) 2 D.L.R. 591 (Ont. C.A.); Hathaway v. Baldwin orse Hathaway, (1953) 9 W.W.R. (N.S.) 331 (B.C.); Hale v. Hale, (1927) 2 D.L.R. 1137 at p. 1138 (Alta. S.C.), (1927) 3 D.L.R. 481 at p. 482 (Alta. S.C. Appellate Div.).

(351) Farris, C.J.S.C. in Hathaway v. Baldwin, ibid.

(352) Burton v. Burton, (1945) 3 W.W.R. 1 (Alta.) confirmed by (1945) 3 W.W.R. 765; Hale v. Hale, (1927) 2 D.L.R. 1137 (Alta. S.C.) affirmed by the Appellate Division at (1927) 3 D.L.R. 481. Both cases deal with psychological impotence in men. See also Feiner v. Demkowicz, (1974) 2 O.R. (2d) 121 at p. 123 (Van Camp, J.).

(353) D. v. D., (1973) 36 D.L.R. (3d) 17 (Ont.); C. v. C., (1949) 1 W.W.R. 911 (Man.); B. v. B., (1944) 3 W.W.R. 113 (Alta.). These cases discuss more particularly vaginal defects in women.

> person entering into a marriage, such as the wife here, must be deemed to represent herself at the time she actually participates in the formal marriage ceremonies as being capable of consummating the marriage and should, therefore, be estopped from seeking to annul the marriage by asserting the contrary thereafter which incapacity she knew at the time she entered into the marriage" (354).

It should also be noted that if one of the parties to the marriage knew of the other spouse's defect prior to the celebration, then the impotence caused by this defect cannot serve as grounds for annulment (355).

Nevertheless, as previously stated, it appears that the legality of post-surgical marriages by transsexuals remain doubtful due to the Corbett decision. Oddly enough, this leads us to the rather startling conclusion that the only solution would be a marriage between a converted male and a converted female transsexual. In this case, it could truly be said that the bride is wearing the pants (356)!

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(354) D. v. D., ibid., p. 31, Lerner J. According to Wilson J. in G. v. G., (1974) 1 W.W.R. 79 at p. 82: "'Consummation' of the marriage refers, then, to the demonstration by the parties to the union of the capacity of each of them to engage in mutual sexual intercourse, demonstrated, that is, by performance of the act itself while the marriage subsists...".

(355) Hale v. Hale, loc. cit., (1927) 2 D.L.R. 1137 at p. 1139 Walsh, J. See also Doshevsky v. Doshevsky, (1974) 13 Rpts. of Family L. 1.

(356) BRENT, loc. cit., p. 420.

iii) The United States

As in the other Common law jurisdictions previously examined, the American States offer means based upon the psycho-sexual or physical situations of the parties involved in order to terminate a marital relationship. Thus, a spouse married to a pre-operative transsexual may be afforded several alternatives in the form of grounds either for annulment or else for divorce. Of course, this choice may be affected by patrimonial or other considerations which may arise and which have little bearing on the topic under discussion. However, aside from the more general grounds for annulment (e.g. duress, mental incapacity, etc...) or for divorce (e.g. adultery, desertion, etc...), there are circumstances which are more likely to be encountered in a marriage involving a transsexual than in ordinary matches.

To begin with, an annulment may be obtained if one of the parties fails to inform the other spouse of some factor of which he or she is aware and which would be material to the projected union (357). Accordingly, it was decided that a man's awareness of his voyeurism cast upon him an affirmative duty of disclosure, the violation of which would permit annulment (358). Clearly, the existence of transsexualism or transvestism goes even more directly to the essence of the marriage relationship and, it is submitted, would easily meet the above-mentioned standard.

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(357) ANONYMOUS, Transsexuals in Limbo, (1971) 31 Maryland Law Review, loc. cit., at p. 245 note 64. See also Steinberger v. Steinberger, (1940) 33 N.Y.S. 2d 597.

(358) Potter v. Potter, (1966) 275 N.Y.S. 2d 499.

Impotence, either psychological or physical, which exists at the time of the union can also furnish good grounds for annulment provided that the condition is incurable (359). In matters related to transsexualism, the patient is generally capable of coitus in his or her biological role and the impotence usually arises or becomes complete shortly after the marriage. Nevertheless, in those few cases in which the impotence is absolute from the very commencement of the marriage, it usually rests on psychological determinants (360).

Divorce likewise offers many opportunities for ending a marriage with a transsexual. Oddly enough, a majority of states have also expressly provided that impotence would be a ground for divorce (361). In addition, homosexuality (362) and transvestism (362a) will similarly furnish a sufficient basis for terminating the marriage.

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(359) Cf. D. v. D., (1941) 20 A. 2d 139 at p. 141 (Del.). See also Tompkins v. Tompkins. (1920) 111 A. 599 (N.J.); Heller v. Heller, (1934) 174 A. 573 (N.J.); Hiebink v. Hiebink, (1945) 56 N.Y.S. 2d 394, conf. at p. 397; Godfrey v. Shatwell, (1955) 119 A. 2d 479 (N.J.); Dolan v. Dolan, (1969) 259 A. 2d 32 (Me.).

(360) Ibid.

(361) Alabama, Alaska, Arkansas, Georgia, Illinois, Indiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, and Wyoming. The following states retain "irretrievable breakdown" of the marriage, which could easily be caused by the impotence of one of the parties, as grounds for divorce: Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Kentucky, Michigan, Missouri, Nebraska, and Oregon. Cf. D. FREED, Grounds for Divorce in the American Jurisdictions, (1974) 8 Family L.Q. 401.

(362) Santos v. Santos, (1952) 90 A. 2d 771 (R.I.); Crutcher v. Crutcher, (1905) 38 So. 337 (Miss.). See also Arthur N. BISHOP, Divorce and the Bedroom, (1968) 8, Journal of Family Law 361, at p. 380. See N.J. Stat. Ann. 2A:34-2.

(362a) P. v. P., (1972) 297 A. 2d 202 (N.J.).

In light of the transsexual's distaste for normal heterosexual intercourse which exacerbates within a short period following the wedding, would a withdrawal from any further sex enable the aggrieved party to obtain divorce? As a general rule, and in the absence of statutory provisions to the contrary, the mere denial of sexual intercourse is not per se a ground for divorce (363). In some jurisdictions, on the other hand, the denial of sex relations has been interpreted as cruelty (364). In most cases, for "extreme cruelty", or "cruel or inhuman treatment" or any other equivalent concept to exist however, the courts require that as a direct result of this refusal of cohabitation, the life or health of the complaining party be endangered (365). Some states construe a refusal of sex as constituting desertion (366), or else abandonment (367). Of course, in all situa-

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(363) BISHOP, loc. cit., p. 380; McCurry v. McCurry, (1939) 10 A. 2d 365 (Conn.); Taylor v. Taylor, (1940) 16 A. 2d 651 (Penn.); Hoback v. Hoback, (1967) 158 S.E. 2d 113 (Va.).

(364) Currie v. Currie, (1935) 162 So. 152 (Fla.); Wisely v. Wisely, (1960) 2 Cal. Rptr. 886; Metcalf v. Metcalf, (1970) 184 N.W. 2d 560 (Mich.); Jizmejian v. Jizmejian, (1972) 492 P. 2d 1208 (Ariz.).

(365) A. v. A., (1945) 43 A. 2d 251 (Del.); X. v. X., (1946) 47 A. 2d 470 (Del.); Dominik v. Dominik, (1951) 81 A. 2d 147 (N.J.); Cannon v. Cannon, (1951) 82 A. 2d 737 (Del.); Reeves v. Reeves, (1952) 55 N.W. 2d 793 (Mich.); Williams v. Williams, (1958) 88 N.W. 2d 483 (Mich.); Gilbert v. Gilbert, (1962) 185 A. 2d 460 (Vt.); Gallagher v. Gallagher, (1962) 128 S.E. 2d 464 (W.Va.); Houck v. Houck, (1968) 300 N.Y.S. 2d 999.

(366) Ringgold v. Ringgold, (1920) 104 S.E. 836 (Va.); Schoren v. Schoren, (1973) 214 P. 885 (Ore.); Tupper v. Tupper, (1929) 147 A. 633 (N.J.); Gilson v. Gilson, (1933) 166 A. 111 (N.J.); Hinkle v. Hinkle, (1953) 74 S.E. 2d 657 (Ga.); Jacobs v. Jacobs, (1970) 263 A. 2d 155 (N.J.); Carneal v. Carneal, (1970) 176 S.E. 2d 305 (Va.).

(367) Jacobsen v. Jacobsen, (1954) 130 N.Y.S. 2d 762.

tions, a refusal based on ill-health (mental or physical) or upon physical incapacity will be considered justified by the courts (368). As a result, a categorical answer to the plight of a person married to a transsexual cannot be given unless it is known in which jurisdiction the divorce is sought.

Can the post-surgical transsexual marry in the new sex-role? In this regards, the opinion has been expressed that:

> "Traditionally, marriage has been understood to mean the legal union of a man and woman, yet the terms male and female in the context of this relationship have never been given explicit legal meaning. Therefore, the state, to prohibit a transsexual marriage, would be required either to enact an express statutory prohibition or to define the sex of the individual in such a way as to invalidate the union" (369).

Fortunately, several quite recent decisions illustrate judicial attitudes towards unions of this type as for instance, the matter of Baker v. Nelson (370), (decided by

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(368) Hayes v. Hayes, (1904) 78 P. 19 (Cal.); Nordlung v. Nordlung, (1917) 166 P. 795 (Wash.); Bishop v. Bishop, (1925) 233 P. 918 (Wash.); Murphy v. Murphy, (1930) 152 A. 397 (Conn.); Ritter v. Ritter, (1930) 284 P. 950 (Cal.); Simons v. Simons, (1962) 176 A. 2d 105 (Penn.).

(369) ANONYMOUS, Transsexuals in Limbo, loc. cit., (1971) 31 Maryland L.R. pp. 244-245.

(370) (1971) 191 N.W. 2d 185. Appeal to the U.S. Supreme court refused (1973) 93 S.Ct. 37. See also the comment by Arthur J. SILVERSTEIN, Constitutional Aspects of the Homosexual's Right to a Marriage Licence, (1973) 12 Journal of Family Law 607.

the Supreme Court of Minnesota), which involved the request by two homosexuals to be issued a marriage licence in order to wed. Upon refusal of the clerk of the District Court to provide said document, the couple sought to force the issue via a writ of mandamus. The writ was denied by the District Court and an appeal was lodged before the State Supreme Court. The grounds for appeal were twofold: Firstly, it was argued that the statutes did not expressly prohibit same-sex marriages. Secondly, it was contended that if, by interpretation, the statutes were viewed as forbidding this type of match, then said statutes should be considered unconstitutional on the grounds that they violated both the due process and the equal protection provisions of the fourteenth amendment.

After rejecting the first grounds, the Court addressed itself to the wider constitutional implications of this case:

> "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis. Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: 'Marriage and procreation are fundamental to the very existence and survival of the race. This historical institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation'" (371).

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(371) Ibid., at p. 186, Peterson, J.

The court also went on to state that this did not imply that all who marry must have a proved capacity or declared willingness to procreate (372).

In the State of New York, the actual issue of a transsexual marriage was litigated on two different occasions: In Anonymous v. Anonymous (372a), a male who unknowingly married an "unconverted" male transsexual was successful in having his marriage declared a nullity, even though the "wife" underwent conversive surgery as the trial was pending. In the words of Buschmann, J.:

> "The Court finds as a fact that the defendant was not a female at the time of the marriage ceremony. It may be that since that time the defendant's sex has been changed to female by operative procedures, although it would appear from the medical articles and other information supplied by counsel, that mere removal of the male organs would not, in and of itself, change a person into a true female. What happened to the defendant after the marriage ceremony is irrelevant, since the parties never lived together.
>
> The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman" (372b).

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(372) Ibid., at p. 187. In Jones v. Hallahan, (1973) 501 S.W. 2d 588 (marriage between lesbians) the Kentucky Court of Appeals arrived at the same conclusion.

(372a) (1971) 325 N.Y.S. 2d 499.

(372b) Ibid., p. 500.

The other case, that of Frances B. v. Mark B. formerly known as Marsha B. (372c), is somewhat different in that the "husband" was a female transsexual who had undergone a mastectomy and a hysterectomy prior to the marriage (372d). Unfortunately, "he" was not given a penis. Although the present reported judgment was involved primarily with procedural questions such as a motion for leave to amend the answer, and a cross-motion for a physical examination, the Court (Heller, J.) expressed the following opinions:

> "Neither by statutory nor decisional law has this state defined male and female. New York neither specifically prohibits marriage between persons of the same sex nor authorizes issuance of marriage licence to such persons. However, marriage is and always has been a contract between a man and a woman (Morris v. Morris, 31 Misc. 2d 548, 549, 220 N.Y.S. 2d 590).
>
> That the law provides that physical incapacity for sexual relationship is ground for annuling a marriage sufficiently indicates the public policy that the marriage relationship exists with the result and for the purpose of begetting offspring...
>
> ...
>
> Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage" (372e).

(372c) (1974) 355 N.Y.S. 2d 712.

(372d) She also requested and obtained a legal change of name.

(372e) Loc. cit., pp. 716-717.

In his critique of the B. v. B. decision, entitled Marriage Rights: Homosexuals and Transsexuals (372f), William Lentz argues that had the proposed Equal Rights Amendment been in effect, the solution would have been different (372g), since the recognition of a marriage as valid only when it occurs between persons of the opposite sex would constitute a form of discrimination (372h). However, this very argument was submitted to the scrutiny of the Court of Appeals of the State of Washington in Singer et al v. Hara (372i), (yet another homosexual marriage situation) without much success (372j). In turning aside this argument, Swanson, C. J., speaking for the Court affirmed:

> "We are of the opinion that a commonsense reading of the language of the E.R.A. (Equality of Rights Amendment) indicates that an individual is afforded no protection under the E.R.A. unless he or she first demonstrates that a right or responsability has been denied solely because of that individual's sex. ... the E.R.A. does not create any new rights or responsabilities, such as the conceivable right of persons of the same sex to marry one another; rather, it merely insures that existing rights and responsibilities, or such rights and responsabilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to

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(372f) (1975) 8 Akron L.R. 369.

(372g) This proposed XXVIIth Amendment to the US. Constitution states: "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex".

(372h) LENTZ, loc. cit., p. 374.

(372i) (1974) 522 P. 2d 1187.

(372j) The Equality of Rights Amendment was incorporated into the Constitution of the State of Washington.

members of either sex.

...

> A generally recognized 'corollary' or exception to even an 'absolute' interpretation of the E.R.A. is the proposition that laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex, rather than a person's membership in a particular sex per se" (372k).

Summarily stated therefore:

> "Appelants were not denied a marriage licence because of their sex; rather, they were denied a marriage licence because of the nature of marriage itself" (3721).

In light of medical evidence that a true "change of sex" is impossible, one may conclude that a marriage involving a post-surgical transsexual would be void as being a homosexual union. Indeed, one could further add that the only way this type of marriage could be valid would be by express statutory enactment which either declares same-sex marriages valid, or even more preferable, which would provide a definition of sex broad enough to include converted transsexuals. Another, yet safer alternative would be to order that once conversive surgery has been completed, then by exception, the patient may be considered for all intents

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(372k) Loc. cit., p. 1194.

(3721) Ibid., p. 1196.

and purposes as belonging to the "new" sex.

Even if we were to admit the validity of post-surgical marriages of transsexuals, legal difficulties could still arise. As mentioned earlier, the patient may be exposed to an annulment of marriage due to impotence or a "want of potentia copulandi" (373). This implies that there must be a capacity for normal copulation as opposed to partial, imperfect, unnatural or painful copulation (374). The defect or impotence must be incurable (375). Nevertheless, the marriage may be ratified by continued cohabitation following discovery of the defect preventing coitus (376).

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(373) Payne v. Payne, (1891) 49 N.W. 230 (Minn.). It should be noted that the marriage is voidable and not void; cf. Southern Pacific Co. v. Industrial Commission et al, (1939) 91 P. (2d) 700 (Ariz.).

(374) Per Kaufman J., in Stepanek v. Stepanek, (1961) 14 Cal. Rptr. 793. See also Steinberger v. Steinberger, (1940) 33 N.Y.S. 2d 597; Donati v. Church, (1951) 80 A. 2d 633; Jwaiden v. Jwaiden, (1958) 140 A. 2d 303 (D.C.).

(375) Vierman v. Vierman, (1948) 213 S.W. 2d 259 (Mo.). In this case the plaintiff was in the happy position of complaining of his wife's inability to satisfy him. At the time, he was 83 years old, while she was 69.

(376) Donati v. Church, (1951) 80 A. 2d 633 (N.J.).

By the same token, many jurisdictions admit divorce for impotence. Although it is indifferent whether the impotence arose through accident, act of nature or through the voluntary actions of the person involved (377), the law requires that the physical incapacity exist at the time of marriage and that the problem be incurable (378). As in the case of annulment, impotence is not considered to be synonymous with sterility, and consequently, it is the want of vera copula rather than the capacity to procreate which implies a right to obtain divorce (379). Obviously, these rules weigh more heavily on the converted female rather than on the converted male transsexual.

2. The civilian jurisdictions

i) France

As in our study of transsexualism and marriage in

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(377) Cott v. Cott, (1957) 98 S. 2d 379 (Fla.).

(378) Ferguson v. Ferguson, (1966) 415 P. 2d 677 (Idaho); Hobbs v. Hobbs, (1909) 101 P. 22 (Cal.). However, in the case of Mutter v. Mutter, (1906) 97 S.W. 393, the Kentucky Court of Appeals per Lassing J. stated that (at p. 394): "We are of opinion that the appellant was not required, or called upon, to resort to surgery in order to construct a wife. He had a right to find his wife of natural build and proportion, and, when such malformation existed as would and did prevent sexual intercourse, and this fact was concealed from him by appellee until after marriage, appellant was entitled to decree granted". It should be noted that recently, California and Kentucky have opted for "irretrievable breakdown" as ground for divorce, cf. FREED, (1974) 8 Family L.Q., loc.cit., pp. 401 et seq.

(379) Peter v. Peter, (1966) 222 A. 2d 511 (Pa.); Reed v. Reed, (1943) 177 S.W. 2d 26 (Tenn.); Wilson v. Wilson, (1937) 191 A. 666 (Pa.); Anonymous, (1890) 7 S. 100 (Ala.).

the other jurisdictions, we will examine this problem in regards to a pre-operative marriage as well as with a view to a post-operative marriage under the adopted sex role.

A consort whose spouse suffers from gender-inversion does not enjoy many avenues of escape from what is probably an unhappy marriage. Since sex is distinguished by purely physiological determinants (380), there can be no question of invoking a nullity of marriage on the grounds that marriage requires persons of opposite sex. Another alternative which has succeeded in only rare cases deals with annulment due to "erreur dans la personne" under article 180 C.C.F. (381). Could one conceivably argue under French law that by marrying in good faith a person subsequently discovered to be transsexual, that an error as to the person has occurred? Aside from the obvious problem of error as to physical identity (e.g. marrying the wrong identical twin), difficulties of interpretation arose over questions of error with regards to the qualities of the person. Indeed, some authors felt that the notion of error in ordinary contractual matters could be transposed without modification to marriage (382). However, in the celebrated affair of the "forçat

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(380) Cass. civ. 6 avril 1903, S.1904.273.

(381) Art. 180: "Le mariage qui a été contracté sans le consentement libre des deux époux ou de l'un d'eux, ne peut être attaqué que par les époux, ou par celui des deux dont le consentement n'a pas été libre.

Lorsqu'il y a eu erreur dans la personne, le mariage ne peut être attaqué que par celui des époux qui a été induit en erreur".

Note that under article 181, error can be invoked only within six months of its discovery.

(382) G. MARTY; P. RAYNAUD, Droit civil (Les Personnes), 2nd ed., Paris, Sirey, 1967, t. 1, vol. 2, p. 87, no 80.

libéré", the Chambres réunies of the Cour de Cassation refused to grant an extensive interpretation to article 180 C.C.F. by holding that error under said provision, aimed only at sanctioning errors relating to physical or civil identity (383). This case involved the marriage of a young lady who later discovered that her husband had once been condemned to imprisonment for being an accomplice to murder. In refusing to allow the action, the Cour de Cassation stated that:

> "Attendu que l'erreur dans la personne dont les articles 146 et 180 C. Nap. ont fait une cause de nullité de mariage, ne s'entend, sous la nouvelle comme sous l'ancienne législation, que d'une erreur portant sur la personne elle-même; Attendu que si la nullité ainsi établie ne doit pas être restreinte au cas unique de l'erreur provenant d'une substitution frauduleuse de personne au moment de la célébration, si elle peut également recevoir son application quand l'erreur procède de ce que l'un des époux s'est fait agréer, en se présentant comme membre d'une famille qui n'est pas la sienne, et s'est attribué les conditions d'origine et de filiation qui appartiennent à un autre, le texte et l'esprit de l'art. 180 écartent virtuellement de sa disposition les erreurs d'une autre nature, et n'admettent la nullité que pour l'erreur qui porte sur l'identité de la personne, et par le résultat de laquelle l'une des parties a épousé une personne autre que celle à laquelle elle croyait s'unir; qu'ainsi la nullité pour erreur dans la personne reste sans extension possible aux simples erreurs sur des conditions ou des qualités de la personne..." (384).

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(383) Cass. ch. réun. 24 avril 1862, D.1862.1.153 concl. Dupin.
(384) Ibid.

This jurisprudence would not appear to have as great authority today due to a more liberal approach to the problem on the part of the French courts (385). For instance, in almost identical circumstances to the 24th of April 1862 case, the Tribunal civil of Bressuire granted an annulment to a young wife whose husband was arrested upon leaving the marriage ceremonies for attempted murder and theft (386). In relation to sexual activities and marriage, an interesting conclusion was reached by the Tribunal Civil of Grenoble (387). In her action, the wife requested annulment due to the irremedial psychological impotence of her husband. In essence, she claimed that since a primary goal of her marriage was to have a family, had she known of her husband's defect, she would never have consented to the match. In acceding to her request, the court declared:

> "Qu'il s'agit avec la transposition qu'implique nécessairement la nature même du mariage, d'une erreur sur les qualités substantielles et que l'on se trouverait ainsi, si cette impuissance est établie, en présence d'une erreur commise sur la personne, cette expres-

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(385) See H. et L. MAZEAUD et J. MAZEAUD, Leçons de droit civil, 4th ed., by M. de Juglart, Paris, Editions Montchrestien, 1967, t. 1, vol. 2, pp. 81 et seq., no 736. See also P. GUIHO, L'erreur dans la personne, cause de nullité du mariage au sens de l'art. 180 al. 2 C.C., note sous Paris 7 juin 1973 et Trib. de Gr. Inst. d'Avranches 10 juillet 1973, D.S. 1974.174 and R. NERSON, De l'erreur sur l'identité civile du conjoint,(1974) 73 R.T.D.C. 140 at p. 142.

(386) Trib. civ. Bressuire, 27 juil. 1945, D.1945.94.

(387) Grenoble, 20 nov. 1958, D.1959.495 (Critique Cornu).

sion étant entendue lato sensu" (388).

It may perhaps be said that, today, the courts will view with favor an action for annulment due to error as to the person, provided that said error was a determining factor involving qualities which are important in marriage (389), and which could legitimately be presumed to cause the plaintiff spouse not to have entered into the union, had the true state of affairs been known beforehand.

Could one validly invoke error as to the person in the case of a transsexual marriage? Since circumspection would appear to be de rigueur in order to protect the stability of the institution of marriage (390), it may be fairly stated that, in the overwhelming majority of cases, these grounds would not be viewed as sufficient. In fact, trans-

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(388) Ibid. In his critique (at p. 496) Cornu remarks: "En toute hypothèse, la décision appelle donc des réserves : si son point de vue est purement psychologique, il est excessif; s'il procède d'une conception du mariage, ce n'est pas la nôtre". Another decision also holds absolute and definitive impotence as constituting error as to the person. Cf. Trib. Gr. Inst. Lille, 17 mai 1962, D.1963 som. 10. Going even further, the Tribunal de Grande Instance d'Avranches in its 10 juillet 1973 judgment (D.S. 1974.170 note Guiho) held that"... une impuissance, sinon totale, du moins psychique et sélective, qui empêche définitivement la consommation du mariage..." constituted a substantial error as to the person, in which case, had the innocent spouse known of it, would never have consented to the union. We could mention in passing that the traditional position was maintained in Riom 7 juin and 2 août 1876, D.1877.2.32.

(389) MARTY ; RAYNAUD, op. cit., p. 88, no 80; MAZEAUD, MAZEAUD, op. cit., p. 82, no 736; GUIHO, loc. cit., p. 178; NERSON, (1974) 73 R.T.D.C., loc. cit., at p. 142.

(390) MAZEAUD, MAZEAUD, ibid.

sexuals usually marry since they often believe that a normal heterosexual relationship will awaken some dormant sexual impulses more in keeping with their biological sex. As a result, an ordinary sexual relationship is generally evidenced in the early stages of marriage. It is only later that transsexuals themselves realize the true impact of their gender inversion. Therefore, it may be argued, how can one claim that there was error as to the person at the time of the marriage? This would make about as much sense as allowing annulment due to a spouse's alcoholism although at the time of the marriage, drinking was not a problem.

It is submitted that a more reasonable solution would be divorce on the grounds of "excès, sévices ou injures", under the terms of article 232 C.C.F. (391). "Excès", and "sévices" generally mean physical violence or mistreatment, while "injures" has a broader connotation in that it includes not only verbal offences but also actions or a deportment which exceed the normal tolerance spouses should have towards each other (392). Under the terms of the Code, there must be (a) acts or abstentions which (b) constitute a serious or renewed violations of the duties and obligations resulting from the marital relationship, (c) of such gravity as to render the marriage intolerable for the "innocent" spouse. This,

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(391) Art. 232 C.C.F.: "En dehors des cas prévus aux articles 229, 230 et 231 du présent Code, les juges ne peuvent prononcer le divorce à la demande de l'un des époux que pour excès, sévices ou injures de l'un envers l'autre, lorsque ces faits constituent une violation grave ou renouvelée des devoirs et obligations résultant du mariage et rendant intolérable le maintien du lien conjugal".

(392) MARTY ; RAYNAUD, op. cit., p. 304, no 275.

of course, implies that the divorce is based upon the fault of the defendant who is in control of his faculties, ie. who can realize the nature of his act and who is able to control his actions. Thus an insane person will not be at fault. However,

> "... la responsabilité du conjoint ne saurait être écartée par des troubles ou des anomalies insuffisamment graves pour lui faire perdre la possibilité de rester maître de son comportement et de ses impulsions et de contrôler les nerfs" (393).

The French courts have, on several occasions, applied these rules in cases of divorce arising out of sexual difficulties.

In two recent decisions involving non-consummation, the Cour de Cassation held that the fact of non-consummation per se would not constitute "injures graves" unless there were some element of fault involved (394). As a result, if a spouse is aware prior to the marriage of his or her incapacity for any reason, to have sex, the fault in this situation would reside in the lack of honesty involved in conceal-

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(393) J. PATARIN, Juris-classeur civil, arts. 216-330, Paris, Editions Techniques S.A., "Divorce" sous les articles 229-232, fasc. A, p. 12, no 28.

(394) Cass. civ. 5 nov. 1969, J.C.P. 1970. II.16226; Cass. civ. 8 oct. 1970, G.P. 1971.1.26. In this case the court held that a refusal to consummate coupled with intolerable sexual practices forced on the wife would provide sufficient grounds for divorce. See also Michel TROCHU, L'impuissance, D.1965, chron. 153 at p. 156.

ing this fact from the other partner (395). Even if the spouse in question were not aware of the inability or disinclination to have sexual relations until after the marriage is celebrated, the failure to seek medical treatment within a reasonable time of discovery of the true state of affairs would also constitute an injure grave (396). Along a different line of ideas, the courts have likewise pronounced divorce in favor of a consort whose wife has indulged in lesbian activities (397). It seems apparent that the fault lies not in the condition of homosexuality but in its indulgence. By the same token, it would seem reasonable to believe that the fulfillment of transvestitic impulses would also provide sufficient grounds for divorce.

How would the husband or wife of a transsexual be treated by the French courts when faced with a refusal to have marital relations? Obviously, a mere voluntary and wilful refusal to have sex will suffice since this constitutes

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(395) TROCHU, ibid., p. 156; Nancy, 12 mai 1958, G.P. 1958. 2.20; Cass. civ. 7 mai 1951, D.1951.II.472.

(396) Cass. civ. 16 déc. 1963, D.1964.227; J.C.P. 1964.II. 13660. This presupposes naturally that the condition is curable. If no treatment exists to rectify the situation, the element of fault would be absent. In the present case, the husband failed to consummate the marriage during a period of five years due to a repugnance towards the sex act which could have been overcome by psychiatric treatment. The husband was reproached for not having sought treatment until the divorce proceedings were commenced.

(397) Cass. Req. 7 mai 1934; G.P.1934.2.481.

a violation of one of the duties inherent in the concept of marriage (398). Nevertheless, could the transsexual, (even if he or she wanted to contest the divorce, which is highly doubtful), answer the charge by claiming that a disinclination towards heterosexual activities forms part of the transsexual syndrome and, as such, will not allow fault or blame to be imputed? We believe not, since there are degrees of gravity between a strong repugnance for ordinary sex and a complete and invincible abhorrence towards coitus. In the first situation, the disinclination can be overcome, whereas in the second, the incapacity is total. Therefore, it is possible to attach blame in the former case.

Let us turn now to the question of marriage and the post-surgical transsexual. The most elementary problem is, of course, whether the converted patient can in fact marry in the new role. Although the French Code does not expressly define marriage as requiring two persons of different sexes, it has never been seriously questioned that any other concept was possible (399). It should be brought out that sterility or even the absence of sex organs would not affect the validity of a French marriage since, as one court held:

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(398) Cass. req., 6 avril 1908, D.1908.1.240; Cass. req., 12 nov. 1900, D.P. 1901.1.21; Lyon, 28 mai 1956, D.1956. 646 (note Breton); Caen 10 mai 1926, S.1926.2.62.

(399) MARTY ; RAYNAUD, op. cit., t. 1, vol. 2, p. 71, no 70; MAZEAUD, MAZEAUD, op. cit., t. 1, vol. 2, p. 63, no 720. As a matter of fact, the courts have expressed this requirement on several occasions, e.g. Caen, 16 mars 1882, D.1882.2.155; Nancy, 16 oct. 1903, D.1904. 2.336; Lyon, 16 mai 1906, D.1907.2.21 and more especially Cass. civ., 6 avril 1903, S.1904.273, D.1904. 395

> "Attendu que le mariage, consortium omnis vitae, est avant tout l'union de deux personnes intelligentes et morales; qu'il doit être contracté entre un homme et une femme (C. civ. 144); que cette condition est nécessaire et suffit à son existence; Que la femme ne peut être rabaissée au point de ne voir en elle qu'une organisation propre à faire des enfants et à satisfaire les passions du mari; que la possibilité de la procréation d'enfants et d'une cohabitation charnelle n'est pas absolument essentielle à l'existence du mariage" (400).

However, before the rather formal pronouncements of the Seine and Parisian courts which decided that sex could not be changed artificially (401), it would appear that any possibility of a post-operative marriage must not be entertained. If perchance, French jurists ever manage to change the definitions of sex presently retained, then one should be quite entitled to view the legal strength of transsexual matches with optimism since the absence of a procreative or even a carnal function would not affect the validity of this type of union. One must hasten to add that this would be true provided that the converted consort was completely candid with the prospective spouse (402). Nevertheless, it should be repeated that French law at present will not countenance the marriage of a person who has undergone "sex-change"

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(400) Caen, 16 mars 1882, D.1882.2.155 at p. 156.

(401) Seine, 18 janv. 1965, J.C.P. 1965.II.14421; Paris, 18 janv. 1974, D.S. 1974.196.

(402) Divorces based on excès, sévices or injures are facultative and thus, a spouse marrying en connaissance de cause cannot impute any fault to the other partner.

unless the other spouse is biologically of the opposite sex (403).

ii) Province of Quebec

In matters related to divorce and transsexualism, the rules already discussed in our study of the laws of the English-Canadian Provinces would apply with equal validity in Quebec due to the fact that divorce legislation falls under federal jurisdiction. Therefore, grounds for divorce such as homosexuality, non-consummation or a refusal to have sexual relations (cruelty) etc... could terminate a Quebec marriage in the same manner as would occur in any other Canadian province.

With regards to the annulment or the nullity of marriage, Quebec civil law presents several interesting viewpoints which pertain, more particularly to the marriage of

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(403) It appears that in order to satisfy French law as well as the partners themselves, a converted male would have to marry a converted female. The other alternatives, that is to say, marriage between a female and a converted male transsexual or a male with a converted female transsexual are not acceptable since in both cases, the transsexuals would view these as homosexual unions.

a transsexual (404). Naturally, the first question to be resolved deals with the legality of marriage in the new sex role. Quebec doctrine is virtually unanimous in affirming that as a basic requirement, the marriage must involve two persons of opposite sex (405). Indeed, a marriage celebrated between persons of identical sex would not only be null and void but non-existent (406). Needless to say, the Que-

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(404) Matters of non-consummation or a refusal of sexual intercourse which may be encountered in a marriage involving a pre-operative transsexual do not provide grounds for annulment under Quebec civil law although recourse could be had to the Canadian Divorce Act; cf. Jean PINEAU, La Famille, op. cit., p. 25, no 28. As for the possibility of one consort obtaining an annulment of marriage based upon "error as to the person" (art. 148 C.C.) due to the transsexualism of the other, we agree with Prof. Groffier-Ayala (De certains aspects juridiques du transsexualisme dans le droit québécois, loc. cit., p. 52) that there is little chance of success because, as she points out: "En effet, le syndrome du transsexualisme chez un conjoint existant au moment du mariage, doit être mis sur le même pied que l'erreur concernant l'état mental du conjoint. Il est peu probable que le sexe psychologique d'une personne soit considéré comme faisant partie à ce point de son identité qu'une erreur à ce sujet puisse être analysée comme une erreur dans la personne". Another reason is, of course, the growing reticence of the Court of Appeal to grant annulments based on error, cf. Yorksie v. Chalpin, (1946) K.B. 51; Proc. Gén. du Québec v. K. et W., (1947) 566; Dame Chisholme v. Starnes, (1949) K.B. 577; Dorion v. Bussières, (1967) Q.B.416; Dame Richard v. Trudel et al, (1968) Q.B. 983.

(405) PINEAU, ibid., p. 23, no 26; Pierre AZARD, Alain-François BISSON, op. cit., p. 115, no 76; P.B. MIGNAULT, Droit civil canadien, Montréal, C. Théoret éditeur, 1895, vol. 1, p. 331. The Quebec legislators felt this to be so obvious that no definition of marriage was ever incorporated into the Civil Code. However, according to the Report on the Family (Part I) prepared by the Committee on the Law on Persons and on the Family, (Montreal, Civil Code Revision Office, 1974), this element will no longer be taken for granted because art. 23 of the project formally provides that: "Marriage is absolutely null when contracted: ... 4. by two persons of the same sex".

(406) PINEAU, ibid., pp. 65-66, no 88.

bec courts have never been faced with a problem of this nature and thus, our jurisprudence supplies little guidance as to how a transsexual marriage would be perceived. However, we would be safe in assuming that since sex cannot be changed, the courts would not be inclined to adopt a broad-minded attitude. Of course, the whole discussion would necessarily be founded on a definition of male as opposed to female, which, for the present, remains in the realm of biology (at least from a legal point of view).

If by chance the converted transsexual managed to obtain some form of legal acknowledgement of a "change of sex" (407), his or her marriage would not be entirely problem-free. The most serious difficulty would arise out of the limitations inherent in conversion surgery; especially those operations involving a female to male transformation. In effect, the Quebec Code stipulates that:

> "Impotency, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotency be apparent and manifest" (408).

As one may note, provided the impotency existed prior to the wedding, it would be indifferent whether this condition arose due to natural causes or through human intervention. In spite of the apparently unambiguous terms of the Code, problems of interpretation have cropped up surrounding the notion of "apparent and manifest" impotency. Certain judgments

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(407) By private bill for example.

(408) Art. 117 C.C. in part. The articles goes on to say: "This nullity cannot be invoked by any one but the party who has contracted with the impotent person nor at any time after three years from the marriage".

have held that psychological impotence would suffice in order to enable the "innocent" partner of the marriage to invoke article 117 C.C. (409). Notwithstanding these judgments, the more orthodox attitude has received greater acceptance. According to this point of view, admirably expressed by Challies J., in Dame Leibovitch v. Beane:

> "...It is the opinion of the court that 'apparent' means clear, open to view, or visible to the eye; that 'manifest' means obvious, or not requiring any proof, as, for example, something that one can touch or feel with the hand; that the only type of impotency which can be 'apparent' and 'manifest' is physical impotency arising from malformation of, or a total or partial absence of sexual organs; that impotency arising from frigidity, psychological bars, nervous disorders, or other conditions that are not purely physical, is not apparent and manifest impotency within the meaning of art. 117 C.C.; and that impotency must be 'apparent and manifest' to any qualified person examining the body of the

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(409) Scholes v. Dame Warlow, (1926) 65 S.C. 6. In this case, Martin A.C.J. was strongly influenced by the English House of Lords decision in G. v. G., (1924) A.C. 349. Of course, this was wrong considering the formal provisions of our Code. See also Dame S. v. G. et al, (1966) SC 388. In commenting this latter case, Jean Pineau wrote (with reason) that: "Désormais, les psychiatres créent le droit, ainsi en a décidé la Cour, contrairement à une jurisprudence respectueuse des textes du Code civil" (1967) 45 C.B.R. 376, at p. 378.

individual alleged to be impotent" (410).

At first glance, it would appear that males (or those who claim so to be) would suffer from a type of physiological discrimination due to the external distribution of their organs, at least according to the opinion of Perrier J., stated in the case of S. v. M. (411):

> "Il est indiscutable que l'impuissance chez la femme, dont tous les organes sont cachés et à l'intérieur du corps, peut plus rarement que chez l'homme, recevoir la qualification 'apparente et manifeste'. Toutefois, il arrive assez souvent que la malformation soit apparente, et il suffit que telle impuissance chez la femme soit 'apparente et manifeste' pour toute personne qualifiée qui procède à l'examen de son corps" (412).

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(410) (1952) S.C. 352 at pp. 358-359. See also Dame W. v. F., (1947) S.C. 66; C. v. Dame G., (1947) S.C. 298; Beaulne v. Thessereault, (1947) S.C. 24; B. v. Dame D., (1949) S.C. 406; Dame Burnett v. Worthington, (1951) S.C. 50. Another approach employed to introduce "psychological impotence" met success in the case of Dame Hivon v. Gagnon, (1962) S.C. 399. In this matter, Drouin J. found that the plaintiff would be afforded relief from the marriage based upon error as to the person. Reduced to its simplest, the argument runs as follows: a person marries with the hope inter alia of consummating the union. However, if the other partner is psychologically incapable of having sex, then this defect would prove a "vice de consentement" since one is presumed to be disposed towards activities of this nature. Pineau dismisses this type of reasoning as going beyond the terms of the Code (op. cit., p. 25, no 28).

(411) (1954) R.L.n.s. 346.

(412) Ibid., at p. 350.

Hopefully, in the eyes of medical experts, both sexes would run equal risks. Nevertheless, one cannot escape the feeling that these legal criteria would be particularly hard on converted female transsexuals.

Happily, some consolation may be drawn from the fact that the law expressly allows that this right to request annulment exists only in favor of the other consort, (provided that recourse is taken within three years), and is thus not of public order. As a result, said right of invoking the apparent and manifest impotence of the other spouse may be renounced, either expressly or implicitly (413). In light of this situation, the converted transsexual sincerely desirous of enjoying a secure marriage would be well advised to describe his or her true situation to a future spouse (414).

3. Conclusion and recommendations

For the most part, an examination of the legal repercussions of transsexualism is essentially an exercise in analogy, comparison and conjecture due to a dearth of jurisprudence and, even more importantly, an almost total absence of legislation on this topic. In spite of this, we may assert with some confidence that seriously considered conversive surgery may be deemed legal in all jurisdictions

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(413) Lachance v. Rochon, (1927) 65 S.C. 556 (Gibsone, J.).

(414) As for those grounds for annulment particular to different religions and which go beyond the terms of the Civil Code (eg. non-consummation) it would appear that notwithstanding article 127 C.C., the courts must abstain from giving them legal effect, cf. Despatis v. Tremblay, (1921) 58 D.L.R. 20 (Privy Council); PINEAU, op. cit., p. 47, no 62.

forming the basis of our study, excepting of course France. It may also be added that almost all jurisdictions, save certain of the American States and two Canadian provinces, refuse to acknowledge a post-surgical "change of sex" on birth records. Concomitantly, marriage in the "new" sex role does not appear to be legally valid, excepting perhaps in those American and Canadian jurisdictions which do allow modification of birth registrations. Obviously, transsexuals, for the most part, are faced with far from ideal conditions for obtaining both surgical transformation as well as a legal change of sexual status.

Naturally, the best argument in favor of conversive surgery and the legal acknowledgement of "sex change" resides in the fact that it is the only alternative to what Benjamin describes as "therapeutic nihilism" (415). Except in cases involving very young children, medicine's "best shot" would appear to lie in the direction of suiting the body to the mind rather than attempting to accomplish the opposite. Of course, this does not imply that psychiatry may not eventually come up with effective treatment, it only means that, at present, this branch of medicine does not offer a cure within the reasonably near future. Therefore, the choice is clear - we either allow the confirmed transsexual to proceed alone on his or her self-destructive or anti-social way, or else we offer a somewhat imperfect solution — "sex change". Nevertheless, to allow conversive surgery without following it up with legal recognition of a new status, smacks not only of therapeutic half-measures (416), but also of hypocrisy. One

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(415) The Transsexual Phenomenon, op. cit., p. 91.

(416) Indeed, post-surgical re-adaptation is considered part of treatment.

cannot but help feel that a converted transsexual, weighed down with legal documentation denying the new status, is in much the same position as an amputee given an artificial but functional leg with the admonition that the new limb shall be used for appearances only and not for walking.

Yet, to place the whole problem in its proper perspective, it should be recalled that transsexualism affects only about .00001 percent of the population. Except as regards the victims of this syndrome, one cannot qualify transsexualism as being one of the most important psychiatric problems of the day. However, how can one quantify or indeed qualify genuine suffering? All that can be indicated by such a statistic is that the solution adopted must not require the complete rejection out of hand of norms and standards generally accepted by the broad spectrum of the population. Thus, the solution would seem to reside in a form of accomodation rather than in a complete redefinition of the distinctions between the sexes.

Another factor one should not lose sight of, in contemplating ways of reintegrating the post-surgical transsexual into the legal fabric of society (and which we have constantly reiterated, perhaps to excess), is that it is scientifically impossible to change the sex of a person. The implication here is that any legislation, regulation or court decision which allows a legal change of sexual status following conversive surgery, necessarily gives legal blessing to a scientific heresy. In all justice, one should hasten to add that this would not be the first, nor likely the last time that the law would conflict with science. In addition, it is submitted that in view of the limited numbers

of converted transsexuals one may encounter in any jurisdiction, the results of this type of "white lie" would hardly shake society to its foundations. Clearly, problems arising out of the deficiencies of the surgically created artificial organs would most often be experienced in post-operative marriages: Not only would sterility be encountered without exception, in addition, impotence especially, would be the main difficulty of the converted female transsexual. Here, more than in any other context, would absolute candor between the contracting parties be the rule. Once aware of the true situation, if the parties wish to marry, there would appear to be no reason why this type of union between persons who are unable to consummate the marriage and/or to procreate, would be any less valid than would be, for instance, a marriage between very old persons merely seeking companionship.

Now the question may be asked, how may one reconcile the difficulties of transsexuals with the larger interests of society without abandoning the former or subverting the legitimate and time-honored standards of the latter? The solution lies in special legislation which should be humane but strict (417). Such legislation would have as goal the legalisation of conversive surgery and the acknowledgement of a change of status consonant with the change in external physical appearance. In our opinion therefore, any worthwhile statute governing "sex-changes" would necessarily have to include the following features:

(1) Only specially designated medical centers would be authorized to evaluate the patients and to perform the surgery. This would prevent costly duplication, and

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(417) These terms are not necessarily contradictory.

would concentrate the experience obtained, thus encouraging better results (418). It would also permit uniform methods of evaluation to be utilized instead of having a different standard for each institution performing this type of surgery. An added bonus would be derived from the fact that unscrupulous or unskilled practitioners would not be allowed to exploit desperate transsexuals or misguided transvestites.

(2) The candidates for surgery would be selected only after careful evaluation, and the surgery would be performed only after a "cooling-off" period. Aside from discovering whether the patient would have the physical stamina to undergo surgery, the process of evaluation would also determine whether the patient would be capable of giving a valid consent, whether he or she would be able to adapt to the new role, and whether the condition was genuine or merely a symptom of some other illness or psychosis.

(3) The surgery would not be granted to married patients unless and until their marital situations were settled. This would avoid many obvious problems both for the patients as well as for their families.

(4) Only persons fulfilling stringent residency requirements would be entitled to benefit from this legislation, thus eliminating the problem of overburdening medical facilities. Likewise this would prevent such medical centers from attracting transsexuals from around the world or in other words, to avoid creating "Meccas for transsexuals".

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(418) STOLLER, A Biased View of "Sex Transformation" Operations, loc. cit., p. 317. Preferably the institutions designated would be research and teaching centers so that many could profit from such experience.

(5) Once the surgery is performed, the patient would be allowed to petition the court having jurisdiction, in order to obtain modification of the birth certificate. Of course, the facts of the petition would have to be reinforced by the testimony or sworn statements of the physicians who performed the surgery. The judgment rendered on the strength of the facts presented would declare that the patient has undergone conversive surgery and that for all legal purposes would be acknowledged as a member of the opposite sex.

Of course, some restrictions could be placed on the applicability of this type of judgment, as for instance, in cases of life insurance or for purposes of adoption. With regards to life insurance, the risk depends essentially on life expectancies established by actuarial tables. Since these tables are compiled from broad statistics reflecting the general population, it is submitted that the few transsexuals involved would not seriously affect the risk. However, this remains a value judgment. Adoption would appear to be much more serious since a young third party is involved. As of now, the etiology of transsexualism is unknown, although many serious researchers point to childhood conditioning or environment. Elementary prudence would thus dictate that children not be exposed to persons suffering from psychosexual inversion, at least until more facts about the causes of this condition are ascertained.

Following a favorable judgment, the persons responsible for the maintaining of birth records would only be allowed to issue the "new" certificates without referring to the original entries unless the transsexual himself requested that the certificate mention that the change of sex has

been made pursuant to court order (419), or else unless the court demanded issuance of a certificate bearing this mention (420). In this manner, the integrity of public records would be protected without unnecessary embarrassment to the patient.

As an experimental procedure, all "changes of sex" would have to be followed up by trained and impartial observers over a long-term period (421) in order to evaluate the effectiveness of this novel approach to treatment. If it is found that the long-term adaptation of the patients shows poor results after a typical initial period of euphoria, then conversive surgery for transsexuals (as opposed to sex-reassignment operations for hermaphrodites) should be made illegal. It is also hoped that this type of surgery will become obsolete through the development of new psychiatric techniques which would attack at the root of the problem itself rather than force science to use palliative forms of treatment.

As a final word on this topic, transsexuals fortunate enough to have successfully undergone surgery, naturally wish to help those of their own kind who have not yet benefited from medical treatment. The greatest aid they could

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(419) This would facilitate changes to passports, etc...

(420) This would occur in matters of inheritances, filiation, etc...

(421) Stoller suggests ten years: Cf. A Biased View of "Sex-Transformation" Operations, loc. cit., p. 317.

bring to the cause of conversion surgery would be to avoid exploiting the circumstances of their cases in order to obtain notoriety. Their behavior has a direct bearing on public opinion which could, just as easily as not, countenance "changes of sex". One thing is certain, the provocation of any appreciable measure of hostility on the part of the general public could quickly destroy any immediate hope of relief from what is at present an almost hopeless situation for transsexuals.

PART 2 - STERILIZATION

I - INTRODUCTION TO STERILIZATION

Of all the words in the medical lexicon, the term "sterilization", simply defined as a procedure whereby a male or female is deprived of the ability to procreate (1), seems unusually capable of provoking strong reactions amongst most segments of the population. Indeed, there are literally hundreds of thousands living today who could sing the praises of this type of operation as a means of obtaining relief from the fear and burdens of unwanted pregnancy. Yet, we may also come upon many other thousands who have suffered, during the years of the Nazi madness, the humiliation of forced sterilization imposed ostensibly for the purposes of racial purification but actually as a means of political repression. Interestingly enough, these very crimes against humanity, for which many were tried and convicted at Nuremberg, originated in the United States while Hitler was still a child, and even more shocking, are still being perpetrated today, under the guise of social betterment. In fact, close to half of the American States, and until very recently, two of the Canadian Provinces (Alberta and British Columbia), have and apply laws providing for the compulsory sterilization of certain categories of the mentally ill and feeble-minded. Even the Celebrated Supreme Court Justice Oliver Wendell Holmes gave his blessing to the eugenic sterilization movement with the words: "Three generations of imbeciles are enough" (2).

On another plane, the word "sterilization" has become a synonym for "sin" in the eyes of Roman Catholics around the world, especially since publication of Pope Paul VI's encyclical Humanae

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(1) D.W. MEYERS, The Human Body and the Law, Chicago, Aldine Publishing Co., 1970, p. 1.

(2) Buck v. Bell, (1927) 47 Sup. Ct. 584 at p. 585.

Vitae of the 29th of July 1968 forbidding contraception except by means of the "rhythm method", or periodic continence. Any operation intended merely to induce sterility is also strictly forbidden for Catholics.

Even physicians often react with less than scientific detachment when faced with a request for sterilization. Indeed, how can one use any other adjective but "reactionary" to qualify the following statement of Dr. T.L. Fisher, dealing with this very problem, which he addressed to the 97th annual meeting of the Canadian Medical Association:

> "Doctors are foolish ... to transfer to their shoulders a responsability the patients themselves should carry and can carry (i.e. contraception), particularly when, as is true in the majority of cases, the patient is not ill and provides no medical indication for the procedure. Doctors should give sufficient thought to requests for sterilization for non-medical reasons to recognize that much of the reasoning and many of the reasons underlying such requests are specious. Surely it is no function of a doctor, for example, to decide that he, in his small sphere, shall labour to damp down the population explosion; doctors are not sociologists. Surely, about matters that are none of a doctor's business, it is not a proper medical responsability for doctors to try to assure their patients all the pleasant things in life and none of the painful, a Utopian state which the doctors themselves cannot reach. When one thinks of the writings of some of the proponents of sexual sterilization, one is glad that doctors have a scientific background which allows most of them to recognize that many of the ideas are distortions caused by the crocodile tears shed by the sob-sisters who hope doctors can be used to forward their ideas" (3).

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(3) T.L. FISHER, Legal Implications of Sterilization, (1964) 91 C.M.A.J. 1363, at pp. 1364-1365. It could be mentioned that at that time, Dr. Fisher was secretary-treasurer of the Canadian Medical Protective Association.

With all due honesty, it should be pointed out that these comments were probably inspired more by a fear of liability due to the uncertainties surrounding the legality of elective sterilization, than by purely ethical, moral or philosophical considerations.

On one fact, however, everyone would have to agree — surgical sterilization is a monument to our present inability to provide a convenient, fool-proof, safe, inexpensive means of contraception (other than abstinence), which is free of all major or minor side-effects. Even our best effort to date, the oral contraceptive pill, causes side-effects ranging from nausea to facial skin pigmentation in about a third of all women (4). Thus, the very nature of sterilization, the fact that it is a mutilation of healthy tissue and is generally irreversible, all contribute to the legal, religious, sociological and ethical attitudes which surround this topic. Indeed, one would hazard the opinion that if a simple, safe and easily reversible technique of sterilization were discovered and generally available, much of the emotionalism and most objections to sterilization would disappear (5).

A) Historical resumé of sterilization

Contrary to what one would at first be inclined to believe, sterilization is not exclusively a twentieth-century phenomenon. In fact, many ancient civilizations including the Chinese, Egyptian, Assyrian, Hindu, Persian, Greek and Roman, regularly

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(4) Alan F. GUTTMACHER, Contraception in Ethical Issues in Medicine, edited by E. Fuller Torrey, Boston, Little, Brown and Co., 1968, 27 at p. 45.

(5) Glanville WILLIAMS, The Sanctity of Life and the Criminal Law, New York, Alfred A. Knopf, 1957, p. 75.

castrated their captive slaves and criminals (6). Although the de-sexing was intended essentially as a form of punishment, it also sought not only to avert slave-uprisings by preventing the more intelligent to procreate, but also to boost productivity by allowing only the biggest and strongest to breed. For obvious reasons, only eunuchs were used to guard harems. Both the Old and New Testaments contain many references to eunuchs (7), who apparently formed a fairly sizeable portion of the total Middle Eastern population. With the advent of Christianity, and perhaps due to the asceticism of St. Paul, many early Christians such as Valesius and Origen (185-254 A.D.) encouraged self-mutilation in order to avoid the temptations of the flesh. These early faithful apparently did not give any thought to the necessity of procreation since they believed that the Second Coming would occur within their generation. The pervasiveness of these beliefs and practices obliged the Church, at the First Nicene Council of 325 A.D. to put a halt to them by decreeing that eunuchs would not be eligible for the priesthood. In spite of generally unfavorable attitudes by most religious and lay-persons towards castration as a form of devoutness, this practice still exists today in Russia amongst the Skoptics or Skoptsi, a sect founded during the XVIIIth century by a personage named Selivanov (8).

In an extraordinary deviation from the official position of the Church, Sixtus IV (Pope from 1471-1484) encouraged the

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(6) H. CURTIS WOOD, Sterilization, in Torrey, Ethical Issues in Medicine, 105 at p. 107; Joseph FLETCHER, Morals and Medicine, Boston, Beacon Press, 1954, p. 143.

(7) II Kings 9:32; Isaiah 56:4; Jeremiah 38:7; Daniel 1:3; Acts 8:26-39; Matthew 19:12 are examples given by FLETCHER, ibid., at p. 143.

(8) Louis KORNPROBST, Responsabilités du médecin devant la loi et la jurisprudence françaises, Paris, Flammarion, 1957, p. 531.

castration of pre-pubertal boys in order to furnish his Sistine Chapel choir with a sufficient number of delicate soprano voices (9).

The first mention of castration as a scientific approach to negative eugenics was made by the Austrian Johann Frank, (1749-1821) in his work Medicinisches Polizei published in 1779. He argued that the state had a leading role to play in the area of public health and should thus adopt a policy of sterilization of the mentally diseased and retarded in order to prevent racial deterioration (10). The cause of eugenics received added impetus through the writings of Thomas R. Malthus (1766-1834). In his essay, On Principles of Population as it Affects the Future Improvement of Society published in 1798, Malthus hypothesized that the world's population was growing more rapidly than its production of food and raw materials. As a result, he felt that a reduction of the birth-rate was essential (11).

True sterilization (as opposed to de-sexing), is a fairly recent phenomenon which began during the late 19th century with the discovery of surgical techniques which could eliminate fertility without destruction or removal of the sex glands. The surgical operation known as vasectomy was developed by Dr. Harry C. Sharpe, who, in 1899, began a program of sterilization on the persons of convicted delinquents. In actual fact, Dr. Sharpe performed sterilizations on between 600 to 700 inmates of Indiana State Reformatory without any legal authority to do so and without any public protest (12).

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(9) Ibid., p. 531.

(10) WOOD, loc. cit., p. 107.

(11) FLETCHER, op. cit., p. 69.

(12) E.Z. FERSTER, Eliminating the Unfit - Is Sterilization the Answer?, (1966) 27 Ohio State L.J. 591, at p. 592; R.J. RIECKHOFF, Compulsory Vasectomy and Orchiectomy, (1969) 33 Ky. St. Bar J. 13, at p. 14; R. MILLAR, Sterilization: A Continuing Controversy, (1966) 1 U. of San. F. L.R. 159 at p. 162.

In point of fact, Indiana did not pass a compulsory sterilization law before 1907 (13). The salpingectomy operation for sterilizing women was first performed in 1897 by a Swiss surgeon (14). In discussing these developments, Fletcher had occasion to comment:

> "It is worth some thought that both of these medical achievements came about in democratic countries. They were not spawned under dictatorships or carried out behind barbed wire. There is also significance in the fact that, at least in America, medical men charged with the care of degenerates and criminal repeaters, and gynecologists in private practice, were not afraid to devise these methods and put them to work even in the absence of enabling legislation" (15).

From 1907, the year in which the State of Indiana passed and ratified a compulsory eugenic sterilization statute, up to the present day, more than half of the American States adopted the same type of law providing for the sterilization of the mentally incompetent (16). On a wider basis, this policy of eugenic sterilization was expanded and put to use in 1933 by the Nazis as part of their Rassenhygiene policies (17).

The Thirties also marked the opening shots of the war

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(13) MEYERS, op. cit., p. 29.

(14) F.W. McKENZIE, Contraceptive Sterilization: The Doctor, The Patient and the United States Constitution, (1973) 25 U. of Fla. L.R. 327.

(15) Op. cit., p. 145.

(16) J.T. PITTS, Sexual Sterilization: A New Rationale?, (1972) 26 Ark. L.R. 353.

(17) KORNPROBST, op. cit., pp. 531-532; J.L. BAUDOUIN, L'Incidence de la biologie et de la médecine moderne sur le droit civil, (1970) 5 Thémis 217, at p. 226.

between the Catholic Church and the proponents of contraception. In his encyclical Casti Conubii of the 31st of December 1930, Pope Pius XI declared that the faithful could not destroy or mutilate parts of their body solely to subvert or defeat natural functions (18). The only exception was, of course, therapeutic necessity. This position has remained substantially unaltered through the years and was recently ratified by Pope Paul's above-mentioned encyclical Humanae Vitae.

The topic of sterilization evokes many diverse and contradictory reactions. In some countries, the legality of sterilization is doubted (e.g. France), in others, sterilization can be imposed for eugenic purposes (e.g. U.S.A.), and yet in others (e.g. India), transistorized radios are offered as an incentive for sterilization (19). Even attitudes vary. In the eyes of some, those who limit family size are committing a serious sin, whereas to others, they are altruistic and ecologically-minded. The disturbing fact is that the ghost of Malthus yet haunts us in the form of dark predictions on future food supplies by the Club of Rome; and natural resources (or a lack of same) may render the whole ethical and legal questions of sterilization moot. Indeed, the day could conceivably dawn where basic survival would necessitate compulsory, world-wide sterilization once the birth-rate exceeded certain acceptable limits (19a).

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(18) FLETCHER, op. cit., p. 158.

(19) P.H. ADDISON, Legal Aspects of Sterilization and Contraception, (1967) 35 Med. Leg. J. 164 at p. 165.

(19a) Charles P. KINDREGAN, State Power Over Human Fertility and Individual Liberty, (1972) 23 Hastings L.J. 1401, at pp. 1402-1405.

B) Statistics on Sterilization

What is the situation governing sterilization today? Although accurate statistics are very difficult to obtain and are merely estimates rather than precise figures, all writers appear to be in agreement on one fact - that voluntary sterilizations for both men and women are greatly increasing in number each year. In the United States for example, it is opined by both the National Fertility Study (20) and the Association for Voluntary Sterilization (21) , that approximately three million men and women under the age of forty-five have submitted to sterilization for purely contraceptive purposes. According to these figures (arrived at in 1970), one fertile couple in five has opted for surgical sterilization; with the number of operations about equally divided between males and females. It appears that the number of men being sterilized has begun to exceed women, probably due to the greater simplicity, safety and less expense involved in the vasectomy procedure as opposed to tubal ligation, which requires general anaesthesia, hospitalization and penetration into the peritoneal cavity. For instance, in the U.S.A., 200,000 vasectomies were performed in 1969 with this figure increasing to 700,000 in 1970 and almost 1,000,000 in 1971 (22).

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(20) Reporter on Human Reproduction and the Law, Charles Kindregan, editor in chief, Boston, Legal-Medical Studies Inc., 1972, p. III-A-3.

(21) J.C. GRAY, Compulsory Sterilization in a Free Society: Choices and Dilemmas, (1972) 41 U. of Cin . L.R. 529, p. 533.

(22) This is according to the National Disease and Therapeutic Index cited by E. SAGALL, loc. cit., p. 57. More conservative figures place the total number of sterilizations in 1970 at 750,000 of which 550,000 were performed on males, (cf. GRAY, loc. cit., p. 533), and 700,000 vasectomies for the year 1971 (J.E. DAVIS, Vasectomy, (1972) 72 Am. J. Nurs. 509).

In Canada, the number of voluntary vasectomies performed up to and including part of 1973 is estimated as being at least 100,000 (23). It has also been stated that three out of every four sterilization procedures are performed on men.

On the other hand, although the number of compulsory sterilizations in the U.S.A. has declined dramatically from year to year, over 63,000 patients have been subjected to this type of surgery as of 1973 (24). In the period from 1907 to 1958, 24,008 males and 36,158 females were so treated. The present annual rate would appear to be close to four hundred or less (25).

C) Surgical Procedures for Male and Female Sterilizations

There are two general methods of procuring sterility by surgical means in men; orchiectomy (castration) or vasligation and resection (vasectomy). The first method is no longer practised today except for therapeutic purposes, i.e. when testicular pathology so indicates (e.g. cancer). The reasons would appear to be related to the hormonal functions of the testes which supply testosterone as well as other sex hormones, the absence of which would have adverse effects.

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(23) C.F. GRINDSTAFF; G.E. EBANKS, Vasectomy: Canada's Newest Family Planning Method, (1973) 21 Canada's Mental Health 3 at p. 5.

(24) R. PATE, P. PLANT, Sterilization of Mental Defectives, (1972) 3 Cumberland-Sanford L.R. 458 at p. 461.

(25) J. PAUL, The Return of Punitive Sterilization Proposals, (1968) 3 Law and Soc. Rev. 77.

As a surgical procedure, vasectomy is quite simple and is often performed in a physician's office under local anesthesia. After the scrotum is shaved, painted with an antiseptic solution and draped, the area is anesthetized by means of a local injection. Proceeding either by way of bilateral or even via a single midline scrotal incision, each vas deferens is grasped in turn and by dissection, is separated from the sheath. Once segments of vas are isolated, approximately a quarter to a half inch length of each is excised. The severed ends of the vas are then tied or else occluded by tantalum clips and in many cases (as an added precaution), the stumps are folded back on themselves and doubly ligated. Finally, the scrotal skin is sutured (26). Depending on the skill of the surgeon as well as other factors, such as the presence of a vigorous cremaster reflex or else the toughness of the scrotum (27), the whole operation would take anywhere from eight to thirty minutes.

Although the above-described procedure is generally employed today, several other methods are also being tested in order to obtain both total azoospermia and complete reversibility. Among the approaches mentioned are the use of plugs, which temporarily occlude the vas, or of valves which can be opened or closed to the passage of sperm by a simple reoperation. Another means of producing reversible sterility being examined is the use of tantalum clips to close the vas by external compression (28). Indeed, it is generally felt that within a short time, a total-

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(26) For excellent descriptions and illustrations of the vasectomy procedure, consult: Joseph E. DAVIS, Vasectomy, (1972) 72 Am. J. of Nurs. 509; Abel J. LEADER, The Houston Story: A Vasectomy Service in a Family Planning Clinic, (1971) 3 Family Planning Perspectives 46; Michael T. RICHARDS, Vasectomy ... As an Office Procedure, (1973) 109 C.M.A.J. 394.

(27) According to Dr. Leader, (Loc. cit., p. 47), "a few individuals will present with a scrotum like a volley-ball, with the skin thick and tough like that of a rhinoceros's hide".

(28) These methods are described by DAVIS, loc. cit., p. 512.

ly reliable means of reversible contraception along the lines of those above-mentioned will be perfected.

One should note that sterility does not immediately result from a vasectomy since a substantial quantity of sperm may be present beyond the points of occlusion. Indeed, in some patients, transient sperm have appeared up to as much as six months following surgery (29). Thus, a most proper precaution would be for the patient to rely on other contraceptive methods for about six weeks to two months and to return for post-operative fertility tests before assuming that sterility has occurred (30).

In spite of its great simplicity, a vasectomy is not as innocuous a procedure as one would presume at first glance. Accordingly, certain facts pertaining to this type of intervention should be mentioned:

(1) The failure rate for vasectomy is placed at approximately .15 per 100 person years with not a single surgical death being reported (31). One of the advantages of this method as opposed to tubal ligation for women lies on the fact that there is a mortality rate for women which is about equal to the risk of death in childbirth (32).

(2) The morbidity rate is also very low with very slight

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(29) SAGALL, loc. cit., p. 57.

(30) H.C.M. WALTON, Male Sterilization, (1970) 4 B.M.J. 748; Philip M. ADDISON, Sterilization, (1972) 1 Lancet 1115-1116.

(31) DAVIS, loc. cit., p. 509. However, see Dunn v. Campbell, (1964) 166 S. 2d 217 (Fla. Court of Appeal) dealing with an action arising out of the death of the patient following an "office" vasectomy.

(32) DAVIS, ibid.

pain and suffering (33). However, painful and serious complications such as "abscess, cellulitis, vasitis, epididymitis, fistula formation, scrotal hematoma and sperm granuloma..." (34) may occur. For instance, in a series of two hundred and ninety-six Canadian cases, there were only five occurrences of post-operative complications, of which three were caused by the patients' overactivity following surgery (35).

(3) Although the psychological response of males following the operation is clearly quite favorable, there does nevertheless exist a fairly substantial psychosexual casualty rate. Most studies indicate that psychiatric difficulties occur in from one to five percent of all cases (36), with three percent being the most widely accepted figure (37). Among the difficulties encountered may be included post-vasectomy sexual anxiety, diminished virility, and impotency (38). As may be expected, sterilizations performed on men already experiencing psychiatric problems tend strongly to exacerbate their conditions (39). Consequently,

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(33) Ibid.

(34) SAGALL, loc. cit., p. 57.

(35) RICHARDS, loc. cit., p. 394.

(36) DAVIS, loc. cit., p. 512.

(37) SAGALL, loc. cit., p. 57; H. LEAR, Vasectomy - A note of concern, (1972) 219 J.A.M.A. 1206 at p. 1207. Other figures mentioned are 4.4% (ANONYMOUS, Voluntary Male Sterilization, (1968) 204 J.A.M.A. 821), 4% (GRINDSTAFF, EBANKS, loc. cit., p. 5), 1% (Roger C. WOLF, Can New Laws Solve the Legal and Psychiatric Problems of Voluntary Sterilization?, (1965) 93 J. of Urology 402 at p. 403).

(38) SAGALL, loc. cit., p. 57.

(39) DAVIS, loc. cit., p. 512; ANONYMOUS, (1968) 204 J.A.M.A., loc. cit., at p. 822; LEAR, loc. cit., p. 1207; WOLF, loc. cit., p. 403.

it is often recommended that psychiatric evaluation be employed in order to ensure that the patient can successfully cope with the psychological repercussions of what is potentially an irreversible step (40).

(4) Attention should also be drawn to a phenomenon known as "spontaneous reanastomosis" or natural recanalization by which a patient may recover his sterility. Through the innate healing capacities of the human body, the severed portions of the vas may rejoin, thus allowing sperm to flow from the testicles unhindered. Although this would appear to occur in from .5 to 1 percent of all cases, the risk is sufficient to encourage the annual testing of all patients (41).

One of the greatest obstacles to the complete acceptance of vasectomy as a means of contraception derives from the fact that it is a drastic and often irreversible procedure. As may be expected due to the increasing numbers of sterilized men and the greater facility with which marital partners may be discarded, many patients have occasion to request surgical recanalization. Although encouraging statistics are appearing which indicate that successful anastomosis can be obtained in from fifty to ninety percent of all cases (42), (apparently depending on the skill of the physician (43)), the rate of successful post-surgical fertilization remains quite low, being established at

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(40) SAGALL, loc. cit., p. 57.

(41) DAVIS, loc. cit., p. 511.

(42) ANONYMOUS, (1968) 204 J.A.M.A. loc. cit., p. 522; GRINDSTAFF, EBANKS, loc. cit., p. 5; DAVIS, loc. cit., p. 512; MILLAR, (1966) 1 U. of San. F.L.R., loc. cit., at p. 161. Millar's figures are somewhat low compared to those proffered today. This is probably due to the fact that he cites documents written in 1950, 1932 and 1964. See also Eugene CATTOLICA, Reversibility of Vasectomy, (1971) 74 Annals of Internal Medicine 475.

(43) WOOD, loc. cit., p. 127 in TORREY, Ethical Issues in Medicine.

five to fifteen percent (44). Although the reasons for this are not known, some feel that the answer lies in the fact that in vasectomized men, an immunosuppressive reaction to sperm may build up(45). In addition, this type of reversal operation is performed under general anesthesia and is quite complicated due to the fact that when the vasectomy is originally performed, added precautions are taken to ensure that spontaneous recanalization cannot occur. Thus, a more skilfully performed vasectomy implies greater difficulty in obtaining a reversal, and in general, physicians usually advise their patients to approach a vasectomy with the view that it is permanent. As a precaution against the day when the loss of fertility may be regretted through remarriage or the death of the child or children, etc..., a circumspect patient could arrange to store his semen in a sperm bank (46). Therefore, if the need should ever arise, his wife could be inseminated artificially.

The surgical sterilization of women may be obtained in four ways — bilateral oophorectomy (removal of the ovaries), hysterectomy (removal of the uterus), bilateral salpingectomy (removal of the fallopian tubes) and finally by bilateral tubal ligation (the interruption of the fallopian tubes). The first three methods are generally used when there are pathological indications for the ablation of the organs involved (47). As a means of destroying fertility, the efficacy of said methods cannot be denied, but the surgical risk is greater, and, in some cases, may cause undesirable side-effects, such as premature menopause in

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(44) SAGALL, loc. cit., p. 57. Wolf in the Journal of Urology, loc. cit., p. 402 note 1, gives the figure of 66% in a study of 32 men, and Davis, loc. cit. at p. 512 hypothesizes that the figure is around 20-25%.

(45) J.J. FRIED, cited by Suzanne PARENTEAU-CARREAU, Love and Life, Ottawa, Serena, 1974, p. 40.

(46) DAVIS, loc. cit., p. 513.

(47) It should be mentioned that salpingectomy is often employed as an alternate means of non-therapeutic sterilization. Non-surgical sterility may also occur when massive doses of radiation are administered to the pelvic region in order to treat a disease. Cf. Alvin SIEGLER, Tubal Sterilization, (1972) 72 Am. J. of Nursing 1625.

the case of an ovariectomy (48).

By far the most popular surgical procedure for sterilizing females is the tubal ligation, even though it entails more difficulty than the vasectomy. Indeed, a ligation requires penetration into the abdominal cavity under general anesthesia, and hospitalization for varying lengths of time is the rule, (even though the length of stay depends upon the procedure employed, the general health of the patient and the success of the surgery) (49). Before referring to the various surgical procedures of ligation, it may be mentioned in passing that this type of operation can also be done vaginally (colpotomy) or else by way of the abdominal wall (laparotomy). The latter approach is generally taken immediately following birth by caesarian section, since the tubes may easily be brought into the operative field, or else following vaginal delivery while the uterus is still distended. In other cases, the vaginal approach is preferred since there is less "... postoperative pain, a better cosmetic result, a need for less relaxation and therefore less anesthesia, a decrease in morbidity, and less hospitalization" (50).

Although there are many techniques available for effecting the actual sterilization (51), the following would seem to be the most heavily relied upon:

(1) The Pomeroy procedure which appears to be the most popular, is also the simplest. Briefly described, it is effected

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(48) WOODS, loc. cit., p. 126; SAGALL, p. 57.

(49) SAGALL, ibid., p. 57.

(50) SIEGLER, loc. cit., p. 1628.

(51) One author mentions twenty-six different methods, cf. Richard W. LINDE, Operative Gynecology, 2nd ed., Philadelphia, J.B. Lippincott, p. 634. Another states that there are 100 techniques of sterilization involving tubal surgery, cf. C.J. DEWHURST, Integrated Obstetrics and Gynaecology for Postgraduates, London, Blackwell Scientific Publications, 1972, p. 463.

by raising a loop in the mid-portion of each fallopian tube. The knuckle so formed is ligated with absorbable sutures and the loop is excised. As the suture material is absorbed and healing sets in, the resected tubal ends move apart and are sealed off by the peritoneum.

(2) In utilizing the Madlener procedure, a smaller knuckle of the tube is raised and then crushed by a hemostat. The crushed portion of tube is then ligated. This method has a fairly high incidence of post-operative tuboperitoneal fistulas (52).

(3) The Irving technique is practised only on puerperal women due to the nature of the procedure itself. The fallopian tubes are ligated about four centimeters from the cornua and then another set of ligatures are placed in the proximal portions of the tubes which are then resected between the two pairs of ligatures. A tunnel is made in the wall of the uterus into which the proximal portion of each tube is drawn by way of a length of suture material and needle. Each tube is then left embedded in the wall of the uterus.

(4) Another general method involves chemical or electrical cauterization of the cornua by way of an intrauterine approach (53).

(5) The newest technique employing laparoscopy is currently receiving much favorable comment due to its safety and con-

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(52) SIEGLER, loc. cit., p. 1626.
(53) Ibid., p. 1628.

venience (54). After introducing a Verres needle into the abdomen, carbon dioxide is then pumped into the abdominal cavity. Cannulae are inserted permitting introduction of the laparoscope, and of biopsy tongs connected to an electrocautery. About .5 centimeters from the uterus, the tissue of the tubes are coagulated and segments of each tube are excised. The small abdominal incisions are then closed.

There exist many other experimental methods of temporary or reversible sterilization, such as the injection of chemical sclerosants, the use of metal clips, or the Aldridge technique, which involves the "burial" of the fimbriated end of the tube beneath the peritoneum of the broad ligament (55). In order to restore fertility, the fimbriated ends of the tubes are released and lifted out of the pocket of the peritoneum.

According to Siegler:

> "The main hazards from tubal operations are pulmonary embolism, hemorrhage, infection, and subsequent tubal pregnancy. Instances of hematoma in the broad ligament and torsion of the distal stump have been noted as well as the general complications that can follow laparotomy. Fatality is rare, but has been known to occur" (56).

From a psychological point of view, it appears that a significant number of women regret the surgery, notwithstanding

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(54) Described by A. LAVENTURE, E. BLOCK, C. MORIN, E. PHILLIPS and G. DEWAR, Laparoscopy: The Method of Choice for Sterilization and Investigation of Infertility, (1973) 109 C.M.A.J. 378.

(55) LINDE, op. cit., p. 640; JEFFCOATE, op. cit., p. 590.

(56) Loc. cit., p. 1629.

the opinion expressed by some, that unlike men, women do not become "emotionally unstrung" by the loss of their reproductive capacities (57). Indeed, from five to ten percent of sterilized women eventually become remorseful over their situations, with many suffering emotional disturbance (58). Naturally, there is a greater risk of adverse psychiatric reactions when the patients were previously emotionally unstable (59). Unfortunately, when sterilization is indicated on serious therapeutic grounds, the luxury of a rigorous selection of candidates for surgery no longer exists and psychiatric difficulties have a greater chance of occurring. Of course, when the request for sterilization is purely voluntary, then the emotional outlook of the patient should be an important factor in determining whether to proceed.

Although statistics vary according to the researcher as well as according to the surgical techniques employed, it is perhaps reasonable to state that there is a failure rate of approximately one percent (60). The likely causes of failure are "... erroneous ligation and resection of the round ligament, pregnancy through a tuboperitoneal fistula or recanalization of the tube" (61). Ectopic pregnancies are also a fairly common phenomenon following

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(57) Peter R. FORBES, Voluntary Sterilization of Women as a Right, (1968) 18 De Paul L.R. 560 at p. 561; WOOD, loc. cit., p. 128.

(58) Roger C. WOLF, Legal and Psychiatric Aspects of Voluntary Sterilization, (1963) 3 J. Family L. 103 at p. 117; WOLF in (1965) 93 J. of Urology, loc. cit., p. 403; SIEGLER, loc. cit., p. 1629; DEWHURST, op. cit., p. 464.

(59) DEWHURST, ibid., p. 465.

(60) FORBES, loc. cit., p. 562. Other figures given are 1 - 4%, (SAGALL, loc. cit., p. 57); 1-2% (MILLER, loc. cit., p. 161); 1-2% (LAVENTURE et al, loc. cit., p. 380); 0.84% (DEWHURST, op. cit., p. 464); 0.04-0.08 per 100 woman-years (PARENTEAU-CARREAU, op. cit., p. 40).

(61) SIEGLER, loc. cit., p. 1629.

tubal ligation (62). There have even been rare cases of pregnancy following hysterectomy and bilateral salpingectomy due to some unknown communication between the ovary and the vagina (63). For reasons which still escape scientists, the risk of failure increases six or seven-fold when the sterilization is performed at the time of a hysterotomy or a caesarean section (64).

What hope is there for the patient who wishes to submit to a reversal of sterilization through a recoupling of the severed tubes? The procedure is more difficult in women than it is for a reversal of vasectomy in men, and current opinion would appear to place the global chances of success at under fifty percent (65), although some physicians report success in sixty-five (66) and seventy-five percent of all cases in their respective series (67). Needless to say, these figures are optimal and represent the efforts of surgeons highly skilled in this branch of gynecology. With the average practitioner, the figures would almost inevitably be less favorable.

A rapid perusal of the many aspects surrounding surgical sterilizations indicates that although these procedures are fairly uncomplicated, there are still the normal risks attending all surgical interferences with the integrity of the human body. This obviously suggests that if possible, other simple and less

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(62) JEFFCOATE, op. cit., p. 591.

(63) Ibid.; SAGALL, p. 57.

(64) DEWHURST, op. cit., p. 464; JEFFCOATE, op. cit., p. 591; SIEGLER, loc. cit., p. 1629.

(65) PARENTEAU-CARREAU, op. cit., p. 40.

(66) Betty GONZALES, Voluntary Sterilization, (1970) 70 Am. J. of Nursing 2581.

(67) WOOD, loc. cit., p. 127.

drastic measures should be employed. In other terms (to borrow a phrase popular with physicians), there should be "no surgery without pathology" – unless a medical problem involved, the physician should recommend non-surgical birth control (68).

Perhaps three basic arguments can be taken into consideration before opting for one point of view or the other: To begin with, the choice of birth control method may not be as completely open as one would expect. The most effective contraceptive – the combination (estrogen-progestagen) pill cannot be taken by many women due to the severity of their reactions to it, in the form of nausea, clotting problems, bleeding, personality changes, etc... (69). The next most effective method, the intra-uterine device, may cause bleeding and is occasionally spontaneously expelled (70). In addition, women who have never given birth, often experience pain after the I.U.D. is in place (71). Aside from the inconveniences, the interferences with sexual spontaneity and the greater margins for error, the failure rate of methods such as spermicidal agents (foams, creams, jellies, suppositories), diaphragms, condoms, douches, coitus interruptus and rhythm can be quite high (72).

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(68) This is the gist of Dr. Fisher's comments to the Canadian Medical Association, cf. (1964) 91 C.M.A.J., loc. cit., p. 1365.

(69) FORBES, loc. cit., p. 560.

(70) GONZALES, loc. cit., p. 2582; FORBES, ibid.

(71) PARENTEAU-CARREAU, op. cit., p. 27.

(72) According to Dr. Parenteau-Carreau (op. cit., p. 27), the failure rates representing the number of unwanted pregnancies per 100 women - years run as follows: Combination pill - 0.7; sequential pill - 1.4; foams 9.7 - 29.3; creams and jellies 7.8 - 40.6; suppositories and foaming tablets 7.7 - 45; diaphragm with cream or jelly 4 - 33.6; condom 7 - 28.3; coitus interruptus 10 - 16; vaginal douche 21 - 37.8; I.U.D. 2 - 3; rhythm (depending on the methods) 3.2 - 34.5.

In addition, with earlier marriages and the smaller sizes of families, it is generally the case that the desired number of children is obtained while the husband and wife are still quite young. As a result, the average couple may well have to cope with nearly a quarter-century of fertility during which contraception would necessarily have to be practised (73).

A third, more tragic argument which merits some consideration is the fact that a substantial number of women turn to abortion (either legal or illegal) when an undesired pregnancy occurs. Contrary to popular beliefs, abortion is sought mostly by married women and is rapidly gaining in societal acceptability (74). As a basically destructive, and morally questionable procedure, abortion must be replaced as the world's chief measure of birth control (75). Between the interference with a natural faculty and the destruction of a living organism, it would appear that if such a choice existed, it would be relatively simple for a thinking person to make.

Sterilization as a means of contraception is becoming more and more popular in all parts of the world, and the moral, legal and religious barriers to this type of measure appear to be giving way with more or less resistance according to the type of sterilization involved. Indeed, sterilization is not a monolithic notion, but rather a generic term covering many different facets or aspects which ultimately lead to the surgical interruption of a person's fertility. For instance, sterilization may be sought on therapeutic grounds, where a pregnancy could seriously compromise the mother's health, or else it may serve a eugenic purpose.

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(73) GONZALES, loc. cit., p. 2582.

(74) M. RINFRET, C. GIROUX, F. BOUCHER, 100 Femmes Devant l'avortement, Montréal, Les Editions du Centre de Planning Familial du Québec, 1972, p. 22.

(75) GONZALES, loc. cit., p. 2582.

Thus, a couple, aware of the fact that they may transmit a genetic defect to their offspring could elect never to procreate. In some jurisdictions, as a matter of fact, the state could impose this obligation on its mentally deficient. And finally, sterilization may be viewed simply as another of many means of contraception available to members of the general public, satisfied with their familial status quo.

Thus, the next few chapters will be devoted to examining the legal implications of therapeutic, eugenic and purely contraceptive sterilization according to the laws of England, the Anglo-Canadian provinces, the United States, France, and finally, the Province of Quebec. In this manner we may see whether one of the greatest barriers to the willingness of surgeons to perform sterilizations – legal liability – is founded on fact or on fantasy.

II - THE LEGALITY OF STERILIZATION FROM A CRIMINAL AND CIVIL LAW POINT OF VIEW

A) The legal aspects of therapeutic sterilization

Although sterility may result from the removal of, or surgical interference with, the organs of reproduction in cases of pathology, this is usually an undesired but inevitable consequence of the type of treatment indicated. Probably in cases of cancer involving the reproductive systems of men or women, would this occur all too frequently. However, our inquiry does not deal with this type of situation, and indeed, neither the law, nor religion for that matter, raise any questions of licitness, since human life naturally outweighs the loss of the power to procreate. Instead, we will view therapeutic sterilization in a narrower sense, i.e. sterilization which is performed when a pregnancy may compromise the life or the health of the patient. As one author

quite reasonably points out, mortality rates for fathers, during pregnancy are exceedingly low (76). And, therefore, one could be justified in assuming that therapeutic sterilization, or sterilizations founded on medical indications would apply only to women. Women's lib notwithstanding, there appear to exist several valid reasons why the male partner in the marriage would be sterilized in order to protect his wife's health (77): Ideally, the family is viewed as a unit and provided that conception does not occur, it is quite indifferent which spouse submits to surgery. On a more practical level, however, one should not overlook the rather grim statistic that approximately one marriage out of four will end in separation or divorce. A second consideration worthy of contemplation is that a vasectomy is a less serious operation from a surgical risk view-point than a salpingectomy; the former being compared to a tooth extraction whereas the latter has about the same element of risk as an appendectomy (78). In a word then, therapeutic sterilization is not the exclusive preserve of one sex.

The primary difficulty involved in any discussion of therapeutic sterilization lies in determining what the word "therapeutic" may encompass in the eyes of the law (79). As may be expected, no controversy surrounds the application of the term

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(76) WOOD, loc. cit., p. 111. With tongue in cheek, he suggests as a hypothesis that the thought of fathering a child would drive a person to suicide or mental derangement, thus providing the necessary medical indications.

(77) Bernard STARKMAN, The Control of Life, (1973) 11 Osgoode Hall L.J. 175 at p. 179.

(78) G.W. BARTHOLOMEW, Legal Implications of Voluntary Sterilization Operations, (1959) 2 Melbourne U. L.R. 77.

(79) MEYERS, The Human Body and the Law, op. cit., p. 2.

"therapeutic" in the context of physical health. In fact, there appears to be general agreement that sterilization is indicated when the woman has severe varicose veins, severe diabetes, sensitization of the Rh negative factor, severe heart disease, chronic nephritis, essential hypertension, pulmonary tuberculosis, numerous prior caesareans, etc... (80). Likewise, it seems to be universally admitted in principle that serious psychiatric grounds may also fall under the rubric "therapeutic" (81). The difficulty arises in establishing a line of demarcation between the normal frustrations and anxieties to be caused by an undesired pregnancy and a genuine emotional inability to cope with a child or children. In the first instance, the indicia are purely contraceptive whereas in the second, true therapeutic indications exist. Of course, the notion of "health" can be broadly or narrowly interpreted (82), and in the example just given with regards to the interpretation of psychiatric indications, the view expressed is obviously quite narrow. The medical profession, however, is taking

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(80) Harry A. PEARSE, Harold A. OTT, Hospital Control of Sterilization and Therapeutic Abortion, (1950) 60 Am. J. of Obstetrics and Gynecology 285 at pp. 292-296; Sol T. DeLEE, Voluntary Sterilization, (1970) 54 Int. Surgery 304 at p. 305; Elinor F.E. BLACK, Abortion and Sterilization, (1961) 33 Manitoba Bar News 33 at pp. 35-36. Many other examples are given by these authors. It is even suggested that multiparity can be a medical indication since each pregnancy causes physiological aging of the uterus, thus increasing the danger of rupture of this organ. Accordingly, sterilization is recommended after eight pregnancies, cf. BLACK, ibid., p. 35.

(81) PEARSE, OTT, ibid.; DeLEE, ibid.; BLACK, ibid.

(82) G. MARTHOLOMEW, Sterilization for "Just Cause" or for "The Sake of the Patients' Health", (1960) 2 Melbourne U. L.R. 397.

a larger view of its own role, which traditionally has been to heal or comfort the ill and infirm, and now sees itself assuming larger responsabilities. Perhaps the Constitution of the World Health Organization (which came into force the 7th of April 1948), best exemplifies this tendency, when it declares:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (83).

As a cherished goal for all mankind, this definition leaves little to be desired and it is only proper that such a high aim be officially declared. As a legal definition of "health", on the other hand, one must necessarily fear that the idea of "social well-being", is too general a notion to be incorporated into this concept, since any action or gesture undertaken upon rather specious social or socio-economic reasons, for instance, would enjoy the same legal protection as would an intervention performed on actual therapeutic grounds. The boundaries between therapeutic, eugenic and purely contraceptive sterilization, ... or abortion for that matter, would disappear, only to resurface under the sole heading "therapeutic". One must seriously doubt whether the courts would be willing to place on the same footing, a sterilization essential to protect the health of a patient suffering from a serious kidney disease, and one performed because a middle-class couple would rather be able to travel than be tied down with a (or another) child. This is not intended to be a value-judgment upon the merits of the one case as compared to the second, and indeed, if the law is broad enough in any given jurisdiction to admit different grounds such as these, then all the more power to the parties involved if their personal ethics or religious beliefs so permit. It is simply meant as a plea that we recognize the existence of different levels of gravity or priority of the premises upon which requests for sterilization

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(83) Quoted by Roberto Margotta, An Illustrated History of Medicine, Feltham England, The Hamlyn Publishing Group, 1968, p. 310.

are based. If, for example, the law in a given jurisdiction is to be broadened to accept purely contraceptive sterilizations, then it should be viewed as the broaching of a new category rather than a liberalization of the notion of "health". In matters such as these, policy changes should never be clandestine, they should be openly declared.

In discussing sterilizations based on indications of physical or mental health, we naturally think of therapeutic abortion. In effect, if a woman has to be aborted due to the threat to her health occasioned by a pregnancy, would it not stand to reason that such threats to health should be permanently avoided by means of a sterilization? (84) Aside from the obvious fallacy of this reasoning in cases where the mother's health is only momentarily too deficient to submit to the rigors of a pregnancy, but will eventually improve to permit future procreation, such an affirmation theoretically would be valid. In actual practice however, there may be conflicting standards imposed. For example, many physicians tend to view requests for therapeutic abortion with a generous eye, presuming that a doubt should be resolved in the patient's favour (85), whereas in situations where demands for sterilization are based on dubious grounds, practitioners will hesitate to act. The rationale would appear to be that an aborted woman may again become pregnant while a sterilization is almost always irreversible. In other situations, perhaps the physicians involved would rather prevent birth than destroy a foetus. In this context, a sterilization would be more easily obtainable than an abortion. In summary, therefore, it seems quite unwise to proceed upon the assumption that therapeutic abortion and therapeutic sterilization naturally walk hand in hand, even though it would be just as wrong to say that the

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(84) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 76.

(85) See for example, K. SMITH, H. WINEBERG, A Survey of Therapeutic Abortion Committees, (1969) 12 Crim. L.Q. 279.

question of abortion should be utterly disregarded. In this, as in many other areas, a certain pragmatism is quite useful.

As previously suggested, once agreement can be reached as to the precise limits to the word "health", all the jurisdictions in our survey demonstrate a similar lack of controversy on the legality of therapeutic sterilization (86). It appears to be universally accepted that the life or health of the patient is paramount and must necessarily override any public policy considerations which seek to maintain the integrity of the power of procreation. In addition, it would seem to be generally admitted that the one consort (almost always the wife), is entitled to seek sterilization on therapeutic grounds without having to obtain the permission of the other. Likewise, the rationale in this situation is predicated upon the superimposition of a person's health over the reciprocal rights and obligations in marriage. A husband cannot complain of a wife's sincere desire to protect her life, if circumstances objectively reveal a need for such a measure. Nevertheless, as a means of avoiding useless discussion, a hospital and/or physician would be well advised to obtain the consent of both consorts if it is available. Such a decision to sterilize is more easily accepted by the other partner to the marriage when each feels that he or she has had a word to say in the matter. Psychologically at least, the responsability for this type of operation is shared equally by all the

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(86) According to MEYERS, op. cit., at p. 3: "Whether therapeutic sterilization is or is not any more defensible on moral grounds than other reasons for the operation, it is at least the form of the operation most clearly justified in the eyes of the law. While non-therapeutic voluntary sterilization is either illegal or open to serious doubts in most Western countries, its therapeutic counterpart appears to be almost everywhere judged or opined legal".

parties involved, including the physician, the husband and the wife.

(1) The Common Law Jurisdictions

(i) England

The legal situation in England respecting sterilization is somewhat problematic due to an absence of legislation or jurisprudence directly on this topic. For the most part, opinions expressed on the subject consist of equivocations as to whether the laws governing mayhem or assault could apply, or else whether public policy would admit this type of operation (87). Fuel was added to the fires of this controversy under odd circumstances in the celebrated divorce case of Bravery v. Bravery (88) decided by the Court of Appeal. As it may be recalled, a couple married in 1934 and had a son two years later. In 1938, the husband underwent a vasectomy for purely contraceptive purposes, although some doubt was expressed as to whether the wife had been consulted. It was not until 1951 that she left her husband and then in 1952, she introduced her petition for divorce on the grounds of cruelty, arising from the anguish of being denied the possibility of having more children without having consented to this deprivation. Upon dismissal of her petition, the wife appealed. The majority of the Court, (Evershed,

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(87) E.g. K. SIMPSON, Taylor's Principles and Practice of Medical Jurisprudence, 12th ed., London, J. and A. Churchill Ltd., 1965, vol. 2, pp. 14-15; J. LEAHY TAYLOR, The Doctor and the Law, London, Pitman Medical and Scientific Publishing Co. Ltd., 1970, p. 81.

(88) (1954) 3 All. E.R. 59.

M.R. and Hodson, L.J.) found as fact that the wife had consented to the operation and that in any case, her health had not been affected by her husband's actions (89). In his dissent, Denning, L.J. did not find that the wife had consented and then he threw in his observations on sterilization which were obviously obiter, but which have since provoked much speculation, due to the failure of any subsequent Court to deal with the subject authoritatively. In effect, Lord Denning stated:

> "I do not think she did consent, but even if I am wrong about this, even if we assume that the wife did consent at the time of the operation, I do not think that her consent then precludes her from complaining of its ill effects in later years when it does in fact injure her health. In this respect an analogy is, I think, to be found from the criminal law about surgical operations. An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it" (90).

He then proceeded from this statement of principle to its application in cases of sterilization:

> "When it (sterilization) is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the

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(89) This case of course predates the Divorce Reform Act (1969) which abolished the Russell v. Russell rule, (1897) A.C. 395, requiring that danger to health or a reasonable apprehension thereof be caused by the alleged cruel acts.

(90) Loc. cit., p. 67.

man consents to it" (91).

The majority of the Court felt obliged to dissociate itself from the rather sweeping and peremptory dicta expressed by Denning L.J., but did so in terms which did little to prevent the seeds of controversy planted by their dissenting colleague from germinating:

> "The Court must, no doubt, take notice of any relevant illegality which appears in the course of any proceeding before it; but in the present case both the general question, whether an operation for sterilization is prima facie illegal, and the more particular question whether the operation here performed was a criminal assault, are alike irrelevant to the issue to be determined" (92).

We are thus forced to ask ourselves, did the majority judges, in effect, dissociate themselves from the minority opinion solely because of its irrelevancy, or was it because they did not approve the law as expressed therein? If the first interpretation is correct, then the law would not favor sterilizations "without just cause", whereas if the second hypothesis is applicable, then Lord Justice Denning's views would be considered isolated and generally not endorsed by the Court of Appeal itself. One cannot help but feel that the second approach is a more accurate assessment of the situation, since the majority judges further stated:

> "In our view, these observations (pertaining to the illegality of prize fights notwithstanding consent of the participants) are

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(91) Ibid., p. 67-68 (emphasis added). This statement then goes on to condemn purely contraceptive sterilization. Its bearing on this subject will be examined in a subsequent chapter.

(92) EVERSHED, M.R., HODSON, L.J., ibid., at pp. 63-64.

> wholly inapplicable to operations for sterilization as such, and we are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest" (93).

In any case, since our immediate preoccupation is limited to an inquiry concerning the legality of therapeutic sterilization, no matter which of the attitudes above-described prevailed, the results still would be favorable to this particular category of surgery.

Five years after the Bravery matter, the Court of Criminal Appeal was asked to give its approval to a sterilization operation which would, in fact, castrate a sexual psychopath. In R. v. Cowburn (94), a previously convicted rapist sexually assaulted a nurse. While imprisoned, medical authorities suggested that castration could greatly curb the prisoner's excessive urges. The accused, Cowburn, readily consented to undergo the procedure. However, before the uncertain legal situation, the Court was asked to certify the legality of the whole transaction, which it refused to do on the ground that what took place in prison was not of its concern. Although it is extremely imprudent to read into an opinion, something which is not stated, or else to "read between the lines" of a judgment, one is almost inevitably led to believe that the legality of the sterilization was not viewed as doubtful by the Court. In effect, even if the Court did not have jurisdiction over purely administrative prison matters, it would certainly have hinted strongly that a particular measure would be of dubious legality. An unsigned commentary appended to the judgment, expressed the opinion that in a case

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(93) Ibid., p. 64. The judges were commenting Denning, L.J.'s heavy reliance on the case of R. v. Coney, (1882) 8 Q.B. 534, a prize-fight case, as authority for the validity of his opinion.

(94) (1959) Crim. L.R. 590.

such as this, Lord Justice Denning's requirement of "just cause" would have been fulfilled since a curative goal was intended (95).

In the yet more recent case of Hamilton v. Birmingham Regional Hospital Board and Keates (96), a mother of three children, all of whom were delivered by caesarean section, was sterilized by her surgeon on therapeutic grounds during the last delivery, without her consent. The plaintiff, as a Roman Catholic, claimed that she was willing to risk her life in childbirth rather than be sterilized, and that the future choice whether to have children was unlawfully taken from her. In awarding damages, the Court did not put in doubt the legality of therapeutic sterilization, the whole issue being restricted to one of consent.

Before the silence of the law, physicians in England have been continously placed in the difficult situation of being urged by their patients to perform operations, the legality of which had not yet been declared. In order to establish protective guidelines, the English Medical Defence Union periodically sought legal opinions on the licitness of surgical sterilization. A 1949 opinion asserted that only therapeutic indications would allow sterilization (97). A revised opinion was obtained in 1960, to the effect that sterilization on any grounds was lawful provided that a valid consent was obtained (98). Thus, the position of

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(95) Ibid., p. 591.

(96) Reported at (1969) 2 B.M.A.J. 456.

(97) Glanville WILLIAMS, Consent and Public Policy, (1968) Crim. L. Rev. 74, at p. 158.

(98) Philip H. ADDISON, Legal Aspects of Sterilization and Contraception, (1967) 35 Med. Leg. J. 164. This attitude was ratified by Lord Devlin in a lecture to the Medical Society of London, when he stated: "I would suggest as a broad principle that an assault should not be treated as criminal if it is done: (a) for the purpose of averting danger to life or grave and immediate injury to health or (b) with the consent of the other party and for a purpose which is not otherwise criminal... If it is thought that sterilization, although done by consent should be prohibited except for grave medical reasons, then it should be made a crime in itself and the law should not try to catch it as a form of assault". Quoted in MEYERS, The Human Body and the Law, op. cit., p. 164, note 91.

English law appears to be accurately summed-up by Glanville Williams when he writes:

> "Although there is no judicial decision upon the legality of this operation, it is now agreed by all (or, at least, by all Protestants), that the operation is lawful if it has a therapeutic purpose, i.e. if it would be dangerous to the health of a woman to have another child. Even an operation to sterilize the husband for the benefit of the wife, instead of the wife herself, would doubtless be lawful, since the operation is more easily performed on the male than on the female" (99).

(ii) The Anglo-Canadian Provinces

As in the case of England, there is, at present, no legislation in Canada dealing with the problem of sterilization (100), although two provinces, Alberta and British Columbia, have had eugenic sterilization statutes on the books until their recent abrogation (101). Likewise, the Courts, either civil or criminal, have never been presented with the opportunity of making direct pronouncements on the legality of this type of operation.

From a criminal law point of view, the most likely provision which would apply to a case of therapeutic steriliza-

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(99) Consent and Public Policy, loc. cit., (1962) Crim. L.R. at p. 157. J.L. TAYLOR, who is deputy-secretary of the Medical Protection Society Ltd., also adheres to this point of view. Cf. The Doctor and the Law, op. cit., p. 81.

(100) Bernard STARKMAN, The Control of Life: Unexamined Law and the Life Worth Living, (1973) 11 Osgoode Hall L.J. 175, at p. 177.

(101) The Sexual Sterilization Repeal Act, 1972 S.A., c. 87 (assented to the 2nd of June 1972); The Sexual Sterilization Act Repeal Act, 1973 S.B.C., c. 79 (assented to the 18th of April 1973).

tion (if a prosecutor were inclined to sue), would be section 228 dealing with the intentional causing of bodily harm (102). Of course, the most effective defence would lie in section 45 Cr.C.:

> "Everyone is protected from criminal responsability for performing a surgical operation upon any person for the benefit of that person if,
>
> (a) the operation is performed with reasonable care and skill and,
>
> (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case".

Nobody can seriously doubt that a sterilization skillfully performed on true therapeutic grounds confers a serious benefit on the patient (103). Oddly enough, when the husband is sterilized to protect the health or life of his wife, the conditions of section 45 Cr.C. are not immediately respected since the benefit which he derives is somewhat indirect (104). Nevertheless, we may argue that a benefit devolves upon the husband when his wife's state of health is protected. In addition, much could be

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(102) "Everyone who, with intent (a) to wound, maim or disfigure any person, (b) to endanger the life of any person, or (c) to prevent the arrest of any person, discharges a firearm, or gun or air pistol at, or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraphs (a), (b) or (c) is guilty of an indictable offence and is liable to imprisonment for fourteen years".

(103) William C.J. MEREDITH, Malpractice Liability of Doctors and Hospitals, Toronto, The Carswell Co. Ltd., 1956, p. 217.

(104) This point of view was advanced by T.L. Fisher, sec. treasurer of the Canadian Medical Protective Association, (1964) 91 C.M.A.J., loc. cit., at p. 1365. In all due honesty, it should be stated that the C.M.P.A. has subsequently changed its position. Cf. STARKMAN, loc. cit., p. 177.

said in favor of considering the married couple as a unit in situations such as this, thus allowing the notion of "benefit" to be applicable to the unit rather than to the one individual undergoing the operation.

As regards therapeutic sterilization and the civil law, the legality of the surgery is governed by the vague notion of public policy, which, in practice according to one writer, would mean the "policy of the judges" (105). In this regard, the opinion of Dr. Fisher of the Canadian Medical Protective Association, expressed in 1964, would appear to be an accurate statement of the law:

> "There is no question of the rightness, the propriety and the legality of sexual sterilization when it is an integral and incidental part of some procedure done for the preservation of the health or life of the individual concerned" (106).

In addition, an operation practised for the sole purpose of producing sterility under similar indications would also be perfectly licit provided an informed consent were obtained (107).

The only reported case which possibly has some bearing

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(105) G.J. HUGHES, Criminal Law - Defence of Consent - Test to be applied, (1955) 33 Can. B.R. 88, at p. 93.

(106) (1964) 91 C.M.A.J. loc. cit., at p. 1363.

(107) ANONYMOUS, Comments Upon the Law Relating to Abortion and Sterilization, annexed to BLACK's article, Abortion and Sterilization, (1961) 33 Manitoba Bar News, loc. cit., at p. 39.

on the subject of the legality of therapeutic sterilization as well as of consent, is that of Murray v. McMurchy (108). The circumstances were as follows: After a patient failed to deliver via the birth canal, her physicians decided to proceed by caesarean. To this effect, the husband of the patient was requested to sign a consent, (which he in fact did), granting permission "... for a caesarean operation, and any further surgical procedure found necessary by the attending physician" (109). The wife, presumably, was not in any condition to consent since her permission was not sought. During the operation, about ten fibroid tumours were found in the wall of the uterus varying in size from a small orange to that of a pea. After consultation with the assisting surgeon, it was decided to ligate the fallopian tubes in order to avoid the hazards with would be occasioned by subsequent pregnancies. Discovering that she was sterilized, the wife sued, alleging her lack of consent to the operation, performed under non-emergency circumstances.

In finding for the plaintiff, the Court never questioned the legality of the surgery which was embarked upon for obviously therapeutic reasons, and this in itself would certainly constitute a tacit approval of this type of operation. The Court also found that even though there were certainly valid therapeutic grounds for the surgery, the sterilization was not immediately necessary (i.e. an emergency situation) for the preservation of the life or health of the patient, but only a matter of convenience in order to avoid the necessity of a second operation. It would thus appear that the condemnation was based on two arguments: Firstly, that the husband authorized surgery only in the case of necessity, which, in the opinion of the judge, would be synonymous with emergency (110). Secondly, except in

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(108) (1949) 1 W.W.R. 989 (Supreme Court B.C., MacFarlane J.). Another case dealing with therapeutic sterilization involved only a question of malpractice: cf. Bennett v. C. (1908) 7 Western L. R. 740 (Dubuc, C.J.)

(109) Ibid., p. 990.

(110) Ibid.

strictly emergency situations, the possibility of some future hazard or danger notwithstanding, the decision to sterilize was one properly left to the sole discretion of the patient involved (111). In this respect, the unique consent of the husband would not appear sufficient (112).

We may summarize therefore, by stating that therapeutic sterilization does not raise much controversy as to its actual legality in the Anglo-Canadian provinces.

(iii) The United States

There appears to be no legislation in the United States expressly forbidding therapeutic sterilizations (113). In fact, only one State, Utah, still has a law on its books which expressly forbids sterilizations performed for other than therapeutic reasons (114). However, even the purview of this solitary piece of legislation has been greatly circumscribed by the interpretation of the Utah Supreme Court in the matter of Parker et al v. Rampton (115). In effect, the Court held that since the only

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(111) Ibid., pp. 991-992.

(112) ANONYMOUS, (1961) 33 Man. Bar News, loc. cit., at p. 44.

(113) Susan L. BLOOM, A Woman's Right to Voluntary Sterilization, (1972) 22 Buffalo L.R. 291 at p. 292; McKENZIE, Contraceptive Sterilization, The Doctor, The Patient and the United States Constitution, (1973) 25 U. of Fla. L.R., loc. cit., at p. 329.

(114) Utah Code Ann. 64-10-12 (1968).

(115) (1972) 497 P. 2d 848.

legislative provisions governing sterilizations were placed in a eugenic sterilization statute dealing with institutionalized mental defectives, then the interdiction of all operations which destroyed the procreative function except in cases of medical necessity, would not apply to persons not institutionalized (116).

In spite of this fairly widespread legislative silence, (117) which would naturally lead one to believe that, in the absence of prohibition, therapeutic sterilization was lawful, the legality of this type of sterilization has still had occasion to be questioned before the courts on the issue of public policy. In the leading case of Christensen v. Thornby (118), plaintiff's wife was advised that in light of the great difficulty she had experienced giving birth to a first child, any further pregnancies

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(116) The law reads as follows: "Except as authorized by this chapter, every person who performs, encourages, assists in or otherwise promotes the performance of any of the operations described in this chapter for the purpose of destroying the power to procreate the human species, unless the same shall be a medical necessity, is guilty of a felony". In the Parker case, women seeking contraceptive sterilizations were told by their physicians that because of the uncertain legal applications of the above-cited provision, the practitioners were hesitant to act until assured that it was lawful to perform the surgery.

(117) It should be brought out that fourteen states implicitly or explicitly permit voluntary sterilizations, i.e. Ark., Cal., Colo., Conn., Fla., Ga., Iowa., N.C.; Okla., Ore., Rhode Island, Tenn., Va., W.Va., cf infra p.337, note 420.

(118) (1934) 255 N.W. 620.

would be dangerous to her life. It was decided that the best solution would be for her husband to undergo a vasectomy. Subsequent to the operation, the wife conceived and eventually gave birth to a normal child; all of which incited the husband to seek damages in compensation of his anxieties and expenses. The trial judge maintained a demurrer to this action on the grounds inter alia that the operation was contrary to public policy. In appeal, the Minnesota Supreme Court (per Loving, J.) declared that a sterilization by means of vasligation did not constitute a maim, and that under the circumstances of the present case, the contract to perform the sterilization would not be void as against public policy (119). The Court also found it logical to sterilize the husband since:

> "So far as progeny is concerned, the results to this married couple would be the same were effective sterilization performed upon either. Therefore, in our opinion, it was entirely justifiable for them to take the simpler and less dangerous alternative and have the husband sterilized" (120).

The recent case of Hathaway v. Worcester City Hospital et al (121) is interesting in that it demonstrates ,somewhat, the evolution which has occurred in American mores. A municipal hospital, chartered to dispense "acute, short-term" general medical care, adopted a policy refusing to permit its facilities or personnel to be used for sterilizations. A thirty-six year-old married woman with eight living children (out of twelve pregnancies), suffering from hernia, high blood pressure, and who had an income below the poverty level, was advised to undergo a tubal ligation for therapeutic reasons (122). Due to a lack of finan-

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(119) Ibid., p. 622.

(120) Ibid., p. 621. The Court nevertheless refused to award damages, since the plaintiff, instead of losing his wife, was blessed with the birth of another child.

(121) (1973) 475 F. 2d 701. An appeal from (1972) 341 F Supp 1385.

(122) She was also medically unable to have recourse to the standard contraceptive methods.

cial resources, she was obliged to seek help in a publicly supported hospital. In reversing the District Court, which refused to order the hospital to allow the operation to be performed within its premises, the United States Court of Appeals (1st Circuit) stated, in the words of Coffin, C.J.:

> "But it seems clear, after Roe and Doe, that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning another involving no greater risk or demand on staff and facilities...
>
> ... it is clear under Roe and Doe that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed...
>
> Doe therefore requires that we hold the hospitals unique ban on sterilization operations violative of the Equal Protection Clause of the Fourteenth Amendment" (123).

Although it is unquestionable today that therapeutic sterilizations are legal in all of the fifty States, particular attention should be paid to the requirements of consent, especially since religious, moral or emotional considerations may play an extraordinary role in what is normally a straightforward medical decision. The courts have unswervingly adhered to the requirements of informed consent (except of course in situations involving the compulsory sterilization of incompetents), with the result that this aspect more than any other (124) would probably form the legal basis for an action in assault (125). In

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(123) (1973) 475 F 2d, loc. cit., pp. 705-706. Cf. Doe v. Bolton, (1973) Sup. Ct. 739 and Roe v. Wade, (1973) 93 Sup. Ct. 705 dealing with the right to request abortion.

(124) Naturally, other aspects would include negligence, failure to produce sterility, etc... to be seen in our discussion on contraceptive sterilization.

(125) Kritzer v. Citron, (1950) 224 P. 2d 808 (Cal.).

one such case, Bang v. Charles T. Miller Hospital (126), a patient admitted for prostate troubles, instructed his physician to do all that was necessary to cure him. Surgery was performed, during which the spermatic cords were cut as a matter of course, thus causing sterility. Upon discovering his predicament, the patient, who was not previously told of this eventuality, sued invoking an absence of consent. In finding for the plaintiff, the Court stated (per Gallagher, J.):

> "... Where a physician or surgeon can ascertain in advance of an operation alternative situations, and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation. By that, we mean that, in a situation such as the case before us where no immediate emergency exists, a patient should be informed before the operation that if his spermatic cords were severed,it would result in his sterilization, but on the other hand if this were not done there would be a possibility of an infection which could result in serious consequences. Under such conditions the patient would at least have the opportunity of deciding..." (127).

In Kritzer v. Citron et al (128), another case dealing with consent, it was held that in matters of therapeutic sterilization, the consent of the husband would not be necessary. It is perhaps interesting to note in passing that as in the Bang case (129), the wife signed a form authorizing the surgeon to do whatever operations which were necessary or advisable. Unlike the Bang case (130) however, this consent was adjudged sufficient even though certain conditions had altered. Here, in the Kritzer affair, the patient, suffering from toxemia of pregnancy, high blood pressure and kidney infection, was supposed to be delivered

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(126) (1958) 88 N.W. 2d 186 (Sup. Ct. Minn.).

(127) Ibid., p. 190.

(128) Loc. cit., (1950) 224 P. 2d. 808 (Cal.).

(129) Supra, (1958) 88 N.W. 2d 186.

(130) Ibid.

by caesarean section, during which a tubal ligation would be performed. Before the operation could be undertaken, she delivered spontaneously, and subsequently, the surgeon proceeded with the sterilization on the basis of the original consent.

The issue of marital rights was once again the subject of judicial scrutiny in the recent Oklahoma decision of Murray v. Vandevander (130a). A husband, who did not consent to the performance of a medically-indicated hysterectomy upon his wife, brought action against the attending physician and the hospital for damages to his right of consortium and the right to reproduce another child. In rejecting the plaintiff's motion for a new trial, the Court of Appeals (per Box, P.J.) held that the natural right of a married woman to her health was not qualified by the necessity of marital consent (130b), nor was there any legally acknowledged right of a husband to a fertile wife (130c). It also affirmed that the right of a person capable of competent consent to control his or her own body was paramount (130d).

For a populous and litigation-prone country like the United States, where sterilizations have, and are being performed in very large numbers, there are surprisingly few cases arising out of this type of surgery. All that have come before the courts were generally decided favorably as regards the legality of therapeutic sterilization. It may also be noted that sterilizations for therapeutic reasons are relatively infrequent in relation to the total number of sterilizations performed (131).

(130a) (1974) 522 P. 2d. 302 (Court of Appeals).

(130b) Ibid. p. 303.

(130c) Ibid. p. 304.

(130d) Ibid.

(131) David N. LOUISELL, H. WILLIAMS, Medical Malpractice, N.Y., Matthew Bender, 1972, vol. 2, p. 580, no 19.11, note 32.

(2) The Civilian Jurisdictions

(i) France

If one makes allowance for article 316 of the French Code pénal, which forbids castration (132), one will find that there is absolutely no direct legislative guidance on the subject of sterilization (133). As a result, great emphasis is placed

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(132) "Toute personne coupable du crime de castration subira la peine de la réclusion criminelle à perpétuité.
Si la mort en est résultée avant l'expiration des quarante jours qui auront suivi le crime, le coupable subira la peine de mort".

(133) J. MALHERBE, Médecine et droit moderne, Paris, Masson et Cie, 1969, p. 233.

on the importance of a single case, the notorious "Affaire des stérilisateurs de Bordeaux" (134), in which the Cour de Cassation was given the opportunity to express an opinion on the general question of contraceptive sterilization. This action arose out of the following circumstances: A barber with a penchant for Neo-Malthusianism, would, while cutting his clients'hair, propagandize them on the advantages to humanity and world peace which could be derived from a greatly diminished birth rate. This idea caught on with a group of Spanish laborers having anarchistic or libertarian ideas, who felt that not only would the cause of birth control be advanced, they could also enjoy debauchery without the inconveniences of paternity. Accordingly, one Bartosek, an unlicensed practitioner was sent for and performed the vasectomies on fifteen men, aided by a plumber and a dyer. The "surgeon" and his accomplices were eventually accused of "coups et blessures volontaires", to which charges they invoked a defence based on the consent of the victims. Condemned by the Cour de Bordeaux, appeal was lodged before the French Supreme Court.

In upholding the convictions, the Cour de Cassation affirmed that:

> "... les prévenus ne pouvaient invoquer le consentement des opérés comme exclusif de toute responsabilité pénale, ceux-ci n'ayant pu donner le droit de violer, sur leurs personnes, les règles régissant l'ordre public" (135).

The Court further added that although consent is not one of the defences enumerated in the Code pénal under articles 327, 328 and 329, the law would authorize mutilations only "... à raison d'une utilité par elle reconnue" (136).

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(134) Cass.crim. 1 juillet 1937, S.1938.1.193, note Tortat ; D. 1937.1.537.

(135) Ibid., p. 193.

(136) Ibid.

The attitude that a person's rights over his own body are only relative since higher interests may prevail, has never been seriously questioned, and to this extent, the Cour de Cassation's findings are merely confirmative of this point of view. Where the controversy enters is surrounding the question whether the right to procreate is vital to the public interests, (in which case it becomes a duty). From this decision, it would appear so to be, although one should recall that the case was liquidated only nineteen years after the First World War, which was especially costly for France in terms of human lives. Nevertheless, from this arrêt, it is safe to surmise that certain circumstances would permit sterilizations to be performed following an informed consent by the patient (137).

Under what circumstances would one be allowed to seek the termination of the procreative function? In his comments on the Bordeaux case, M. René Tortat, (président honoraire à la Cour d'appel de Paris), felt that only one motive would provide legal immunity to a surgeon; "...c'est de sauver la vie du malade, ou d'améliorer sa santé, ou de lui éviter un mal plus grand que celui qui résultera de l'opération" (138). Along this same line of thought, Dr. R. Merger expressed the following opinion:

> "Le critère de l'exercice licite de ce droit de porter atteinte à l'intégrité physique d'autrui, c'est qu'il doit en résulter une amélioration de l'état physique de l'individu. Que penser alors de la stérilisation?
>
> A s'en tenir à l'état purement physique de l'opérée, la stérilisation ne peut jamais entraîner d'amélioration, mais elle peut, en interdisant de nouvelles grossesses, empêcher l'aggravation de certaines maladies, ou la survenance de certains accidents" (139).

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(137) MALHERBE, op. cit., p. 235.

(138) Cass.crim. 1 juillet 1937, loc. cit., S.1938.1.193.

(139) Problèmes juridiques de la stérilisation féminine en fonction de ses aspects médicaux et sociaux, J.C.P. 1963.D.1770.

He then added:

> "L'opération n'est licite que si l'opérée en tire un bienfait" (140).

Malherbe adopts this same opinion in identical words, but tacks on the following supposed clarification:

> "Autrement dit, elle doit avoir été pratiquée à des fins thérapeutiques" (141).

Unfortunately, this only confuses the issue since he presumes that the notions of "benefit" and "therapeutic" are equivalent propositions, which they most certainly are not. Admittedly, a therapeutic undertaking is, by its very nature, destined to benefit a patient, but a benefit to a person does not necessarily derive only from a therapeutic operation. Nevertheless, the legality of a therapeutic sterilization would not appear to be questioned either in light of the arrêt of the 1st of July 1937 or by legal doctrine (142). This would apply not only to questions of physical health, but also to psychological indications.

The official position of the French medical profession seems to be somewhat less liberal, (and somewhat more ambiguous) , that that of French jurists. In a declaration issued the 30th of April 1955, the Conseil National de l'Ordre des Médecins, after having condemned purely contraceptive sterilizations, stated the following:

> "Pratiquée dans un esprit de thérapeutique préventive et intervenant dans des circonstances exceptionnelles, elle demeure un acte lourd de conséquences en opposition avec la morale la plus généralement admise.

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(140) Ibid.

(141) Médecine et droit moderne, op. cit., p. 236.

(142) R. SAVATIER, J. SAVATIER, J.M. AUBY, H. PEQUIGNOT, Traité de droit médical, Paris, Librairies Techniques, 1956, p. 248, no 274.

> Le médecin qui, en conscience et pour des motifs scientifiquement défendables, pratique une stérilisation préventive en assume l'entière responsabilité" (143).

The declaration then went on to recommend that a physician performing these operations, draw up a memorandum for his own files clearly stating the reasons of his decision, and that he notify the Conseil départemental de l'Ordre of said décision.

This immediately led to the logical conclusion that all forms of sterilization, excepting sterility which was an inevitable by-product of an otherwise unrelated intervention (e.g. hysterectomy) would be illegal due to an illicit cause (144). In other words, if a legal opinion on the validity of an operation depended upon a just proportion between the advantages to be gained from the sterilization and the degree of infringement or harm (atteinte) to the human body, the whole discussion would become pointless, since the medical profession itself stated that sterilizations were a priori immoral (145). Before the greatly increasing numbers of sterilizations done under various pretexts, the Conseil de l'Ordre once again lent its attention to this problem. However, the only result was merely to render obligatory the notification to the Conseil Départemental de l'Ordre which previously, was only recommended (146).

In spite of this immobility of attitude, it would appear

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(143) Bulletin de l'Ordre, juin 1955 at p. 119, quoted in A. DECOCQ, Essai d'une théorie générale des droits sur la personne, Paris, Librairie Générale de Droit et de Jurisprudence, 1960, p. 307, no 442.

(144) DECOCQ, ibid., p. 308, no 442.

(145) Ibid.

(146) Declaration of April, 1964, cf. MALHERBE, op. cit., p. 241.

that therapeutic sterilizations (immoral or not) form part of French medical practice since the ruling medical body itself demands to be advised each time an operation is performed.

The other aspect which should not be overlooked when considering the legality of sterilization, is the imperious necessity of informed consent. Naturally, the existence of true therapeutic indications will dispense with the necessity of obtaining the consent of the other consort since sterility (or indeed impotence) does not constitute a marital fault (if it was not concealed prior to the marriage (147) or if it occurred during the marriage). Although procreation is one of the important elements of marriage, this aspect can be unilaterally set aside in the superior interests of a consort's physical or mental health. Likewise, a consort who is deprived of the possibility of procreating due to the sterilization of the other spouse without his or her consent will benefit from a right of action against the medical practitioner for interference to marital rights (148).

In the final analysis, according to Professor Jean Savatier:

> "Une intervention chirurgicale, spécialement une intervention mutilante, telle une stérilisation, implique un choix entre les avantages à en attendre, et les risques et sacrifices qu'elle comporte. Ce choix doit être fait par le malade lui-même, éclairé et consulté par son médecin. La règle a été posée fréquemment par la jurisprudence française. Elle s'applique certainement à la stérilisation, même curative" (149).

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(147) DECOCQ, op. cit., p. 211, no 319.

(148) MALHERBE, op. cit., p. 236.

(149) Stérilisation chirurgicale de la femme, aspects juridiques in (1964) Juin, Cahiers Laënnec 54, at p. 57.

(ii) The Province of Quebec

As we have already determined in our examination of therapeutic sterilization in the Anglo-Canadian Provinces, there would appear to be no objection to this type of procedure under the terms of the Canadian Criminal Code.

Aside from certain provisions of the Civil Code pertaining to the protection of the integrity of human bodies (articles 19 - 23 C.C.), there is no Quebec legislation, nor for that matter, jurisprudence dealing directly with the legality of sterilization. Under the terms of article 19 C.C. which declares the inviolability of the human body, it is specifically stated that:

> "No one may cause harm to the person of another without his consent or without being authorized by law to do so".

Consent alone, however, would not suffice to legalise a mutilation unless the intervention itself complied with the requirements of public order and good morals (150). In this respect, can one honestly question vis-à-vis public order and good morals,

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(150) E. DELEURY, Le Sujet reconnu comme objet du droit, (1972) 13 C. de D. 529, at p. 537. Professor L. Baudouin anticipated this question when he wrote: "Il existe donc un principe général de protection du corps humain, principe de sacralité contre les atteintes qui y seraient portées.

Mais ne faut-il pas aller plus loin et admettre qu'en dehors de la réparation due à l'individu pour atteinte par des tiers à son intégrité physique, celui-ci peut disposer volontairement de tout ou partie de son corps ou en faire usage comme d'une chose ou d'une marchandise? Sur ce point, on en revient au principe suivant lequel le consentement librement donné par l'individu fait disparaître l'illicéité de l'atteinte à son intégrité physique". Cf. La personne humaine au centre du droit québécois, (1966) 26 R. du B. 66, at p. 67.

the validity of an operation which seeks to preserve the life or health of a patient? Indeed, not only does the Quebec legislator impose an obligation that care or treatment be provided "...to every person in danger of death..." (151), our doctrine and jurisprudence also admit that a refusal to submit to treatment can be taken into consideration in assessing damages (152). Consequently, one would be entitled to conclude that, far from viewing therapeutic sterilization with distaste, our civil law would, in reality, encourage it as a small price to pay for the protection of the whole organism (153).

As in many other jurisdictions, the only aspect of therapeutic sterilization to be involved in controversy before the

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(151) Art. 37, Public Health Protection Act, 1972 S.Q., ch. 42. This provision reads as follows: "An establishment or a physician shall see that care or treatment is provided to every person in danger of death; if the person is a minor, the consent of the person having paternal authority shall not be required".

(152) A. NADEAU, R. NADEAU, Traité pratique de la responsabilité civile délictuelle, Montreal, Wilson & Lafleur Ltée, 1971, p. 551, no 589 and jurisprudence therein cited.

(153) It is primarily for these reasons that one must view with circumspection, the opinion expressed by Léon Mazeaud in Les Contrats sur le corps humain, (1956) 16 R. du B. 157, at p. 168 which states: "On doit, en tous cas et sans hésitation, frapper de nullité les conventions dans lesquelles la victime poursuit un but répréhensible d'intérêt personnel et, dans ce but, fait opérer sur son corps une mutilation".

Indeed, is it not generally the case that one acts only from motives of self-interest (or that of one's family). Perhaps a more valid criterion would be a balancing of the advantages with the risks involved, as is already the case for matters of experimentation and transplantation under article 20 C.C.

courts was that of consent - an essential element of validity for this type of procedure. In fact, in the two reported occasions on which our tribunals were called to pronounce themselves on sterilizations, the quite identical cases involved allegations that unauthorized sterilizations had been performed; in the first case, on the wife of the plaintiff, (it should be recalled that at the time, women were subjected to the puissance maritale of their husbands), and in the second, on the plaintiff herself. In the first action, Caron v. Gagnon (154), the plaintiff's minor wife was suffering from "female troubles", for which she received treatment from the defendant, a reputable specialist in obstetrics and gynecology. In addition to these troubles, she suffered an attack of appendicitis, which caused defendant to recommend surgery. The husband consented and told the physician "Je veux que ça soit fini une fois pour toutes" (155). During the course of the surgery, the defendant discovered that not only was the appendix inflamed, there were also cysts on both ovaries which would eventually require that the said ovaries be removed. Thus, the surgeon decided to remove them while he still had access to the abdominal cavity. After completion of the operation, the husband was advised of the circumstances and seemed satisfied, asking only that his wife not be told for the time being of the true state of affairs. Eventually, the plaintiff's wife became suspicious due to the disappearance of her monthly cycle, and was finally told the truth by the defendant. Within a short time, the action for damages was served, based essentially on the absence of consent.

In finding for the defendant-physician, Sir François Lemieux C.J., delivered a three-pronged judgment. In the first place, he stated that a consent should have been obtained but that the surgeon did not have the burden of proving its existence (156). Moreover, the court felt that the husband had consent-

(154) (1930) 68 S.C. 155.

(155) Ibid., p. 156.

(156) Ibid., p. 160.

ed in the words quoted above. Secondly, even if consent or ratification were not established, the removal of the ovaries was in the best interests of the patient in the opinion of the physician and accordingly, the court had no business reviewing what was basically a medical decision:

> "Suivant le langage des auteurs, dans les cas graves d'interventions chirurgicales, il n'y a que l'honneur entre la conscience du médecin et le patient et il n'y a entre eux, pour juge, que Dieu. Le médecin qui a agi d'après son savoir, sa conscience et l'honneur a bien fait. Toute autre doctrine est fausse et dangereuse à la société" (157).

The final argument was the most peremptory of all:

> "Les seuls griefs du demandeur et de sa femme sont que l'opération des ovaires a rendu stérile la femme, la privera de famille et que tous deux en conçoivent un grand chagrin. La chose est possible.
>
> Cependant, malgré le droit qui peut être exercé en pareil cas, il y a des douleurs morales qu'on ne guérit guère avec de l'argent et dont il vaut mieux quelquefois, ne pas exposer ou étaler les causes devant le public" (158).

In the second case of E. v. M. (159), the woman-plaintiff sought damages for the unauthorized removal of her ovaries during an operation for genital problems. In rejecting her case, Rhéaume J., merely affirmed that the operation had been properly performed, that no fault occurred nor had damages been suffered. The sole authority mentioned in the judgment was the Caron v. Gagnon decision. In reality, the situations were quite different, since one may reasonably infer that the plaintiff in Caron v. Gagnon had consented in a manner of speaking to the operation,

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(157) Ibid., p. 164.

(158) Ibid., pp. 165-166.

(159) (1937) 77 S.C. 298.

whereas in the second, no consent was given. Viewed in light of contemporary doctrine and jurisprudence, only Caron v. Gagnon would have had the same end-result (160).

Today, in the absence of an emergency situation where a consent cannot be obtained, (e.g. an unconscious accident victim), Quebec jurisprudence freely admits that a physician may be condemned for unauthorized intrusions upon a person's physical integrity (161). Article 19 C.C. moreover, would seem to be explicit on this point.

Thus we may conclude that since married women now enjoy full legal capacity (162), they are able to give a complete and valid consent to a therapeutic sterilization. In addition, due to the fact that a person's right to health necessarily predominates over any duty inherent in marriage (such as procreation), each consort can give this consent without having to obtain the approval of the other partner (163).

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(160) Of course, medical liability today is based as a rule, on contract and not on article 1053 C.C. Also, the courts do permit themselves to review medical procedures (G. v. G. et De Coster, (1960) Q.B. 161) and finally, all unauthorized violations of a person's corporeal integrity can be translated into damages (Dame Dufresne v. X., (1961) S.C. 119).

(161) Dame Dufresne v. X., ibid.; A. MAYRAND, L'autonomie de la volonté du patient anesthésié, (1961) 21 R. du B. 297, at pp. 297-298; Beausoleil v. La Communauté des Soeurs de la Charité de la Providence et al, (1965) Q.B. 37, at pp. 41 and 51; A. BERNARDOT, La responsabilité médicale, Sherbrooke, R.D.U.S. 1973 at p. 66. See also Brunelle v. Dr. Sirois, (1974) S.C. 105, according to which a physician may, in certain circumstances, be entitled not to reveal all the risks of an operation (at p. 108).

(162) Art. 177 C.C.: "The legal capacity of each of the consorts is not diminished by marriage. Only their powers can be limited by the matrimonial regime". Even prior to this legislation, MEREDITH, (op. cit., pp. 140-141) felt that the husband's consent was not strictly necessary. He saw this essentially as a patrimonial problem (since the husband administered the community), and not as one concerning the wife's capacity to contract, i.e. to agree to the operation.

(163) Lalumière v. X., (1946) S.C. 294, especially at p. 299. See also sec. 114 of the Act Respecting Health Services and Social Services, S.Q. 1971 c.48 which provides: "The consent of the consort shall not be required for the furnishing of services in an establishment".

In the final analysis, Quebec law is fairly consonant with the attitudes of the other jurisdictions examined above, in regards to therapeutic sterilizations (164).

B) The Legal aspects of eugenic sterilization

(1) Introduction

Eugenic sterilization could be defined as the medical means by which the powers of conception of persons having undesirable hereditary backgrounds, are permanently interrupted in order to prevent the procreation of genetically defective offspring.

As a movement, sterilizations practiced for purposes of racial betterment would appear to be a late 19th and early 20th century phenomenon. Said movement owed its great popularity and wide acceptance to perhaps four factors: Firstly, the scientific basis for the sterilization of persons was supplied by the Austrian monk, Gregor Mendel (1822-1884), who formulated general laws of heredity through his study of plants (165). At the time of his death, Mendel's work was relatively unknown, and rediscovery of it occurred only about forty years after first publication of his findings in 1865.

A second important element was the founding of the eugenics movement in 1904 by Sir Francis Galton, a relative and a

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(164) Albert MAYRAND, L'inviolabilité de la personne humaine, (Wainwright Lectures), Montreal, Wilson et Lafleur, 1975, no 11.

(165) ANONYMOUS, Reappraisal of Eugenic Sterilization Laws, (1960) 173 J.A.M.A. 1245; Regina BLIGH, Sterilization and Mental Retardation, (1965) 51 Am. Bar Ass. J. 1059, at p. 1060.

disciple of Charles Darwin. Through his study of the genealogies of celebrated contemporaries, Sir Francis arrived at the conclusion that outstanding people often had a common lineage and that ancestry almost inevitably determined human ability (166). Accordingly, he coined the word "eugenics" from the greek eugenes meaning "well-born" (167). The eugenics movement sought to improve mankind by way of a two-pronged attack; i.e. through positive eugenics or the reproduction of sound people, and through negative eugenics, or the non-reproduction of inferior beings (168). At that time, it was generally believed that the poor, the criminal and the defective tended to reproduce more rapidly than the "purer" elements of the population. Galton sought to prevent the world from being swamped by inferior human specimens (169).

By coincidence, a third essential element presented itself during this same period and that was, of course, the development of effective and simple methods of sterilization for both men and women through the techniques of vasectomy and salpingectomy (170).

The final factor was perhaps the most essential since it

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(166) Walter M. MATOUSH, Eugenic Sterilization - A Scientific Analysis, (1969) 46 Denver L.J. 631.

(167) Ibid.

(168) (1960) 173 J.A.M.A., loc. cit., at p. 1245.

(169) Charles P. KINDREGAN, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, (1966) 43 Chicago-Kent L.R. 123.

(170) (1960) 173 J.A.M.A., loc. cit., p. 149.

appeared to grant scientific validity to the synthesis of Mendel's theories of heredity and Galton's notion of eugenics. Through sociological and evolutionary studies of the now celebrated Jukes, Kallikaks, Nam, the Tribe of Ishmael, Virginian and Mongrel families, it was found that their undesirable traits of criminality, pauperism, feeble-mindedness and immorality were manifested in each generation, presumably due to genetic transmission (171). As may be suspected in cases of sweeping generalizations, it was felt that genetics determined all and, consequently, little or no attention was paid to the possible influence of environment. The persuasiveness of the eugenic argument with its aura of scientific detachment and rationality soon convinced broad and influential segments of the population. Even Bertrand Russell saw fit to write:

> "Imagine the feelings of a farmer who was told that he must give all his bull calves an equal opportunity! As a matter of fact the bull which is to be the progenitor of the next generation is very carefully selected for the milk-giving qualities of his female ancestors... All domestic animals have been improved enormously by scientific breeding, and it is not open to question that human beings could, by similar methods, be changed in any desired direction" (172).

Through the influence of organizations such as the American Association of Mental Deficiency, (presided over in 1902 by Dr. Harry Sharpe, better known for his perfection of the vasectomy technique on boys institutionalized in the Indiana State Reformatory, of which he was superintendant), and the Human Betterment Foundation,

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(171) Abraham MYERSON, Certain Medical and Legal Phases of Eugenic Sterilization, (1943) 52 Yale L.J. 618 at p. 622; MATOUSH, loc. cit., at p. 631; BLIGH, loc. cit., p. 1060.

(172) Marriage and Morals, Toronto, Bantam Books, 1968 (the original date of publication of this book was 1929), p. 178.

incorporated by E.S. Gosney in 1926, pressure was brought to bear on American legislators to pass compulsory eugenic sterilization laws (173). From the enactment of the first law of this type in 1907 in the State of Indiana to that of Georgia in 1937, twenty-eight states opted in favour of eugenics legislation (174). Indeed, enthusiasm for this simplistic solution to the multitude of ills of society was so great that, in 1922, a Model Eugenical Sterilization Law was proposed which would have subjected to sterilization, the following groups of people:

> "(1) Feeble-minded; (2) Insane (including the psychopathic); (3) Criminalistic (including the delinquent and wayward); (4) Epileptic; (5) Inebriate (including drug-habitués); (6) Diseased (including the tuberculous, the syphilitic, the leprous and others with chronic infections and legally segregable disease); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled); and (10) Dependents (including orphans, ne'er-do-wells, the homeless, tramps and paupers)" (175).

If one were to write a farce or satire on this whole

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(173) Robert J. RIECKHOFF, Compulsory Vasectomy and Orchi ectomy, (1969) 33 Kentucky State B.J. 13 at p. 14. It should be noted that compulsory sterilization was primarily an American phenomenon although Canada (British Columbia and Alberta) and certain European countries such as Switzerland (Vaud), Germany, and Denmark also fell into line to a greater or lesser degree.

(174) RIECKHOFF, ibid., p. 14. The list is as follows: Alabama, Arizona, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia and Wisconsin.

(175) Quoted in MATOUSH, loc. cit., p. 632 and in (1960) 173 J.A.M.A. loc. cit., p. 153. It was also recommended that even though some persons did not show these traits, they should still be sterilized if they were genetic carriers of said defects. Cf. J.A.M.A. ibid.

movement, could one possibly improve upon the following proposal, introduced as a serious piece of legislation in 1929 by Assemblyman C.E. Ballew, to the 55th General Assembly of the State of Missouri, and which provided for the compulsory sterilization of those

> "... convicted of murder (not in the heat of passion), rape, highway robbery, chicken stealing, bombing, or theft of automobiles" (176).

(2) Scientific critique

Through voluntary, and in some instances, compulsory means, eugenic sterilization serves a double goal - to prevent defective children from being born and to prevent defectives from reproducing. In actual fact, is there any scientific validity to these aims, or are heresies being legally perpetuated? In order to arrive at some conclusion, a brief foray into the field of genetics is necessary.

To begin with, the nucleus of each cell of the human body contains forty-six chromosomes arranged in twenty-three pairs. The chromosomes themselves are composed of basic units called "genes", each of which is responsible for a characteristic of heredity. Genes which occupy the same relative position on each pair of chromosomes are referred to as "alleles". These alleles are either homozygous or heterozygous according to whether they are identical or different in relation to a particular characteristic. Each gene consists of an elongated molecule called deoxyribonucleic acid (D.N.A.) which contains information (a genetic code) according to the sequence in which the four chemical groups which compose D.N.A. are arranged. The D.N.A. transfers

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(176) Quoted in BLIGH, loc. cit., p. 1063. Understandably, this legislative project never passed.

the genetic information to molecules of ribonucleic acid (R.N.A.) which in turn triggers the production of enzymes necessary to bodily functions and development (177). When reproduction occurs, the sex cells (gametes) of the male and female which had previously received half of the characteristic chromosomes of the other body cells through a process of cell division known as "meiosis", now unite, imparting to the new organism a portion of the genetic makeup of both parents. Once the union is effected, the genotype of the embryo may contain errors which can trigger an abnormal development, sufficiently serious to provoke spontaneous abortion, or which is even more tragic, to cause a defective child to be born. These errors or genetic defects belong to four basic categories: (a) dominant, (b) recessive, (c) sex-linked or (d) chromosomal (178) which we will examine successively:

(i) Dominant defects

In this situation, one allele is able to produce so great an abnormality as to overcome the effects of the other normal gene in a pair (179). Thus, if an Aa person mates with a bb (the "A" being dominant), about half of the children will be affected (Ab, Ab, ab, ab), since the dominant defect will always assert itself. Among the most common conditions ascribed to this type of defect are included, achondroplasia (dwarfism), epiloia (mental deficiency with epilepsy), retinal aplasia (blindness) and Huntington's chorea (fatal degeneration of the nervous system). The frequency of this type of defect is about 1 in 5000.

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(177) MATOUSH, loc. cit., pp. 634-636.

(178) Gerald LEACH, The Biocrats, Harmondsworth, Middlesex, England, Penguin Books Ltd., 1972, p. 128. We will rely heavily on Leach for our examination of the genetic aspects.

(179) Ibid., p. 128.

(ii) Recessive Defects

> "With a recessive defect, both genes of the pair are defective, but defective in such a way that the protein they control does not actually do harm but simply does not work" (180).

In such a situation, the presence of one normal gene of the pair will suffice to produce the required enzyme so that no untoward effects are noticed. Indeed, only when two carriers of the same recessive defect mate may the child suffer. Accordingly, if two Aa people reproduce (the "a" being recessive), one of every four children will have a normal AA genotype, two of the four will be apparently normal but will be carriers of a recessive gene (Aa), and finally, one of four children will suffer a recessive genetic defect (aa). Among the recessive disorders are included phenylketonuria (severe retardation), cystic fibrosis (often fatal disease for children caused by the accumulation of thick fluids in the lungs and other organs); sickle-cell anemia and Cooley's anemia (fatal childhood blood diseases). These types of defects occur once in every ten thousand births (181).

(iii) Sex-linked defects

These defects are so described since the recessive genes to which they relate are carried in the sex chromosomes. Women have two X-shaped chromosomes whereas those of men are shaped XY. Interestingly enough, the recessive gene is nearly always found in the X chromosome. Consequently, only males suffer from the defect since they do not have the other normal X gene in the pair to overcome the failure of the one defective gene. It also means that only women can carry the genetic defect. Thus, if a normal male XY breeds with a female carrier xX, (the "x" being recessive) the couple will likely have out of four

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(180) Ibid., p. 130.

(181) Ibid.

children, one normal girl XX, one normal boy XY, one carrier girl xX and one boy xY, victim of a genetically-caused disorder. On the other hand, if a normal girl XX has four children by an affected man, the results would be two normal boys XY, one normal girl XX and one carrier girl xX. The diseases transmitted in this fashion include haemophilia (uncontrollable bleeding), Duchenne's muscular dystrophy, glycogen storage disease (liver disease), goitrous cretinism (mental deficiency), histidinemia (defective speech often accompanied by mental retardation), galactosaemia (blindness, retardation, liver failure, often fatal), and maple syrup urine disease (fatal brain damage). On a less serious level, red-green colour-blindness is also a sex-linked defect.

(iv) Chromosomal defects

In these situations, the whole or a part of a chromosome is incorrectly transmitted; often in relation to the sex chromosomes. In such circumstances, one may encounter, for instance, XXY males (Klinefelter's syndrome), XO females (Turner's syndrome), the XXX females (superfemales) and XYY males (the potential genetic criminals). When defects occur in the other chromosomes (the autosomes), mongolism usually occurs (Down's syndrome, E syndrome, D syndrome). In cases of chromosomal defect, there is often sterility, mental retardation or physical malformation (182). These defects appear to arise spontaneously in about one percent of all births and do not seem to follow any set pattern. It is known however that the risk of mongolism increases dramatically in relation to the age of the mother at the time of conception (183), or to her exposure to viral infections such as hepatitis or rubella (184).

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(182) Ibid., p. 183.

(183) As she gets older, the mother runs a greater risk of having a mongoloid child.

(184) LEACH, op. cit., pp. 134-135.

Certain facts should be elucidated in order to place the eugenics question in its proper perspective: Of fundamental importance, it should be brought out that of all birth defects, only about 20 to 25% are primarily due to heredity (185). The remainder could be caused by reasons varying from birth trauma to environmental factors (186). Epilepsy is a clear example of a condition which may have a diverse etiology, not necessarily genetically-related (187). Thus, in an overwhelming proportion of cases, sterilization would not serve a truly eugenic purpose.

In those cases where birth defects are actually genetically-inspired, the effectiveness or need of sterilization to avoid transmission may vary according to the nature of the genetic error. In situations where dominant defects are encountered, (notwithstanding the highly transmissible nature of these disorders), the short life-span, the reduced sex-drive of its victims, and the fact that they usually have to be institutionalized when they do survive would serve to render a sterilization program redundant (188). In the notable exception of Huntington's chorea, the sufferers of this illness generally realize its presence only in advanced middle-age after a goodly number of child-producing years have elapsed. Sterilization in this situation would probably serve the same purpose for the patient as closing the proverbial barn door after the cattle have escaped (189).

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(185) MATOUSH, p. 638; LEACH, ibid., p. 127.

(186) Charles W. MURDOCK, Sterilization of the Retarded: A Problem or a Solution, (1974) 62 Cal. L.R. 917 at p. 925.

(187) K.G. McWHIRTER, J. WEIJER, The Alberta Sterilization Act: A Genetic Critique, (1969) 19 U. of T. L.J. 424 at p.429.

(188) Ibid., p. 139. Of course, in exceptional cases such as dwarfism, where the victims reach maturity, sterilization could be recommended, cf. LEACH, op. cit., p. 140.

(189) McWHIRTER, WEIJER, loc. cit., p. 429.

With the sex-linked defects, the male sufferers may die before reproduction can occur. In the remaining cases, if and when reproduction does take place, only the girls can become carriers. It is felt that sterilization of the affected males and the female carriers would reduce by two-thirds the incidences of this category of disease (190).

The recessive defects can be avoided to a great extent by genetic screening, which would discourage two persons carrying the same particular recessive genes from marrying, or at least from having their own children. Although this pre-marital screening may provide many beneficial effects within the short term, the longer range effects could merely exacerbate the problem. In this connection, the argument would appear to run as follows: As people with recessive genes marry and have children, the number of genetic carriers would remain fairly stable, since children afflicted with a recessive genetic defect would be naturally eliminated through death, incapacity or subfertility (191), while new mutations would continue to contribute to the number of carriers. If all carriers were encouraged to marry only "normal" i.e. non-carrying spouses, then the number of carriers would greatly increase while the process of natural selection would no longer reduce the ranks of persons with the defect (192). However, the time could come when carriers would have to marry together since the number of non-carriers would diminish during each generation. It is easy to imagine that in this type of situation, the solution would lie in the area of sterilization rather than in mere genetic screening (193).

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(190) LEACH, op. cit., p. 141.

(191) Ibid., p. 150.

(192) Ibid., p. 151.

(193) MATOUSH (loc. cit., p. 643) feels that this would be an exercise in futility. According to the statistics he furnishes, this is perhaps true on a global level, but for two carriers married together, sterilization could in fact be a great boon to them.

Finally, with the chromosomal defects, the eugenic solution is inherent in the problem itself, since mongoloids only have a life expectancy of twelve years (194). For those that do reach the reproductive stage, sterility generally obviates any necessity for birth control. This is also the case for the victims of Turner's and Kleinfelter's syndromes, who are also sterile. The "supermales" and the "superfemales" on the other hand produce normal children (195).

Before making a general evaluation of the scientific validity of sterilization for eugenic purposes, one last particular should be mentioned - that abnormal genes are constantly being created through mutations caused by radiation or chemicals (196). Each atomic or hydrogen bomb exploded in the atmosphere, every "trip" on L.S.D., and all the clouds of industrial pollution can be considered as mutagenic. Obviously, the price of "progress" will be paid for by generations yet unborn.

What therefore is the value of a eugenic sterilization programme? As early as 1936, the American Neurological Association's Committee for the Investigation of Eugenical Sterilization sought to address itself to the main arguments of the proponents of compulsory sterilization, who believed that ever increasing mental retardation, mental illness, immorality and pauperism were solely genetically-inspired. The pro-sterilization faction also felt that such undesirables propagated at a faster rate than the rest of the population (197). The Committee of the A.N.A. replied that there was no evidence to the effect that a biological deterioration was occurring, that mental defectives

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(194) McWHIRTER, WEIJER, loc. cit., p. 427.

(195) Ibid., p. 428.

(196) MATOUSH, loc. cit., p. 644.

(197) FERSTER, (1966) 27 Ohio St. L.J., loc. cit., at p. 602.

reproduced more rapidly than others, and that heredity rather than environment was responsible for conditions such as mental illness, retardation or immoral conduct (198). In light of this knowledge (or ignorance) of genetics, the committee concluded with the recommendation that sterilization be voluntary rather than compulsory (199). More recently, Walter Matoush admirably summarized the modern scientific consensus in the following terms:

> "... (1) Sterilization of persons with non-inheritable conditions does not achieve a eugenic purpose; (2) a sterilization program is of limited value if it fails to recognize the significance of defect carriers; and (3) allowance must be made for the impact of natural and induced mutations in creating genetic defects.
>
> Based on these conclusions, the present laws for eugenic sterilization of the mentally defective or deficient (or of physical defectives) are in most cases unsound. Genetic etiologies have usually not been established with reasonable medical certainty. Furthermore, the sterilization process, as applied only to individuals with expressed defects, is woefully inefficient in eliminating defective genes. Finally, the elimination of defective genes may, in fact, be a practical impossibility, in view of the fact of genetic mutation" (200).

Before the strong attacks on the scientific basis of most compulsory eugenic sterilization laws, many champions of this cause have retreated to a second line of defence. In effect,

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(198) Ibid., pp. 602-603.

(199) Ibid., p. 603. This was also the recommendation of the English Brock Report of 1934, cf. WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 93.

(200) Loc. cit., pp. 646-647. McWHIRTER and WEIJER would heartily concur with these findings, cf. loc. cit., p. 431.

they argue that to forcibly deny mental defectives their powers of procreation, is to perform a double good service: Firstly, it prevents them from bringing up children in what would be an inadequate environment (201). In addition:

> "... the argument certainly must follow that it is cheaper to sterilize mental defectives, repulsive as it might be, than support children who have no one competent to care for them" (202).

Secondly, according to Glanville Williams, a sterilization is not only an advantage but is often welcomed since it permits incompetents to marry and to have some semblance of a home-life without straining what is already probably a difficult situation to cope with, without the added burden of children (203).

The logic of these arguments is quite difficult to refute even though some efforts have been made in this direction with more or less success (204). One cannot point out strongly enough, however, that these discussions merely confuse the issue. When one recommends the sterilization of incompetents for the above reasons, they are no longer in the realm of eugenics but are now making policy statements regarding purely contraceptive sterilization (205). Likewise, when one argues that it would be

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(201) BLIGH, (1965) 51 Am. Bar Ass. J., loc. cit., at p. 1062; WILLIAMS, op. cit., p. 85.

(202) James T. PITTS, Sexual Sterilization: A New Rationale?, (1972) 26 Ark. L.R. 355 at p. 357.

(203) Op. cit., p. 87; BLIGH, loc. cit., p. 1062. It should be stated in all honesty that Williams also disapproves of compulsory sterilization, feeling that persuasion can attain the same ends (ibid., p. 90).

(204) BLIGH, ibid., pp. 1062-1063.

(205) Some would place this in the category of therapeutic sterilization, e.g. Charles W. SMILEY, Sterilization and Abortion Counselling for Retarded Patients, (1973) March, Canadian Family Physician, 78. The argument is to the effect that the elimination of the stresses of child-bearing and rearing improves the retarded patient's physical and emotional health.

useful to sterilize the retarded or the mentally-ill who are not totally segregated (e.g. outpatients, so-called "open" hospitals, protected workshops, etc...) due to the risks occasioned by less restraint or discernment in sexual matters, one is actually discussing contraceptive sterilization for the convenience of both the persons responsible for the surveillance of the patients as well as for the patients themselves (206).

In the United States, another tendency has arisen, i.e. in the wake of the decline in numbers of eugenic sterilizations, greater attention is being paid to the reintroduction of punitive sterilization previously outlawed by the courts. The approach is twofold: On the one hand, legislative attempts are being made to introduce the sterilization of women with illegitimate children who receive welfare or A.F.D.C. (Aid to Families with Dependent Children) benefits (207). On the other hand,

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(206) The following situation in Sherbrooke was brought to our attention: Apparently, retarded adult females working in a protected workshop were able to live with their parents and get to and from work by bus or otherwise without too much difficulty. While walking or waiting for buses, however, these reasonably attractive women would innocently get in cars when invited to "go for a spin" by unscrupulous men. With the number of out-of-wedlock pregnancies increasing drastically, their parents have grouped together to actively seek tubal ligations for these patients. Due to the problem of consent and the questionable legality surrounding the sterilization of incompetents in Quebec, most hospitals have refused to act.

(207) These attempts are carefully detailed in Julius PAUL's article, The Return of Punitive Sterilization Proposals, (1968) 3 Law and Society Rev. 77, particularly pp. 79-99.

some courts have begun to offer probation to criminal offenders on the condition that they submit to sterilization (208). In both situations, much adverse publicity has begun to counteract initiatives in this direction (209).

Although we heartily join others who condemn compulsory sterilizations on eugenic grounds or otherwise, we must not permit this to obscure the undisputed fact that, in individual cases, sterilizations can serve a truly eugenic purpose. For example, the sisters of a haemophiliac or the children of a victim of Huntington's chorea would probably be well served by a sterilizing operation. Thus, before clear indications of a sufficiently strong possibility that a defective child may be produced, we can see no reason why sterilization cannot be offered as a valid alternative. In many ways, would this not be less iniquitous than the abortion of a defective foetus, so diagnosed after amniocentesis (210)?

There remains a chilling thought — the jurisprudence which examines the constitutionality of American compulsory sterilization statutes now in decline, may once again be carefully scrutinized under different circumstances. In effect, unless much is done to restrain the population explosion which is rapidly outstripping natural resources, we may eventually see the day when compulsory contraceptive sterilization will be introduced.

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(208) For example, see the cases of Andrada, People v. Topia and Hernandez which are unreported except for the summary refusal of certiorari in Andrada by the Supreme Court, (1965) 85 Sup. Ct. 1088. The order regarding sterilization was reversed in the Hernandez case. For a description of said judgments, see MEYERS, op. cit., p. 37; FERSTER, (1966) 27 Ohio St. L.J., loc. cit., p. 610 and PAUL, loc. cit., pp. 79-80.

(209) PAUL, ibid., p. 79.

(210) See generally, Jane M. FRIEDMAN, Legal Implications of Amniocentesis, (1974) 123 U. of Pa. L.R. 92.

Indeed, the argument of "compelling state interest" would be hard to rebut in these circumstances (211).

In our examination of the legality of eugenic sterilization, we will view first voluntary sterilizations undertaken for eugenic purposes, and then we will consider compulsory sterilizations imposed for these same reasons.

a) Voluntary Eugenic Sterilization

(1) The Common Law Jurisdictions

(i) England

As previously mentioned in our examination of therapeutic sterilization, the dearth of legislation and jurisprudence dealing directly with the general topic of sterilization, obliges one to resort to "reasoned" conjecture in hazarding an opinion on the legality of eugenic sterilization. It may be recalled that, except for genuine therapeutic necessity occasioned by fears for maternal health, legal attitudes originally viewed sterilization with a jaundiced eye. As for eugenic sterilization, the following opinion by the Departmental Committee on Sterilization (the Brook Report) was issued in 1934:

> "The legal position in regard to the eugenic sterilization of persons of normal mental ability is less certain, but most authorities take the view that it is illegal. This is the

(211) Kenneth A. YATES, Population Policy - Making: Reproductive Freedom and the "Compelling State Interest", (1973) 42 U. of Missouri K.C. L.R. 201 et seq.

> view commonly adopted by the medical profession and acted upon by hospitals, and we understand that the medical defence organizations agree in refusing to indemnify any practitioner undertaking eugenic sterilization. In theory, the point is not entirely free from doubt, but in practice it appears to be almost universally accepted that eugenic sterilization is illegal and involves the surgeon concerned in the risk of legal proceedings, even though the full consent of the patient is obtained" (212).

So matters stood, with the medical profession generally avoiding controversy by refusing to perform other than therapeutic sterilizations, until publication of the celebrated Bravery v. Bravery (213) divorce decision of 1954, which yet retains its distinction as the sole reported judicial pronouncement (in England) on the subject of sterilization. Although Lord Justice Denning's dissenting opinion has provoked much speculation and hesitation amongst proponents of purely contraceptive sterilization, it did have the effect of reassuring practitioners as to the legality of eugenic sterilizations:

> "An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it... Another instance is an operation for abortion, which is 'unlawful' within the statute (Offences Against the Person Act, (1861) s. 58), unless it is necessary to prevent serious injury to health. Likewise, with a sterilization operation. When it is done with the man's consent

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(212) Cmd 4485 (1934) 6, cited by G.W. BARTHOLOMEW, Legal Implications of Voluntary Sterilization Operations, (1959) 2 Melbourne U.L.R. 77, at p. 78. The Brock Report also recommends that sterilization measures be offered on a voluntary basis to defective carriers. Cf. G.WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit. p. 93.

(213) (1954) 3 All. E.R. 59.

> for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it" (214).

As we already know, the majority of the court refused to approve this point of view that purely contraceptive operations were illegal per se:

> "In our view, these observations are wholly inapplicable to operations for sterilization as such, and we are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest" (215).

Accordingly, one would not hesitate to affirm the legal validity of eugenic sterilization, since both the majority judges (Evershed, M.R. Hodson, L.J.) as well as dissenting Lord Denning refused to place in doubt, the idea that eugenic indications would fulfill the requirement of "just cause". Indeed, although very critical of Denning's opinion on both legal and policy grounds, Glanville Williams felt that "... it may be taken as reasonably certain that the courts would uphold a voluntary sterilization submitted to on eugenic grounds" (216) in his book published shortly after this decision. This settled matters for lawyers.

In spite of a consensus amongst lawyers, it took a particularly tragic situation to provoke a change of attitude on

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(214) Ibid., pp. 67-68, emphasis added.

(215) Ibid., p. 64.

(216) The Sanctity of Life and the Criminal Law, op. cit., p. 106.

the part of the medical profession: A woman, mother of a child born with a serious hereditary defect, subsequently gave birth to a second child with the same defect. Faced with this particularly outrageous case which brought the debate to a head, the Medical Defence Union decided to retain counsel so that existing opinions on the legal status of sterilization dating back to 1949, could be reviewed in light of current law and updated if necessary. The joint opinion of leading and junior counsel, which eventually appeared in the British Medical Journal (217), advised that sterilizations practiced for therapeutic, eugenic as well as purely contraceptive grounds would be lawful, provided of course, a complete and valid consent were obtained from the patient involved (218).

In summary, it may be affirmed that today, the English legal community does not appear hesitant in approving sterilizations undertaken on eugenic indications (219). Of course, the likeliest potential source of danger would arise out of matters of consent, since English law consecrates the right of every person to produce children, whether they are defective or not. Only following an enlightened consent could this procreative capability be validly eliminated.

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(217) (1960) 2 B.M.J. 1510 at p. 1516.

(218) Philip ADDISON, Legal Aspects of Sterilization and Contraception, (1967) 35 Med. Leg. J., loc. cit., at p. 164; Glanville WILLIAMS, Consent and Public Policy, (1962) Crim. L.R., loc. cit., p. 158. Williams reaffirmed his opinion as to the validity of eugenic sterilization at page 159.

(219) TAYLOR, The Doctor and the Law, op. cit., p. 81.

(ii) The Anglo-Canadian Provinces

The absence of legislation or jurisprudence renders somewhat more hazardous than in cases of therapeutic sterilization, the formulation of opinions on the legality of eugenic sterilization. The problem is somewhat accentuated from a criminal law view-point due to the fact that the general defence (concerning surgical operations) afforded by article 45 Cr. C. requires that the operation be performed "for the benefit" of the patient, having regard inter alia "... to all the circumstances of the case" (220). Again one must ask, just how direct a benefit must be derived? With therapeutic sterilization, the saving of one's life or health provides the most immediate and direct benefit possible. In cases of eugenic sterilization, the benefit is not as direct since the mother (or indeed the family) is advantaged only by not being drained of the time, effort, expense, anxiety and heartbreak (221) involved in raising a defective child. Although some may attempt to turn aside this objection by pointing out the special schools, hospitals, equipment and personnel available to help the defective, one has only to ask the parents of a retarded child, who have assumed responsability for its care, whether this argument is valid (222). The answer would not be long in forthcoming that in almost all areas and provinces of Canada, the various governments' records of neglect are scandalous. However, since the word "benefit" does not appear to be qualified in the Criminal Code, any reasonable benefit, as opposed to a merely frivolous benefit would suffice to bring a sterilizing operation within the ambit of article 45 Cr.C. (223).

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(220) Art. 45 Cr. C.

(221) Not necessarily in that order.

(222) By assuming responsability for the child, we mean that the parents have kept the child with them rather than have it "put away" or institutionalized.

(223) Of course, appreciation of the circumstances of the case to see whether a reasonable benefit was obtained would be a question of fact left to the judge or jury.

For years, the position of the Canadian Medical Protective Association was one of extreme caution (224). The reasoning was based in most part on an extremely strict interpretation of article 45 Cr.C.:

> "The Code says that some of the things which (were) discussed as being illegal were legal when a benefit was conferred, but it goes further and says '... for the benefit of that person'. This leaves no doubt. The benefit shall not be to the spouse, to a companion, to a pocket-book, to society as a whole, to an idea or theory, or to any other nebulous thing; it shall be 'to that person'.
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> ...
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> The conclusion therefore that one reaches when he has thought the problem through is that sexual sterilization should be done, broadly speaking, only for the preservation of the health or life of the individual concerned and that doctors should refuse to do it for any other reasons" (225).

This attitude was indeed ludicrous, especially when one considers that the provinces of Alberta and British Columbia had, until very recently, laws regarding compulsory as well as voluntary eugenic sterilization. The repeal of these laws resulted from our natural repugnance towards forced violations of the integrity of human bodies, as well as from the dubious scientific foundations on which said laws were based. Nevertheless, it is difficult to see how the repeal of said laws would have rendered voluntary eugenic sterilization illegal.

With the strong influence of public opinion (obviously due to a change in mores), as well as a relaxing of opinions

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(224) BLACK, (1961) 33 Man. Bar News, loc. cit., pp. 36-37.
(225) FISHER, (1964) 91 C.M.A.J., loc. cit., at p. 1365.

once rigidly held by the medical profession, the Canadian Medical Protective Association drastically revised its position:

> "The Association thinking has reached the point where it now feels the problem should be left for decision by the individual doctor faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment" (226).

In the case of eugenic sterilization, the situation would be even less ambiguous since the above recommendation addresses itself to non-medical reasons. When we speak of eugenic sterilization, we are found in a grey area between therapeutics and mere convenience since both elements are involved. Parents may wish to avoid conceiving haemophiliacs or haemophilia carriers, since the birth of male descendents would inevitably imply the need for massive medical treatment throughout the lifetime of their offspring. By the same token, the added difficulties and inconvenience involved with such children would also render the indications for sterilization merely contraceptive.

It would seem highly unlikely that Anglo-Canadian law views eugenic sterilization as being contrary to public policy.

(iii) The United States

It is in the United States where one may find the greatest quantity of legislation on eugenic sterilization, especially of a compulsory nature. Of the twenty-six states

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(226) ANONYMOUS, Sexual Sterilization for Non-Medical Reasons, (1970) 102 C.M.A.J., loc. cit., p. 211.

which formally approve a eugenics policy (227), only two (228) require the consent of the defective or his guardian, even though some question may be raised as regards the ability of a mental defective, who is a priori mentally incompetent, to furnish a valid consent (229). The statutes of these states are directed primarily towards the mentally deficient, the epileptic or the mentally-ill, with some providing for the sterilization of habitual criminals (230), or sex perverts (231). Oddly enough, these laws aim largely at sterilizing persons whose presumed hereditary defects inspire aberrant social behavior, while neglecting other defects which may be just as disadvantageous for the general welfare of the community, but which are not so highly visible (e.g. haemophilia, Huntington's chorea, etc...).

Notwithstanding the foregoing, can voluntary eugenic sterilizations be qualified as legal operations? Apart from the Minnesota and Vermont statutes, which require a consent by or on behalf of a defective person before such an operation may be performed, fourteen states allow contraceptive sterilizations (232). Of all the remaining states, only one, Utah (233), ex-

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(227) See the list in R. PATE; P. PLANT, Sterilization of Mental Defectives, (1972) 3 Cumberland-Sanford L.R. 458 at pp. 471-472. The states mentioned include: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Maine, Michigan, Minnesota, Mississippi, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin.

(228) Minnesota and Vermont.

(229) RIECKHOFF, (1969) 33 Kentucky State Bar J., loc. cit., at p. 14.

(230) Delaware, Idaho, Iowa, Oklahoma, Utah, Washington, Wisconsin.

(231) Idaho, Iowa, Michigan, South Dakota, Utah, cf. PATE, PLANT, loc. cit., p. 473.

(232) i.e. Ark., Cal., Colo., Conn., Fla., Ga., Iowa, N.C., Okla., Ore., Rhode Island, Tenn., Va., W.Va., cf infra p. 337, note 420.

(233) Utah Code Ann., 64-10-12 (1961).

pressly forbids sterilization except in cases of "medical necessity". One may ask, what standard or test will be used in judging "medical necessity" and would this be equivalent to the preservation of life or health criterion so commonly used in reference to abortion (234)? On first impression, it seems logical to believe that a greater leeway was being granted to physicians in judging whether a sterilization would be indicated or not, than would be the case in matters of abortion (235). Could one go so far as to extend this notion of "medical necessity" to eugenic sterilization and the prevention of hereditary defects?

Fortunately, an answer to this question has been furnished by the Supreme Court of Utah in the matter of Parker v. Rampton (236). The plaintiffs (women each having two children), requested purely contraceptive sterilizations. Due to a fear of legal liability arising out of a provision of the Utah eugenic sterilization statute, the physicians would perform the surgery provided that an adjudication were obtained, declaring that the law forbidding sterilization except in cases of "medical necessity", would not apply to them. The District Court held that the Sterilization Act applied only to institutionalized persons and therefore would not prohibit a non-institutionalized person from undergoing such an operation. Upon appeal, the State Supreme Court affirmed the lower court's decision. In delivering the judgment, Crockett J., expressed the following opinion:

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(234) E.g. Georgia Criminal Code, sec. 26-1202(c) (adopted April 13, 1973; Idaho Laws 1973, ch. 197, s. 7 (adopted March 17, 1973); Illinois Abortion Law Rev. Stat., ch. 38, sec. 4 (approved July 19, 1973).

(235) Linda CHAMPLIN, Mark WINSLOW, Elective Sterilization, 113 U. of Pennsylvania L.R. 415 at p. 427; Peter TIERNEY, Voluntary Sterilization, A Necessary Alternative?, (1970) 4 Family L.Q. 373 at p. 378 note 28.

(236) (1972) 497 P. 2d 848.

> "... There is to be kept in mind the principle, essential to a free society, that each individual should be free to choose his own course of conduct, and to take the consequences thereof, except as restricted by law. This should be especially true of matters relating to one's own person. It is recognized of course that in various phases of conduct, which may interfere with others, or conflict with the interests of society generally, there must be some restrictions. But such regulations and restrictions are for the legislature to determine; and they should be set forth in the statutory law with sufficient certainty and clarity that persons of ordinary intelligence who desire to obey the law can understand what the requirements are in order to conduct themselves in conformity with it" (237).

According to this argument, since the statute applied only to a "class of defectives" therein described, then there would be no restriction upon those individuals not falling under its jurisdiction (238). Before this interpretation of the law, it is safe to assume that in the sole state of the Union expressly forbidding sterilization except for medical necessity, not only would voluntary eugenic sterilization be legal, but also those operations undergone for purely contraceptive purposes would not raise much difficulty.

These facts, along with other circumstances, lead us to believe that all the American States admit voluntary sterilization for eugenic purposes: For instance, how could one argue that eugenic sterilization is contrary to public policy when a majority of the states have, or have had some type of compulsory sterilization statute on its books, ostensibly in furtherance of a eugenics movement? Moreover, since the American Supreme Court, in the cases of Griswold v. Connecticut (239) and Eisenstadt v. Baird (240), has ruled that statutes outlawing or

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(237) Ibid., pp. 849-850.

(238) Ibid., p. 851.

(239) (1965) 381 U.S. 475.

(240) (1972) 92 S. Ct. 1029.

limiting voluntary birth control intrude on the right of privacy, would this not indicate the validity of a surgical form of birth control which seeks to eliminate the risk of defective children being born (241)?

With the increasing ability to identify genetic carriers rapidly (242), the success of any program which seeks to contain the transmission of genetic defects, depends on the means put at the disposal of the persons involved. There is no conceivable reason why, in conjunction with public education and genetic counselling services, all palliative measures, including sterilization, cannot be offered on a voluntary basis.

(2) The Civilian Jurisdictions

(i) France

In the absence of any French legislation on the subject of voluntary sterilization undertaken for eugenic purposes, the likeliest source of authority for determining its legality probably lies in the rather improbable affaire des stérilisateurs de Bordeaux (243), the facts of which we have already described in our discussion of therapeutic sterilization (244). In confirming the Cour d'appel of Bordeaux, which had found that the vasectomies were practised without medical or surgical necessity, the Cour de Cassation stated:

> "... les blessures faites volontairement ne constituent ni crime ni délit, lorsqu'elles ont

(241) SAGALL, loc. cit., pp. 58-59.

(242) MATOUSH, loc. cit., p. 650.

(243) Cass. crim. 1 juillet 1937.S.1938.1.193, note Tortat ; D.1938.1.537.

(244) Supra, p.241.

> été commandées, soit par la nécessité actuelle de la légitime défense de soi-même ou d'autrui; que, hors ces cas et ceux où la loi les autorise à raison d'une utilité par elle reconnue, les crimes et les délits de cette nature doivent ... donner lieu à condamnation contre les auteurs et complices" (245).

The Court also added that the consent of the victim would not serve as a valid defence. The fact that no other judgments other than the present one have been rendered on the subject of sterilization, has obliged legal commentators to carefully scrutinize this text in order to derive some inkling as to how the judiciary would react in less repugnant circumstances. Would the court have been less rigid had the defendants been a licensed physician and a hospital rather than a charlatan without any diploma, aided by two laborers in a boarding house? Would the goal of the sterilizations have changed the outcome? It is probably safe to say yes on both counts, but this still remains simple speculation.

In his comments on this case, René Tortat sought to determine what motives could legitimize surgery:

> "Il n'y en a qu'un que puisse invoquer pour se couvrir de l'immunité médicale, même un chirurgien muni d'un diplôme dûment enregistré, c'est de sauver la vie du malade, ou d'améliorer sa santé, ou de lui éviter un mal plus grand que celui qui résultera de l'opération" (246).

In other words, a long outstanding legal precept received confirmation: Injuries (blessures) could not be caused to another except in self-defence or for useful purposes recognized by law,

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(245) S.1938.1. loc. cit., at p. 195.

(246) Ibid., p. 193.

i.e. in a medical context. In addition, unless the treatment or surgery improved or was at least intended to improve the health of the patient, it would be held illicit (247). Accordingly, it was quite easy to conclude that the improvement to one's health would not be a purely subjective criterion, but rather more objective in nature.

> "Toutefois, au regard du médecin, la volonté du malade n'est pas elle-même entièrement souveraine. Car le devoir que le médecin tient de son ministère l'oblige à ne rien faire contre la santé et l'intégrité du corps du malade, même sur la volonté de celui-ci" (248).

The realization, however, that the strict notion of physical health was a standard which could not keep abreast with developments in modern medicine, caused a slight shift in attitudes towards the more elastic notion of "imperative medical reasons".

> "C'est pourquoi le médecin qui procéderait, sans impérieuses raisons médicales à une castration, même demandée par un malade, serait responsable civilement et pénalement. Il faut en général en dire autant d'une stérilisation" (249).

One could thus argue that sterilization for eugenic purposes would still fulfill the requirements of this standard, since the decision to not transmit serious hereditary defects to yet unborn children would be based on solid medical grounds (250). Yet, at

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(247) G. HUGHES, Two Views of Consent in the Criminal Law, (1963) 26 Mod. L.R. 233 at p. 242.

(248) R. SAVATIER, J. SAVATIER, J.M. AUBY, H. PEQUIGNOT, Traité de droit médical, Paris, Librairies Techniques, 1956, p. 248, no 274.

(249) Ibid.

(250) Under the original yardstick of amelioration to the health of the patient, this would not be possible except perhaps by having recourse to the somewhat specious arguments one usually encounters when discussing abortion, i.e.: "If I have a defective child, I will be unhappy, and this, along with the time and effort involved in raising such a child may affect my physical or mental health".

about the same time Savatier et al issued the above-quoted statement, Kornprobst addressed himself squarely to the problem of eugenic sterilization and was forced to conclude that:

> "Les obscurités et les incertitudes de nos connaissances sur l'hérédité pathologique ne permettent pas de faire du caractère supposé héréditaire d'une tare, la condition nécessaire et suffisante de la stérilisation" (251).

Of course, this was not a condemnation of voluntary eugenic sterilization per se, but in actual fact a hesitation to view as legal, any operation which was predicated on doubtful or at least questionable scientific hypotheses. Although our knowledge of human genetics is still quite incomplete, there are many defects of proven hereditary origin which today, would probably attenuate the absoluteness of Kornprobst's affirmation.

So the ambiguities persist.

The most recent opinions give the following guidelines:

> "A s'en tenir à l'état purement physique de l'opérée, la stérilisation ne peut jamais entraîner d'amélioration, mais elle peut, en interdisant de nouvelles grossesses, empêcher l'aggravation de certaines maladies ou la survenance de certains accidents.
>
> ...
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> L'opération n'est licite que si l'opérée en tire un bienfait" (252).

French doctrine generally approves therapeutic sterilization while remaining quite unanimous in its disapprobation of sterilization for purely contraceptive purposes ... and this

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(251) KORNPROBST, op. cit., p. 593.

(252) MERCIER, loc. cit., J.C.P. 1963.1770. MALHERBE, in his more recent book Médecine et droit moderne reproduces these same ideas in identical terms, op. cit., pp. 236-237.

is the crux of the problem. While eugenic sterilization seeks to avoid future medical or socio-medical problems caused by the birth of defective children, it is not directly related to maternal health. Furthermore, the same type of sterilization is a means of avoiding conception although it rests on more than simple socio-economic indications. With a wider societal and legislative acceptance of birth control (253) and abortion (254), the public order objections to contraceptive sterilization will eventually diminish in volume if not disappear altogether. Thus, any hesitations with regards to eugenic sterilization would likewise dissolve. In the final analysis, the strongest argument in favor of eugenic sterilization may be found in the fact that it is primarily a medically-indicated procedure which confers distinct advantages not only to the married couple itself as well as to society at large, but also would spare future generations untold suffering. Consequently, the benefits to be derived from the operation greatly outweigh the inconveniences inherent in this type of mutilation of the human body. On this basis, we may be entitled to assume that French law would not place in doubt the legality of eugenic sterilization (255).

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(253) E.g. Loi no 67-1176 du 28 décembre 1967 Relative à la régulation des naissances D. 1968 L. 44; Loi no 73-639 du 11 juillet 1973, La Création du Conseil supérieur de l'information sexuelle; Loi no 74-1024 du 4 décembre 1974; Portant diverses dispositions relatives à la régulation des naissances, D.S. 1974.L.368.

(254) Loi no 75-17 du 17 janvier 1975, Relative à l'interruption volontaire de la grossesse, J.C.P. 1975.III.42438.

(255) It is interesting to note that Roger Nerson, in his paper to the 8th Congrès International de Droit Comparé held at Pescara in 1970 (L'Influence de la biologie et de la médecine modernes sur le droit civil, 33 Etudes de Droit Contemporain 67, at pp. 80-82) discusses an "amorce de politique de l'eugénisme" which deals with pre-nuptial certificates, birth control and donor artificial insemination. The gist of this presentation is that the law will eventually have to contemplate many scientifically-inspired practices of questionable morality which are gaining public acceptance. He warns against the "'biologisation' du droit".

(ii) The Province of Quebec

As we have seen in our discussion of the legality of eugenic sterilization from a criminal law point of view in the Anglo-Canadian Provinces, there would not appear to be any insurmountable objections to this type of operation in the Criminal Code. In the absence of civil legislation, (aside from the general rule of article 19 C.C., which allows mutilations solely with the consent of the patient or with legal authorization), only a violation of the general notions of public order and good morals (256) could render a eugenic sterilization illicit.

Several reasons militate in favour of eugenic sterilization, the most important of which being the goal sought by the parties involved. The wish to avoid having a defective child or to avoid transmitting to future generations a serious hereditary defect would clearly outweigh any of the inconveniences resulting from slight mutilations of the human body. Any policy decision which would forbid this type of surgery would be as great an intrusion on personal liberty as would be a governmental directive ordering fertile couples to have as many children as humanly possible. What logic would there be in forbidding eugenic sterilizations when public institutions for receiving retardates or otherwise defective children who would require intensive full-time care, are woefully inadequate and understaffed? Indeed, what purpose is there in having badly defective children who may generally expect to live an abridged life only within the walls of a shelter or asylum? One could go even further and ask what use would there be in offering to the public genetic screening programs in order to discourage certain carriers from procreating, unless the warning was accompanied by effective measures to avoid the dangers brought out by this type of screening?

Another argument in favour of eugenic sterilization

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(256) Art. 13 C.C.

resides in the fact, so accurately described by Professor Jean-Louis Baudouin, that a eugenics policy of sorts already exists in Quebec (257). This can be seen in the fact that closely-related persons are forbidden to marry, that therapeutic abortions have been rendered legal and that aside from purely consensual difficulties, the insane or feeble-minded cannot validly contract marriage (258). He also predicts greater steps towards a more comprehensive eugenics program:

> "On peut prévoir que dans un futur plus ou moins lointain, la médecine pourra fournir à chaque individu sa 'carte génétique' complète et remplacer ainsi par des certitudes ou au moins des probabilités, les doutes sur le résultat de futures grossesses. L'époque ne sera pas alors loin où le législateur devra peut-être intervenir en tenant compte des données médicales, pour prohiber les combinaisons génétiques susceptibles d'entraîner des résultats non désirés... Ne peut-on entrevoir le jour où le droit permettra le mariage entre certains individus génétiquement incompatibles à la condition qu'ils acceptent une stérilisation volontaire préalable ou ne s'engagent à avoir des enfants que par hétéroinsémination?" (259).

From the point of view of "good morals", the only objection against the operation can be found in the tenets of the Catholic Church, which, for a sizeable segment of Quebec doctrine and jurisprudence (260), apply with substantial force in

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(257) L'incidence de la biologie et de la médecine moderne sur le droit civil, (1970) 5 Thémis 217, at p. 226.

(258) Ibid.

(259) Ibid., pp. 226-227. Professor Baudouin recommends that a medical certificate be made a condition sine qua non for the celebration of marriage as a protection both for the couple and their children as well as for reasons of public salubrity.

(260) Cf. Gagné v. Poulin, (1922) 29 R. de J. 37 (S.C.); Sutherland v. Gariépy, (1904) 11 R. de J. 314 (S.C.).

the determination as to whether a transaction is legal or not. The preferable view-point is a broader standard which takes into consideration the fact that Quebec is a pluralistic society with no state religion. To impose a Roman Catholic standard of morality upon everyone regardless of religious beliefs or lack of same, smacks of religious imperialism which, for obvious reasons, is inacceptable in a society dedicated to intellectual and religious liberty (261). With the Quebec government itself (through the Quebec Health Insurance Board) assuming a non-judgmental posture as to the acceptability of certain sterilizing operations or abortions, with birth control products being openly advertised and sold, and with group health insurance policies in public institutions such as the Université de Sherbrooke (which holds a Papal charter), paying for contraceptives as part of its coverage, it cannot be seriously argued that, in matters of good morals, the standards of particular denomination should prevail over all others.

In viewing sterilizations undertaken for eugenic purposes, there appears to be no serious reason why physicians proceeding on the basis of objective indications and an enlightened consent should fear legal repercussions from operations of this nature. Edith Deleury describes accurately the considerations which must predominate in this area of law:

> "Si l'on place la personne physique au-dessus des conventions, c'est pour la protéger. Il serait donc paradoxal de prohiber des conventions qui ne peuvent être qu'utiles, sinon indispensables à la vie humaine" (262).

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(261) In the relatively old case of Taché v. Dérome et al, (1890) 35 L.C.J. 180 (S.C.), Mr. Justice Davidson (at p. 181) expounds this point of view with a very enlightened attitude, considering the temper of the times during which this case was heard.

(262) (1972) 13 C. de D., loc. cit., p. 537.

"Human life" should be seen not only as a notion of physical existence but also as a psychological, emotional and social condition. If the blight of genetic defects can be attenuated in some appreciable measure, nobody can seriously object to the utilization of reasonable means in this direction.

b) Compulsory Eugenic Sterilization

(1) An Overview

In terms of the jurisdictions falling within the purview of our study, compulsory sterilization would appear to be a North American rather than a European phenomenon. In England, Blackstone had noted that ancient English law provided a membrum pro membro type of punishment for mayhem, which included castration (263). The common law soon set aside this rule of retaliation in kind, since it could not be an effective deterrent for repeated offenders. As a result, compulsory sterilization has never been practised in England, nor does it appear that it will ever become accepted as a eugenics measure. In 1934, the Brock Report formally condemned compulsory sterilization in its recommendations (which have never been seriously contested) (264), with the result that although coercive measures have been definitely set aside, the voluntary sterilization of defectives or carriers with adequate legal

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(263) Sir William BLACKSTONE, Commentaries on the Laws of England, edited by W.N. Welsby, N.Y., Harper and Bros., 1847, p. 213.

(264) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 93.

safeguards would appear to be gaining in popularity (265).

France has always been traditionally opposed to compulsory sterilization, viewing as retrograde, barbaric, unscientific and immoral, any forced mutilation of the human body for punitive or eugenic reasons (266). Up to the present, these noble tendencies have shown no sign of weakening.

Happily, the Province of Quebec has seen fit to follow closely in France's footsteps in its attitude towards compulsory sterilization, and has never contemplated an obligatory negative eugenics policy. This is also due in no small measure, to the traditionally strong influence of Catholicism and its antagonism towards interruptions of the natural procreative function.

Among the Anglo-Canadian provinces, there no longer exists any compulsory eugenics legislation, although for a period of over forty years, the Provinces of Alberta and British Columbia have both had Sexual Sterilization Acts (267). While

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(265) WILLIAMS, ibid.; MEYERS, The Human Body and the Law, op. cit., p. 39.

(266) KORNPROBST, op. cit., pp. 530-535. TORTAT, in his note to Cass. crim. 1 juillet 1937, S.1938.1.193 at p. 195 wrote: "De telles mesures législatives, procédant de la conception, rétrograde et barbare, d'une sorte de régie sanitaire d'un bétail humain, répugnant invinciblement à notre sens, très français, de la justice sociale et de la suréminante dignité de l'homme".

(267) 1970 Revised Statutes of Alberta, c. 341; 1960 Revised Statutes of British Columbia, c. 353; subsequently repealed by The Sexual Sterilization Repeal Act, 1972 Statutes of Alberta, c. 87 (assented to the 2nd of June 1972) and The Sexual Sterilization Act Repeal Act, 1973 Statutes of British Columbia, c. 79 (assented to the 18th of April 1973).

the Alberta legislation aimed at the sterilization of institutionalized patients who were psychotic, mentally deficient, epileptic, suffering from neurosyphilis, or from Huntington's chorea (268), the British Columbia act encouraged the sterilization of institutionalized patients who would likely have children with "... a tendency to serious mental disease or mental deficiency..." (269). Before public pressure and telling cogent critiques of the scientific and legal inadequacies inherent in these pieces of legislation, the two legislatures finally laid them to rest (270).

The United States still remains a bastion of the compulsory eugenics movement although the numbers of forced sterilizations have begun to decline. In addition, even though several of the American States have chosen to withdraw from the movement, about half of the States still have eugenics laws in force.

The first attempt to introduce compulsory sterilization occurred as early as 1897 in the State of Michigan. The measure did not,however, acquire sufficient backing (271).

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(268) Ibid., ss. 5, 6, 7, 8.

(269) 1960 R.S.B.C., ch. 353, loc. cit., s. 4.

(270) An excellent example of this type of legal writing may be found in McWHIRTER and WEIJER's article, The Alberta Sterilization Act: A Genetic Critique, (1969) 19 U. of T. L.J., loc. cit., p. 424.

(271) FERSTER, (1966) 27 Ohio L.J., loc. cit., pp. 592-593.

In 1905, the State of Pennsylvania actually passed a bill entitled An Act for the Prevention of Idiocy, which authorized institutions to perform the "safest and most effective" operations to prevent the inmates from procreating (272). Refusing to be seduced by the enthusiasm generated by the eugenics movement and its simplistic solutions, Governor Pennypacker vetoed the bill because of its vagueness, its questionable scientific basis, its delegation of broad discretionary powers which could lead to abuses, and finally, because its terms were conducive to human experimentation (273). Event-

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(272) Ibid., p. 593.

(273) In actual fact, the Governor's message read in part as follows: "This bill has what may be called with propriety an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an act would have long been passed and approved in this state... What is the nature of the operation is not described, but it is such an operation as they shall describe to be 'safest and most effective'. It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the bill to this staff of scientific experts.... The bill is furthermore, illogical in its thought.... A great objection is that the bill ... would be the beginning of experimentation upon living human beings, leading logically to results which can readily be forecasted", quoted in FERSTER, ibid., p. 593. B. STARKMAN in The Control of Life: Unexamined Law and the Life Worth Living, (1973) 11 Osgoode Hall L.J. 175, at p. 179 recounts an amusing anecdote involving Gov. Pennypacker and the press, which appeared to be very hostile towards him. When their aggressive behavior got out of hand, the Governor restored order by stating: "Gentlemen, gentlemen! You forget you owe me a vote of thanks. Didn't I veto the bill for the castration of idiots?".

ually, the State of Indiana enacted a compulsory eugenic sterilization statute on the 9th of March 1907, which was put to immediate use until it was challenged and declared invalid on constitutional grounds in the case of Williams et al v. Smith in 1921 (274).

This generally set the tone in the United States for the next two decades; laws were adopted, applied and then often successfully attacked in the courts until, by a process of trial and error in order to hit upon a constitutionally acceptable formula, the American Supreme Court in the celebrated case of Buck v. Bell (275) was able to decide that a Virginia eugenics statute was valid (276). Until the Supreme Court was again call-

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(274) (1921) 131 N.E. 2 (Supreme Court).

(275) (1972) 47 S. Ct. 584.

(276) For very good descriptions of the early legislative and judicial history of the American eugenics movement, consult J.H. LANDMAN, The History of Human Sterilization in the United States - Theory, Statute, Adjudication, (1928) 23 Illinois L.R. 463, and PATE, PLANT, Sterilization of Mental Defectives, (1972) 3 Cumberland-Sanford L.R., loc. cit., p. 58. For example, the following states had their compulsory sterilization statutes struck down prior to the Buck v. Bell decision: Washington (adopted the 22nd of March 1909) by State v. Feilen, (1912) 126 P 75 (Sup. Ct. Washington); Nevada (adopted the 11th of March 1911) by Mickle v. Henrichs, (1918) 262 F 687 (Nev. District Court); New Jersey (adopted the 21st of April 1911) by Smith v. Board of Examiners of Feeble-Minded, (1913) 88 A. 963 (Supreme Ct. New Jersey); New York (adopted the 16th of April 1912) by In re Thomson et al, (1918) 169 N.Y.S. 638 (N.Y. Supreme Ct.) confirmed by Osborn v. Thomson, (1918) 171 N.Y.S. 1094; Michigan (adopted the 1st of April 1913) by Haynes v. Lapeer Circuit Judge, (1918) 166 N.W. 938 (Supreme Ct. Michigan); Iowa (adopted the 19th of April 1913) by Davis v. Berry, (1914) 216 Fed. Rptr. 413 (District Court Iowa).

ed upon to pronounce itself upon the problem of compulsory sterilization fifteen years later, in the case of Skinner v. State of Oklahoma (277), only on three of a total of nine occasions have the courts overturned sterilization statutes. Even in these cases, the only basis for legal reproach was the absence of notice or hearing provisions which constituted violations of procedural due process (278). Even in the Skinner case, the Supreme Court found the Oklahoma statute unconstitutional, essentially because of its arbitrary nature in that only habitual criminals guilty of "crimes involving moral turpitude" would be subject to sterilization. The general idea of compulsory sterilization itself was not subjected to re-examination (279). More recently, the constitutionality of two statutes was reaffirmed in the cases of State of Nebraska v. Cavitt (in which appeal to the Supreme Court of the United States was denied) (280), and Cook v. State of Oregon (281). Although, at one time, eventually thirty-three states have had steriliza-

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(277) (1942) 62 S. Ct. 1110.

(278) This occurred in Brewer v. Valk et al, (1933) 167 S.E. 638 (N.C.); In re Opinion of the Justices, (1935) 162 S. 123 (Alabama); In re Hendrickson, (1942) 123 P. 2d 322 (Wash.). In the remaining cases, the sterilization orders were upheld: State ex rel. Smith v. Schaffer, (1928) 270 P. 604 (Kansas); Davis v. Walton, (1929) 276 P. 921 (Utah); In re Clayton, (1931) 234 N.W. 630 (Nebraska); State v. Troutman, (1931) 299 P. 668 (Idaho); In re Main, (1933) 19 P. 2d 153 (Oklahoma); Garcia v. State Department of Institutions et al, (1939) 97 P. 2d 264 (Cal.). See also PATE, PLANT, (1972) 3 Cumberland-Sanford L.R., loc. cit., p. 463.

(279) PATE, PLANT, ibid., p. 463.

(280) (1968) 159 N.W. 2d 566, appeal denied 90 Sup. Ct. 543.

(281) (1972) 495 P. 2d 768 (Oregon Court of Appeals).

tion statutes in force (282), the popularity of this type of measure is noticeably on the wane. Nevertheless, it should be recalled that approximately half of the states still belong to the eugenics "club". This factor, along with previously described pressures to utilize sterilization as a punishment for being on welfare, as a means of obtaining a parole, or as an ultimate answer to the population explosion prevents the whole topic of compulsory sterilization from becoming moot.

(2) American Eugenic Sterilization Statutes and their Constitutionality

It is quite interesting to note that exorbitant pieces of legislation such as the compulsory eugenic statutes have seldom been challenged before the courts. One writer estimates that of the nearly seventy-five thousand persons upon whom forced sterilizations had been practised, there are less than twenty-five appellate court cases attacking the validity of the laws involved (283). One organization, the Association for Voluntary Sterilization, has attributed this factor to the care devoted to the drafting and application of the laws in question, although this has been seriously challenged (284). Since institutionalized persons are almost always involved and most of these are either retarded or insane, the whole notion of consent becomes somewhat problematic. Even with provisions

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(282) MILLAR, (1966) 1 U. of San Francisco L.R., loc. cit., at p. 162.

(283) Patrick J. McKINLEY, Compulsory Eugenic Sterilization: For Whom Does Bell Toll?, (1967-68) 6 Duquesne U. L.R. 145, at p. 146.

(284) Ibid.

seeking to safeguard patient "rights" through requirements of notice and/or a hearing, or else through consultation with the next of kin, one can easily imagine the indifference involved in most cases. Release from mental institutions may often be made conditional upon sterilization (285). Citing these and similar factors, as well as the dubious eugenic efficacy of such haphazard methods, attacks have, and are still being mounted against eugenic statutes on several grounds. Depending on the wording of the statute in question or the circumstances of the particular case, the most fruitful arguments for contesting a sterilization order may include: (i) That it is a cruel or unusual punishment; (ii) that it denies equal protection of the laws; (iii) that it violates substantive due process; (iv) that it violates procedural due process; (v) that it constitutes a bill of attainder, or (vi) that it violates a fundamental right to procreate. We will examine each of these aspects in turn.

(i) Cruel and unusual punishment

The "cruel and unusual punishment" argument derives from the Eighth Amendment to the Constitution which provides:

> "Excessive bail shall not be required,
> nor excessive fines imposed,
> nor cruel and unusual punishment inflicted".

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(285) Ibid., p. 147.

The first occasion upon which this defence was raised occurred in the case of State v. Feilen (286), in which a person, found guilty of statutory rape of a ten year-old child, was sentenced to life imprisonment as well as to undergo a vasectomy. In upholding the sentence, the State of Washington Supreme Court felt that if the death sentence could have been imposed for such a crime, anything less than death, barring physical torture, could also be inflicted (287). The Court also felt that the notion of cruel and unusual punishment applied to punitive measures of the pillory, whipping-post, breaking on the wheel, or quartering, etc... variety.

Two years later, the Federal Court struck down an Iowa statute providing for the compulsory sterilization of twice-convicted felons. In Davis v. Berry (288), the tribunal felt that the effects of the sterilization would be to put shame, degradation and mental torture on the prisoner, and as such would violate the Eighth Amendment.

Similarly in 1918, a Nevada punitive sterilization statute was set aside when attempts were made to apply it to a convicted rapist who was also epileptic. As Farrington, Dist. J. put it:

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(286) (1912) 126 P. 75.

(287) Ibid., p. 76.

(288) (1914) 216 Fed. Rptr. 413. The appeal to the U.S. Supreme Court was declared moot since the State desisted from the sterilization order and repealed the statute, cf. Berry v. Davis, (1916) 37 S. Ct. 208 or 242 U.S. 468.

> "Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; but when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel" (289).

The Court also distinguished the Feilen case by stating that in that situation, unlike the present one, the Constitution of the State of Washington only banned "cruel" punishments, whereas that of Nevada aimed at both "cruel" and "unusual" punishments.

When applied in a non-penal context, the general consensus of all the courts called to pronounce themselves upon the validity of compulsory sterilization statutes, was to the effect that the "cruel and unusual punishment" concept would not apply (290). The argument underlying these findings would appear to be based on the idea that not only should the act complained of be "cruel" and "unusual", it should also be a punishment (291).

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(289) Ibid., p. 690.

(290) Cf. In re Thomson, (1918) 169 N.Y.S. 638 affirmed by Osborne v. Thomson et al, (1918) 171 N.Y.S. 1094; Smith v. Command, (1925) 204 N.W. 140 (Mich.); In re Salloun, (1926) 210 N.W. 498 (Mich.); State v. Troutman, (1931) 299 P. 668 (Idaho); In re Clayton, (1931) 234 N.W. 630 (Neb.); In re Main, (1933) 19 P 2d 153 (Okla.); In re Opinion of the Justices, (1935) 162 S 123 (Ala.). It should be noted that in the Thomson and the Opinion of the Justices cases, the statutes were unconstitutional for other reasons. In the Smith case, the sterilization order was set aside due to an incorrect application of the Michigan Sterilization statute. In applying a sterilization law to a prisoner, a Utah court decided that the law would be valid if used for eugenic rather than for punitory purposes, cf. Davis v. Walton, (1929) 276 P 921.

(291) McKINLEY, (1967-68) 6 Duquesne U.L.R., loc. cit., at p. 152.

In other words, if a sterilization law were perceived as non-punitive, one could eliminate the Eighth Amendment protection (292), with the incongruous result that felons would enjoy added constitutional safeguards not normally available to the insane or to the mentally defective (293).

Yet chinks appear in the forcefulness of this argument. The U.S. Supreme Court in Robinson v. State of California (294), declared unconstitutional on Eighth Amendment grounds, a California penal statute which declared narcotics addiction a crime. While admitting that, in cases of danger to public health and welfare, the state could impose quarantine or compulsory treatment, the Court refused to countenance any confinement which would be merely punitive (295). Thus, how could one describe as "treatment" in the case of a mental defective, any action such as sterilization which, if applied to a criminal, would be construed as a "cruel and unusual" punishment (296)? Although scientific knowledge in the field of genetics is far from complete, there can be no question that compulsory sterilization does not cons-

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(292) MILLER, (1966) 1 U. of S.F. L.R., loc. cit., at p. 168.

(293) G. MORRIS, J. BREITHAUPT, Compulsory Sterilization of Criminals - Perversion in the Law; Perversion of the Law, (1964) 15 Syracuse L.R. 738, at p. 743. This has inspired Charles KINDREGAN to state: "Whether (compulsory eugenic sterilization) is a cruel and unusual punishment is still an open question. There particularly is doubt about the status of statutes which call for sterilization of criminals on eugenic grounds". Cf. Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, (1966) 43 Chicago-Kent L.R. 123, at p. 127.

(294) (1960) 370 U.S. 660.

(295) Ibid., pp. 666-667.

(296) McKINLEY, loc. cit., p. 153.

titute a recognized form of treatment of insanity or feeble-mindedness, nor does it have any appreciable eugenic effects (at least from a statistical point of view). Consequently, forced violations of a person's physical integrity which do not serve any therapeutic purpose, cannot benefit from the law's benign attitude towards medical treatment, and must necessarily be viewed as a form of punishment. The end result is that as in any other cases of punishment, only persons convicted of crimes should suffer legal sanctions, and just as essential, the punishments applied must not be cruel nor unusual.

As the courts have already decided in cases involving prisoners, one is obliged to opine that the forced sterilization of mental incompetents violates the constitutional protection against cruel and unusual punishments. This, in itself, affords sufficient grounds for the courts to attack any compulsory eugenic sterilization law (297).

(ii) A Denial of Equal Protection

The Fourteenth Amendment to the American Constitution which states that "... no state shall ... deny to any person within its jurisdiction the equal protection of the laws", has afforded the legal basis upon which several compulsory sterilization statutes of selective application were subjected to critical judicial scrutiny. On several occasions, statutes of this

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(297) As recently as 1968, the Supreme Court of Nebraska, in a decision confirmed by the U.S. Supreme Court, has refused to view as a cruel and unusual punishment, an order rendering release from a state home conditional upon sterilization. Cf. State v. Cavitt, (1968) 159 N.W. 2d 566, confirmed by 90 S. Ct. 543.

type which applied only to institutionalized patients were adjudged violative of the equal protection provision, since they applied only to one section of an identifiable class of people. In Smith v. Board of Examiners of the Feeble-Minded (298) for instance, an epileptic confined in a state institution was successful in resisting a sterilizing order by pointing out the anomalous eugenic results which would be attained by operating only on the institutionalized while permitting the non-institutionalized to maintain their powers of procreation. Likewise, in Haynes v. Lapeer Circuit Judge (299), the Michigan Supreme Court found this type of statute a violation of the constitutional prohibition against class legislation. That point of view was also shared by the appellate division of the State of New York in the case of Osborn v. Thomson et al (300).

Judicial constancy began to be disturbed, however, in the matter of Smith v. Command (301), in which the Michigan Supreme Court (302) upheld a statute providing for the sterilization of institutionalized mental defectives (but which excluded the insane), by deciding that this law did not constitute class legislation since it was aimed only at those who menaced the public welfare. In addition, the Court felt that the statute was warranted by "biological science". Surprisingly, the Court

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(298) (1913) 88 A. 963 (N.J.).

(299) (1918) 166 N.W. 938 (Mich.).

(300) (1918) 169 N.Y.S. 638 sub nom. In re Thomson; affirmed by (1918) 171 N.Y.S. 1094.

(301) (1925) 204 N.W. 140.

(302) The statute struck down by Haynes v. Lapeer Circuit Judge had been replaced the 23rd of May 1923.

also stated (per McDonald C.J.) that:

> "The Michigan Statute ... is expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all time. Whether this belief is well founded is not for this court to say. Unless for the soundest constitutional reasons, it is our duty to sustain the policy which the state has adopted" (303).

Of the two opportunities which the U.S. Supreme Court has had to express an opinion on a compulsory sterilization statute, that tribunal chose to retain the equal protection argument only once. In Buck v. Bell (304), a Virginia law, applying only to institutionalized mental defectives, was attacked on the basis inter alia that since it did not apply to the non-institutionalized, it therefore constituted class discrimination. Mr. Justice Holmes summarily dismissed this argument in the following terms:

> "It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within its lines, and seeks to bring within the lines

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(303) (1925) 204 N.W., loc. cit., at p. 145. In a strongly-worded dissent, Wiest J., stated: "If this law is held valid, then the measure of power of asexualization has not yet been marked, and classes may be added, and tyranny expanded" (at p. 153).

(304) (1927) 47 S. Ct. 584.

> all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached" (305).

Thus, in a peremptory fashion, the Supreme Court set aside the accumulated authorities such as the Smith, Haynes and Thomson (306) cases, and temporarily blunted the equal protection argument (307), at least in a non-penal context. In the long-run, this narrow view of equal protection was eventually retired by the U.S. Supreme Court in favour of the more responsible concept of "reasonableness". In other words, a distinction between categories of persons would be considered invidious unless the classification was reasonable in view of the purpose of the statute (308). If one were to review Buck v. Bell today in light of this standard, it would be safe to predict a different result. Indeed, how could one support a statute enacted purportedly for purposes of racial improvement when it covers only a small proportion of the eugenically "inferior"? This is especially striking when one considers that only the non-institutionalized generally have opportunities to procreate (309). And yet, this objection is neither astounding nor even novel, having been successfully argued before the courts as early as 1913 (310).

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(305) Ibid., p. 585.

(306) Loc. cit.

(307) MILLAR, (1966) 1 U. of S.F. L.R., loc. cit., p. 165.

(308) McLaughlin v. Florida, (1964) 379 U.S. 184 at p. 191.

(309) MALHERBE in Médecine et droit moderne terms internment "la stérilisation carcérale", op. cit., at p. 239.

(310) E.g. Smith v. Board of Examiners of the Feeble-Minded, (1913) 88 A. 963.

In spite of this, could not one yet maintain that it is reasonable to sterilize patients in order to evacuate terribly crowded asylums and provide places for other defectives? This argument also receives short shrift by one writer who affirms:

> "To bottom reasonableness here on the capacity of a state's mental institutions would be to encourage crowded conditions and allow the protections of the constitution to be determined by appropriations of the state legislatures" (311).

In the case of Skinner v. State of Oklahoma (312), the Supreme Court was more receptive to the equal protection argument. Skinner, a convicted armed robber, was ordered sterilized under Oklahoma's Habitual Criminal Sterilization Act which was aimed at persons "convicted two or more times of crimes amounting to felonies involving moral turpitude". The law specifically excluded those guilty of violations against revenue acts or the prohibitory laws, embezzlement, or political crimes. In speaking for the Court, Douglas J., expressed the opinion that:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offence and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable

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(311) McKINLEY, (1967-68) 6 Duquesne L.R., loc. cit., at p. 155.
(312) (1942) 62 S. Ct. 1110.

> discrimination... We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offences" (313).

Despite the opportunity to do so, the Supreme Court refused to attack Buck v. Bell on the basis of its dubious constitutional interpretation. Instead, Douglas J. even went so far as to qualify as a "saving feature" the assertion of Holmes J. to the effect that by sterilizing patients and releasing them, asylum space would be made available for others (314). Consequently, one may safely assert that again, greater protection is offered to the criminal than to the mentally defective, even though there are valid reasons for placing both on the same footing, at least as regards the constitutional safeguards. As we have previously mentioned, with the development of the "reasonableness" standard, a reversal of Buck v. Bell would likely occur should the Supreme Court once more have the opportunity of deciding a case involving similar circumstances. In the interim, there would seem to be continued resistance to this step. In Cook v. State of Oregon (315), the state ordered the sterilization of a promiscuous 17 year-old girl who was emotionally disturbed as well as brain-damaged. To the argument that only the poor were discriminated against, (since the rich could afford to pay others to care for their children, thus avoiding

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(313) Ibid., p. 1113.

(314) Ibid., p. 1114.

(315) (1972) 495 P. 2d. 768.

that their children become neglected or dependent as the statute requires), the Court found that equal protection was not lacking since:

> "The Oregon law specifies that the potential offspring would become dependent or neglected as a result of the patient 's inability to provide adequate care and is not concerned with the patient's financial status.
>
> The state's concern for the welfare of its citizenry extends to future generations and when there is overwhelming evidence, as there is here, that a potential parent will be unable to provide a proper environment for a child because of his own mental illness or mental retardation, the state has sufficient interest to order sterilization" (316).

(iii) Substantive Due Process

Compulsory eugenic sterilization statutes may be in conflict with the Fourteenth Amendment guaranteeing substantive due process. In effect, if a law is based on an unsound or a scientifically questionable eugenics policy, then it is violative of a person's right to life or liberty (317). This being the case, any actions taken under the aegis of this type of law necessarily become unreasonable exercises of the police power (318).

Originally, the courts accepted at face value the

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(316) Ibid., pp. 771-772 (per Foley, J.).
(317) KINDREGAN, (1966) 43 Chicago-Kent L.R., loc. cit., p. 132.
(318) McKINLEY (1967-68) 6 Duquesne U.L.R., loc. cit., p. 150.

unqualified assertions of eugenicists that criminality, epilepsy, feeble-mindedness, insanity and even pauperisn were all genetically-inspired and could be eliminated through surgery. The first case which questioned this belief was Smith v. Command (319) in 1925, and even here, the doubt was resolved in favour of the state since the Court felt that this was essentially a question of state policy (320). However, the Supreme Court in Buck v. Bell (321) quickly and resoundingly nipped any uncertainties in the bud by asserting (per Holmes J.):

> "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. 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. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian Tubes (Jacobson v. Massachusetts, 197 U.S. 11). Three generations of imbeciles is enough" (322).

In this case, Carrie Buck was a feeble-minded, institutionalized, eighteen year old woman, born of a feeble-minded mother who was also an inmate at the same institution. Carrie became pregnant and gave birth to a female child, allegedly as

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(319) (1925) 204 N.W. 140 (Mich.).

(320) Ibid., p. 145.

(321) (1927) 47 S.Ct. 584.

(322) Ibid., p. 585.

feeble-minded as her ascendants. Virginia law permitted the sterilization of the feeble-minded, and on this issue, it was decided to use the seemingly straightforward Buck matter as a test case.

A sociological background study of the Buck litigation which was made public in 1953, revealed many disturbing facts: Firstly, Carrie's guardian ad litem was appointed only pro forma and paid by the state, the princely sum of twenty-five dollars; secondly both Carrie and her mother were morons and not imbeciles; and finally, the conclusion that Carrie's child was mentally defective was apparently arrived at by a Red Cross nurse who examined the baby when it was only one month old (323). Subsequent information revealed that, in fact, the child completed two years of school with excellent marks before dying of measles (324).

The Buck decision has served as a target for legal criticism and in most instances deservedly so. Aside from the obviously weak eugenic argument and the "unusually platitudinous" tenor of Holmes' opinion (325), at least three aspects of the judgment warrant particular scrutiny: To begin with, the parallel made between military service and compulsory sterilization is too tenuous to warrant any detailed comment other than to say that one does not consciously seek injury or death while serving in the armed services, nor is this type of harm caused by one's own countrymen (326). Secondly, the analogy between compulsory ste-

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(323) RIECKHOFF, (1969) 33 Ky. St. Bar J., loc. cit., p. 15.

(324) Ibid.

(325) LANDMAN , (1928) 23 Ill. L.R., loc. cit., p. 465.

(326) John B. GEST, Eugenic Sterilization: Justice Holmes vs Natural Law, (1950) 23 Temple L.Q. 306 at p. 307; MORRIS, BREITHAUPT, (1964) 15 Syracuse L.R., loc. cit., p. 748.

rilization and compulsory vaccination also begs the question since the Supreme Court in the Jacobson case (upon which Holmes J. relies), affirmed that a refusal to submit to vaccination would only expose the recalcitrant party to a five dollar fine (327). It also declined to approbate any idea of vaccination by force (328). In this connection, is it really necessary to point out the differences as regards corporeal integrity? In the one case, i.e. vaccination, a superficial scratch is made in order to protect the person from disease, whereas in the case of sterilization, a normal and healthy function is permanently destroyed. Thirdly and most important, the eugenic efficacy of sterilization was judicially endorsed without reservation. The coupling of this endorsement with the statement that "Three generations of imbeciles is enough" (329), has provoked one author to go so far as to affirm that we would now have the "... philosophy of the absolute state" (330).

The most far-reaching result of the Buck case and its staunch approval of the eugenics theory was that, in subsequent cases, inferior courts merely accepted as fact the scientific basis behind the compulsory eugenic sterilization statues (331). This state of affairs was to continue until Mr. Justice Jackson of the Supreme Court, in Skinner v. Oklahoma (332), reopened the whole scientific controversy, or at least took judicial cognizance of the existence of such a controversy when he opined:

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(327) Jacobson v. Massachusetts, (1904) 197 U.S. 11.

(328) MORRIS, BREITHAUPT, loc. cit., p. 748.

(329) (1927) 47 S. Ct., loc. cit., at p. 585.

(330) GEST, (1950) 23 Temple L.Q., loc. cit., p. 309.

(331) E.g. State ex rel. Smith v. Schaffer, (1928) 270 P. 604 (Kansas); State v. Troutman, (1931) 299 P. 668 (Idaho).

(332) (1942) 62 S. Ct. 1110.

> "I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity...
>
> There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority - even those who have been guilty of what the majority defines as crimes" (333).

It may be reasonably concluded, at this stage of our knowledge of genetics, that criminality is more of a social or economic problem rather than one caused by errant chromosomes (334). Moreover, except in a very limited number of cases, can retardation or other disorders be accurately predicted and ascribed to a genetically-inspired etiology. In too many cases, retardation, epilepsy and the myriad other disorders with which a child may be born are simply a case of being a victim of a mutated gene. As we become more and more exposed to radiation and to mutagenic chemicals spewed into the environment, we will likely see a great increase in genetically-induced birth defects among children born of normal parents. Scientists appear willing to admit that most prognostications in the genetic field are highly speculative in nature (335), and this alone seems sufficient to

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(333) Ibid., p. 1116.

(334) KINDREGAN, (1966) 43 Chicago-Kent L.R., loc. cit. p. 137. Of course, there is some discussion in scientific circles of the anti-social inclinations of the "supermales" or so-called "genetic criminals" possessing the extra Y chromosome, see for example A.H. ROSENBERG, L.J. DUNN; Genetics and Criminal Responsability, (1971) 56 Mass. L.Q. 413.

(335) Ibid., p. 136.

raise serious doubts as to the constitutionality of compulsory sterilization. Couched in simpler terms, questionable science makes for questionable law, and any laws predicated on disputable scientific theories are violative of substantive due process.

(iv) Procedural Due Process

The Fourteenth Amendment guarantee of due process requires not only that the law in question have substantive validity but also that procedural safeguards be included. In the field of compulsory eugenic sterilization, this would normally include a reasonable notice of hearing, the right to counsel, and an opportunity to present evidence and to cross-examine witnesses (336).

Although procedural grounds had previously been cited as ancillary reasons for invalidating a sterilization statute (337), the first case in which procedural due process was invoked with success as the unique basis for contestation was Williams et al v. Smith (338). Interestingly enough, the law struck down was that of Indiana, the first statute of this kind to be passed and put into application in the United States. Once Buck v. Bell (339) took the wind out of the sails of the substantive due process argument, the opponents of compulsory sterilization were forced to rely more heavily on the procedural argument with mixed success. On two occasions (340), the courts felt that the lack of a right of appeal in the first case, and the absence of notice, hearing

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(336) McKINLEY, (1967-68) 6 Duquesne U. L.R., loc. cit. p. 147.

(337) E.g. Davis v. Berry, (1914) 216 Fed. Rptr. 413.

(338) (1921) 131 N.E. 2 (Indiana).

(339) (1927) 47 S. Ct.584.

(340) State ex rel. Smith v. Schaffer (1928) 270 P. 604 (Kansas); and Garcia v. State Department of Institutions, (1939) 97 P. 2d 264 (Cal.).

or appeal in the second, did not constitute a denial of due process.

Although the right of appeal or lack of same has not been the issue in any subsequent sterilization cases, the absence of provision for notice or hearing was held constitutionally repugnant by the courts of three states. In Brewer v. Valk (341) and In re Opinion of the Justices (342), (the latter being only an advisory opinion which subsequently caused the statute to be vetoed), the absence of procedural safeguards was held to be decisive. In the In re Hendrickson matter (343), the Supreme Court of the State of Washington stated (per Driver J.):

> "The essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adjusted to the nature of the case... A sterilization law which does not fairly and adequately afford the defective subject notice and assure him his day in court violates this guaranty" (344).

With a greater preoccupation for the protection of certain categories of persons, such as the criminal or the mentally-ill, there naturally will be an increased sensitivity towards the rights of persons falling within the contemplation of sterilization statutes. There is absolutely no valid reason why these persons should not enjoy all possible sources of pro-

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(341) (1933) 167 S.E. 638 (N.C.).
(342) (1935) 162 S. 123 (Ala.).
(343) (1942) 123 P. 2d 322 (Wash.).
(344) Ibid., p. 325.

tection available; the primary one being a clearly laid-out procedure with adequate provision for hearing and appeal. The more solicitous treatment of the criminal than that of persons in no way responsible for their insanity or feeble-mindedness, is totally unacceptable. All persons who are subject to legal constraint, whether of a penal or of a eugenic nature, should enjoy the same complete rights of protection from arbitrary infringements of personal liberty.

(v) Bill of Attainder and Ex Post Facto Legislation

Only in the single case of Davis v. Berry (345) was serious consideration given to any possible objections to a compulsory sterilization statute on the basis of its being a bill of attainder or an ex post facto law. Davis, a prisoner, in Iowa, was twice convicted of a felony and was therefore considered eligible for forced sterilization under the terms of the Iowa statute, (which provided that persons found guilty of felonies on two occasions would be rendered sterile). Davis objected on the grounds that one of his two convictions had occurred out of state and before the Iowa statute had been passed. While refusing to accept the point of view that under the circumstances, this was an ex post facto law, the court did feel that it constituted a bill of attainder since it inflicted a punishment for a past offence without a jury trial (346).

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(345) (1914) 216 F. Rptr. 413.

(346) Ibid., p. 419. See also, MILLAR, (1966) 1 U. of S.F. L.R., loc. cit., p. 165.

Of course, the bill of attainder objection always remains a useful means of defence against the sterilization of criminals, but in the area of pure eugenics, i.e. without any element of punishment or criminality involved, this form of protection does not avail.

(vi) The fundamental right to procreate

The notion of a fundamental right of procreation devolves mainly from the dicta of Mr. Justice Douglas, in the case of Skinner v. Oklahoma ex rel. Williams (347). In striking down a statute providing for the sterilization of habitual criminals, his opinion implied that underlying the equal protection clause was a concept of procreative liberty forming part of a total civil liberties package:

> "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. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty" (348).

(347) (1942) 62 S. Ct. 1110.

(348) Ibid., p. 1113.

This attitude fits in well with the apparently accretive tendencies of the American Supreme Court to avoid interference with personal liberty in the areas of sex and reproduction, provided of course that compelling state interests are not thereby seriously affected. Accordingly, Griswold et al v. Connecticut (349) affirmed the existence of the right of privacy surrounding the marriage relationship and the use of contraceptives. In Eisenstadt v. Baird (350), the right to have recourse to contraception was recognized as an individual right not necessarily dependent upon or associated with marriage. More recently, the Supreme Court went even further in holding that during the first trimester at least, the decision to abort a foetus would belong to the mother (in consultation with her physician) as part of her constitutional right of privacy (351).

In summary, these developments illustrate that in matters of reproduction, the recognition of the Ninth Amendment guarantee (352), as well as of the right of privacy and the related right of procreation, points to an increasing reluctance on the part of the Supreme Court to accept unwarranted invasions in these areas. Consequently, it would seem reasonably predictable that compulsory eugenic statutes will be viewed with greater impatience by constitutionalists, both off and on the bench, until this type of measure is struck down once and for all. Yet, it bears repeating that all the constitutional

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(349) (1965) 381 U.S. 479.

(350) (1972) 405 U.S. 438.

(351) Roe v. Wade, (1973) 93 S. Ct. 705 especially at p. 731; Doe v. Bolton, (1973) 93 S.Ct. 739.

(352) "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people".

questions already discussed may one day be viewed as the dress rehearsal of a larger drama-compulsory contraceptive sterilization. The first feeble steps in this direction have already been taken. With a scientific basis which is somewhat tarnished, the motivational emphasis gradually is forced to shift from pure eugenics to social and economic considerations (353), or, as one author puts it, towards the "new rationale" (354). In effect, greater stress is being placed on the supposed welfare of the potential child rather than on the procreative rights of the parents. Therefore, just as a person having a criminal background may provide a poor social environment for future progeny, so will an indigent parent on welfare, lacking the wherewithal to adequately support children, subject their offspring to economic deprivation and transform them into burdens of the state. In both sets of circumstances, there have been numerous instances in which probation from prison or welfare payments have been made conditional upon the performance of sterilizations (355). In situations of this sort however, the argument devolving from the notion of compelling state interest is a difficult one to refute unless one accepts the view-point that the right to procreate supercedes any possibility of children becoming liabilities of the state, or in other words, that in this area, private interests predominate over state interests. At this point in time, this appears highly unlikely (356).

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(353) MEYERS, The Human Body and the Law, op. cit., p. 37.

(354) PITTS, (1972) 26 Arkansas L.R., loc. cit., p. 353.

(355) See for example, PAUL, (1968) 3 Law and Soc. Rev., loc. cit., p. 77; MEYERS, op. cit., p. 37; FERSTER, (1966) 27 Ohio St. L.J., loc. cit., p. 610.

(356) PITTS, loc. cit., p. 359.

If a compelling state interest can be demonstrated effectively in a purely economic context, can this interest be easily opposed when more serious or imperative considerations are involved? Naturally we are contemplating the effects of the population explosion and the possibility of state intervention in order to keep population figures at least within subsistence levels (357). At this point in time, it would not appear foolhardy to predict that some measure of state control over procreation will probably become a reality within the next half-century (358).

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From our examination of eugenic sterilization, we may note that voluntary sterilization on eugenic grounds would appear to be licit in all the jurisdictions discussed. It cannot be denied that in particular cases, this measure may save families much heartache and expense, and as such, is properly viewed as a lawful medical procedure. As for the forced sterilization of certain categories of people, this practice still persists in a substantial proportion of the American states, much to their discredit. Unlike Glanville Williams, who views compulsory sterilization as a "proven means of social betterment" (359), we feel that distinct advantages (i.e. so-called

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(357) This thesis is defended by Jan C. GRAY, Compulsory Sterilization in a Free Society: Choices and Dilemmas, (1972) 41 U. of Cin . L.R. 529.

(358) Of course this refers to direct control rather than to indirect regulation such as the sale of contraceptives, birth control advertising, etc...

(359) The Sanctity of Life and the Criminal Law, op. cit., p. 81.

"racial" improvement), would result only if laws of this type were based on scientifically accurate premises and were applied universally. (That, of course, would presuppose our riding roughshod over the fundamental notions of personal liberty and corporeal integrity). In our view, this is a step our civilization cannot afford to take. Given the option, "three generations of imbeciles" is a small price indeed for freedom, if in fact such a choice has to be made.

Ideally, a partial solution would lie in the areas of popular education and in genetic-screening. Once aware of the hazards of procreation in certain cases, (e.g. haemophilia), a properly advised couple would probably opt for sterilization albeit with some remorse, but at least consoled by the fact that an innocent third party would be spared a very unhappy life, and that this decision would be arrived at freely without any outside coercion (aside from the forces of circumstance).

One may ask if a sterilization performed for eugenic reasons truly would be voluntary, if in fact the patient involved were insane or mentally defective? There certainly would not be any possibility of informed consent in most cases, and this would suffice to render such operations compulsory as far as the patients themselves are concerned. An appreciable distinction does however exist: In a context of state-imposed sterilization, compulsion in the true sense of the word would occur without any real consideration for the patient. In the other situations, where parents, guardians or curators request and consent to the surgery, the decision would be arrived at in the best interests of the subject. At least, this would be the goal in view. Even though the patient is but a passive bystander in the whole proceedings, the benefits sought would have to be in his or her favor rather than in favor of the state. Needless to say, the public interest and the interest of the

individual do not necessarily dovetail; so the distinction remains quite real.

Thus, we are inclined to agree with Meyers' viewpoint that:

> "In man's present state of knowledge, it is submitted that such treatment of any individual is only medically and morally justified when carried out pursuant to his free, uncoerced request, once the full implications of the operation have been brought home to him or to those private persons closest to him and responsible for his welfare" (360).

C) Legal aspects of purely contraceptive sterilization

Although the words "contraceptive sterilization" at first glance appear somewhat pleonastic, the idea of sterilizing a person merely to avoid the conception of children has provoked legal, moral and religious controversies of surprising intensity. The simplest explanation likely devolves from the teachings of St. Paul and the early Christians, who equated sex with sin, a moral lapse redeemed only by marriage (361). (The procreation of children would simply be a normal by-product of this type of activity). With the discovery of more effective methods of contraception (362), emphasis was eventually placed on the notion that any interference with the

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(360) The Human Body and the Law, op. cit., p. 46.

(361) E.g. 1 Corinthians 7:9.

(362) After all, Onan was struck down by God for practising ... onanism. Cf. Genesis 38:8-10. More recent studies confirm that Onanism or coitus interruptus is quite a risky contraceptive procedure.

natural consequences of the sex act would render the whole activity sinful (363).

With a redefinition of the goals of marriage and with perhaps a liberal dose of religious cynicism thrown in, public pressures upon surgeons to perform sterilizations are increasing astronomically, and may be presumed to have reached a point (in the public's mind at least), where sterilization is merely another form of surgery or an alternative method of contraception. Yet the law in many jurisdictions, just stumbles behind, with not one legislative word written about this type of procedure. Consequently, the medical profession feels somewhat buffeted not only by public opinion as opposed to its own collective philosophy or morality, but also by what it feels, and justly so, is a total avoidance of formal legal guidance on the subject of sterilization.

This has given rise to a type of "strength through numbers" approach, in which arbitrary but uniform standards are applied to accept or refuse requests for sterilizations. As a result, one surgeon cannot be faulted (except in instances of surgical malpractice) for following guidelines accepted by a majority of his or her profession. The World Health Organization, for example, has advanced the "One Hundred Rule" which consists of an age/parity formula. Under this system, the age of a woman multiplied by the number of her living children must equal a hundred. Unless this "magic" figure is attained, a sterilization will be refused (364). The Association of Obstetri-

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(363) This position is still held by the Roman Catholic Church.

(364) Michel PERREAULT, Ce qu'il nous faut faire en planning des naissances au Québec in (1974) 1 Planning des naissances au Québec 4.

cians and Gynecologists of Quebec has also adopted this rule but with the double modification that (a) ten points are added automatically to each total, (or in other words, the "magic" number is ninety), and (b) in certain cases where the one hundred points are not attained, the sterilization may still be performed provided that two outside consultants agree to the procedure (365).

The weaknesses inherent in any rule as arbitrary as the one above-described, leap to mind: Firstly, how can anyone, especially persons with scientific backgrounds, justify the sterilization of a thirty-four year old mother of three children while refusing a thirty-three year old woman with a similar number of offspring, or indeed a thirty-five year old woman with two children (366)?

Secondly, from a strictly legal point of view, how can any court, in the absence of a formal legal text so stating, fault the sterilization of one of the women described above without doing the same for the others (367).

Thirdly, aside from the possible medical indications which result from multiparity (368), why should this type of

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(365) Letter dated the 22nd of February 1973, circulated by Dr. Jacques M. Gagnon, registrar of the Association of Obstetricians and Gynecologists of Quebec.

(366) This, of course, presupposes that we are working under the W.H.O. hundred point system.

(367) We presume that all the other factors such as intelligence, health, sanity etc... are relatively identical.

(368) The opinion is often expressed that after eight pregnancies, the multiparous woman should be offered sterilization on medical grounds. Cf. BLACK, Abortion and Sterilization, (1961) 33 Man. Bar News, loc. cit., p. 35.

standard be applied to women seeking tubal ligations and not to men requesting vasectomies?

Finally, any decision which does not seriously consider the individual circumstances of each patient such as intelligence, psychological status, age, health, marital situation, etc... should not be dignified with the adjective "medical". In determining whether to sterilize or not, the physician should not act (or react) as a petty bureaucrat who simply and unquestioningly applies arbitrary norms handed down from above.

Yet, in many, and one could venture, in most circumstances, the requests for purely contraceptive sterilization are neither irrational nor frivolously made, especially where serious reasons exist for such an application. The examples which most readily come to mind include the inability to utilize "traditional" contraceptive measures, and the idea of having to have recourse to mechanical or chemical forms of contraception for decades after a desired family size has been reached.

During the next several pages, we will discuss whether or not contraceptive sterilizations are in fact licit. We will also examine the effects sterilization may have on the legal aspects of the matrimonial relationship.

a) <u>The legality of purely contraceptive sterilization</u>

(1) <u>The Common Law jurisdictions</u>

(i) England

As in most other jurisdictions, the legality of purely contraceptive sterilization in England has remained, until fairly recently at least, the subject of heated controversy. Writing in 1953, one author mentioned that he had occasion to read during the preceding twenty-five years, several opinions on the subject by eminent jurists, which ranged from a categorical affirmation that sterilization, except for therapeutic purposes, was a felony punishable by life imprisonment, to an equally categorical statement that no offence was involved (369). Although the preferable opinion, at least from a legal point of view, was to the effect that sterilization did not constitute mayhem (370), persistent doubts as to the applicability of the assault provisions of the Offences Against the Person Act (1861) (371) caused the medical profession generally to play for safety and avoid the issue. Public declarations such as that of the Departmental Committee on Sterilization in the United Kingdom (the so-called "Brock Report" of 1934) which seriously questioned the legality of eugenic and contraceptive sterilization (372), merely served to reinforce these attitudes.

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(369) Cecil BINNEY, Legal Problems Raised by Modern Discoveries About Sex, (1953) 21 Medico-Legal Journal 90 at p. 94.

(370) G.W. BARTHOLOMEW, Legal Implications of Voluntary Sterilization Operations, (1959) 2 Melbourne U. L.R. 77 at p. 89. Of course, only the actual castration (as opposed to a vasectomy) of the male would constitute a maim. As for women, the law of maim historically did not apply to them. Cf. WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 104.

(371) 24-25 Vict., c. 100, sec. 18.

(372) BARTHOLOMEW, (1959) 2 Melbourne U. L.R., loc. cit., p. 78.

This eventually became the official posture of the British Medical Association in 1949, after it was advised to this effect by an opinion emanating from counsel (373).

Up to this point, heavy reliance was placed upon the landmark case of Rex v. Donovan (374) involving the sexual flagellation of a consenting female victim, which appeared to deny the validity of a defence of consent in circumstances adjudged morally reprehensible per se (375). The Court of Appeal case of Bravery v. Bravery (376) merely exacerbated the issue by specifically relating the validity of consent as exculpatory grounds to the problem of contraceptive sterilization. In his dissent to the Bravery decision, Denning L.J. permitted himself to express an obiter opinion on the criteria for lawful sterilization:

> "An ordinary surgical operation, which is done for the sake of a man's health, with his consent is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it... Likewise with a sterilization operation. When it is done with the man's consent for a just cause, it is quite lawful, as for instance,

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(373) WILLIAMS, (1962) Crim. L. Rev., loc. cit., p. 158.

(374) (1934) 2 K.B. 498.

(375) Ibid., p. 507.

(376) (1954) 3 All. E.R. 59. The fact situation, involving a divorce action by the wife against her husband on the grounds of cruelty arising from his obtaining a vasectomy, has already been described in detail, supra pp 225 et seq.

> when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it" (377).

As examples of situations where "just cause" would be lacking, Denning L.J. provided the following:

> "Take a case where a sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsabilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman he may marry, to say nothing of the way it opens to licentiousness; and unlike contraceptives, it allows no room for a change of mind on either side" (378).

As it may be recalled, the majority of the Court of Appeal (Evershed M.R.; Hodson L.J.) summarily dismissed this point of view with a comment to the effect that not only were the observations made by Denning L.J. analogizing prize-fights and sterilizations inappropriate, but also that said majority was not prepared to hold that surgical sterilizations were injurious to the public interest (379). Oddly enough, in spite of this rather emphatic disclaimer, Lord Justice Denning's dissent inserted a note of hesitancy into attitudes which were crystallizing in favor of contraceptive sterilization.

However, two-pronged attacks on Denning's comments

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(377) Ibid., pp. 67-68.

(378) Ibid., p. 68.

(379) Ibid., p. 64.

soon appeared in legal articles and books (no subsequent court having had the occasion to review this or a similar case involving sterilization). The first source of discontent addressed itself to the findings of the Donovan case (380), upon which Denning L.J. placed such great reliance. The main thrust would appear to be directed against the proposition that any act likely to inflict bodily harm would constitute a malum in se unremedied by the victim's consent (381). The Donovan court (Swift J.) also defined "bodily harm" as "... any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must ... be more than merely transient and trifling" (382). Obviously, the furthest thing from the court's mind while making such sweeping generalizations was the idea that surgical operations could fall within the purview of the notion of "bodily harm" (383). Although some feel that, as a matter of policy, the case was badly decided since people are usually the best judges of their own interest, and in consenting to a sadistic act, they should assume the inconveniences resulting therefrom (384), the more conventional point of view tends towards the theory that Justice Swift stumbled badly in attempting

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(380) (1934) 2 K.B. 498.

(381) Ibid., p. 507.

(382) Per Swift J., ibid., at p. 509.

(383) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 106; WILLIAMS, Consent and Public Policy, (1962) Crim. L.R., loc. cit., at pp. 156-157; G.J. HUGHES, Criminal Law - Defence of Consent - Test to be Applied, (1955) 33 C.B.R. 88 at p. 92; BARTHOLOMEW, (1959) 2 Melbourne U. L.R., loc. cit., p. 93.

(384) WILLIAMS, The Sanctity of Life and the Criminal Law, ibid., p. 106.

to set out public policy standards (385). Instead of basing legality upon the degree of harm caused (as in Donovan), or indeed upon the pure question of consent as Glanville Williams has so emphatically urged (386), we feel that the preferable solution would be to decide each case in light of the general principle that any gesture which is directly or indirectly adverse to the interests of society would be contrary to public policy. Accordingly, some acts would never be approved by the community (e.g. premeditated murder (387)), and yet others could be acceptable to society provided the "victim" consented thereto, (e.g. boxing matches, ritual circumcision, surgery) (388). Consent would therefore appear to be pertinent as a means of defence only in cases where the community at large generally approves the type of act or gesture in question. Without such approval, "consent" could never suffice in its own right (389). This type of approach would obviously eliminate much of the

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(385) G. HUGHES, Two Views of Consent in the Criminal Law, (1963) 26 Mod. L.R. 233, at pp. 236-237; HUGHES, (1955) 33 C.B.R., loc. cit., p. 92; MEYERS, The Human Body and the Law, op. cit., p. 15.

(386) (1962) Crim. L.R., loc. cit., p. 159; The Sanctity of Life and the Criminal Law, op. cit., p. 106.

(387) Although many anti-abortion militants would debate this point.

(388) HUGHES, (1955) 33 C.B.R., loc. cit., p. 92; MEYERS, op. cit., p. 15.

(389) P. SKEGG in Medical Procedures and the Crime of Battery, (1974) Crim. L.R. 693, at p. 700 states: "In seeking to determine whether a procedure is injurious to the public interest, any consideration which supports the conclusion that there is a just cause or excuse for it remains applicable. But other considerations could also be taken into account. Perhaps the most important of these is the interest in individual liberty and self-determination...

Although it is not inherent in the test itself, this approach might also enable a court to consider whether the public interest is best served by their deciding that the application of force amounted to the crime of battery, despite consent".

uncertainty inherent in the Donovan rule with regards to surgical procedures (390).

The second target of criticism in the Bravery case was the "just cause" standard laid down in the Denning dissent. After pointing out the acceptability of therapeutic and eugenic sterilization, the learned justice faulted purely contraceptive sterilization due to the absence of "just cause", on the rather specious grounds that this type of operation leads to licentiousness and permits irresponsible sexual pleasure (391). Could not a distinction be made between the serious, well thought-out decision of a mature person not to have children, and a measure of expediency which permits the libertine and prostitute to continue their activities unburdened by the hazards of pregnancy? Of course, public policy considerations could well militate against the latter and according to some, would even place in doubt the legality of all purely contraceptive sterilizations (392). Undoubtedly, in each of the above situations, there is irresponsability in the sense that sex is indulged in for its own sake, without the "normal" risk of parenthood. Yet,in actual fact, could one not delve deeper and perceive sterilization as a most proper precaution for persons who simply do not want children due to reasons of time, economics, age,or mere whim? It is the birthright of every

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(390) Naturally, our discussion always involves the Criminal law since under Tort law, the defendant could easily invoke the volenti non fit injuria plea.

(391) (1954) 3 All. E.R., loc. cit., at p. 68.

(392) WILLIAMS, (1962) Crim. L.R., loc. cit., at p. 158.

child to be born to parents who positively desire the infant's presence.

An additional argument may also be found in the fact that contraception is no longer a legal issue, and if one can lawfully avoid procreation through mechanical or chemical means, why not through surgical methods (393)? Lord Justice Denning gave an answer of sorts to this very question by noting that a sterilization, unlike contraceptives, does not allow any room for a subsequent change of heart. Some writers seized upon this argument to point out that reversal operations are achieving greater success rates each year (394). However, this type of reply, although factually accurate, merely begs the question. In truth, the irreversibility issue is of secondary importance. Life can be difficult and we are often called upon to make unalterable decisions which we may eventually have occasion to lament. It is probably just as easy to regret having produced a child as it is to rue having given effect to the decision never to have one. Sane capable adults who are duly advised of the consequences of any act must shoulder all liabilities which result therefrom.

Following the Bravery case, the situation remained legally ambiguous for physicians (395) until 1960, when the

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(393) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 107.

(394) G. HUGHES, Two Views of Consent in the Criminal Law, (1963) 26 Mod. L.R., loc. cit., p. 238; BARTHOLOMEW, (1959) 2 Melbourne U. L.R., loc. cit., p. 94.

(395) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 108.

Medical Defence Union sought and received an updated opinion on the whole issue of sterilization. This opinion affirmed that provided an enlightened consent were obtained; sterilizations for any reason would be valid (396). In light of this advice, the Secretary of the Medical Defence Union, Dr. Philip Addison, was able to assert:

> "... We have no hesitation in advising members of the medical profession in Britain that sterilization carried out merely on the grounds of personal convenience, in other words as a convenient method of birth control, is a legitimate legal undertaking" (397).

In a publication of more recent date, the Deputy-Secretary of the Medical Protection Society, Dr. J. Leahy Taylor, was somewhat less categorical in his book, The Doctor and Law which was clearly intended only as a practical guide for physicians:

> "In the absence of a judicial decision, there can be no certainty, but it is thought that the operation would only be held to be unlawful if it were proved that there was some element of moral turpitude or damage to the public interest" (398).

Undoubtedly, in the absence of statute or jurisprudence addressing itself squarely to this issue, sweeping statements are somewhat hazardous. However, it seems clear from

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(396) (1960) 2 British Medical Journal 1516.

(397) Legal Aspects of Sterilization and Contraception, (1967) 35 Med. Leg. J., loc. cit., p. 164.

(398) London, Pitman Medical & Scientific Publishing Co. Ltd., 1970, p. 81.

various circumstances, including the fact that the British National Health Service issues free birth control devices and drugs to all who ask, irrespective of age (399), that at least family planning is officially perceived as not being contrary to public policy. In addition, the total lack of jurisprudence condemning contraception by artificial means encourages one in the belief that if the issue of sterilization arose, the courts would tend to view it favorably. Of course, the most questionable aspect involves the permanent effect of a sterilization as opposed to the temporary protection afforded by non-surgical contraceptive methods. It is submitted, nevertheless, that this line of logic avoids the basic issue - whether contraception is valid or not. If it is licit, then there is no reason why one should distinguish the methods utilized since the outcome is the same - the avoidance of conception.

In order for it to be performed lawfully, the patient must give an enlightened consent to the sterilization. In the absence of such consent, the patient could complain of assault or trespass (400). Such being the case, it would be reasonable to assume that mental defectives cannot obtain sterilizations, even with the consent of their parents or guardians, unless that type of operation is to their benefit (401). This would certainly occur where the indications for sterilization are therapeutic, although it is more difficult to visualize circum-

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(399) The Pill Free to All in Britain, The Montreal Star, Friday, 29th of March 1974, p. C-6, col. 5; P.T. O'Neill and I. Watson, The Father and the Unborn Child, (1975) 38 Modern Law Review 174 reason along the same lines when they write (at p. 181): "Considering the fact that there is no conclusive statement on the legality of sterilisation, it is astonishing that the legislature should have produced the National Health (Family Planning) Amendment Act 1972, empowering Local Authorities to provide a vasectomy service, without having first made it clear that voluntary vasectomy is lawful. One can only assume that the legislature is confident that the judiciary is now certain that sterilisation is not unlawful".

(400) ADDISON, (1967) 35 Med. Leg. J., loc. cit., p. 164.

(401) WILLIAMS, The Sanctity of Life and the Criminal Law, op. cit., p. 111.

stances where eugenic or contraceptive sterilization would accrue to the patient's advantage (402). Any future court debate would necessarily revolve around the notion of "benefit", which can be given either a narrow or an extensive definition. In the strictest sense, "benefit" may be interpreted as an improvement of physical status (e.g. the removal of diseased ovaries), whereas if given a larger signification, "benefit" could be viewed as an improvement in physical, mental or emotional status. In attributing this more liberal shading to the notion of "benefit", a purely contraceptive sterilization certainly would be legal, for example, in a situation where a moderately retarded (403) but very promiscuous female mental defective could otherwise function adequately in a somewhat protected environment. The danger involved is that the persons responsible for the care and supervision of the mentally deficient could unconsciously attempt to bend the idea of "benefit" to accomodate themselves rather than to ameliorate the situations of their patients. Thus, the director of a publicly-supported home for the mentally deficient would be tempted to sterilize the more sexually active of his charges rather than increase the number of supervisors. Here again, only a statutory or juridical definition of the term "benefit" as applicable to incapable persons could afford us any certainty in this

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(402) WILLIAMS, ibid.

(403) The levels of retardation include mild, moderate, severe and profound. A description of each category may be found in Charles W. MURDOCK, Sterilization of the Retarded: A Problem or a Solution, (1974) 62 Cal. L.R. 917, at p. 928.

area (404). Perhaps this very absence of jurisprudence speaks well of the manner in which mental patients are treated in England.

(ii) The Anglo-Canadian Provinces

In the absence of formal legislation or of jurisprudence indicative of the direction in which judicial sympathies lie (405), the legality of purely contraceptive sterilization depends in some measure, upon whether this type of surgery falls

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(404) Under the Mental Health Act 1959, 7-8 El. II, c. 72, sec. 34 (1), the person or persons named guardians possess, subject to the regulations made by the minister, "... all such powers as would be exercisable by them or him in relation to the patient if they or he were the father of the patient and the patient were under the age of fourteen years".

According to the regulations in question, (S.I. 1960, no 1241, reg. 6 (1)), "the guardian shall, so far as is practicable, make arrangements for the occupation, training or employment of the patient and for his recreation and general welfare and shall ensure that everything practicable is done for the promotion of his physical and mental health". It is obvious from these provisions that very little light is cast upon the particular problem under discussion.

(405) In their article, Parenthood and the Mentally Retarded, (1974) 24 U of T. L.J. 117, Bernard GREEN and Rena PAUL state (at p. 121) that the only Criminal Code sections which could possibly apply to sterilization are 244 (assault) and 228 (causing bodily harm with intent). They conclude that these are only remote possibilities.

within the purview of sec. 45 of the Criminal Code (406). As it may be recalled, sec. 45 Cr. C. provides that no criminal liability attaches to a surgical act, provided inter alia that it is for the benefit of the patient and that it is reasonable to perform the operation according to the health of the person as well as to the circumstances of the case (407). From our discussion of English Law, we are well aware of the contrasting interpretations and viewpoints which may surround the whole concept of "benefit". To date, Canadian attitudes have generally tended towards conservatism and, indeed, Meredith advocated a very narrow application of this notion when he wrote (in 1956):

> "But a needless operation causing injury to the patient, is obviously not for his 'benefit', and, notwithstanding his consent to undergo it, may be the subject of a criminal charge. Included in this category are operations for the sterilization of a male or female, unless performed for the patient's health, or in virtue of a special statutory provision" (408).

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(406) Provided that sterilizations for purely contraceptive purposes are not otherwise contrary to public policy.

(407) The full text of sec. 45 Cr. C. reads as follows: "Everyone is protected from criminal responsability for performing a surgical operation upon any person for the benefit of that person if: (a) the operation is performed with reasonable care and skill and, (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case".

(408) Malpractice Liability of Doctors and Hospitals, op. cit., p. 217. It would have been interesting to know Meredith's views on cosmetic surgery but regrettably, no opinion is expressed in this regard.

Dr. J.L. Fisher of the Canadian Medical Protective Association subsequently ratified this point of view in 1964, in the following terms:

> "This leaves no doubt. The benefit shall not be to the spouse, to a companion, to a pocket-book, to society as a whole, to an idea or theory, or to any other nebulous thing; it shall be 'to that person'" (409).

There is also the difficulty in determining whether the "benefit" concept should be viewed subjectively or objectively, or in other terms, whether the operation can be beneficial only in the eyes of the patient, or else whether it must so be not only in the eyes of the patient but also in those of the average person in similar circumstances as the patient. Perhaps the two following hypothetical situations illustrate this conflict: On the one hand, we may encounter a young, upper-middle class socialite having no children and who desires sterilization merely to avoid putting her youthful figure through the rigors of pregnancy. On the other hand, the situation may involve a lower-class woman living in a cold-water flat with her five children, aged six and younger, and whose alcoholic husband is on welfare. One's first impulse is to seize upon the second fact-situation as being a more valid application of the notion of "benefit" in relation to the first, and our less fortunate woman probably <u>does</u> possess a more sympathetic case. It is submitted, however, that although the <u>Criminal Code</u> would seem to require an objective rather than subjective appreciation, the

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(409) (1964) 91 C.M.A.J., <u>loc. cit.</u>, at p. 1365. From a letter of his published at (1970) 103 C.M.A.J. 1394, it would seem that Dr. Fisher does not often change attitudes.

conflit is more imagined than real. As Glanville Williams once wrote: "Human beings are usually the best judges of their own interest ..." (410). If this is indeed true, (and we have no reason to doubt it), then every sane capable adult who seriously desires a surgical operation not otherwise prohibited by public policy considerations, normally draws gratification, mental tranquility or some other equivalent form of satisfaction from it. As a result, these subjective advantages derived from a sterilization, objectively improve the emotional outlook of the patient, or in other words, they confer a "benefit" upon the person in question. Naturally, on the other side of the coin, there is still the loss of the power to procreate. Nevertheless, if no imperative social considerations require the production of children, then there is no reason why society should place a thumb on one pan of the scales, rather than on the other, in order to promote a particular point of view. Each person must decide what is more beneficial to him or to her. We might also mention that, in the general context of matrimony, the idea of "benefit" should be viewed as applying to both consorts rather than to each one individually. Of course, this collective standard avails only in matters such as sex and reproduction, which directly appertain to the marriage relationship itself.

As for the civil law and the public policy considerations concerning purely contraceptive sterilization, only one case remotely bears on the subject. In the unreported Ontario decision of Chivers and Chivers v. Weaver and McIntyre (unfortunately also undated) (411), a woman slated to undergo surgery

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(410) The Sanctity of Life and the Criminal Law, op. cit., p. 106.

(411) This case is described in Comments Upon the Law Relating to Abortion and Sterilization, annexed to BLACK's article Abortion and Sterilization, (1961) 33 Manitoba Bar News, loc. cit., pp. 42-43.

for the removal of a diseased ovary, requested her own physician to render her sterile. During the surgery, the surgeon went ahead and ligated the remaining fallopian tube on the instructions of the family physician, who was assisting at the operation. Shortly thereafter, the husband and wife sued for assault, claiming that no specific consent had been granted to the ligation. Although the jury eventually found in favour of the physicians, this case is noteworthy in that at no time was there any suggestion by Kelly, J. that, notwithstanding consent, the operation was unlawful. He merely tried to issue on the side question of consent.

In spite of the minor encouragement derived from the Chivers case as well as from legal articles which expressed favorable opinions in connection with the sterilization controversy (412), the Canadian Medical Protective Association actively discouraged doctors from performing sterilizations except on therapeutic grounds (413), even though it grudgingly admitted that the purely contraceptive operation was probably legal (414). The rationale appears to have been one of avoiding a potential source of trouble, since readily available contraceptives could attain the same ends without destroying healthy tissue. It was also urged that if the reasons for requesting sterilization were

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(412) E.g. BLACK, ibid., p. 45.

(413) "... Only for the preservation of the health or life of the individual concerned". Cf. FISHER, (1964) 91 C.M.A.J., loc. cit., p. 1365.

(414) Ibid., p. 1364.

non-medical, then they did not concern the doctor. Succinctly stated, the argument was one of "why get involved unnecessarily"; public policy did not seem at all in issue.

In 1970, after several queries on the subject of voluntary sterilization, the Canadian Medical Protective Association issued a revised opinion. The legal foundation upon which this still current opinion is based is that of custom - the fact that this type of surgery has become relatively common (415). The opinion further states:

> "The Association thinking has reached the point where it now feels the problem should be left for decision by the individual doctor faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment. One should start by realizing that under these particular circumstances, there is no medical indication for such an operation so that doctors should not use those words to themselves; they should think in terms of 'reasons' and then they should weigh their patients' reasons for wishing the operation to decide if they, the doctors, feel those reasons are valid" (416).

In addition, a standard of sorts is provided for appreciating the validity of the "reasons" advanced:

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(415) Sexual Sterilization for Non-Medical Reasons, (1970) 102 C.M.A.J. 211.

(416) Ibid.

> "If the doctor decides he can agree with the reasons for surgery, he should review those reasons to be sure they are such that he could expect agreement about them, or at worst not disagreement, by a majority of his confrères were they asked later in court for their opinion about his judgment. If his confrères agreed, a court probably would; if they did not, their evidence might persuade a court the doctor under scrutiny probably was wrong, or lax". (417).

The text then goes on to deal with the duty of the doctor to mention the efficacy of non-surgical contraceptive methods, and with the requirements of consent.

With all due respect to the C.M.P.A., there would appear to be some incongruities in its position. In effect, it asserts that said modified opinion in favor of purely contraceptive sterilization derives its legal basis from the idea of custom - or in other words, from the feeling that non-essential sterilization is no longer contrary to public policy. Further on, the Association encourages doctors to sterilize only for reasons which would be acceptable to the majority of the members of their profession, on the grounds that a court of law would follow the majority's lead in deciding on the validity of the decision to sterilize in a given situation. The error in reasoning reposes upon the fact that physicians may testify as experts only in the field of their expertise, i.e. medicine, and even here, a judge is not bound to adopt the opinions expressed by the experts (even though he would most likely rely heavily on their testimony, at least as regards technical subjects). In non-medical areas, (and this is precisely the situation encountered when dealing with purely contraceptive sterilization), a physician is no more qualified to pass upon the reasons advanced with the request for surgery, than is any other average per-

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(417) Ibid.

son. Thus, a judge would depend upon his own knowledge and experience in arriving at a decision. Paradoxically, the C.M.P.A., in its insistance upon the value of custom or public policy, appears to presume that public policy as viewed by the medical profession and "true" public policy are one and the same. The fallacy of this attitude is obvious. It cannot be denied however that, in general, such an outlook plays for safety since the medical profession is not noted for being avant-gardist. The greatest inconvenience derives from the fact that some patients risk having their legitimate requests for sterilization refused, if the surgeon arbitrarily decides that the reasons advanced are insufficient.

Interestingly enough, a more acceptable alternative is suggested by Dr. Philip M. Alderman, a Vancouver physician who felt constrained to comment on the merits of the C.M.P.A. opinion. After pointing out the difficulties inherent in determining what <u>is</u> the consensus of the medical profession as regards "valid reasons", he goes on to state:

> "To date, I have been unable myself to formulate the indications for voluntary sterilization, other than the expressed desire to limit family size with certainty. Contraindications are more readily discernible, and those performing the operation may concern themselves with such factors as inappropriate motivation, unresolved psychosexual problems, hemorrhagic disease, and the withholding of the spouse's consent.
>
> Unquestionably it is the physician's duty to assure himself of the physical and mental health of persons requesting voluntary sterilization and to inform them fully of the risks and alternatives. Having done so, however, it is my opinion that the final decision as to contraceptive method can legitimately be left to the intelligent patient" (418).

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(418) <u>Correspondence - Voluntary Sterilization</u>, (1970) 103 C.M.A.J. 1391-1392.

This statement has extraordinary merit for two reasons: Firstly, it is logical, legally speaking, and secondly, it respects the dignity of the patient. The legal logic is apparent since a purely contraceptive sterilization is either licit or else it is not. If it is legal, then the physician's duty is to refuse to act only in situations where this type of surgery is objectively inappropriate, as for instance in cases where the physical or mental status of the patient contraindicate the sterilization. The imposition of arbitrary standards such as an age/parity formula or any other similar measure will not modify, by one iota, the legal status of the operation.

The dignity of the patient is respected in that as a competent mature person, he or she is granted a type of right of medical self-determination. Just as the patient may refuse blood transfusions because of religious convictions, or seek death with dignity (i.e. the suspension of all extraordinary life-support measures), it would seem equally reasonable for a patient to determine how and when contraception shall occur. In being given greater freedom of choice, the responsability for any subsequent regrets arising out of such a decision will, of course, have to rest upon the patient.

Therefore, Dr. Alderman's statement to the effect that, in the absence of physical, mental or marital contraindications, the decision to undergo sterilization should be left to the properly informed patient, is an accurate appreciation of the legal status of this type of operation in the Anglo-Canadian provinces (419).

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(419) See also BLACK, (1961) 33 Man. Bar News, loc. cit., at p. 45, as well as GREEN and PAUL, (1974) 24 U. of T. L.J., loc. cit., who conclude at p. 121: "Doubts concerning the legality of sterilization have been raised, but they seem to be without substance - at least in relation to the sterilization of a normal adult".

(iii) The United States

Of the fifty American States, fourteen (to wit Arkansas, California, Colorado, Connecticut, Florida, Georgia, Iowa, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Virginia, West Virginia) have, through legislative enactment, opted expressly or implicitly in favor of sterilization without medical necessity (420). Only the State of Utah (421) still has

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(420) Cf. Arkansas Family Planning Act, art. 235, sec. 2(b), adopted 7 March 1973); California Health and Safety Code, nos 1225, 1416, 1459, 32128.10 (adopted 29 Dec. 1972). (Note that the legislation merely forbids clinics and hospitals of different categories from forcing candidates for sterilization to meet non-medical qualifications not imposed on persons seeking other types of surgery); Colorado Revised Statutes 66-32-2 sec. 5. As regards Connecticut, we have been unable to trace any concrete evidence of favorable legislation although SAGALL, writing in (1972) 8 Trial, loc. cit., p. 59, states that such legislation exists. McKENZIE's article which was written in 1973 (25 U. of Fla. L.R., loc. cit., p. 328, note 19) makes no such mention. The Reporter on Human Reproduction and the Law is also mute as regards Connecticut. Florida's Family Planning Act, ch. 72-132 (Laws of 1972) sec. 4 provides for the implementation of a family planning program authorized to dispense all medically recognized methods of contraception. Sec. 5 of this Act forbids however that minors be made sterile surgically. Georgia, Code Ann, no 84-931 to 935-2 (Supp. 1971); Iowa Code no 234-24 affirms that decisions concerning family planning and birth control form part of the fundamental rights of the individual; North Carolina General Statutes 90-271 to 274 (Supp. 1971); Oklahoma Stat. adopted 27 Feb. 1973 (cited in 1972-73 Reporter on Human Reproduction and the Law, op. cit., p. 111-B-23; Oregon Revised Statutes 435.305; Rhode Island General Laws 11-9-17 (adopted 10 May 1974) expressly forbid the sterilization of minors under 18 years of age except for therapeutic purposes; therefore, a contrario the sterilization of adults appears licit. Tennessee Health and Safety Code 53-4604 and 4608; Virginia Code Ann no 32-423 to 427 (1969); West Virginia Codes 16-11-1 (adopted 25 March 1974). Idaho 1973 Laws ch. 200 (S-Bill 1187) (adopted 16 March 1973) sec. 1 and Montana 1974 New Laws, p. 421 (adopted 21 March 1974) sec. 2 both simply state that no physician, hospital, or medical staff member shall be required to participate in any sterilization procedure if they consider such an act morally repugnant.

(421) Utah Code Ann. 64-10-2 (1961)

legislation on its books which is apparently hostile to voluntary sterilization. However, as we have already had occasion to discover (422), the Supreme Court of Utah in Parker v. Rampton (423) has seen fit to place a very limited interpretation upon the Utah statute, restricting its application only to institutionalized mental defectives (424).

As a result, there would not appear to be any legislative provision expressly denying the right for any non-institutionalized person from having recourse to sterilization as a purely contraceptive measure. This finding, as regards the legislative branch at least, would seem to render academic, any discussion involving the constitutionality of laws forbidding voluntary sterilization in light of the U.S. Supreme Court decision in Griswold v. Connecticut (425), which acknowledges and protects the right of marital privacy (426).

In the absence of express statutory guidance, the criminal liability of physicians for contraceptive sterilizations possibly may be incurred via the mayhem or the assault and battery laws, even though there have never been any reported prosecutions of this nature arising from these or similar circumstances.

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(422) Supra, p.234 et seq.

(423) (1972) 497 P. 2d. 848.

(424) The dissents in this case were limited exclusively to matters of procedure, cf. ibid., pp. 853-854.

(425) (1965) 381 U.S. 475.

(426) SAGALL, (1972) 8 Trial, loc. cit., p. 59. The California Court of Appeal suggested the feasibility of this argument in Jessin v. County of Shasta, (1969) 274 Cal. App. 2d 739 (or 79 Cal. Rptr. 359 at p. 366), and in Custodio v. Bauer, (1967) 59 Cal. Rptr. 463 at p. 473.

Although mayhem in its original sense sought to punish all mutilations which rendered men less able to fight for the King (427), this common law crime was eventually given statutory form and evolved into the "malicious maiming" laws which we know today (428). Whereas common law mayhem applied exclusively to men and sanctioned only injuries of a specific nature (i.e. injuries affecting the "fighting capabilities"), the modern maiming legislations now cover both sexes and most forms of disfigurements or mutilations (429). Consequently, even though a surgical sterilization (except by castration) could never constitute mayhem, the broader provisions of the maiming statutes could easily pertain to this type of operation, especially when the redeeming feature of medical necessity is absent.

Legal writers have suggested several reasons why the maiming provisions should not apply to voluntary surgery: Firstly, as regards the nature of the operation itself, many express the opinion that the cutting of the vas deferens or of the fallopian tubes does not signify a "disabling" nor are "members" of the human body involved (430). Secondly, it is seriously

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(427) L. BRAVENEC, Voluntary Sterilization as a Crime: Applicability of Assault and Battery and of Mayhem, (1966) 6 J. of Family Law 94, at p. 117.

(428) McKENZIE, (1973) 25 U. of Fla. L.R., loc. cit., p. 329.

(429) CHAMPLIN, WINSLOW, (1965) 113 U. of Pa. L.R., loc. cit., p. 428. As for the applicability of maiming statutes to the protection of the reproductive organs of women, see Kitchens v. State, (1888) 7 S.E. 209 (Ga.).

(430) P. TIERNEY, Voluntary Sterilization, A Necessary Alternative?, (1970) 4 Family L.Q. 373, at p. 377; BRAVENEC, loc. cit., p. 119. In an extensive analysis of the meaning of these words, Bravenec encounters some difficulty with the term "disable" since surgical sterilizations certainly "disable" or end procreation: "Under a functional definition of disabling, sterilization would be considered to disable the patient, because it terminates one of the many functions of the genital organs ... On the other hand, under a purposeful definition of disabling, there would be no disabling by sterilization if the procreative function were unnecessary or undesirable. A principal problem in following this definition would be in developing a test of, or desirability of, such function".

questioned whether the required malicious intent is present, especially in a medical context and in accordance the patient's informed consent (431). Malice has been viewed as the intent to injure another without justification, or with the intent to perform an illegal act (432), and in the patient-physician relationship, said intent normally would be absent. Caution must still be exercised since, in many cases, the statutory requirements for malice would be satisfied simply by the specific intent to perform the act in question (433). In the latter hypothesis, before acquitting a physician, it would be necessary for the courts to make a determination as to the legality of sterilization per se, that is to say, an acquittal would rest upon the finding that contraceptive sterilization is not a priori a reprehensible act (434). A third approach concerning the non-applicability of the "maiming" laws devolves from the somewhat innovative argument to the effect that since the rational basis of these laws has altered considerably, then the consent of the "victim" should constitute a valid defence (435). Originally, the sovereign's interests were safeguarded by the sanctions surrounding mayhem, whereas now a strong analogy may be made between the interests protected by laws prohibiting assault and battery, and those secured by edicts which forbid disablement and disfigurement. According to one writer, consent should be a complete defence unless its disallowance is dictated by reasons of public policy (436). As interesting as this notion may be, the present state of the law rejects the possi-

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(431) TIERNEY, loc. cit., p. 377.
(432) People v. Bryan, (1961) 12 Cal. Rptr. 361 at p. 364 (Bray J.).
(433) CHAMPLIN, WINSLOW; (1965) 113 U. of Pa. L.R., loc. cit., p. 429.
(434) Provided of course that the maiming statutes do in fact apply.
(435) BRAVENEC, (1966) 6 J. of Family L., loc. cit., p. 121.
(436) Ibid., p. 122.

bility that consent will form a valid defence to mayhem, precisely because now one of the goals of the maiming statutes is to protect the individual from himself (437). In addition, the traditional obligation of fighting for the king has been transformed into a broader, more modern concept of duty towards society, (not necessarily limited only to military service). The fact of being eligible for public service, and of not being a public charge due to a criminally-inflicted injury, are interests to be protected by law. Accordingly, the North Carolina Supreme Court in State v. Bass (438) was able to convict of mayhem a physician who deadened a patient's fingers in order for said patient to cut them off and collect insurance money.

Jurisprudence on the subject of sterilization and its relationship to mayhem (or maiming) is quite rare, obviously because it does not appear to be seriously argued that this type of crime is committed during the performance of a sterilization. For instance, the Christensen v. Thornby (439) decision simply affirmed that sterilization did not constitute mayhem (440). In Jessin v. County of Shasta (441), the Attorney-General's viewpoint that sterilization was a mayhem was rejected by the California Court of Appeal on the grounds that a voluntary vasectomy in no manner implied malice (442), nor would it prevent the patient from fighting for the "king".

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(437) Ronald ANDERSON, Wharton's Criminal Law and Procedure, Rochester N.Y., The Lawyer's Co-Operative Publishing Co., 1957, vol. 1, p. 728, no 268.
(438) (1961) 120 S.E. 2d 580.
(439) (1934) 255 N.W. 620 (Supreme Court, Minn.).
(440) Ibid., p. 622 (Loring J.).
(441) (1969) 274 Cal. App. 2d. 737; 79 Cal. Rptr. 359.
(442) Ibid., p. 365 (Regan A.J.). It is interesting to see the courts of a republic decide whether a crime was committed in light of the interests of a non-existent sovereign. In all due honesty, it should be stated that Justice Regan was merely quoting from the Christensen v. Thornby case.

Another aspect of the criminal law which could conceivably raise some doubts as to the legality of purely contraceptive sterilization is that of assault and battery. Normally, consent would form an effective defence to this type of accusation, unless of course, the consent itself were adjudged contrary to public policy (443). Needless to say, a determination of public policy in this area is the key difficulty since no breaches of the peace, nor violations of other laws, nor serious bodily injury (aside from sterility) result from the surgery (444). If a consensus on the state of the law in this particular field were asked of modern legal writers, they would undoubtedly subscribe to the following statement, which fairly reflects contemporary attitudes:

> "Considering all of the ... indications of state policy on voluntary sterilization, including personal freedom, the various interests of the state, the critical morality of jurisprudential circles, the divided critical morality of religious groups, the diffuse state of generally accepted morality, and the dubious effect on promiscuity, disallowing the excuse of consent in assault and battery is not required by public policy. At the most, public policy might call for the establishment of procedural safeguards which would help guarantee that a rational decision would be made to sterilization by a patient" (445).

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(443) McKENZIE, (1973) 25 U. of Fla. L.R., loc. cit., 331; TIERNEY, (1970) 4 Fam. L.Q., loc. cit., 378; CHAMPLIN, WINSLOW, (1965) 113 U. of Pa. L.R., loc. cit., 429.
(444) BRAVENEC, (1966) 6 J. of Fam. L., loc. cit., 98.
(445) Ibid., pp. 116-117.

The courts have generally refused to interfere with the decision by a competent adult to obtain a sterilization. Aside from the fairly old (1938) case of Foy Productions v. Graves (446), in which a distribution licence for a film promoting sterilization as a means of contraception was withheld on the grounds of immorality and public policy considerations (447), recent jurisprudence has adopted a more liberal stance. Today, there is virtual unanimity of judicial opinion as regards the legality of elective sterilization, which is now considered a matter of individual conscience (448).

Turning to the civil liability aspects, can a physician performing a vasectomy or tubal ligation successfully be sued on the grounds of civil assault by the capable, consenting patient? Several hypotheses may exist, the most likely of which holds that since sterilization is not considered contrary to public policy, any consent given in pursuance thereof would effectively bar any action for trespass to the person. A more remote possibility which could occur if sterilization were ever held to be criminal, would be a tort action for assault and battery. In such an eventuality, what effect would the consent

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(446) (1938) 3 N.Y.S. 2d. 573 (N.Y. Supreme Ct., Appellate Div.).

(447) "'Tomorrow's Children' publicizes and elucidates sterilization as a means to prevent the conception of children, that it is a form of birth control, contraception without penalty, and that it is 'an immoral means to a desirable end'... The content of the picture is devoted to an illegal practice, which is, as a matter of common knowledge, immoral, and reprehensible according to the standards of a very large part of the citizenry of the state" (per McNamee J.), ibid., at p. 577.

(448) Cf. Custodio v. Bauer, (1967) 59 Cal. Rptr. 463 at p. 473 (C.A.); see also Shaheen v. Knight, (1957) 11 Pa. Dist. & Co. R., 2d 41 (C.P. Lycoming) quoted in MEYERS, The Human Body and the Law, op. cit., pp. 5-7; Christensen v. Thornby, (1934) 255 N.W. 620 (Minn.); Jessin v. County of Shasta, (1969) 79 Cal. Rptr. 359 at p. 366; Jackson v. Anderson, (1970) 230 S. 2d. 503 (Fla. C.A.).

of the patient have on the efficacy of his or her recourse? Unfortunately, the success of the action would depend upon the jurisdiction in which matters were pursued since some courts have held that the acquiescence of the victim to the injury complained of would bar recovery under the volenti non fit injuria or ex turpi causa non oritur actio rules. In denying recovery, the courts would, in effect, be refusing judicial aid to persons participating in illegal acts (449). In yet some other instances, the courts have held that, in matters of life or health, public policy could not countenance any agreement in furtherance of an illegal transaction. Therefore, the consent of the patient would be null and void, thus effectively eliminating the possibility for the defendant to invoke consent (450). Of all these possibilities, the first hypothesis suggested above would appear to be gaining in popularity in the United States, and has

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(449) This reasoning has been invoked quite often in the older "abortion" cases, i.e. actions by the victims against their abortionists: Hunter v. Wheate, (1923) 289 F. 604 (D.C.); Herman v. Turner et al, (1925) 232 P. 864 (Kan.); Goldnamer v. O'Brien, (1896) 33 S.W. 831 (Ky.); Nash v. Meyer, (1934) 31 P. 2d 273 (Idaho); Joy v. Brown, (1953) 252 P. 2d 889 (Kan.); Henrie v. Griffiths, (1964) 395 P. 2d 809 (Okla.); Sayadoff v. Warda, (1954) 271 Cal. Rptr. 2d 140 (Cal.); Szadiwicz v. Cantor, (1926) 154 N.E. 251 (Mass.); Miller v. Bennett, (1949) 56 S.E. 2d 217 (Va.); Andrews v. Coulter, (1931) P. 2d 320 (Wash.); Bowlan v. Lunsford, (1936) 54 P. 2d 666 (Okla.); Castranova v. Murawsky, (1954) 120 N.E. 2d 871 (Ill.).

(450) Milliken v. Heddesheimer, (1924) 144 N.W. 264 (Ohio); Hancock v. Hullett, (1919) 82 S. 522 (Ala.); Gaines v. Wolcott, (1969) 169 S.E. 2d. 165 (Ga.); Rickey v. Darline, (1958) 331 P. 2d 281 (Kan.).

in fact been adopted in the Restatement of the Law of Torts (451). Nevertheless, in matters of sterilization, this whole question remains fairly conjectural since public policy appears solidly entrenched in favor of this means of contraception (452).

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In spite of the favorable attitudes manifested by the courts and the law in general towards purely contraceptive sterilization, patients with surgeons willing to operate may still be thwarted by hospital regulations and sterilization committees operating under age/parity restrictions or similar controls of equally dubious merit (453). In the event of a refusal on an arbitrary non-medical basis, can a patient contest the validity of this type of decision on constitutional grounds?

In the area of the right of privacy, particularly with regards to sex and matrimony, the U.S. Supreme Court has recognized and has gradually expanded this concept: In the Skinner v. State of Oklahoma case (454) which set aside the Oklahoma Habitual Criminal Sterilization Act, Douglas J. affirmed:

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(451) St. Paul Minn., American Law Institute Publishers, 1939, vol. IV, p. 486, no 892.

(452) For a more detailed analysis of the problem of consent and tort liability, the reader is asked to refer to our discussion of this subject in the chapter on transsexualism, supra, p.82 et seq.

(453) For instance, the American College of Obstetricians and Gynecologists has recommended that ratios of five children with a maternal age of twenty-five, four at thirty years of age and three children at thirty-five as socio-economic indications for surgery, cf. P. FORBES, Voluntary Sterilization of Women as a Right, (1969) 18 DePaul L.R. 560 at p. 563.

(454) (1942) 62 S. Ct. 1110.

> "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" (455).

Subsequently, the landmark Griswold v. Connecticut (456) decision formally acknowledged the existence of a right of matrimonial privacy. This action arose out of a complaint against the executive director and the medical director of the Planned Parenthood League of Connecticut for violations of the Connecticut anti-contraceptive statute. It had been established, however, that the accused had provided birth control counseling and contraceptive devices only to married couples. In delivering the opinion of the court, which held the statute in question unconstitutional, Mr. Justice Douglas concluded that the right of marital privacy originated in the penumbras of the guarantees found in the Bill of Rights. In protecting this right of privacy, Douglas J. added:

> "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship" (457).

A concurring opinion of Mr. Justice Goldberg reasoned that the Constitution protected all fundamental rights and not necessarily only those enumerated in specific terms in the Bill of Rights. He argued that legal authority for the existence of unenumerated rights reposed upon the Ninth Amendment which he felt had not been subjected to much scrutiny by the court.

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(455) Ibid., p. 1110.
(456) (1965) 381 U.S. 479 or 86 S. Ct. 1678.
(457) Ibid., p. 1682.

In his estimation, the only manner in which the proponents of the anti-contraceptive law could have overcome the presumption of unconstitutionality deriving from the clear violations of a fundamental right would have been for the government to have proven a compelling, subordinating state interest. To the dissentors (Black, Stewart JJ.) who asserted that while the law in question was "uncommonly silly" (458), but not unconstitutional since the marital right of privacy was not specifically mentioned in the Constitution, Goldberg J., replied:

> "While it may shock some of my brethren that the court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected ..." (459).

The case of Eisenstadt v. Baird (460), which likewise dealt with an anti-contraceptive law (Massachusetts), provided an opportunity for the Supreme Court to enlarge upon the right of marital privacy. The court observed that "... whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike" (461). In addition:

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(458) Ibid., p. 1705.
(459) Ibid., p. 1688.
(460) (1972) 405 U.S. 438 or 92 S. Ct. 1029.
(461) Per Brennan J., ibid., at p. 1038.

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, 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" (462).

The abortion decisions of Roe v. Wade (463) and Doe v. Bolton (464), elucidated the extent to which the right of personal privacy would hold sway over other considerations. Roe declared that the right of personal privacy included the abortion decision (465) up to the point at which a compelling state interest would then have to predominate. The Court placed this interface at the end of the first trimester of pregnancy, since up to this moment, the maternal mortality rate was lower in undergoing an abortion than in childbirth (466). As for Doe, one of its principal contributions was to strike out the necessity of a hospital abortion committee due to its being too restrictive of the patient's rights and needs which would be sufficiently delineated, medically speaking, by her personal physician (467).

So matters stand: It is now firmly established that there exists a constitutionally protected right of privacy both in favor of the married couple as well as in favor of individuals, which extends to the right of contraception in all its forms. Although it may be argued that surgical sterilization is more drastic than the simple contraceptive measures involved in Griswold and in Eisenstadt, there can be no contro-

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(462) Ibid., p. 1038.
(463) (1973) 93 S. Ct. 705.
(464) (1973) 93 S. Ct. 739.
(465) (1973) 93 S. Ct., loc. cit., p. 727.
(466) Ibid., p. 732.
(467) (1973) 93 S. Ct., loc. cit., p. 750.

verting the fact that, morally at least, it is a less reprehensible step than abortion which is also, to a certain extent, a constitutionally protected element of the right of privacy.

Theoretically, some difficulty could exist in bringing these constitutional arguments into play, especially when the hospitals involved are privately funded, and thus free of "state action", to which the constitutional protections apply (468). Nevertheless, through an extension of the notion of "state action" to cover all hospitals benefiting from state or federal funding, grants or other forms of financial involvement, few if any private institutions are able to escape the constitutional controls (469). Therefore, American law would appear to protect patients from arbitrary standards and decisions imposed by hospitals and selection committees, at least, where the right of procreation or of contraception is in issue.

Fortunately, the particular subject of sterilization has been litigated before the courts with many of the constitutional aspects alluded to above, forming the basis of discussion. In the matter of Allen v. Sisters of St. Joseph (470), the female plaintiff was the unwed mother of two children. Due to the fact she was epileptic as well as pregnant with twins, she and her physician agreed that a tubal ligation would be performed following the delivery. As luck would have it,

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(468) McKENZIE, (1973) 25 U. of Fla. L.R., loc. cit., p. 344.

(469) Ibid., pp. 344-345; S. BLOOM, A Woman's Right to Voluntary Sterilization, (1972) 22 Buffalo L.R. 291 at pp. 304-306; Citta v. Delaware Hospital, (1970) 313 F. Supp. 301 (Pa.); Simpkins v. Moses H. Cone Memorial Hospital, (1963) 323 F. 2d. 959; Chrisman v. Sisters of St. Joseph (U.S. Dist. Ct. Oregon) case no 40-430 reported in (1973-74) Reporter on Human Reproduction and the Law, op. cit., p. III-C-38; Taylor v. St. Vincent's Hospital, (U.S. Dist. Ct. Montana), case no 1090 reported in (1973-74) Reporter on Human Reproduction and the Law, ibid., p. III-C. 39.

(470) (1973) 361 F. Supp. 1212.

Allen was involved in an accident in which she fractured her thigh. She was received by a Catholic hospital and placed in traction. In order to avoid the risk and inconvenience of being moved, she requested that after the birth of the children, the sterilizing operation be performed. In keeping with its religious affiliation, the hospital refused. The U.S. District Court declined intervening in the internal affairs of the hospital on the grounds that:

> "The interest that the public has in the establishment and operation of hospitals by religious organizations is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or await a later date for her sterilization" (471).

It should be noted however, that the force of this case as a precedent would appear to have been overruled by a more recent decision of the U.S. Court of Appeals in Hathaway v. Worcester City Hospital et al (472). The controversy involved a thirty-six year-old married woman with seven children (and one more on the way) who was obliged to request sterilization in a public hospital due to a lack of personal resources. As grounds for the operation, she alleged her high blood pressure and her inability, for various medical reasons, to use the standard contraceptive procedures. The

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(471) Ibid., p. 1214 (Woodward, D.J.).

(472) (1973) 475 F. 2d 701 in appeal from (1972) 341 F. Supp. 1385. See also J.A. ALZAMORA, Equal Protection, Municipal Hospital Cannot Refuse Facilities for Voluntary Sterilization When Permitting Both Procedures of Equal Risk and Non-Therapeutic Procedures, (1974) 79 Dickinson L.R., 163.

hospital refused to allow the surgery, arguing that the Massachusetts laws, governing birth control put in question the legality of the non-therapeutic operation. The hospital also felt that the powers granted under its charter would not extend to the operation in question, since the institution was founded "for the reception of persons requiring relief during temporary sickness". In a decision overruling the hospital's refusal, Coffin, C.J., noted that not only did the hospital perform operations of a more serious nature than a tubal ligation, it also authorized non-essential or non-therapeutic procedures such as rhinoplasty. Accordingly, he wrote:

> "... It seems clear, after Roe and Doe that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning another involving no greater risk or demand on staff and facilities" (473).

And further on he added:

> "... It is clear under Roe and Doe that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is too broad when other comparable surgical procedures are performed ... Doe therefore requires that we hold the hospitals unique ban on sterilization operations violative of the Equal Protection clause of the Fourteenth Amendment" (474).

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(473) (1973) 475 F. 2d. ibid., p. 705.

(474) Ibid., p. 706. In a quite similar case of McCabe v. Nassau County Medical Center, (1971) 453 F. Rptr. 2d 698, the U.S. Court of Appeal was called to pronounce itself on the validity of a refusal based on an age/parity formula. However, before the hearing, the hospital acceded to the request and a question of mootness was raised. In deciding that the case was not moot, thus allowing evidence of the facts to be produced, Feinberg, J., mentioned that it was "a massive understatement to say that (plaintiff's objections against the arbitrary refusal were) not frivolous" (at p. 704).

In summary, it would appear safe to say that a sterilization performed for purely contraceptive purposes is a licit procedure in all of the American States. Moreover, hospitals benefiting from state or federal funding cannot refuse to permit this type of operation on arbitrary grounds, without falling afoul of the constitutional protections. Naturally, the most stringent requirement for avoiding legal difficulty is the obtainment of an enlightened consent from the sane, capable patient (475).

Would this requirement of consent imply a priori the deprivation of insane, retarded or other incapable persons (including minors) of the advantages of sterilization in those particular cases where such a measure is clearly indicated (476)? The reactions of different courts towards this issue have varied: In Smith v. Seibly (477), the Supreme Court of Washington held that the consent given by a married minor, eighteen years of age, requesting a vasectomy due to his myasthenia gravis, was perfectly legal. The minor, who sued his surgeon for assault and battery claiming that his consent was invalid, saw the

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(475) The problem of consent of the spouse will be examined later.

(476) We wish to avoid the implication so freely espoused by eugenicists that sterilization is always and automatically to the advantage of the mentally disturbed or deficient. Quite the contrary, until proven otherwise, the presumption should be to the opposite effect.

(477) (1967) 431 P. 2d 719.

court treat him as an adult and his action rejected (478).

As for the mentally deficient, there has been a noticeable tendency on the part of the courts to become more reticent in approving this type of operation without expréss legislative authorization. Originally, the opinion was widely held that the Probate Court (or equivalent) could grant permission for an incompetent to be sterilized under its plenary powers at law and in equity, unless these powers were specifically abridged by statute (479). This, in effect was the rationale supplied by Judge H. Gary in the case of In Re Simpson (480), involving a feeble-minded (I.Q. of 36), physically attractive, young woman of eighteen who was sexually promiscuous, and who had already given birth to one illegitimate child. On the request of the girl's mother, sterilization was ordered for several reasons including the lack of public facilities to receive her for care, the possibility that her offspring would be mentally deficient, the fact that more illegitimate children would put added strains on the welfare department, and finally that the operation would be to the "advantage" of the patient (481).

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(478) Ibid., at p. 723 (Shorett, J.): "A married minor, 18 years of age, who has successfully completed high school and is the head of his own family, who earns his own living and maintains his own home, is emancipated for the purposes of giving a full disclosure of the ramifications, implications and probable consequences of the surgery has been made by the doctor in terms which are fully comprehensible to the minor".

(479) Naturally, we are speaking of those jurisdictions in which there exist no compulsory sterilization laws.

(480) (1962) 180 N.E. 2d 206 (Ohio).

(481) Ibid., at p. 481, Gary J. States: "To deny Nora Ann such an operation would be to condemn her to a lifetime of frustration and drudgery, as she continued to bring children into the world for whom she is not capable, either physically or mentally, of providing proper care".

In quite similar circumstances, the Texas Court of Appeals refused to authorize the sterilization of a thirty-four year-old woman with a mental age of six, requested by her elderly parents, who had to care for their daughter as well as her two illegitimate children (482). According to the Court's reasoning, an incompetent's rights could not be denied or adversely affected without due process, which would imply, in this case, the necessity of statutory authority in order to approve such an operation. No such statute in fact existed. The Court also refused to recognize the existence of equitable powers vested in the Probate Court which would allow a sterilization to be performed, merely because the parties involved felt it were for the best.

In Holmes v. Powers (483), the Kentucky Court of Appeals likewise refused to grant declaratory relief to a county health officer and the medical society concerning the legality of a sterilization of a thirty-five year-old retarded female with two illegitimate children, one of whom was also retarded. According to Palmer, J.:

> "If, as is alleged and proved, the appellee is in fact mentally incompetent, she does not have legal capacity to consent to anything. Nor, at her age, does the law give her parents any control of her person or property. It may be (though we do not decide) that a legally constituted committee could exercise such a choice ..." (484).

The matter of Wade v. Bethesda Hospital et al (485) is extraordinary in that one of the defendants, Holland Gary,

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(482) Frazier v. Levi, (1969) 440 S.W. 2d 393.
(483) (1969) 439 S.W. 2d 579.
(484) Ibid., p. 580.
(485) (1973) 356 F. Supp. 380 (U.S. Dist. Ct. Ohio).

was a Probate Court judge (486). In the present case, the plaintiff, a feeble-minded, female minor who was sterilized following a court order issued by Judge Gary, sued not only the Judge but also the hospital where the surgery was performed, the surgeon of record as well as the other persons (such as a caseworker, the matron of the state home, the executive-secretary of the Children Services Board and the Board's psychologist), who were involved in the decision to sterilize. To plaintiff's action which alleged violation of her constitutional rights, assault and battery, and violation of her civil rights, defendants presented a motion to dismiss based on immunity since the sterilization was performed under court order. The defendant, Gary, claimed judicial immunity because he was acting in his official capacity as Probate Judge. In rejecting the motion, the District Court (Kinneary, C.J.) held that Gary had acted in the absence of all jurisdiction and therefore, would not benefit from immunity. As for the immunity sought by the physicians and the hospital, the court held that on principle, only those acting pursuant to an explicit court order would be immune. In the present case, however, Gary did not directly order any of the defendants to sterilize the plaintiff (487); his judgment merely instructing that the plaintiff submit to sterilization.

For the time being, the legal atmosphere seems to be quite hostile towards the sterilization of incompetents in the absence of specific enabling legislation. As for the powers of the court to order sterilization without such legislation, it would appear, at best to be a risky proposition if performed on so-called socio-economic grounds, even though circumstances such as those

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(486) Of In re Simpson fame, loc. cit.
(487) Ibid., p. 383.

encountered in the Frazier v. Levi case may indicate that a contraceptive sterilization is the best possible solution in an awkward situation. By the same token, it should be considered irresponsible to withhold sterilization on non-therapeutic indications from the mentally deficient if, in fact, these indications outweigh the inconveniences which would result from the violation of the patient's physical integrity. Just as it is unacceptable that the mentally deficient be deprived of the power to procreate on the fairly whimsical grounds of personal inconvenience for the rest of the family or for the authorities of the institution in which the patient is placed, it is equally wrong to post impregnable legal barriers for the preservation of the faculty of reproduction. The deciding factor, undoubtedly, should be whether or not a sterilization would enure to the advantage of the patient according to the circumstances of each particular case. Moreover, in order to ensure that the patient's interests are properly served, it would be desirable that a disinterested third party, aside from the judge, be mandated to protect the patient from a rubber-stamp sterilization order. For obvious reasons, a court-appointed attorney or equivalent would be a preferable guardian ad litem than, for example, the patient's family whose interests could conceivably be in conflict with those of the candidate for surgery (488).

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(488) For example, in the 1974 case of In Re Doe, as yet reported only in the (1974-75) Reporter on Human Reproduction and the Law, p. III-C-5, a fourteen year old retarded girl with an I.Q. of fifty, and with other severe problems, was sterilized at the request of her parents and pursuant to a court order issued by Hoester, J. of the Circuit Court of St. Louis, Mo. The parents, the child and the Juvenile Officer of St, Louis were all represented by separate counsel.

Ideally, a comprehensive set of laws to deal with this particular problem would remove many of the ambiguities involved in sterilization. It would also be highly desirable that any such legislation avoid the excesses and exaggerations endemic to the more militant branches of the eugenics movement. The emphasis would not be on saving mankind but on protecting the patient.

(2) The Civilian Jurisdictions

(i) France

With a total absence of legislation on the subject, French jurists have adopted attitudes inimical to purely contraceptive sterilization. Naturally, the decision of the Cour de Cassation in the matter of "Les stérilisateurs de Bordeaux" (489) played no small part in reinforcing the point of view that any mutilation of the human body which did not serve a therapeutic

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(489) Cass. crim. 1 juillet 1937; S.1938.1.193, note R. Tortat.

purpose would be illicit. This 1937 case involved, as it may be recalled, an unlicensed practitioner and his two temporary assistants (a plumber and a dyer), who sterilized about fifteen anarchically-inclined Spanish laborers in order to advance the cause of birth control. The Supreme Court confirmed the condemnations of the principal actors, found guilty of the crime of coups et blessures volontaires, and refused to accept a defence of Volenti non fit injuria since:

> "... les prévenus ne pouvaient invoquer le consentement des opérés comme exclusif de toute responsabilité pénale, ceux-ci n'ayant pu donner le droit de violer, sur leurs personnes, les règles régissant l'ordre public; ..." (490).

Moreover, the Court affirmed that:

> "... les blessures faites volontairement ne constituent ni crime ni délit, lorsqu'elles ont été commandées, soit par la nécessité actuelle de la légitime défense de soi-même ou d'autrui; que hors ces cas et ceux où la loi les autorise à raison d'une utilité par elle reconnue, les crimes et les délits de cette nature doivent, suivant les circonstances déterminées par les articles 309 et s. C. Pén., donner lieu à condamnation contre les auteurs et complices; ..." (491).

This was perhaps an unfortunate test of the sterilization question since several circumstances tended to militate against the acquittal of the accused: The most obvious was the fact that the "surgeon" and his accomplices were not trained physicians, and the performance of the operations in a borrowed

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(490) Ibid., p. 193.
(491) Ibid., (emphasis added).

bedroom instead of a hospital or clinic did much to accentuate the sordidness of the whole transaction. A second, more subtle, factor against the accused was the great preoccupation of the French nation with its birth-rate, especially after the First World War had bled the country white and had almost wiped out an entire generation of young men (492).

Nevertheless, the rule stands today that, for a surgical intervention to be legal, it must not be contrary to public order, and the consent of the patient, except in cases of emergency, must be obtained.

The determination as to what type of surgery would not be in conflict with the requirements of public order has never been made by the courts, except of course for the vague formula suggested by the Cour de Cassation that an operation would be authorized by law only when performed in pursuance of a useful purpose. To French jurists, this was interpreted as implying that only interventions serving a therapeutic goal would be valid (493). According to Jean Savatier, the reasoning behind this principle was based on the fact that a physician's immunity to prosecution depended not upon the patient's consent, but essentially upon the therapeutic objective of the medical act in question (494). Only this type of treatment would authorize a

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(492) HUGHES, (1963) 26 Mod. L.R., loc. cit., p. 243.

(493) MALHERBE, Médecine et droit moderne, op. cit., p. 236; MERGER, loc. cit., J.C.P. 1963.D.1770 ; DECOCQ, Essai d'une théorie générale des droits sur la personne, op. cit., pp. 306-307, no 442; J. SAVATIER, Stérilisation chirurgicale de la femme: aspects juridiques, Juin (1964), Cahiers Laennec, loc. cit., pp. 59 et seq.

(494) Likewise, an unqualified person performing a therapeutic act would not be de facto liable to the patient. Of course, this in no way dispenses of any legal liability resulting from the illegal practice of medicine, cf. J. SAVATIER, ibid., p. 59.

violation of the physical integrity of each person which is protected by law, not only in the interest of the individual concerned but also in the interest of the state (495). Consequently, one arrived at the inevitable conclusion that:

> "Cela permet de condamner certaines stérilisations préventives qui seraient pratiquées, à des fins exclusivement anticonceptionnelles, sur une femme pour qui une maternité éventuelle ne présenterait aucun risque particulier. Le désir de l'intéressée de mener une vie sexuelle sans frein, et d'éviter la gêne et les risques d'échec des autres procédés anticonceptionnels, ne peut suffire à justifier le médecin de pratiquer une opération qui mutile ou modifie ses organes. Cette utilisation de techniques médicales à des fins non médicales n'est pas couverte par l'immunité habituelle des médecins pour les actes par lesquels ils portent atteinte à l'intégrité physique de leurs patients" (496).

The imperiousness of the therapeutic goal has suffered attenuation through the rise in popularity of cosmetic surgery which, until fairly recently at least, was considered contrary to public order (497). However, as the Cour d'appel de Lyon decided in 1936, a moral (i.e. psychological) need could serve as an indication for surgery, provided that the surgical risk was proportional to the advantage sought (498). In spite of this progress, the greatest obstacle to the acceptance of purely contraceptive sterilization in France lies in the fact that jurists are unable or unwilling to accept the idea that the risks inherent in contraceptive surgery are proportional to the so-called moral

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(495) Ibid., p. 60.
(496) Ibid.
(497) R. DIERKENS, Les droits sur le corps et le cadavre de l'homme, Paris, Masson et Cie, 1966, p. 54, no 67.
(498) Lyon, 27 mai 1936; D.1936.465. French jurisprudence has subsequently confirmed this rule: e.g. Paris, 13 jan. 1959, J.C.P. 1959.11142; Paris, 20 juin 1960, G.P. 1960.2.169. See also SAVATIER, SAVATIER, AUBY, PEQUIGNOT, op. cit., pp. 248-249, no 274.

advantages sought. In addition, the idea of destroying an otherwise normal function is also quite repugnant to them. The pervasiveness of this attitude is illustrated by the fact that the French medical profession, through a declaration of the Conseil national de l'Ordre, issued the 30th of April 1955 and subsequently reaffirmed in 1964, stated categorically that: "La stérilisation préventive à but uniquement anti-conceptionnel est rigoureusement interdite" (499).

Yet, the second element generally required for the validity of a surgical intervention i.e. the consent of the patient, can play an important role in determining the surgeon's liability. Since all indications today point to the illicit nature of contraceptive sterilization, both from a penal as well as a civil law point of view, it can be argued that a consenting patient is not a "victim" in the truest sense of that term. In the eyes of the droit pénal, this type of reasoning is of no avail since the higher interest which the state possesses in repressing anti-social conduct, cannot be disposed of by a private agreement between the participants in a wrongful act. This point has been uncompromisingly affirmed by the Cour de Cassation in its 1937 sterilization decision, and does not appear to be seriously questioned in doctrine. The solution is not the same however, in the case of a private law recourse, since French Civil Law basically abhors giving any legal effect to an agreement which is violative of public order or good morals:

> "Intenter une action en dommages-intérêts pour inexécution d'un contrat nul c'est donner effet au contrat; c'est le prendre en considération pour constater qu'il n'a pas été exécuté.
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(499) Quoted by R. SAVATIER, loc. cit., p. 61.

> A fortiori aucune action en responsabilité n'est ouverte - sans recours à l'adage 'nemo auditur' - pour réparer le préjudice subi par suite de la conclusion d'un contrat immoral (J. Saiget, Le Contrat immoral, thèse, Paris 1939, p. 369). D'autant que le demandeur aujourd'hui mécontent, signait avec satisfaction et en toute liberté quelque temps auparavant, ce contrat, 'volenti non fit injuria', 'qui mavult, vult'" (500).

Consequently, if a woman (or man for that matter) who obtained sterilization decided to seek damages due to the illegal nature of the contract which rendered it void, her voluntary participation in the transaction could possibly bar her from seeking reparation although it would not affect the agreement (501). This is probably one of the primary reasons why there is such a dearth of jurisprudence on the subject.

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(500) Philippe LE TOURNEAU, Règle "Nemo Auditur" in Jurisclasseur civil, arts. 1101-1155 under arts. 1131-1133, Paris, Editions Techniques, fasc. 10 bis, p. 16, nos 72 and 74. See also art. 1131 C.C.F.

(501) J. SAVATIER, loc.cit., p. 61. This reasoning has not always been followed by the courts, as demonstrated in the 27 juin 1913 decision of the Cour d'appel de Lyon (D.1914. 2.73 note Lalou) involving non-therapeutic experimentation. In this matter, an old woman of limited means and sagging breasts, was incited by her husband to allow a surgeon to test a new surgical technique destined to restore a woman's bust to its original youthful appearance. The intention was to operate on one breast and then present the patient at a future medical convention as living "before and after" proof. Apparently, the forces of gravity had the final word since the "test" breast hung lower than ever. The court admitted the woman's claim for damages, stating:

> "Attendu que l'on doit considérer comme illicite et contraire aux bonnes moeurs une convention qui avait uniquement pour objets ces pratiques de vivisection sur une femme agée et besogneuse; qu'une telle convention ne pourrait être admise comme compatible avec la dignité humaine, alors que, par l'appât d'un gain des plus minimes, l'appelante se déterminait à trafiquer de son corps et à le faire servir à des expériences inutiles pour elle, sinon dangereuses, qui n'étaient entreprises qu'en vue des profits que leur auteur escomptait". Likewise, René SAVATIER, in Jurisclasseur civil, Paris, Editions Techniques, vol. IV, XXXb, p. 15 no 92, seems to feel that the right of recovery remains, notwithstanding the consent of the victim.

Present legal attitudes towards sterilization, which are based on the highly flexible and ever-changing notion of public order, will undoubtedly become more tolerant as persistent demands for this type of surgery increase in number. Already, France has reversed its violently anti-contraception posture and has taken firm steps in the opposite direction. For instance in 1967, the provisions of the Code de la santé publique, prohibiting the sale and advertising of contraceptives were greatly modified (502). In 1973, the Conseil supérieur de L'information sexuelle was created for the purpose of providing information about birth control (503), and in 1974, family planning centers were authorized to distribute contraceptive products to minors without parental consent (504). Most important of all, France introduced in 1975, abortion on demand during the first ten weeks of pregnancy (505). Before these changes were made, the French position towards contraceptive sterilizations was logical since not only were non-therapeutic surgical interventions viewed with a jaundiced eye, the whole subject of contraception (other than by abstinence), as well as propaganda advocating birth control were subject to legal sanction (506). Now that birth control and abortion have gained acceptance in France, it is quite forseeable that one of the most efficient techniques of contraception, i.e. sterilization, will likewise no longer be considered in violation of the standards of common morality.

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(502) Loi no 67-1176 du 28 déc. 1967.
(503) Loi no 73-639 du 11 juillet 1973.
(504) Loi no 74-1026 du 4 déc. 1974.
(505) Loi no 75-17 du 17 janv. 1975 Relative à l'interruption volontaire de la grossesse.
(506) French law still prohibits birth control propaganda and commercial advertisements may only be made in professional publications, cf. Loi no 74-1026 du 4 déc. 1974, loc. cit., art. 3.

The most positive aspect of this problem may be found in the fact that purely contraceptive sterilizations are felt to be in opposition only with the notion of public order. The absence of prohibitory legislation makes a modernization of the law much more simple in light of the fact that legislators are notoriously tardy in grasping the trends of public attitudes. If the occasion arose, the courts would likely decide the issue according to contemporary standards of public order. In the interim, jurists are justifiably cautious in their attitudes towards this type of surgery.

(ii) Province of Quebec

Is purely contraceptive sterilization legal in the Province of Québec? As may be recalled from our examination of the Criminal law aspects of sterilization in the Anglo-Canadian provinces, there have never been, nor is there much likelihood of a licensed physician being prosecuted for causing bodily harm with intent (sec. 228 Cr. C.) following such an operation, provided naturally that the requirement of consent has been respected. If such a prosecution ever does arise, we have already stated that sec. 45 Cr. C. would probably furnish an adequate defence (507). Of course, the essential difficulty would be in interpreting the phrase "for the benefit of that person", which said sec. 45 Cr. C. sets out as an essential element. Obviously, the removal of the capacity to procreate does not physically improve a person's health in most cases. However, as

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(507) Supra, p. 231 et seq.

we have previously opined, it is submitted that the notion of "benefit" would be broad enough to include psychological contentment or peace of mind.

To determine the legality of purely contraceptive sterilization from a civil law point of view, two aspects must be considered (508): To begin with, art. 19 C.C. provides that:

> "The human body is inviolable.
>
> No one can cause harm to the person of another without his consent or without being authorized by law to do so".

Ostensibly, this article constitutes formal recognition of the intangibility of the human body, with the repercussion that only in cases where permission is obtained from the patient or his representatives, or where the state orders a violation of a person's integrity for the welfare of the community (under authority of law of course) (509), can a physician violate this integrity. Thus, at first glance, an enlightened consent by the patient would cover this objection.

There remains, however, a second element of the Civil law which must be respected, i.e. that the agreement entered into not be contrary to the laws governing public order and good morals (510). Now the question may be asked, would a purely contraceptive sterilization based on socio-economic

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(508) As previously mentioned, there is no Quebec legislation dealing directly with the issue of sterilization.

(509) Cf. Public Health Protection Act, S.Q. 1972 c.42 secs 8-24.

indications or even on the simple request of the patient be considered a violation of public order and good morals? Clearly this is a value judgment which has yet to be tested by our courts. Mayrand certainly feels this to be the case (511), on the grounds that any harm (atteinte) arising out of the operation must be appreciated in light of the advantages to be gained (512). In the hypothesis of an operation destined to eliminate what he terms, "... la responsabilité normale de la paternité ou de la maternité ...", Mayrand appears to doubt that surgically-induced sterility is worth the sacrifice involved (513). We, on the other hand, prefer the opinion that contraceptive sterilization is not contrary to public order and good morals.

The notions of public order and good morals are in a constant state of flux as the attitudes of society evolve. As a result, we can understand why, for example, a judgment rendered at the turn of the century, (which held Balzac's La Comédie Humaine contrary to good morals), is looked upon today as legal folklore (514). Yet, objections to the validity of purely contraceptive sterilizations would arise from two sources, which include persons worried about Quebec's low birth-rate and "cultural suicide" (515), and, of course, the Catholic Church.

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(511) L'Inviolabilité de la personne humaine, op. cit., par. 11, note 19.
(512) Ibid., par. 10.
(513) Ibid., par. 11.
(514) Sutherland v. Gariépy, (1904) 11 Rev. de Jur. 314 at p. 319 (S.C.) (DeLorimier, J.).
(515) According to an article which appeared in the Montreal Star entitled Quebec A World Leader in Decreasing Birth Rate (Thursday, Oct. 25, 1973, p. B-6), Dr. Corbett Mc Donald, professor of epidemiology at McGill University told a conference on world population that during the 1960's, Quebec's birth-rate dropped by 43%, compared to 26% for the whole of Canada and the U.S.A., and a world average of 6%.

The answer to the first group lies in the fact that the easiest way to increase a birth-rate while respecting personal liberty would be to encourage people to have children (through economic incentives or through propaganda) rather than in discouraging contraception. Indeed, if this were the real issue, then not only would sterilization be contrary to public order and good morals, but also all contraceptive methods from the pill to the I.U.D. would fall under this ban.

As for the objections of the Church, reaffirmed by the encyclical Humanae Vitae of the 29th of July 1968, we feel that this is a question of conscience between each Catholic and the Church, which must not intrude into the sphere of secular law, especially in view of our pluralistic society. This point of view is far from new. In an 1890 case which also dealt with books of questionable moral value (Victor Hugo's Notre Dame de Paris, Les Misérables and Le Pape, which were placed at the Index librorum prohibitorum), Mr. Justice Davidson refused to release a Catholic bookseller from a promise to purchase the above works despite the latter's objection that the contract was based on an illicit consideration (516). In delivering his decision, Davidson, J. reasoned as follows:

> "Let the fact be granted, can (the defendant's beliefs) affect a civil contract? To say yes would be to lay down the principle that the Congrégation de l'Index, or the ecclesiastical authority of any other church, would have the power, as between the members of its own communion, to interpret, qualify or even annul contracts. As between members of different religions, these courts might become battle-grounds for the theologians ...

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(516) Taché v. Dérome et al, (1890) 35 L.C.J. 180 (S.C.).

> What, I take it, courts have to deal with in the maintenance of contracts is not the conscience of the individual, but the great public conscience which quickens and gives life to the body of the civil law, whose interpreters we are. Now, a contract with an unlawful consideration has no effect, and (C.C. 990) 'the consideration is unlawful when it is contrary to good morals or public order'. The clear duty of a court is to give universal application to this article of our Code - that is to so interpret it as that the interpretation will not vary because of the persons concerned, but be broad enough to cover all contracts of like classes, no matter who the contracting parties may be" (517).

The above considerations notwithstanding, it is interesting to note that according to a survey conducted by Princeton University in 1970 among Roman Catholics in the United States, 68% of all couples were using methods of contraception forbidden by their faith (518). In addition, in 1972, there were 38,905 legal abortions in Canada, of which 2,912 were performed in Quebec. Of these, 1000 were done at the Montreal General Hospital, about 600 at the Jewish General and over 400 at the Catherine Booth (519). The point which is interesting is that the patients at these English-speaking hospitals fairly reflected the demographic composition of Quebec society, i.e. a large

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(517) Ibid., p. 181.

(518) Cf. Majority of Catholics Practice Church - Banned Birth Control, in the Montreal Gazette, Thursday, 4 January 1973 p. 24. The authors of the survey, Doctors C.E. Westoff and L. Bumpass, also predicted that by 1980, the figure would reach 90%. Although these statistics apply to the United States, there is no reason to doubt that similar reactions are occurring in Quebec. Certainly, our birth-rate bears this out.

(519) Cf. M.G.H. Swamped with Abortion Requests, in the Montreal Star, Tuesday, 12 March 1974, p. B-3. In 1973, the total figure reached 3141 abortions or 3.7 for every 100 live births. Cf. Abortion: An Emotional Issue Rejoined, in Time, 14 April 1975, vol. 105, no 15, p. 7.

majority of them were French-speaking and presumably, for the most part, Catholic (520). One should add to this the estimated 20,000 abortions per year obtained in the United States or through illegal abortion clinics in Quebec (521).

Of course, a definition of what is, or what is not violative of public order and good morals cannot be arrived at by public opinion polls or through statistical analyses of public reactions, and on this basis alone, we cannot issue more than an educated opinion as to the validity of purely contraceptive sterilization. When we consider, however, that under the Act Respecting Health Services and Social Services (522), regulations provide a procedure for requesting sterilization (523), and that the Quebec Health Insurance Board will defray the costs of this type of operation (524), then it is unlikely that the courts would declare illicit, a form of surgery looked upon with a certain amount of magnanimity by the administration.

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(520) We dislike using broad generalizations but, in this case, our conclusion appears accurate, cf. testimony of Dr. Peter Gillett, a staff specialist (obstetrics and gynecology) of the Montreal General Hospital before Hugesson J., in the Morgentaler abortion trial, as reported in the Montreal Star, Wednesday, 22 May 1974, p. A-1.

(521) Cf. Attitudes Promote Illegal Abortions, in the Montreal Star, Wednesday, 9 February 1972, p. 21.

(522) (1971) S.Q., ch. 48 (sanctioned the 24th of December 1971).

(523) Art. 3.2.3.3: "Toute personne désirant se soumettre à une intervention chirurgicale stérilisante doit en faire la demande par écrit sur une formule prévue à cette fin". Cf. Gazette officielle du Québec of the 25th of November 1972, vol. 104, no 47, p. 10575.

(524) Cf. Directive no 49 issued the 1st of July 1971 by the Q.H.I.B.: "Tous les actes posés dans un but de planification familiale sont reconnus comme services assurés. La vasectomie et la ligature des trompes sont des services assurés", quoted by S. MONGEAU, La vasectomie: évolution récente, (1972) 7 Le Médecin du Québec 44, at p. 46.

The Quebec College of Physicians (as it was then known), established a committee to look into the question of sterilization. The committee's report, endorsed by the College the 24th of February 1971, included a policy statement fairly similar in attitude to that of the Canadian Medical Protective Association (525):

> "Le Collège rappelle aux médecins que si une stérilisation chirurgicale est pratiquée, elle doit l'être au même titre que toute autre procédure chirurgicale et ne doit être pratiquée que dans le meilleur intérêt du patient ... La décision de pratiquer une telle procédure appartient au médecin qui doit juger chaque cas en particulier, après avoir donné au patient, et à son conjoint lorsque c'est possible, des explications sur la nature et les conséquences de l'intervention" (526).

In the main, we agree with this statement as representing a reasonable description of the status of the law on the subject of sterilization. We are more hesitant when it comes down to the question as to upon whom the sterilization decision rests. Of course, a physician (emergency situations excepted) (527) cannot be forced to accept patients that are not desired nor must he perform surgery which is morally, philosophically or professionally repugnant to him. This does not imply that the decision to operate is his alone. On the contrary, we feel that if no medical or psychological contraindications are present then the decision should be left to the patient. In these

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(525) The C.M.P.A. position is described at (1970) 102 C.M.A.J. 211.

(526) Quoted by MONGEAU, loc. cit., p. 46.

(527) Cf. Public Health Protection Act, loc. cit., art. 37: "An establishment or a physician shall see that care or treatment is provided to every person in danger of death; if the person is a minor, the consent of the person having paternal authority shall not be required".

circumstances, any patients later regretting their decisions will be obliged, as mature people, to accept the consequences of their acts. Perhaps it would be preferable to say that if a surgeon does not otherwise object to performing sterilizing operations, then the decision to go through with it must rest upon the informed capable adult. As we have mentioned previously, we feel it is preferable to avoid arbitrary and discriminatory rules such as those based upon age and parity, which have no probatory force before the courts.

In summary, we consider that, as in all other cases involving corporeal integrity, the decision to undergo sterilization is properly left to the patient as long as no other broader interests such as those of society are involved. It is a natural reflex of jurists of this province to seek some guidance on this and other equally controversial issues, from the legal literature and jurisprudence of other jurisdictions. Perhaps this merely compounds our difficulties due to the fact that our soul belongs to Rome, our Civil law owes much to France, our Criminal law is of Anglo-Saxon origin, and our morals are American.

b) Contraceptive sterilization and marriage

Two fundamental issues are commonly raised with regards to purely contraceptive sterilization in the context of marriage: The first involves the effects this type of sterilization could have on the initial formation of the nuptial contract, as well as the repercussions which could arise during marriage, should one of the consorts object to the voluntarily induced sterility of the other. The second issue goes beyond the actual

parties to the marital union and deals with the problem whether a medical practitioner may be held liable towards one consort for having sterilized the other without the permission of both partners, or in other words, whether he can be sued for having interfered in the marital relationship.

We will attempt to provide solutions to these controversies by examining first the common law jurisdictions and then the civilian jurisdictions.

(1) The Common Law Jurisdicitons

(i) England

Under English law, can one consort obtain an annulment of marriage in the event that the other consort is discovered to be sterile? Of the grounds for which a marriage is voidable, according to the terms of the Matrimonial Causes Act (1973) (528), only the provisions regarding invalid consent (529), and those relating to non-consummation (530) could have any potential application in this problem.

The courts have always adopted rather rigourous attitudes towards consorts seeking to void a marriage on grounds of mistake or fraudulent misrepresentation (531). In general,

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(528) 1973 c. 18

(529) Sec. 12 (c): "... that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise".

(530) Sec. 12 (a) incapacity to consummate; 12 (b) wilful refusal to consummate.

(531) RAYDEN's Law and Practice in Divorce and Family Matters, 11th ed., editor in chief, J. Jackson, London, Butterworths, 1971, pp. 119-120, paras. 9,10.

errors as to a spouse's character, fortune or status would not vitiate consent since the wish to enter into matrimony with the person in question would always be present (532). Thus, the accidental or self-induced sterility of one of the parties would not suffice to support a claim of mistake.

As for the situation in which a future spouse concealed his or her sterility from the other, the chances of relief are no less remote. The English approach is summarized by Mr. Justice Jeune, in the case of Moss v. Moss, in the following manner:

> "When in English law fraud is spoken of as a ground for voiding marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent" (533).

The relationship between sterility and the complete consummation of marriage (or vera copula), has been explored in depth in jurisprudence. On several different occasions, the courts have been called upon to decide whether, according to the particular circumstances of each case, a valid consummation had occurred: In the celebrated D-e v. A-g, falsely calling herself D-e matter (534), (which later became the leading precedent on the subject of consummation), the court was asked to decide

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(532) Ibid.

(533) (1897) P. 263 at pp. 268-269. This case dealt with a woman, (pregnant through the efforts of another man), who concealed her situation from her future husband. In spite of the striking circumstances, the court refused to find that there was sufficient fraudulent concealment or misrepresentation to allow the annulment. Today, although a formal provision of the Matrimonial Causes Act (1973), sec. 12 (f) deals with this particular issue in favour of granting the annulment, the Moss decision remains a valid statement of the law with regards to fraud in marriage.

(534) (1845) 1 Rob. Ecc. 297 reprinted in 163 E.R. 1039.

whether intercourse with a woman having no uterus and a two-inch deep vagina admitting only a partial insertion of the male organ could constitute consummation. In voiding the marriage, Dr. Lushington affirmed:

> "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character.
>
> ...
>
> If there be a reasonable probability that the lady can be made capable of a vera copula - of the natural sort of coitus, though without the power of conception - I cannot pronounce the marriage void" (535).

The case of L -. v. L -. (orse D -.) (536), dealt squarely with the issue of sterility on the basis of Dr. Lushington's dicta above quoted. In effect, Horridge, J., refused to grant a decree of nullity to a husband who was unaware at the time of marriage, that a therapeutic, pre-marital operation had rendered his wife sterile, though still capable of normal intercourse.

This point of view, however, was not to be consistently followed by the courts. For example, in the case of J. (Orse S.) v. J. (537), the wife was granted an annulment although her husband-to-be had been sterilized with her knowledge for purely contraceptive purposes and no other impairment to his ability to engage in sexual relations was evident. The Court

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(535) Ibid., pp. 298-299.
(536) (1922) 38 Times Law Reports 697.
(537) (1947) 2 All.E.R. 43.

of Appeal (per Somerville, J.) felt that consummation could occur only if the male seed passed naturally into the body of the female (538). The hair-splitting inherent in this particular rule is quite apparent since according to said interpretation, we would be forced to conclude that a male with a vasectomy would not be able to consummate whereas a woman with a tubal ligation could.

Fortunately, The House of Lords in the case of Baxter v. Baxter (539), reestablished the traditional rule that simple sterility (natural or surgical) or the use of contraceptive measures would not bar a valid consummation of marriage. In the words of Viscount Jowitt, L.C.:

> "I take the view that in this legislation, Parliament used the word 'consummate' as that word is understood in common parlance and in light of social conditions known to exist, and the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsability of either or both for a childless home, form the background to some other claim for relief" (540).

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(538) Ibid., p. 44. See also Cowan v. Cowan, (1946) P. 36 (C.A.).
(539) (1948) A.C. 274.
(540) Ibid., p. 290. In the present case the wife refused to have intercourse with her husband unless he used a condom. As for coitus interruptus, see Cackett (Orse Trice) v. Cackett, (1950) P. 253.

Apparently, it is only in the context of divorce rather than of annulment that the courts would be willing to act upon a sterilization which is contrary to the wishes of the other spouse. We may in fact suggest two basic premises for divorce with regards to the sterilization question—constructive desertion (541) and so-called "unreasonable behavior" (542).

Constructive desertion occurs when one of the spouses is forced, due to the intolerable conduct of the other, to leave the matrimonial home (543). For instance, a continuous refusal to have sexual relations which impels the other consort to leave the home has been construed on several occasions as constituting desertion (544). Although the courts have never had the occasion to pronounce themselves on the particular issue of the non-therapeutic sterilization of one spouse without the consent of the other (545), legal writers suggest that a finding of constructive desertion could be reasonably arrived at under the circumstances set out, since this unilateral act in itself, would be evidence of an in-

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(541) In fact, The Divorce Reform Act (1969), (1969 c. 55), coming into effect the 1st of January 1971, has only retained as the sole ground for divorce, marriage breakdown (sec. 1). Section 2 enumerates the cases in which a marriage is held to have broken down, i.e. adultery, unreasonable behavior, desertion and separation. The Matrimonial Causes Act (1973), sec. I reproduces these provisions. Sec I (2) (c) applies to desertion: "... that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceeding the presentation of the petition."

(542) Sec. 1 (2) (b): "... that the petitioner cannot reasonably be expected to live with the respondent".

(543) RYDEN, op. cit., p. 229, no 56.

(544) E.g. Fletcher v. Fletcher, (1945) 1 All. E.R. 582; Lawrence v. Lawrence, (1950) P. 84; Slon v. Slon, (1969) 1 All. E.R. 759 at p. 766 (C.A.).

(545) In Bravery, loc. cit., it was found that consent had been given.

tention to put an end to a "normal" marital relationship (546).

In practice, however any set of circumstances sufficient to justify a finding of constructive desertion would easily constitute "unreasonable behavior", with the added advantage that in the case of "unreasonable behavior", the petitioner would not have to wait two years before acting (547).

The celebrated case of Bravery v. Bravery (548), examined the issue of sterilization as constituting a ground for divorce (cruelty) under the now abrogated Matrimonial Causes Act 1950 (549). According to the facts of the case, the husband obtained a vasectomy after the birth of a first (and only) child of the marriage. One of the main points in issue was whether the wife in fact had consented to the operation, since she claimed not to have done so and the husband maintained the contrary. The majority of the Court of Appeal (Evershed M.R.; Hodson, L.J.) believed that the consent of the wife had actually been obtained. They also felt that she had failed to establish cruelty of a sufficiently grave nature so as to cause injury (or a reasonable apprehension thereof), to her health (550). As regards the repercussions of sterilization on marriage, the judges stated:

> "As between husband and wife, for a man to submit himself to such a process without good medical reason ... would, no doubt, unless his wife were a consenting party, be a grave

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(546) H.R. HAHLO, Sterilization as Ground for the Dissolution of Marriage, (1955) 72 S.A.L.J. 198 at p. 201; G.W. BARTHOLOMEW, Legal Implications of Voluntary Sterilization Operations, (1959) 2 Melbourne U. L.R., loc. cit. at p. 97.
(547) Sec. 1 (2) (c) of the Matrimonial Causes Act (1973)
(548) (1954) 3 All. E.R. 59.
(549) 14 Geo. VI, c. 25, sec. 1 (1) c.
(550) Loc. cit., p. 61.

> offence to her which could without difficulty, be shown to be a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury" (551).

In his dissenting opinion, Denning L.J. found as fact that the wife had not consented and in any case, even if she did, such consent would have been invalid as being contrary to public policy (552). Put in other terms, due to the illicit nature of a non-therapeutic sterilization, one could not validly consent to such an illicit act.

Aside from the hesitations and soul-searchings by the legal and medical professions which were provoked by the Denning dissent, it is natural to speculate whether, in the field of matrimonial law, the Bravery decision still has some authoritative value. In effect, since The Divorce Reform Act (1969) has not only eliminated cruelty per se and the Russell rule (553), but has also substituted for cruelty, the somewhat equally nebulous notion of "unreasonable behavior", can one argue that, in light of present law, Bravery would have produced a similar result? We are certainly inclined to think so because, as one writer described it,"unreasonable behavior"... may broadly be said to be cruelty without the injury to health" (554). Therefore, it can be affirmed that one consort obtaining a non-therapeutic sterilization contrary to the wishes of the other would probably be guilty of unreasonable behavior rendering cohabitation impossible (554a). Moreover, the consent of the other spouse would likely constitute a valid defence to any divorce action founded upon self-induced sterility.

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(551) Ibid.
(552) Ibid., p. 67.
(553) Russell v. Russell, (1897) A.C. 395, requiring that harm to health or a reasonable apprehension thereof be caused by the acts of cruelty.
(554) RAYDEN, op. cit., p. 205 no 28.
(554a) O'Neill, Watson, (1975) 38 Mod. L.R. loc. cit., at p. 182.

Turning to the field of tort law, would a consort who was not consulted or who did not approve a voluntary sterilization for the other consort, recover damages from the surgeon performing the operation? Until quite recently, the English Medical Defence Union expressed fears that an operation under these circumstances would amount to an actionable interference with marital rights (555). This does not appear, however, to be the case. Since the Law Reform (Miscellaneous Provisions) Act 1970 (556), the number of actions normally enjoyed by the husband for protection against the interference of strangers in his marriage, has been reduced from four (action for loss of services, harbouring a wife, enticement and criminal conversation) to one, an action for loss of services (557). The gist of this solitary basis of recovery is that if, through the wrongful act of others the wife suffers personal injury, her husband may claim damages should such injuries deprive him of her consortium et servitum (558). As we may suspect, this action which devolved from the now defunct view that the husband "owned" his wife, is actually a claim for trespass rather than an action on the case (559). As a result, his right of recovery is independent of any recourse which his wife may enjoy in her own right. The original goal was to safeguard the husband from a loss of his wife's services, in much the same fashion as he was entitled to sue for the loss of a domestic's services. Needless to say, the action for loss of services was and is enjoyed only by the husband and as a result, there can

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(555) ADDISON, (1967) 35 Med. Leg. J., loc. cit., p. 165. According to the 1966 annual report of the Defence Union, the damages would be for the loss of consortium even though conception, and not intercourse, would be impeded. Cf. MEYERS, The Human Body and the Law, op. cit., p. 19.

(556) 1970, c. 33, sections 4,5.

(557) SALMOND, On Torts, 16th ed by R.F.V. Heuston, London, Sweet & Maxwell, 1973, p. 360.

(558) An action per quod consortium et servitum amisit, cf. CLERK-LINDSELL, On Torts, 13th ed. by A.L. Armitage, general editor, Sweet & Maxwell, 1969, pp. 449-450, no 843.

(559) SALMOND, op. cit., p. 361; contra, J.G. FLEMING, The Law of Torts, 4th ed., Sydney Australia, The Law Book Co. Ltd. 1971, p. 576.

be no question of a wife suing a surgeon for the loss of her husband's consortium (560).

For a husband to succeed in his action in the event of a sterilization, he would have to overcome several obstacles: He would have to establish that the sterilization of his wife with her permission was wrongful as against her; he would have to establish that sterility constituted a loss of consortium; the law would have to be willing to compensate a partial (as opposed to a complete) loss of consortium, even though the loss was of a non-material or temporal nature.

It appears to be admitted that an action will lie for a partial loss of consortium (561), although no actual expenditure as a result of this loss has been incurred by the husband (562). Likewise, there is little doubt today that the impairment of a wife's sexual capacity, including the capacity to conceive, constitutes the fragmentation of a total and complete right of consortium (563).

The gratest issue, therefore, is whether the non-therapeutic sterilization of a wife constitutes a wrongful injury. If we were to follow the opinion expressed by Denning L. J. in his Bravery dissent (564), then there would be no reason why the husband could not sue for loss of consortium since, as it may be recalled, Denning L.J. expressed the view that this type of operation was illegal per se, and that the wife's consent would be no defence. As we have previously noted, this

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(560) Best v. Samuel Fox & Co. Ltd., (1952) A.C. 716 or (1952) 2 All. E.R. 394.
(561) Cutts v. Chumley, (1967) 1 W.L.R. 742 (C.A.), leave to appeal refused, (1968) 1 W.L.R. 668.
(562) SALMOND, op. cit., p. 362.
(563) FLEMING, op. cit., p. 577.
(564) (1954) All. E.R. loc. cit., at pp. 67-68.

point of view is not followed in England and thus, the very fact that the operation itself is legal (565) creates a bar to any right of recovery by the husband against a surgeon, provided, of course, that his wife has validly consented to the operation (565a)

(ii) The Anglo-Canadian Provinces

The repercussions of self-imposed sterility upon marriage in the Anglo-Canadian provinces are quite similar to those discovered in our examination of English law.

In effect, a prospective bride who knowingly conceals or lies about her sterility to her future husband (or vice versa), does not run much risk of seeing the marriage annulled either on the grounds of mistake or of fraud. In addressing himself to the subject of mistake, Hahlo states that to have a valid marriage, there need only be a declared willingness by the parties to actually marry each other; secondary considerations such as character, fortune, health or social status cannot come

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(565) ADDISON, loc. cit., p. 164.

(565a) O'Neill and Watson ((1975) 38 Mod. L.R. loc. cit., at pp.181 and 182) suggest that the husband does not enjoy this right of recovery because his proprietary interests, based on the consortium of his wife, for all intents and purposes, have been abolished by the Law Reform (Miscellaneous Provisions) Act 1970 loc. cit. This opinion is open to criticism because the husband's claim for services has been retained by the legislation. We agree however, that in the final analysis, the husband would not be able to claim damages from the surgeon who sterilized the wife with only her consent.

into play (566). So is it with the question of fraud — deceptions practiced, or the fraudulent concealment of elements which could be of interest to the future spouse will not render the marriage voidable. Indeed, the English case of Moss v. Moss (567), in which a husband whose wife concealed the fact that she was pregnant with the child of another at the time of the marriage, generally enjoys precedential value in Canada. As it may be recalled, the marriage in question was not invalidated. In this connection, perhaps the most succinct statement of the law relating to this aspect of consent was that made by Falconbridge, J. in Brennan v. Brennan:

> "The maxim 'caveat emptor' seems as brutally and necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or of a horse" (568).

Impotence, which may serve as the basis either of an annulment or of a divorce (569), would not be pertinent in the case of a simple sterilization which in no manner affects either libidinous impulses or the capacity to perform the actual sex act (570). Canadian courts have refused to equate ste-

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(566) R.H. HAHLO, Nullity of Marriage, 651 at pp. 675-676 in D. MENDES DA COSTA, Studies in Canadian Family Law, vol. 2. Toronto, Butterworth's, 1972.
(567) (1897) P. 263.
(568) (1890) 19 O.R. 327 at pp. 337-338.
(569) Divorce Act, 1970 R.S.C., c. D-8, sec. 4 (1) d.
(570) HAHLO, Nullity of Marriage, loc. cit., p. 678. As he puts it: "Sterility (impotentia procreandi) not accompanied by incapacity to have normal sexual intercourse (impotentia coeundi) is not sufficient".

rility with impotence (571), although an "imperfect" sex act has been held on occasion, to be equipollent to impotence on the part of the man. Accordingly, a marriage in which the husband performed only coitus interruptus for six years (due to his being psychologically unable to complete intercourse in the normal fashion), was held not to have been consummated (572). Nevertheless, the case of Hale v. Hale (573) clearly established the general thrust of jurisprudence on the subject of impotence and its relationship to sterility. In this matter, a spouse complaining that her husband could perform the sex act but was incapable of emission, was denied her request for an annulment.

It appears therefore that an incapacity to procreate without a concomitant inability to perform the coital function will not avail as grounds for nullity even though such incapacity were caused by surgical means prior to the marriage, and without the knowledge of the future consort (574).

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(571) E.g. Tice v. Tice, (1937) 2 D.L.R. 591 at p. 592 (Ont. C. A.) per Middleton, J.: "Plaintiff's counsel argued that a wife is entitled upon marriage to have a husband not only capable of intercourse but capable of procreating. The absence of sperm in the husband's discharge avoids the marriage. It would follow that every marriage without issue could be dissolved - a doctrine for which there is no authority".

(572) Wilkinson v. Wilkinson, (1950) 3 D.L.R. 236 (B.C. C.A.). Although non-consummation and impotence are two different phenomena, it could be argued that there was non-consummation due to impotence arising out of an aversion to the complete coital act. See also G. v. G. (1974) 1 W.W.R. 79 at p. 82.

(573) (1927) 3 D.L.R. 481 (Alta Supreme Court appellate division) reversing (1927) 2 D.L.R. 1137.

(574) Hathaway v. Baldwin (orse Hathaway), (1953) 9 W.W.R. (N.S.) 331, Farris, C.J.S.C., (B.C.).

Turning to a different problem, would one spouse be allowed to divorce the other for having, subsequent to the actual marriage, obtained a non-therapeutic sterilization without the consent of his or her marital partner? In other terms, would this unilateral act constitute" ... mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses" (575)?

Hahlo suggests that the procreation of children, being one of the main objects of marriage, then each spouse, under normal circumstances, enjoys the right to procreate (576). This right, of course, must be distinguished from the right of each consort to have sexual relations; the cessation of which could involve two equally offensive results depending on the desires of the innocent party:

> "Refusal of sexual intercourse by one spouse may affect the other spouse for two quite different reasons. He or she may suffer because of sexual frustration due to a lack of normal adult sexual life or he or she may suffer because of the desire for a family, the fulfilling of which is prevented by the other spouse's refusal" (577).

According to Canadian law, in order for cruelty to form adequate grounds for divorce, the cruel conduct must occur subsequent to the celebration of marriage and must render cohabitation intolerable. Each situation is a question of fact to be determined on its own merits, and in making such a de-

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(575) Divorce Act, loc. cit., sec. 3 (d).
(576) The South African Law of Husband and Wife, 3rd ed., Cape Town, Juta & Co. Ltd., 1973, p. 394.
(577) Stephen J. SKELLY, Refusal of Sexual Intercourse and Cruelty as a Ground for Divorce, (1969) 7 Alta. L.R. 239 at p. 240.

termination, the temperament, nature and sensibilities of the particular parties must be taken into account (578). Moreover, it does not appear necessary to prove an intention on the part of one party to injure the other (579), provided that the conduct reproached is of a sufficiently grave and weighty nature (580).

An issue quite similar to the problem under discussion has been examined in the case of P. v. P. (581), in which the wife sought a divorce based on the cruelty of her husband who refused to have a family. Prior to their marriage, the couple had agreed that they would like to have three or four children but that, during the first year of marriage, they would delay the pregnancies by the wife's taking of the "pill". A few months following the wedding, the husband advised the wife that he did not ever want any offspring and he insisted that she sign a consent form permitting him to undergo a vasectomy. Faced with a refusal, the husband deserted the plaintiff and submitted to the operation in any case. In his judgment, Barry, J. concluded that the actions of the husband constituted extreme [illegible]ty (582) and granted a decree nisi. Logically, the outcome w[illegible]robably have been the same had the husband merely arrived home one day and announced that he had been sterilized.

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(578) D. MENDES DA COSTA, Divorce, 359 at p. 451 in Studies in Canadian Family Law, vol. 1, op. cit.

(579) Ibid., p. 457.

(580) J.C. MACDONALD, L.K. TURNER, Canadian Divorce Law and Practice, Toronto, Carswell & Co. Ltd., 1969, pp. 3-4, no 3.73. See also H. DE MESTIER DU BOURG, Causes et effets du divorce en droit canadien, doctoral thesis, McGill University, typewritten, 1974, p. 156.

(581) (1972) 4 N.B. Rpts. 2d 525 (N.B. Supreme Ct., Q.B. div.).

(582) Ibid., p. 527.

It is submitted therefore, that the arbitrary frustration of a fairly strong paternal or maternal instinct through the voluntary act of the offending spouse can support a finding of mental cruelty, even though normal sexual intercourse is in no way impaired (583).

Let us turn to the problem of a physician's tort liability following the sterilization of one spouse without the consent of the other. As in England, the most probable recourse in the Anglo-Canadian provinces is that based upon a loss of consortium (584). This right of recovery which belongs exclusively to the husband, can serve to compensate said loss of consortium only when his wife has been injured or incapacitated through the tortious conduct of another, or through a third party's breach of contract (585). Consequently, it is on the basis of the very nature of this type of action that a recourse against a physician will fail, for it cannot reasonably be claimed that a contraceptive sterilization is a tortious or illegal act in its own right. In spite of the fact that this

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(583) G.CHALLIES, Cruelty as a Ground for Divorce, (1970) 16 McGill L.J. 113 at p. 120, affirms this to be the case except that he adds that there must be injury to the health of the petitioner (the old Russell v. Russell rule, (1897) A.C. 395). Of course, the latter requirement is no longer retained in Canadian law, cf. R.W. REVILLE, The Divorce Act Annotated, Agincourt Ont., The Canada Law Book Co., 1973, pp. 19-20.

(584) Although there is no precise definition of consortium, it is said to include companionship, love, affection, comfort, mutual services, and sexual intercourse - per Schroeder J.A., in Kungl v. Schiefer, (1961) O.R. 1 at p. 7. It is submitted that the procrative capacity should also be included.

(585) Ontario Law Reform Commission, Report on Family Law, Part I, Torts, Toronto, Dept. of Justice, 1969, p. 98.

aspect in itself should suffice to defeat any potential claim, there are several secondary considerations which reinforce this stand. For example, some Canadian provinces allow recovery only for a total loss of consortium (586), which is not generally the result of a sterilization (excepting perhaps for the very short period of hospitalization). In addition, although the husband's right of action is viewed as being independent of any claim vested in the wife, it is generally held in the Anglo-Canadian provinces that contributory negligence on the part of the injured party will either totally bar recovery or else reduce the claim of the husband (587) (in the case of apportionment legislation), since the action for loss of services is regarded as a derivative or dependent action. If this is true of contributory negligence, then it is also certainly true in the case of a volenti non fit injuria plea.

In light of all these obstacles to a possibility of recovery, we may conclude "... that no sterilization of a consenting adult competently performed, would give rise to a civil action at the instance of the patient or of the patient's spouse" (588).

(iii) The United States

In American law, physical capacity to enter into marriage implies that the parties must be capable of copulation

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(586) E.g. Szmerski v. Robinson, (1961) 36 W.W.R. 46 (Manitoba); Bates v. Fraser, (1963) 38 D.L.R. (2d) 30 (Ont.).

(587) Enridge v. Cooper, (1966) 57 D.L.R. (2d) 239 (B.C.). This judgment includes a general review of the case law. See also FLEMING, The Law of Torts, op. cit., p. 580. The Ontario Law Reform Commission, citing Young and Young v. Otts, (1948) 1 D.L.R. 285, maintains the contrary in Ontario law. Cf. Report on Family Law, op. cit., p. 99.

(588) Comments Upon the Law Relating to Abortion and Sterilization, annexed to BLACK's Abortion and Sterilization, (1961) 33 Manitoba Bar News, loc. cit., p. 45.

but not necessarily of procreation (589). As a result, sterility, either surgical or natural, generally will not entitle the other consort to seek an annulment (590), unless of course, there has been fraudulent misrepresentation or concealment of a known fact (591).

It is difficult to envisage a case where a person who has been surgically sterilized, can realistically defend himself or herself against an action for annulment based on fraud, since the medical profession is usually quite punctilious in informing the patient of the consequences of projected surgery, especially in relation to its permanent effects. Thus, rare would be the situations in which one of the consorts would have been sterilized without being aware of this fact. Normally, the procreation of children is a basic premise of the marital relationship (592), and therefore, it seems logical to presume, in

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(589) Corpus Juris Secundum under Marriage, Brooklyn, N.Y., The American Law Book Co., 1968, vol. 55, no 13, p. 827.

(590) Gibbs v. Gibbs, (1945) 23 S. 2d 382 (Fla.); Payne v. Payne, (1891) 49 N.W. 230 (Minn.); Smith v. Smith, (1921) 229 S.W. 398 (Mo.); Wilson v. Wilson, (1937) 191 A. 666 (Pa.); S. v. S., (1942) 29 A. 2d 325 (Del.); Lapides v. Lapides, (1930) 171 N.E. 911 (N.Y.); Kronman v. Kronman, (1936) 286 N.Y.S. 627; Korn v. Korn, (1930) 242 N.Y.S. 589; T. v. M., (1968) 242 A. 2d 670 (N.J.).

(591) Aufort v. Aufort, (1935) 9 Cal. App. 2d 310; Vileta v. Vileta, (1942) 53 Cal. App. 2d 794; Stegienko v. Stegienko. (1940) 295 N.W. 252 (Mich.); Osborne v. Osborne, (1937) 191 A. 783 (N.J.); Marks v. Marks, (1948) 77 N.Y.S. 2d 269; Williams v. Williams, (1939) 11 N.Y.S. 2d 611; Kronman v. Kornman, (1936) 286 N.Y.S. 627.
On the other hand, an Alabama Court has decided that the concealment of a known sterility would not be fraud of a sufficiently serious nature to warrant an annulment, cf. Smith v. Smith, (1945) 23 S. 2d 605.

(592) CHAMPLIN, WINSLOW, (1964-65) 113 U. of Pa. L.R., loc. cit., 438.

the absence of any contrary indication, that both future consorts hold out to each other, a capability of engendering children (593).

Turning to the problem of sterilization during marriage, writers intimate that the unilateral action of one spouse without the consent of the other, may offer a basis for divorce (594); the grounds suggested including cruelty, constructive desertion or irretrievable breakdown of the union (595). We could also add a fourth possibility, that of indignity. Interestingly enough, there appears to be no reported cases dealing with the hypothesis of elective sterilization, and all opinions have to be derived from analogies made with the "contraceptive" cases, i.e. cases in which divorce was sought because one of the consorts refused all sexual activity except when contraceptive methods were employed.

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(593) Champlin and Winslow also felt that "... unilateral elective sterilization, shortly after marriage and before the birth of any issue, could constitute grounds for annulment if it could be shown that the operation was procured pursuant to an intention formed prior to marriage" (ibid., at pp. 438-439).

(594) Ibid., p. 438; MEYERS, The Human Body and the Law, op. cit., 10.

(595) Irretrievable breakdown or variations of same are admitted in the following states: Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho (irreconciliable differences), Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada (incompatibility), New Hampshire, New Mexico (incompatibility), North Dakota, Oregon, Texas (insupportability), Washington. Cf. Doris FREED, Grounds for Divorce in the American Jurisdictions, (1974) 8 Family L.Q. 401.

Of the four grounds suggested, the notions of irretrievable breakdown of marriage and constructive desertion are perhaps the likeliest foundations for a successful divorce action. Due to its relatively short existence, irretrievable breakdown has not been greatly examined by the courts in relation to the issue of contraception, although it seems reasonable to assume that irreconciliable differences on the topic of procreation would be indicative of a very unstable union. Constructive desertion, on the other hand, has had occasion to undergo judicial scrutiny in this connection. For instance, in the celebrated case of Kreyling v. Kreyling (596), the husband insisted upon birth control measures because he did not wish to lower his living standard by having to support children. In granting a decree to the wife, the court held that the husband's refusal to allow the conception of children was contrary to the "controlling purpose of marriage" (597). This view, however, is not consistently followed (598).

Although somewhat more difficult, it is nonetheless possible to contemplate a unilateral sterilization as constituting cruelty. Unfortunately, a dearth of pertinent jurisprudence on this point relegates any opinion one may wish to express, to the realm of pure speculation. However, according to a definition supplied in Corpus Juris Secundum:

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(596) (1942) 23 A. 2d 800 (N.J.).

(597) Ibid., p. 804 (per Matthews, Advisory Master). See also Goldstein v. Goldstein, (1967) 235 A. 2d 498 at p. 499 (N.J.); Kirk v. Kirk, (1956) 120 A. 2d 854 (N.J.).

(598) Cf. Fink v. Fink, (1954) 105 A. 2d 451 (N.J.), although this case seems to turn mainly upon a question of evidence. In the case of Harrington v. Harrington, (1937) 192 A. 555 (Del.), it was held that a refusal to have children did not per se constitute desertion.

> "... it is generally sufficient and necessary to constitute cruelty warranting a divorce, that there be actual personal violence or conduct causing a reasonable apprehension of it, or such a course of treatment, apart from bodily violence, as endangers life, limb or health, and renders cohabitation unsafe or intolerable" (599).

In most jurisdictions, it is also admitted that the conduct of one of the consorts which causes mental suffering of a serious nature to the other will similarly constitute cruelty (600). If one spouse can in fact establish that the self-centered gesture of the other partner in obtaining a sterilization has had the effect of thwarting the legitimate desire of the former to have children, and that the frustration of this desire has indeed caused mental suffering of an intolerable intensity, then there is no reason why divorce should not be granted. It is submitted, though, that an unauthorized sterilization would not ipso facto constitute cruelty, and any complainant invoking these grounds would have to further establish the serious repercussions that such an action has occasioned as regards the marriage itself.

With regards to the possibility of invoking indignity as grounds for divorce, there seems to be little chance of success. On at least two occasions, the courts have decided that a refusal by a woman to bear children would not suffice to support a claim of indignity (601). Consequently, it seems reasonable to opine that a refusal to have children, reinforced by a unilateral sterilization, would have a similar outcome.

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(599) Divorce, Brooklyn, N.Y., The American Law Book Co., 1959, vol. 27A, no 25, p. 56.
(600) Ibid., no 21(1), p. 75.
(601) McGuigan v. McGuigan, (1955) 112 A. 2d 440 (Pa.); Taylor v. Taylor, (1940) 16 A. 2d 651 (Pa.).

Turning to the potential liability of surgeons vis-à-vis the unconsenting consort, many states have passed legislation expressly dispensing with the necessity of spousal permission (602). As regards the remaining states, articles in medical journals consistently advise their readers to obtain the consent of both partners before proceeding with a sterilization under the "ounce of prevention" avoiding a pound of litigation philosophy (603). The greatest fear is that the courts may construe a unilaterally-obtained sterilization either as a wrongful interference with the marital relationship, or else as a tortious loss of consortium. Interference with the marital relationship takes place when a tortfeasor, through an intentional act, deprives one consort of the consortium of the other by way of enticement, criminal conversation, or alienation of affection. Enticement occurs when a spouse is compelled or induced to live apart from the other, while criminal conversation is nothing other than "ordinary adultery". Alienation of affection, as the term implies, is the deprivation of one spouse of the affections of the other (604). Although this type of claim traditionally belonged to

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(602) Cf. for example the California Health and Safety Code, Nos 1225, 1416, 1459, 32128.0 state that candidates for sterilization need not meet non-medical qualifications, which includes marital status. The New Mexico Statutes, (no 12-3-43, approved the 30th of March 1973) dispenses with the necessity of consent if in fact the patient has been abandoned by his or her spouse. The Oregon Revised Statutes no 435-305 provides an immunity for physicians who practice sterilizations without the consent of the other spouse. The Tennessee Code no 53-4609 is somewhat similar in effect.

(603) For example, M. MACKAY, H. EDEY, The Law Concerning Voluntary Sterilization as it Affects Doctors, (1970) 103 J. of Urology 482 at p. 483. See also SAGALL, (1972) 8 Trial loc. cit., p. 61.

(604) See generally W.L. PROSSER, Handbook of the Law of Torts, 4th ed., St. Paul Minn., West Publishing Co., 1971, pp. 873-878, no 124.

the husband due to the once quasi-proprietary interest which he had over his wife, it has now been extended to the wife through statutory enactment in all the American states except Maine (605). The doubt has been expressed that this cause of action could be broadened to cover a sterilizing operation, since the gist of any claim for interference with the marital relationship is that the conduct complained of must undermine the mutual affection each spouse has for the other (606). Yet, would not the mere fact of one consort seeking a sterilization without the approval of the other indicate that the marriage was already in a questionable state? Nevertheless, in theory, it could be possible for an operation of this kind to erode the affection of the sterilized spouse for the other, although it would take a psychiatrist and not a jurist to explain just how. In addition, one writer has suggested that an action of this category would likely fail because it would not be possible to establish that the sterilization was undertaken by a surgeon with the intention of undermining the couple's mutual affection (607).

As for an action based on the tortious deprivation of consortium (consisting of services, society and sexual relations (608)), a non-negligent sterilization performed with the patient's consent would render the whole transaction non-tor-

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(605) Ibid., p. 880, no 124.
(606) CHAMPLIN, WINSLOW, (1964-65) 113 U. of Pa. L.R., loc. cit., p. 437.
(607) MEYERS, op. cit., p. 10.
(608) PROSSER, op. cit., p. 889, no 225.

tious (609). In other words, the non-consenting spouse's right of recovery is subject to the same defences as would be the claim in tort of the sterilized consort, including contributory negligence, or volenti non fit injuria (610).

In a word, the fact that there is not a single reported case dealing with these very problems in the context of purely contraceptive sterilization tends to indicate that a surgeon does not have much to fear in this respect. Although useful as a means of precaution, the consent of both spouses should not be viewed as a condition sine qua non before sterilizing a married person.

(2) The Civilian Jurisdictions

(i) France

Sterility, whether induced or accidental, is not a bar to marriage in France. In a leading decision dated the 6th of

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(609) CHAMPLIN, WINSLOW, loc. cit., p. 437; MEYERS, op. cit., p. 10. In the recent case of Murray v. Vandevander et al, (1974) 522 P. 2d 302, the Court of Appeals of Oklahoma decided that a husband could not recover damages from a surgeon and hospital for a loss of consortium occasioned by the sterilization of his wife without said husband's consent. It should be noted that this matter dealt with sterility obtained through a hysterectomy, i.e. a therapeutic sterilization. Nevertheless, the following statement (per Box, P.J.) would seem general enough to cover non-therapeutic operations: "We have found no authority ... which holds that the husband has a right to a child-bearing wife as an incident to their marriage. We are neither prepared to create a right in a husband to have a fertile wife nor to allow recovery for damage to such a right. We find that the right of a person who is capable of competent consent to control his own body is paramount" (at p. 304).

(610) PROSSER, op. cit., p. 891, no 125.

April 1903, the Cour de cassation (611) affirmed that the existence of a valid union was subject only to the double requirement that it be entered into by persons whose sexes could be recognized, and that their sexes be different (612). The Court went on to state:

> "Mais attendu que, si ces deux conditions sont nécessaires, elles sont, en même temps, suffisantes, et que, lorsqu'elles sont réunies, le défaut, la faiblesse ou l'imperfection de certains organes caractéristiques du sexe sont sans influence possible sur la validité du mariage ..." (613).

In the event that one of the consorts entered into a marriage without revealing his or her sterility to the other, there would still exist a few possibilities of terminating the union at the request of the "innocent" party. The first hypothesis which comes to mind would be an action en annulation de mariage founded upon article 180 C.C.F. (614), dealing with error as to the person. Since the establishment of a rather narrow interpretation of the provisions of said article 180 C.C.F. by the Cour de cassation (Chambres réunies) judgment of the 24th of April 1862 (615), (which held that only errors as

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(611) S. 1904.1.273 ,note Wahl .

(612) "... que le sexe de chacun des époux soit reconnaissable et qu'il diffère de celui de l'autre conjoint; ..." (ibid., p. 274).

(613) Ibid., p. 275. See also Lyon 16 mai 1906, D.P. 1907.2.21.

(614) "Le mariage qui a été contracté sans le consentement libre des deux époux, ou de l'un d'eux, ne peut être attaqué que par les époux, ou par celui des deux dont le consentement n'a pas été libre.
Lorsqu'il y a eu erreur dans la personne, le mariage ne peut être attaqué que par celui des époux qui a été induit en erreur".

(615) D.P. 1862.1.153; S.1862.1.341.

to actual physical identity rather than as to the qualities of the spouse, would avail), French jurisprudence has gradually broadened the notion of error to the point that the courts are now willing to view the marriage relationship as more than just a contract concluded between two persons of the opposite sex. Today, French jurists are inclined to take into consideration the goals which spouses have in mind when marrying. For example, the Civil Court of Grenoble was willing to annul a marriage because of the impotence of the husband, by holding that the wife married with the hope inter alia of having a family and that had she known of her fiance's impotence, she would never have consented to the match (616). In a similar decision also dealing with impotence, the Tribunal de Grande Instance de Lille perceived the law to be as follows:

> "Qu'il convient ainsi d'admettre que l'erreur dans la personne annule le consentement au mariage toutes les fois qu'elle a porté sur une qualité substantielle de la personne qui a déterminé le consentement et en l'absence de laquelle le consentement n'aurait pas été donné si l'époux demandeur avait agi en connaissance de cause ..." (617).

In any event, it now seems reasonably certain that, as in the case of impotence, surgically induced sterility cannot be concealed with impunity from the other consort, especially when it is reasonable to assume that the marriage was entered into with a goal of procreation (618). In situations

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(616) Tribunal de Grande Instance de Grenoble, 13 mars et 20 novembre 1958, D. 1959.435, note Cornu.

(617) Tribunal de Grande Instance de Lille, 17 mai 1962, D. 1962, som. 10. See also Grenoble, 19 juin 1963, J.C.P. 1963.II.13334 and Tr. Gr. Ins. d'Avranches, 10 juillet 1973, D.S. 1974 174, note Guiho.

(618) It should be noted in passing that error as to the person cannot be invoked after six months of cohabitation with knowledge of the error has elapsed, cf. art. 181 C.c.f.

other than these however, Loysel's adage, "en mariage, trompe qui peut" remains fundamentally accurate.

As a second hypothesis in which a spouse who was ignorant of the sterility of the other could terminate the marriage, it is suggested that divorce can be obtained on grounds of "injures graves" (619). According to Trochu, the injury consists not in the fact of being unable to procreate but in the dissimulation of the "guilty" spouse's status before the marriage (620). In other words, the voluntary concealment of information of primary importance in a marriage constitutes a form of fraud (621). By the same token, a spouse obtaining a non-essential sterilization during marriage without the consent of the other consort is also exposed to an action in divorce for injures. In order to succeed, the Code civil requires that the act(s) complained of must constitute a serious violation of the duties or obligations inherent in the marital relationship. The gravity of the act(s) in question, moreover, must be such as to render the marriage ties unbearable or intolerable. It should be noted at this point that French law

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(619) Art. 232 C.C.F.: "En dehors des cas prévus aux articles 229, 230 et 231 du présent Code, les juges ne peuvent prononcer le divorce à la demande d'un des époux que pour excès, sévices ou injures de l'un envers l'autre, lorsque ces faits constituent une violation grave ou renouvelée des devoirs et obligations résultant du mariage et rendent intolérable le maintien du lien conjugal".

(620) L'Impuissance, D.1965, chron. XXXV, p. 155.

(621) Ibid. See also Cass. civ. 5 juillet 1956, D.1956.609, or G.P. 1956.2.176. As for the concealment of psychological impotence, see for example: Nancy, 12 mai 1958, G.P. 1958.2.20 or D.1958.som. 121; Cass, civ. 25 jan. 1922, S.1925.1.15; Trib. civ. Château-Chinon, 24 nov. 1948, G.P. 1949.1.7.

does not require that the acts or gestures complained of be committed with an intention to harm ("nuire") the innocent spouse, but only that the party committing them be acting with discernment or the capability of understanding the consequences of his or her actions (622). For example, it was held that an unjustified refusal by the husband to have sexual relations was injurious since it deprived his wife of a legitimate desire to have children (623). In a similar vein, the practice of coitus interruptus (624) or of having intercourse only with prophylactics was viewed as constituting an injure grave (625). In spite of the absence of any jurisprudence dealing directly with the problem of purely contraceptive sterilization, we feel quite safe in affirming that solutions similar to those above-described, involving the more "traditional" forms of birth control, would apply with equal force (626).

It is opined that a surgeon performing a non-therapeutic (or non-eugenic) sterilization on a married person without the consent of the other spouse will be answerable to the latter for damages (627). This finding is based upon the fact that purely contraceptive sterilizations are still viewed in

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(622) Cass. civ. 2 mai 1958, D.1958.509, note Rouast.

(623) Trib. Civ. Seine, 12 nov. 1948, G.P. 1949.1.7

(624) Cass. civ. 2 juillet 1964, Bull. civ. II, no 529, p. 395; Paris, 27 oct. 1959, D.1960.144.

(625) Caen 26 déc. 1899, S.1900.2.143; Trib. civ. Seine, 12 nov. 1948, G.P. 1949.1.7.

(626) It should be noted that the consent of the plaintiff to the sterilization would constitute a fin de non-recevoir to a divorce action, cf. J. PATARIN, Jurisclasseur civil, Divorce, arts. 229-232, Paris, Editions Techniques S.A. 1972, fasc. A, p. 15, no 35.

(627) Cf. J. SAVATIER in (1964) Cahiers Laënnec, loc. cit., p. 61 writes: "Il nous semble donc certain que le médecin qui pratique la stérilisation féminine à des fins anti-conceptionnelles, même avec le consentement ou sur la demande de l'intéressé, engage sa responsabilité pénale. Il peut également être condamné civilement à réparer le dommage que l'opération aura causé au mari, si celui-ci n'était pas complice".

France as being illicit (628), and that the consent of the "victim" (or patient) will not provide a bar to an eventual right of recovery:

> "S'il est établi qu'il y a faute de la part d'un chirurgien à entreprendre une opération ..., le consentement donné par le patient ne peut pas supprimer le caractère fautif de l'acte; et ce caractère demeure, même s'il y a plus que 'consentement', plus qu''acceptation' des risques; si c'est la victime qui a sollicité l'intervention quelle que soit la supplication qu'elle ait pu adresser au chirurgien" (629).

Should non-essential sterilizations ever become viewed as not being in contravention of the principles of public order and good morals, (as they will certainly be in the near future if the current French attitudes towards contraception continue to evolve in the same direction), then all litigation arising out

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(628) Cass. crim. 1 juillet 1937, S.1938.1.193, note Tortat.

(629) H. L. et J. MAZEAUD, Traité théorique et pratique de la responsabilité civile, 6e éd., Paris, Editions Montchrestien, 1970, vol. 2, pp. 601-602, no 1493. In discussing the subject of artificial insemination with the sperm of a donor (another medical practice of questionable legality in France), René Savatier clearly states that the husband and the wife may sue even though they have consented to the procedure. Cf. Jurisclasseur de responsabilité civile et des assurances, Paris, Editions Techniques, XXXb, p. 15, no 90. As regards the right of recovery of the wife, René Savatier is in contradiction with the opinion of Jean Savatier in Cahiers Laennec (loc. cit., p. 61) since the latter affirms: "En revanche, la femme serait irrecevable à demander elle-même réparation du préjudice résultant de la stérilisation illicite accomplie avec son accord". In any case, there appears to be unanimity of opinion in granting the unconsulted consort a recourse against the surgeon.

of non-negligently performed operations of this type will probably be restricted to the spouses themselves in the context of divorce actions or separations from bed and board.

(ii) Province of Quebec

Although a marriage can be annulled due to the "apparent and manifest" impotency of one of the consorts at the time of the marriage (630), Quebec courts have generally avoided equating sterility with impotence (631):

> "It is first necessary to distinguish between 'impotency' and 'sterility'. Impotency is the inability to have sexual intercourse (what the Canon Law calls impotentia coeundi), while sterility is the inability to conceive in the case of a woman, or impregnating a woman if one is dealing with a man. The inability to have children (sterility) or the refusal to have children is not a ground of nullity" (632).

This point of view has not always been uniformly followed by the courts. Indeed in one notable exception, G. v. Dame B. (633), involving a woman rendered sterile due to a fibroid tu-

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(630) Art. 117 C.C. In its Report on the Family (PartI), Montreal, Civil Code Revision Office, 1974, the Committee on the Law on Persons and on the Family, recommends (art. 26) that a marriage be annulled at the request of either spouse in case of impotence, psychological or physical. Consequently, this recommendation greatly expands art 117 of the present Civil Code (op. cit., p. 116)

(631) Cf. B. v. W., (1952) S.C. 206 (Demers, J.): "Le Code déclare donc le mariage nul seulement dans le cas d'impuissance et non pas dans le cas de stérilité". (In this case, the woman had an ovariotomy before the marriage. See also D. v. D., (1946) S.C. 480.

(632) Challies, J. in Dame Leibovitch v. Beane, (1952) S.C. 352. This case dealt with a husband with chronic encephalitis, who was unable to have an erection.

(633) (1947) S.C. 82.

mor, Cousineau J. concluded that:

> "... Impotency in a woman must be taken to mean the inability to fulfill the principal end of marriage, namely the procreation of children.
>
> As to 'apparent and manifest', it would be fantastic to assume these words to mean that any individual could conclude by looking at a woman, either dressed or naked, that she was impotent to procreate" (634).

Subsequent jurisprudence (635) however, indicates that this decision is an isolated deviation from the more orthodox view of impotence.

Although a spouse contracting marriage will not be exposed to an annulment on the mere grounds of sterility, there are suggestions that, as in the case of French civil law, the failure to reveal a known state of sterility to the "innocent" consort could permit the latter to seek an annulment by reason of error as to the person (636). Aside from the rather obvious

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(634) Ibid., p. 85.

(635) Cf. Dame Leibovitch v. Beane, (1952) S.C. 352 at p. 358; H. v. M., (1951) R.L. 511 (Collins J.) and S. v. M., (1954) R.L. 346 (Perrier J.). These above-cited cases insist upon the fact that the impotence must be truly "apparent and manifest". It must also be permanent; cf. Rigler v. Segal, (1947) R.L. 318 (Demers J.), and Dame W. v. F., (1947) S.C. 66 (Demers J.). In one isolated case, it was decided that psychological impotence which was "apparent and manifest" to a psychiatrist would fulfill the requirements of art. 117 C.C., cf. Dame S. v. G. et al, (1966) S.C. 388 (St-Germain J.).

(636) Art. 148 C.C.: "A marriage contracted without the free consent of both parties, or of one of them, can only be attacked by such parties themselves, or by the one whose consent was not free.
When there is error as to the person, the marriage can only be attacked by the party led in error".

hypothesis of error as to the physical person (637), it has been debated whether the courts could go further and take into consideration errors relating to the substantial qualities of the marital partner, a knowledge of which would have induced the misled spouse not to marry (638). In general, our jurisprudence, after an initial period of liberalism (639), has become more circumspect in granting annulments based an error due to the difficulty of determining which qualities should be held essential in a spouse, and a concomitant fear of contributing to the instability of marriage as an institution (640). This movement towards restraint in dissolving marriage, which was initiated and maintained by the Court of Appeal (641), augurs badly for persons complaining of the sterility of their marital partners. Nevertheless, the door is not absolutely locked to this type of approach, at least, in the opinion of Gagné J.:

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(637) E.g. marry the wrong identical twin.

(638) J. PINEAU, La Famille, Montreal, Les Presses de l'Université de Montréal, 1972, p. 34, no 45.

(639) Cf. P. AZARD, A.F. BISSON, Droit civil québécois, Ottawa, Editions de l'Université d'Ottawa, 1971, t. 1, p. 90, no 59. For errors as to the physical health of the spouse which were retained, see Dame Benditsky v. X., (1939) 77 S.C. 391 (syphilis) (Duclos J.) and Dame N. v. E., (1945) S.C. 109 (chronic psoriasis) (Forest J.). As regards errors as to the spouse's religion, cf. McCawley v. Hood, (1943) R.L. 366 (Forest J.); contra: Whalley v. Kowalyck, (1947) R.L. 228 (Demers J.). Likewise, error as to the marital antecedents has been adjudged sufficient for an annulment, cf. Leduc v. Jones, (1945) R.L. 222; Dame Rousseau v. Enloe, (1965) S.C. 448 (Deslauriers J.), as well as ignorance of a criminal record, cf. Dame J. v. J. et al, (1947) S.C. 143 (Forest J.) and Dame Weinstock v. Blasenstein et al, (1965) S.C. 505 (Demers J.).

(640) PINEAU, op. cit., p. 34 no 45.

(641) For example, in the following cases, the Court of Appeal has consistently refused to grant an annulment: Yorksie v. Chalpin, (1946) K.B. 51 (prior unchastity); Procureur général du Québec v. K. et W., (1947) K.B. 566 (incapability of having sexual relations except in a manner contrary to nature); Dame Chisholm v. Starnes, (1949) K.B. 577 (misrepresentations as to personal and family background); Dorion v. Bussière, (1967) Q.B. 416 (epilepsy); Dame Richard v. Trudel et al, (1968) Q.B. 883 (psychological development arrested at the stage of adolescence).

> "Si l'état civil, la famille, la race, la religion et même le nom, comme le disent plusieurs auteurs et plusieurs décisions, ne sont pas les éléments essentiels de la personne, que reste-t-il que l'on puisse considérer comme constituant l'essence de la personnalité? Ne faut-il pas déduire de la doctrine des auteurs sur cette question que les tribunaux ont une certaine discrétion à exercer dans l'appréciation des qualités sur lesquelles il y a eu erreur?
>
> C'est pour cette raison, je crois, que l'interprétation des mots 'erreur dans la personne' portera toujours à controverse ...
>
> Ce qui est certain, c'est que les qualités qui auraient faussement apparu exister ou auraient été frauduleusement représentées comme existant, doivent avoir été la considération principale du consentement au mariage, et il incombe à celui qui demande l'annulation d'en faire une preuve absolument certaine" (642).

We see no reason why error as to the person could not be successfully invoked provided the complainant can establish that an essential goal of the marriage was to have children. In addition, we feel that the courts would be more receptive to this type of argument if fraudulent concealment or misrepresentation occurred, notwithstanding the imperiousness of the maxim

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(642) Dame Chisholm v. Starnes, (1949) K.B. 577 at p. 586.

"en mariage, trompe qui peut" (643). In spite of the fact that the courts will naturally tend to be quite severe in granting annulments based on error, we consider that in particularly conspicuous cases, these grounds should be viewed with sympathy.

A spouse obtaining a non-therapeutic sterilization during marriage, without the consent of the other may also, depending upon the circumstances, obtain a divorce on grounds of mental cruelty (644), or else a separation from bed and board

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(643) PINEAU, op. cit., p. 33 no 44 is very critical of certain decisions which were based on "false representation": "La fausse représentation, en effet, si elle est établie par manoeuvres frauduleuses, peut être assimilée au dol; or 'en mariage, il trompe qui peut': le dol n'entraîne pas l'annulation du mariage". We feel that persons courting each other are generally on their best behavior and probably tend to put the best complexion on matters of family background, employment, personal finances, etc ... in presenting these subjects to each other. It is perhaps inevitable that facts get distorted in the telling. However, we feel that when the exaggeration or misrepresentation carries on essential qualities of the parties involved and these qualities are held critical in the decision whether to marry a proposed spouse, then the marriage can be annulled on grounds of error. The misrepresentation will not be considered fraud per se but merely a means of proving error, i.e. it would be easier to establish error as to the person if we can establish that the offending spouse had consciously concealed facts or misled the "innocent" consort. In fact, the Civil Code Revision Office (Report on the Family (part I) op. cit., art. 24) recommends that "Any marriage may be annulled when: ... 3. either consort has been misled by an error as to an essential characteristic of his spouse, through fraudulent measures practised by such spouse." In making this recommendation, the Committee stated (at p. 112): "The Committee considered error as to essential qualities insufficient; it felt that for one consort to apply for annulment it was necessary that this error have been induced by fraud on the part of the other".

(644) The reader is referred to the section dealing with the Anglo-Canadian provinces, supra, p. 384 ff. In its Report on The Family (part I) op. cit., the Civil Code Revision Office recommends at art. 77 that: "Divorce or separation as to bed and board is granted, on application by either consort, when cohabitation has become intolerable".

for grievous insult (645).

As for the issue of a surgeon's liability for having performed an elective sterilization without the prior consent of the other spouse, there seems to be little possibility of this type of recourse succeeding. Unlike the Common law which does not acknowledge a woman's right to sue for loss of services and consortium (646), Quebec doctrine (647) and jurisprudence (648), is willing to accord this recourse to either consort. However, a claim of this type must be based upon an illicit or delictual act and for this reason alone, would not avail in situations where the activity complained of was lawful (as we feel to be the case of sterilization). Even if contraceptive sterilizations were held to be contra bonos mores, the surgeon's liability towards the unconsulted consort would be retained only after having taken into consideration the contributory fault of the sterilized spouse (649). The chances of the latter hypothesis ever arising are, as we have previously stated, very remote due to the obvious reason that sterilization is not per se an illegal operation (650).

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(645) Cf. arts. 189, 190 C.C. Grievous insult may be defined as follows: "Ce sont toutes les paroles, actes, faits contraires aux obligations du mariage et à la dignité de la vie conjugale". According to PINEAU, La Famille, op. cit., p. 256, no 325, the gravity of the offence(s) is left to the discretion of the judge who must make his appreciation according to the rules of art. 190 C.C.

(646) Supra, p.379 .

(647) J.L. BAUDOUIN, La responsabilité civile délictuelle, Montreal, P.U.M., 1973, pp. 83-84, no 106.

(648) Sebaski et uxor v. Leonard J. Weber Construction Co., (1972) S.C. 557.

(649) Ibid.

(650) In this respect, it is very interesting to note that consent forms for sterilization (AH-219) issued by the Ministry of Social Affairs, have been modified to no longer require the concurrence of the other spouse. See annexes 2 and 3, the old and the new form respectively. The new form was issued pursuant to s.114 of the Act Respecting Health Services and Social Services loc.cit., added to this act the 24th of Dec. 1974, and which reads as follows: "The consent of the consort shall not be required for the furnishing of services in an establishment."

HOSPITAL CENTRE

ANNEX 2

LEGAL CONSENT

FOR TUBAL LIGATION OR VASECTOMY

Date:

Date _____ Record No. _____

Name _____ Age _____

Address _____

Attending Physician _____

Responsible _____

Assistant _____

Room No. _____

I, the undersigned, request that the following surgical operation:

_____
(vasectomy or tubal ligation)

be performed by Dr _____ and his assistants.

I acknowledge that the nature, risks and consequences of this surgical operation have been explained to me by Dr _____ _____. This surgical operation should render me sterile. However, I was informed that this procedure does not assure sterility in all cases and I have received no guarantee to this effect. I acknowledge that if this surgical operation is successful, the result will be permanent sterility, and that it will be impossible for me to father or conceive a child

Consequently, I agree not to take any legal action against Dr _____, his assistants or the institution or hospital centre where they are practising because this surgical operation has not rendered me sterile.

Signed this _____ at _____
(day, month, year)

Signature of Applicant _____

Signature of Witness _____

Signature of Surgeon _____

Consent of Spouse: (If the applicant is married and lives with his or her spouse, the latter must also give his or her consent)

I, the undersigned, spouse of _____ have full knowledge of the above-mentioned request, permission and legal consent, and completely agree that this surgical operation be performed.

Signature of Spouse _____ Date _____

Signature of Witness _____ Date _____

IMPORTANT: When this surgical operation is performed in a hospital centre, a copy must be placed in the person's medical record.
If the physician wishes to have a copy of this legal consent for his own records, a second copy must be completed.

AH-219

(French on reverse side)

HOSPITAL CENTRE

ANNEX 3

Date d'admission	Chambre n°	N° dossier médical
Nom	Prénoms	
Adresse		
Date de naissance	Sexe	N° téléphone
Médecin traitant		
Numéro d'assurance maladie		

LEGAL CONSENT
FOR TUBAL LIGATION OR VASECTOMY

Date:

I, the undersigned, request that the following surgical operation: _____ (vasectomy or tubal ligation)
be performed by Dr _____ and his assistants.

I acknowledge that the nature, risks and consequences of this surgical operation have been explained to me by Dr _____ This surgical operation should render me sterile. However, I was informed that this procedure does not assure sterility in all cases and I have received no guarantee to this effect. I acknowledge that if this surgical operation is successful, the result will be permanent sterility, and that it will be impossible for me to father or conceive a child.

Consequently, I agree not to take any legal action against Dr _____, his assistants or the institution or hospital centre where they are practising because this surgical operation has not rendered me sterile.

Signed this _____ (day, month, year) at _____

Signature of Applicant _____

Signature of Witness _____

Signature of Surgeon _____

IMPORTANT: When this surgical operation is performed in a hospital centre, a copy must be placed in the person's medical record.

If the physician wishes to have a copy of this legal consent for his own records, a second copy must be completed.

AH-219

(French on reverse side)

III- SUMMARY AND CONCLUSION CONCERNING STERILIZATION

From our study of the jurisdictions under survey, virtually all admit the validity of therapeutic and voluntary eugenic sterilization. Compulsory eugenic sterilizations still take place in about half of the American states, although this number is constantly diminishing and deservedly so. Of the other jurisdictions examined, all appear to be disinclined to adopt this type of coercive legislation, and the two Canadian provinces, (Alberta and British Columbia) which once promoted policies of forced sterilization, have recently abrogated their eugenics laws. The subject of purely contraceptive sterilization is still somewhat controversial but remains a licit form of birth control in the United States, Canada and England. Only in France is there substantial resistance to the idea of admitting the legality of non-therapeutic sterilization. Nevertheless, the recent substantial liberalization of abortion and contraception laws in that country tolls the death-knell of legal opinions inimical to voluntary sterilizations.

As regards contraceptive sterilization and marriage, while virtually all jurisdictions could admit that such a measure may open the way for a divorce in favor of the unconsenting spouse, the chances of obtaining an annulment exist only in the United States (for fraudulent concealment), France and Quebec (for erreur quant à la personne). France is the only jurisdiction in which a surgeon runs the risk of being sued by a consort for a sterilization practiced on the other without the former's approval.

There remains one aspect of sterilization which, strictly speaking, does not fall within the purview of this dissertation

but which, due to the novel nature of the problems raised, warrants examination - we refer of course to malpractice liability. As a general rule, surgeons undertaking to perform sterilizations are not bound to ensure that sterility ensues, unless through express agreement, they are willing to guarantee the results of their operations (which rarely occurs). In other words, surgeons generally contract to operate in a competent, reasonable fashion, or as civilians would put it, are bound to obligations de moyens rather than obligations de résultat . What then would be the result, if, through negligence or want of skill, the operation did not succeed in producing sterility, and a healthy normal baby was eventually put into the world? Would the courts be willing to grant damages for an event which, under ordinary circumstances, is regarded as a great blessing by most parents (651)?

It is only in the United States that this precise issue has had occasion to be tried, and the reactions of the American courts are quite illuminating: Initially, there was a general repugnance to award damages for the birth of a normal baby. In

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(651) In the Province of Quebec, the closest analogy which can be made with the problem of "unwanted" birth is that of seduction. The courts will award moderate damages for the moral prejudice caused (atteinte à l'honneur et à la réputation) but will concentrate primarily on compensating patrimonial losses such as loss of salary and medical expenses. As for the actual expense of raising a child, it will be assumed by the seducer under the form of an alimentary allowance (for a more general discussion of these and related matters, see J.L. BAUDOUIN, La responsabilité civile délictuelle, op. cit., pp. 124-125, nos 161-165). Of course, when an "unwanted" birth occurs, the husband of the mother is the biological father of the child and he would be liable to support said child in any case. That is why our comparison with seduction offers little guidance.

Christensen v. Thornby (652), the first reported case to deal with the subject, the court refused to grant compensation to a man who underwent a vasectomy because of his wife's inability to withstand the strain of childbirth:

> "The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority" (653).

The indications for the operation were therapeutic and, therefore, when the risks feared did not materialize, no damages had been suffered. A subsequent case, Shaheen v. Knight (654), arrived at a similar conclusion even though the husband in that matter underwent a vasectomy for purely contraceptive reasons. Damages were refused because to allow them would have been "... foreign to the universal public sentiment of the people ..." (655).

The California case of Custodio v. Bauer (656) eventually established a break-through for those holding the opinion

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(652) (1934) 255 N.W. 620 (Minn. Sup. Ct.).
(653) Ibid., p. 622 (Loring J.).
(654) (1957) 11 Pa. Dist. and Co. R. 2d 41 (C.P. Lycoming) reported in MEYERS, op. cit., pp. 5-6.
(655) Ibid., p. 45. The court went on to say: "In our opinion, to allow such damages would be against public policy" (at p. 46).
(656) (1967) 59 Cal. Rptr. 463 (Court of Appeal).

that the birth of a child should be compensable in damages (657). The Court reasoned that had the wife died, or have been crippled by childbirth, the husband (and the wife herself in the second hypothesis) would have been entitled to damages, but:

> "Where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over a larger group. If this change in the family status can be measured economically it should be as compensable as the former losses" (658).

The difficulties inherent in attempting to balance the advantages derived from the birth of a child, with the inconveniences which undoubtedly result therefrom, were examined in

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(657) Other cases prior to Custodio were involved with the issue of unsuccessful sterilizations and pregnancies but none actually dealt squarely with the question presently under discussion, e.g. Doerr v. Villante, (1966) 220 N.E. 2d 767 (Appellate Court Ill.) and Vilord v. Jenkins, (1969) 226 S 2d 245 (Fla. Dist. C.A.) dealing with questions of limitations; Ball v. Mudge, (1964) 391 P. 2d 201 (Wash. Supreme Ct.) and Lane v. Cohen, (1967) 201 S. 2d 804 (Fla. Dist. Ct.), medical negligence not proved; Tosh v. Tosh, (1963) 29 Cal. Rptr. 613 (Dist. Ct. of Appeal), legitimacy of the child; Bishop v. Byrne, (1967) 265 F. Sup. 460 (W. Va.), question of damages other than for support etc.. of the child.

(658) (1967) 59 Cal. Rptr. ibid., p. 476 (per Simms, A.J.). He went on to state: "On the present state of the record it cannot be ascertained to what extent plaintiffs, if they establish a breach of duty by defendants, are entitled to damages. It is clear that if successful on the issue of liability, they have established a right to more than nominal damages" (at p. 477). See also Jackson v. Anderson, (1970) 230 S. 2d 503 (Fla. C.A.).

detail by the Michigan Court of Appeals in Troppi v. Scarf (659). By error, the defendant, a druggist, incorrectly filled a prescription by substituting for an oral contraceptive Norinyl, a mild tranquilizer called Nardil (660). The Court refused to find as a matter of law that the birth of a child conferred an overriding benefit. Instead, it felt that the benefits derived from the unplanned child should be weighed against all the elements of the claimed damages; the so-called "benefits rule" (661).

The Superior Court of Delaware in Coleman v. Garrison (662) went even further in its interpretation of the "benefits rule":

> "The rationale that benefits occurring from the birth of a child neutralize the cost of his maintenance is also suspect. Analytically, plaintiffs seek compensation for the expenses necessary for support despite their love and affection for the child ... However, conceding that the rewards of a child are in point, it cannot be said as a matter of law that a healthy child always confers a benefit greater than the expense of his birth and support. Troppi supra. Otherwise, all married couples would choose to have children ... The jury should be allowed to weigh the benefit against the economic burden because the advantage which a child brings his parents mitigates the damage of his support" (663).

As matters presently stand in the United States, it may be affirmed that in principle, compensation for "wrongful

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(659) (1971) 187 N.W. 2d 511.

(660) It is submitted that had this prescription been for a male contraceptive pill, there would have been no action since a tranquilizer would probably have served just as effectively.

(661) (1971) 187 N.W. 2d, loc. cit., p. 518 (per Levin P.J.).

(662) (1971) 281 A. 2d 616.

(663) Ibid., p. 618 per Messick J. confirmed sub nom. Wilmington Medical Center Inc. v. Coleman, (1973) 298 A. 2d 320 (Supreme Ct. Delaware).

life" will be awarded unless the defence can prove that under the "benefits rule", the advantages of having the child adequately compensate the expense and the troubles involved (664).

Logically speaking, there is no reason why a claim of this nature should not be acceptable, since the birth of a child is a readily foreseeable consequence of a negligently performed sterilization. Moreover, it does not necessarily follow that the birth of a child is a boon no matter what the circumstances, otherwise society would in fact owe a debt of gratitude to every rapist or seducer whose efforts produced a child. In other terms:

> "The doctor whose negligence brings about such an undesired birth should not be allowed to say 'I did you a favor', secure in the knowledge that the courts will give to this claim the effect of an irrebuttable presumption" (665).

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(664) The Texas Court of Appeal, in two instances, has refused to grant compensation; cf. Hays v. Hall, (1972) 477 S.W. 2d 402; Terrell v. Garcia, (1973) 496 S.W. 2d 124. In the latter case, Barrow C.J. states (at p. 128): "Nevertheless, as recognized in Hays and Troppi, the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents are undoubtedly the thing that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy normal child".

(665) Dissenting opinion of Cadena J. in Terrell v. Garcia, ibid., at p. 131.

In closing this discussion of sterilization, we believe that contraception is the right of every person, married or single, and that it is the birthright of every child to be born wanted (666). We also feel that the method of contraception chosen, whether of a temporary or a permanent nature, should be left to the sole discretion of the individual, advised and guided by persons such as physicians and public health nurses, who are versed in matters of birth control. Finally, we affirm that the decision to have recourse to contraception is a matter best left to the individual and his conscience.

At the present juncture, the state has no possible justification in compelling fertility either by express statutory enactment or by the implied threat of sanctions on grounds of public policy (667). Quite the contrary, we are on the point of being overwhelmed by a population explosion which has begun to stretch our resources to the limit (668). Indeed, it is feared that unless mankind seriously undertakes to initiate and encourage contraception on a broad scale without further delay, our generation may well live to see the re-introduction of compulsory sterilization.

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(666) J. STEPAN, E.H. KELLOGG, The World's Laws on Contraceptives, (1974) 22 The American Journal of Comparative Law 615 at p. 625. The authors point out that the U.N. Conference on Human Rights at Teheran in 1968, unanimously affirmed that it is the right of couples to decide on the number and spacing of their children (Resolution XVIII). In August 1974, the U.N. World Population Conference at Bucharest approved the World Plan of Action which seeks to implement these principles.

(667) MEYERS, op. cit., p. 24.

(668) W. FRIEDMAN, Interference With Human Life: Some Jurisprudential Reflections, (1970) 70 Col. L.R. 1058 at p. 1063.

GENERAL CONCLUSION

From our rather extensive comparative study of the topics of sex-reassignment and sterilization, two facts would seem to stand out (669); firstly, that conversive surgery for transsexuals appears to enjoy medical and legal acceptance (except of course in France), and secondly, that voluntary sterilization for non-medical reasons also seems to enjoy general acceptance (likewise except in France).

Our study has also brought to light major controversies: In the case of transsexualism and sex-reassignment, the greatest issue is whether post-surgical patients should be allowed as a matter of policy to marry in the new sex role, notwithstanding the deficiencies inherent in the present state of the art in matters of conversive surgery. Regrettably neither our present Civil Code nor the Report on the Family Part I (670) prepared by the Civil Code Revision Office have undertaken to supply a comprehensive definition of marriage as an institution. Traditionally, marriage was conceived in the words of Portalis, as "la société de l'homme et de la femme, s'unissant pour perpétuer leur espèce, pour s'aider par des secours mutuels à supporter le poids de la vie et pour partager leur commune destinée" (671). The Romans defined marriage as viri et mulieris conjunctio, individuam vitae continens or a union for life in common, of one man and one woman (672). The ends of marriage included

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(669) Specific conclusions and recommendations have been made at the end of each part of this paper, and for this reason, need not be reiterated here.
(670) Op. cit.
(671) Quoted by Pineau, op. cit., p. 17.
(672) Hahlo, The South African Law of Husband and Wife, op. cit., p. 32.

individua vitae consuetudo et procreatio sobolis, (community of life and the procreation of children (673). Notwithstanding the transformation of the family unit due to the social upheavals caused by accelerated scientific progress and by urbanization (674), these old and venerable definitions of marriage still remain valid today:

> "Les observateurs ont déjà parlé de la dissolution de la famille. Nous admettons maintenant que la famille ne disparaît pas; en fait, elle change, s'adapte et se façonne de nouveaux cadres, mais toujours elle conserve les fonctions essentielles d'intégrer ses membres dans la société, de socialiser les enfants et de stabiliser les relations entre l'homme et la femme" (675).

Can we thus go so far as to recommend that the traditional concept be enlarged or stretched in order to admit transsexual marriages (and possibly even homosexual unions)? Would public policy accept that two persons of the same biological sex could make a mutual pledge of a union for life for the purposes of comfort, society and perhaps interrelated patrimonial interests in spite of the fact that this sort of match disregards the traditional basic requirement of different sexes and the possibility of procreation? (676) Considering the very limited number of

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(673) Ibid., pp. 32-33.
(674) Civil Code Revision Office, Report on the Family Part I, op. cit., p. 2.
(675) F. Elkin, La famille au Canada, April 1964, Congrès canadie de la famille, p. 8, quoted in the Report of the Family Part I, ibid., p. 4.
(676) Naturally, we ask this question only in the hypothesis that provisions for a legal "change of sex" are set out, e.g. the modification of birth certificates etc.

alliances involving transsexuals which could occur, we feel that the social order would easily withstand or tolerate the existence of this type of union. It would, at least, constitute a marriage between persons having opposite gender identities and superficially different sexes (677).

In the area of sterilization, the greatest controversy surrounds the attitude of only grudging legal acceptance of this form of birth control in spite of our exploding world population. Writing in 1963, Sir Julian Huxley affirmed that:

> "The world needs a population policy. We must stop thinking in terms of a race between the production of people; we must begin thinking in terms of a balance between people and the various resources they need. To achieve this, we must balance death-control with some form of birth control, with the immediate aim of reducing the rate of population increase and the ultimate aim of achieving a balanced adjustment instead of unbalanced adjustment.
>
> To do this we must first of all overcome a great deal of moral, ideological and religious resistance. This can only be done by helping people understand that to oppose proper methods of birth control is radically immoral since it condemns an increasing number of human beings to increasing misery, frustration and ill-health". (678)

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(677) In the case of a homosexual union, this type of "marriage" would constitute an act contrary to nature, not only physically but also psychologically.

(678) The Future of Man-Evolutionary Aspects, in G. Wolstenholme, editor, Man and His Future, A Ciba Foundation Symposium, Boston, Little, Brown and Co., 1963, I at p. 16.

In a similar vein, the noted anthropologist, Margaret Mead has flatly stated that for the first time in human history, our survival depends upon reducing the number of children instead of increasing it (679).

In both situations, i.e. the question of marriage for transsexuals and the need for encouraging sterilization and other forms of birth control, the issues clearly illustrate the intimate relationships between both the law and morality, and the law and religion (680). Since legislative guidance is usually absent in the field of modern medicine, we are confronted squarely with the need of determining the public order considerations involved. In this regards, the Quebec Civil law approach is quite typical: After stating at art. 13 C.C. that no one by private agreement may validly contravene the laws of public order and good morals, the law leaves us in the lurch by failing to state what <u>are</u> public order and good morals (681). Fortunately, both doctrine and jurisprudence have leaped into the breach to remedy this lacuna, at least to some extent. Writing almost thirty years ago, Antonio Perrault attempted to circumscribe the notion of public order in the following terms:

> "Sont reconnues comme d'ordre public toutes les lois qui se rattachent à l'intérêt vital d'un état, dispositions de droit public réglant l'organisation des pouvoirs civils,

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(679) <u>The Cultural Shaping of the Ethical Situation</u>, in K. Vaux, editor, <u>Who Shall Live ?</u>, Philadelphia, Fortress Press, 1970, 4 at p. 10.

(680) Need one point out that morality and religion are not synonymous?

(681) <u>Hébert v. Sauvé</u>, (1932) 38 R.L.n.s. 410 at p. 417.

> celle des tribunaux, l'administration de la justice, les droits des 'sujets de sa Majesté' concernant le 'libre exercice du culte de toute profession religieuse'...; les droits et les obligations des citoyens aux points de vue électoral et fiscal, l'état et la capacité des personnes, le status familial, puissance maritale et puissance paternelle. L'on peut y ajouter d'autres lois, celles, par exemple, édictées pour la protection des individus, limitant le taux de l'intérêt, assurant la protection des ouvriers ...
>
> ...
>
> L'organisation sociale d'un état ne repose pas uniquement sur des principes à caractère politique ou économique. L'une de ses assises essentielles est composée de règles morales" (682).

As we may see, the idea of "good morals" forms part and parcel of the larger notion of public order (683).

Although attempts have been made in French doctrine to express good morals in terms of public opinion and contemporary attitudes (684), Quebec law has chosen to set a standard of good morals intimately related to Christian religious ideals (685).

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(682) Ordre public et bonnes moeurs, (1949) 9 R. du B. I at p. 6.

(683) In the words of G. Challies, writing in Thémis (Good Morals, (1952-53) 3 Thémis 77 at p. 79): "... The two concepts are so closely allied as almost to be two sides of the same medal"; Perrault, loc. cit., at p. 7; A Morel, Limites de la liberté testamentaire dans le droit civil de la Province de Québec, Paris, Librairie générale de droit et de jurisprudence, 1960, pp. 84-85, no. 69.

(684) Morel, ibid., p. 86, no. 70; Challies, ibid., p. 80.

(685) Hébert v. Sauvé, (1932) 88 R.L.n.s. 410 at p. 421; Sutherland v. Gariépy, (1905) 11 R. de J. 314 at p. 319; Perrault, loc. cit., p. 7; Morel, ibid., p. 88, no. 72; Challies, ibid., p. 80.

The goals obviously are to not only avoid a deterioration in morality but also to eliminate the introduction of a highly arbitrary basis for judging behavior. As Ripert once argued:

> "La répétition de l'acte immorale ne le rend pas licite parce que l'immoralité devient coutumière. L'assentiment général n'est souvent que l'accoutumance au vice. La pitoyable consécration d'une pratique par une opinion égarée ne la légitime pas" (686).

The fact that Quebec law has placed great reliance on a religious ideal to regulate behavior does not necessarily imply that it has abdicated its responsability. On the contrary, it would seem that our religious faith and our views of morality are generally so interrelated that they in fact coincide (687), even though the law is, theoretically at least, religiously neutral. Clearly, we cannot divorce our minds from our souls; the religious or moral training we all receive cannot do otherwise than colour our attitudes or create biases when we seek to establish secular standards of behavior. Going one step further, can we then conclude that morality depends entirely on religion and if not totally, then religion has at least a leading role to play in establishing morality?

To begin with, it is undeniable that notwithstanding cultural differences between human societies, there would appear to be moral principles which are universally accepted (688). These usually pertain to the sanctity of life and sexual morality.

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(686) G. Ripert, La règle morale dans les obligations civiles, 4e édition, Paris, Librairie générale de droit et de jurisprudence, 1949, p. 72, no. 39.
(687) Morel, op. cit., pp. 88-89, no. 72.
(688) B. Mitchell, Law, Morality and Religion in a Secular Society, London, Oxford U. Press, 1967, at p. 106.

As far as Christians are concerned, we commonly believe it is wrong to destroy life, and we feel that sexual relationships should be monogamous and heterosexual. This being the case, are we then entitled to state that these moral virtues are purely God-given and observed as part of our unquestioning subservience to divine Authority, or does their social utility have much to do with their universal acceptance? In other terms, is it wrong to covet our neighbour's wife because Exodus 20:17 so orders, or rather because the disruptions caused by legions of vengeance-seeking cuckolds would destroy our social order?

In addition, it would seem fallacious to infer that theology and the social sciences are mutually exclusive when it comes down to regulating human behavior. Too often it is presumed that theology is a system based on divine Revelation which does not take into account natural features of the world. For instance, the biblical injuction to not kill does not appear to acknowledge the sometimes subtle distinctions between murder, passive euthanasia, and therapeutic abortion. Likewise, St-Paul's Epistle to the Corintians (689) condemning "men who lie with men" becomes somewhat problematic when we contemplate post-surgical transsexual marriages. Social science (690) also falls prey to the popular misconception that it is an almost hermetically sealed system of a basically statistical nature which judges man according to normative or "average" behavior, and

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(689) I Corinthians 6:9.

(690) We use the term "social science" as defined in Webster's New World Dictionary Second College Edition: "The study of people living together in groups, as families, tribes, communities etc."

without taking into account the so-called "higher" principles. The obvious fallacy of this view reposes upon the fact that indeed, even in the case of a "science", certain assumptions having no rational basis have to be made:

> "No one can embark on a discussion of anti-social behavior without making assumptions as to the criterion by which any specific actions are defined as such; and these assumptions are bound to reflect, not only the norms of a particular culture, but in some degree also, the subjective preferences of the person who makes them; and even where standards are much the same, actual manifestations will vary" (691).

Thus, sociology must reach outside itself in order to set certain basic standards. Similarly, present day theology cannot in itself be considered as a comprehensive guide or code of human behavior because of our present inability to grasp or appreciate the full measure of our mission in life:

> "However much theologians may differ as to the extent to which God may be known through the created order without special revelation, it is implicit in the Christian claim that the purposes of God are to be realized in and through the created order and that men are granted some insight into these purposes. If this is so, it would indeed be very strange if such a revelation had nothing to say about the created order itself or if empirical investigation of the created order were wholly irrelevant to our understanding of the divine purpose" (692).

In a nut-shell therefore, we may affirm that morality is essentially a derivation of revealed religion, explained and

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(691) Barbara Wootton, Social Science and Social Pathology, London, Allan & Unwin, 1959, p. 13, quoted by Mitchell op. cit., at p. 116

(692) Mitchell, ibid., p. 117.

molded by man's accumulated experience. For this reason, morality must remain a dynamic notion, constantly evolving until hopefully, as has been and is promised by most religious faiths, a state of enlightenment is attained. Since we are still searching out this elusive ideal according to our feeble means, morality at any one point in time cannot be considered as the absolute standard for regulating all future behavior.

We thus feel that in order for the law to develop in a rational fashion while fulfilling its role of maintaining moral standards in spite of our all too prevalent weaknesses, certain considerations should not be overlooked: (a) Individual liberty and privacy must not be encroached upon except to the extent that is necessary to preserve the essential institutions of society (693). In the framework of the present paper, the social institution most often subject to scrutiny is that of marriage (694).

(b) Behavior should be sanctioned only if it tends to "seriously corrupt the ethos of society" (695). Anti-social or aberrant behavior which is involuntary should not be punished. Instead, persons who have difficulty controlling their behavior should be given

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(693) Ibid., p. 134.

(694) According to Albert Rosenfeld in The Second Genesis, (Englewood Cliffs N.J., Prentice-Hall Inc., 1969, at p. 106): "Departures from convention were never uncommon, human powers of self-discipline being what they are, but on the whole deviations from conformity have fared rather badly. Romantic love and other cultural variants have influenced people's attitudes from time to time and from place to place. But not at any time or in any place, until modern times, has there ever existed for very long any widespread belief that a stable society of responsible citizens could be maintained without at the same time maintaining the classical social institutions of marriage and the family."

(695) Mitchell, op. cit., p. 134.

treatment and afforded every consideration in order to facilitate their adaptation to society. The clearest example of this type of situation is that of the transsexual, whose bizarre deportment stems from a psycho-sexual disorder of such magnitude that it resists conventional treatment.

(c) All legislation which seeks to control morality should, on its own merits, command the respect of reasonable people subject to it, and should also be capable of equitable enforcement (696). The repeal of laws punishing homosexual practices between consenting adults acting in private, for example, points to the realization that it is futile to legislate in areas where uniform enforcement cannot hope to be attained. It also constitutes the tacit admission that abnormal behavior cannot be cured by legislative fiat. Similarly, the promulagation of laws which sought to impose temperance on a thirsty population and their subsequent repeal also illustrate that bad laws exacerbate rather than curb immoral behavior (697).

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(696) Ibid., p. 135.

(697) James H. Gray, The Roar of the Twenties, Toronto, Macmillan of Canada, 1975, pp. 135 et seq. We do not wish to imply that Prohibition was all evil. On the contrary, Gray writes (at p. 142): "The impact of Prohibition on the lives of the people was important in many other aspects. Drunkenness ceased to be a factor worth noting, as the drunks disappeared from the streets and the police-court statistics. Crimes associated with booze dropped to a near nothing, and crimes of all kinds were reduced by as much as two-thirds. Manitoba closed two provincial jails and Saskatchewan one, for lack of miscreants to incarcerate. Savings accounts doubled; bailiffs sat in idleness as their business dropped off. Absenteeism ceased to be a problem in business and industry. Men stopped beating their wives, and children stopped going shoeless to school. The Winnipeg General Strike of 1918 passed off without a single important scuffle, let alone a major riot, a fact that labor leaders were quick to attribute to the closing of the bars".

(d) Although it is axiomatic that one should respect the law, it does not necessarily follow that laws cannot be criticized, if indeed they warrant criticism. Accordingly, laws enforcing morality should be adopted, revised and if necessary, repealed only after rational and enlightened discussion and debate. A good law will generally be enhanced and more appreciated through thorough scrutiny, whereas bad or inadequate legislation usually cannot withstand the rigors of serious inspection.

When we consider the difficulty which the law has in regulating medical practices which have been around for decades or longer (the current abortion debate being a case in point), then we may well imagine the trepidation with which jurists foresee having to face the future developments of modern medicine. Needless to say, the law as a rule, cannot act or react in anticipation of some new discovery and consequently, there will always be a certain amount of lag behind medical science. The disadvantages of this are certain - scientists will be walking on legal ice of an unknown thickness, thus putting their personal liability on the line; and perhaps some cynical and shocking experiments may be performed beyond the contemplation of the law (698). On the other hand, the general slowness of the law in responding to contemporary conditions is sometimes an advantage since it tends to restrain some of the excesses of modern medicine through fear of incurring penal or civil liability.

We are convinced that for the present, the most rational approach would be to deal with each new development of modern

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(698) Imagine if a researcher announced today that he had produced a cross between a human and a horse (a centaur of sorts?!) through a non-sexual form of reproduction.

medicine in a pragmatic, unemotional fashion, without tying ourselves beforehand to a set of rules which may cause more mischief than that which we seek to avoid. Blank prohibitions with regards to future innovations would serve only to restrict medical exploration and discovery.

Medical scientists, for their part, must be willing to accept the self-discipline which resides in the realization that the human body is sacred (699). In the final analysis, we believe that the medical profession must enjoy the greatest possible independence, tempered only by the aura of respect which surrounds the human person and by the knowledge that a physician's sacrosanct and sole duty is to enhance man's temporary existence on this planet.

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(699) See for example art. 2217 C.C., and I Corinthians 3:16-17: "Know ye not that ye are the temple of God, and that the Spirit of God dwelleth in you? If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple ye are."

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