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VOLUNTARY STERILIZATION: IS LEGISLATION ADVISABLE?

Mark J. Treacy*

The Association for Voluntary Sterilization, Inc. estimates that more than 750,000 Americans were sterilized in 1970. An even larger number were expected to request the operation last year.¹ Adding to these totals the Association's earlier estimates that at least 2,000,000 Americans had submitted to the surgeon's scalpel before 1970,² we can safely assume that over 3,500,000 Americans have been voluntarily sterilized up to this date.

A recent Gallup poll disclosed that 64 percent of Americans approve of voluntary sterilization for socio-economic reasons.³ Why this startling increase in the popularity of voluntary sterilization?

The desire for family planning has become a prevalent and widely accepted attitude of American marriage. Sterilization is a surgical procedure which offers a married couple a permanent means of limiting their family to its present size. However, it has significant moral and religious overtones for many members of the community and the law in most jurisdictions has not provided the medical standards for a legally acceptable sterilization policy.⁴

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The preceding excerpt introduces two areas of concern, 1) the moral and religious area, and 2) the legal area. For most people voluntary sterilization is a moral issue first and a legal concern second.

At the forefront of those objecting to voluntary sterilization is the Roman Catholic Church, followed by a few Protestant sects (basically of Fundamentalist orientation) and Conservative and Orthodox Jewry.⁵ The Roman Catholic Church opposes sterilization except where it is the by-product of another operation for some other medical necessity. This opposition stems from many apparent sources, all related: the position of the Roman Catholic Church against "mutilation" (akin to mayhem and discussed more fully later in this paper), against depriving one of a natural function, and its attitude that marriage and conjugal relations are not complete unless they can be said to be directed toward procreation.⁶

Charles J. McFadden of Villanova presents the Catholic position in his book, Medical Ethics:

... any use of man's reproductive powers is immoral when the use is of such a nature that it impedes the very purpose for which God created those powers. 'Husband and wife may take pleasure in the marital act but they may not seek this pleasure in any way which would

destroy the very purpose for which this pleasure exists, namely the propagation of the race'.⁷

McFadden quotes Pope Pius XII:

Direct sterilization, that which aims at making procreation impossible as both a means for an end, is a grave violation of the moral, and therefore, illicit.... It is an immoral act because it is a deliberate and serious invasion of the supreme rights of the Creator over one of his creatures.⁸

Catholic hospitals place the sterilization operation on a par with that of abortion. The administrator of one such hospital, when asked about the hospital's sterilization practice, responded that sterilization is contrary to natural law and facilitates licentious living, undisciplined habits and venereal disease.⁹

Is this conclusory statement sound? Is promiscuity the natural result of a sterilization operation? No definitive answer can be given. In view of the general availability of contraceptives, however, it would seem that society has made a tacit judgment that it is better to take a chance with a possible increase in promiscuity than to take the chance of children being born out of wedlock or of the spread of disease.¹⁰

There is evidence that the voluntary sterilization operation decreases the likelihood of promiscuity among

married persons by removing the conscious or subconscious fears of another pregnancy, thus making the sexual act more pleasurable. Fewer husbands are disposed to go elsewhere for sexual gratification because their wives' reluctance to engage in sexual relations disappears in the bright sunlight of one hundred percent security.¹¹

Moreover, it should be remembered that the position held by the Catholic Church is a minority position, and one which appears to be steadily losing ground.¹²

The legal problem of voluntary sterilization is divisible into three distinct areas, those of 1) statutory regulation, 2) criminal liability for assault and battery and mayhem, and 3) civil liability for negligence or breach of contract.

At the present time, forty-nine states permit voluntary sterilization; North Carolina,¹³ Virginia¹⁴ and Georgia¹⁵ by statute, California¹⁶ by judicial decision, and the remainder of the states, excepting Utah, by not specifically prohibiting it. Utah does not permit voluntary sterilization except where it is a medical necessity.¹⁷ Although there is no prohibition of voluntary sterilization in forty-five states, the status of voluntary sterilization under the laws of those states is

generally felt to be unclear.¹⁸ At least three authors writing in this area have recommended the adoption of statutes similar to those in effect in Georgia, North Carolina, and Virginia by those states which have neglected to legislate in the area.¹⁹

The actual offer to use force to the injury of another person is assault; the use of it is battery."²⁰ It is settled law that for a plaintiff to present a prima facie case for assault, he must prove the defendant created in him a well-founded fear of imminent peril.²¹ Similarly, for a plaintiff to present a prima facie case for battery, he must prove that the defendant committed a wrongful physical act of violence upon him without his consent.²² In a properly conducted sterilization operation neither of the aforementioned elements would arise. Consent to assault and battery will excuse the crime unless such consent is considered to be anti-social.²³ Is the voluntary sterilization operation sufficiently 'anti-social' to override an individual's consent? I reiterate: "The desire for family planning has become a prevalent and widely accepted attitude of American marriage."²⁴

This widely accepted attitude coupled with the current availability of numerous artificial birth-control devices, the dissemination of family planning literature, and the unrestricted activities on the part of such organizations as Planned Parenthood and the Association for Voluntary Sterilization indicate to the author that the voluntary sterilization operation is not sufficiently 'anti-social' to override an individual's consent to it. Hence, there can be no crime under normal circumstances.

There is also a question as to whether the operation is maiming, i.e., does it fall within the requirements for the common law crime of mayhem?. A malicious intent to maim must be present in the perpetrator of the act for the crime to come about.²⁵ Additionally, mayhem, as it is applied presently, requires that some bodily member be unlawfully or maliciously cut-off or that some bodily function be irrevocably disabled.²⁶

Unlike consent to assault and battery, consent to a maim is never a defence, except where a diseased member of the body is amputated or removed in a surgical operation.²⁷ However, in Jessin v. County of

Shasta, the California court noted that "the suggestion that a voluntary sterilization constitutes mayhem is unacceptable, for ... a voluntary vasectomy is in no way done maliciously."²⁸ This dicta should render impotent the first argument for holding voluntary sterilization up as a maim.

The second argument cannot be disposed of as easily as the first. It is clear that the sterilization operation does not fit into the classic definition of mayhem.²⁹ However, the present definition, as recited above, presents a more difficult obstacle to overcome. In the voluntary sterilization operation no bodily member is cut-off or rendered useless (sterilization is not castration). However, it is arguable that some bodily function is permanently disabled; particularly, the reproduction function. It is necessary, at this point, for the purposes of overcoming this obstacle, to look to the meaning of bodily function as referred to in the definition of maim. The kind of bodily function implicit in the definition is one that is required for the living of a normal life, such as seeing, hearing, walking, or grasping. These functions are of a different class from the reproductive function and are

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essentially unrelated, except perhaps by some allegorical string. Finally, because the sterilization operation is, on occasion, reversible, it may not conform to the standard of irrevocable disabling.³⁰

The final area of legal concern dealing with the voluntary sterilization operation is that of civil liability for negligence or breach of contract. As far as liability for negligent performance of the sterilization operation is concerned, Georgia, North Carolina, and Virginia, in their statutes, hold the performing physician or surgeon to the rules of law generally applicable to medical malpractice.³¹ And so it should be.

In Sheehan v. Knight, plaintiff husband sued defendant doctor for the birth of a child by plaintiff's wife.³² Plaintiff alleged that the defendant contracted to make him sterile by a sterilization operation. He further alleged that the doctor breached his contract and offered as evidence the fact that his wife had given birth. Plaintiff sought to recover damages based upon the burden he was forced to bear, because of the doctor's breach, of supporting, educating, and maintaining his child. The Pennsylvania court denied relief

saying that the plaintiff had failed to show damages.

The court said:

To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy, and affection which plaintiff Sheehan will have in the rearing and educating of this, his fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such, he wants to have the child and wants the doctor to support it. In our opinion, to allow such damages would be against public policy.³³

Most physicians, in order to preclude such a suit for breach of contract, require the person submitting to the operation to sign a consent form in which it is mentioned that although rare, pregnancies have been known to occur after a voluntary sterilization operation.³⁴

In ending this discussion on the legality of the voluntary sterilization operation, it is mandatory that the case of Griswold v. Connecticut be mentioned. There are indications that sterilization may fall within its constitutional protection.³⁶

Arguments for Legislation

"The number of voluntary sterilizations was limited in the past by two ill-founded fears. One was

that the operations were illegal. In fact, they are legal in every state although Utah still requires that they be done for 'medical reasons' only." The second, not relevant here, was the popular confusion between sterilization and castration.³⁷ More particularly, the status of voluntary sterilization under the criminal law is uncertain.³⁸ This confusion regarding the legality of the operation, coupled with the ever-increasing number of people resorting to it, for whatever reasons,³⁹ makes this an area ripe for legislation. As already mentioned, several states have recognized this and have enacted legislation to cope with the situation. The author recommends this course of action, and moreover urges the adoption of legislation notwithstanding the fact that a gynecologist and lawyer who were personally interviewed both felt that the operation involved basically a contract situation and the status quo should be maintained.⁴⁰

Parenthetically, the author feels that this attitude is another manifestation of a problem in our society which has come into prominence of late, that of the failure of various segments of our society to anticipate any harmful or detrimental aspects which might

spin-off from an immediate commitment to a certain course of action. One very obvious example of the failure to look before leaping is the motion-picture industry's seizure of sex as a dominant theme in a great percentage of its films. Even if we were unwilling to admit that this has contributed to a debasing of our moral fibre, we must frankly admit that this 'sexploitation' has, at the very least, caused confusion as to the proper use of this very powerful yet very delicate force. The effects of this on our children will someday be a subject of study; but the investigations may come too late.

The following statute is suggested for enactment by the legislatures of those states who have failed to legislate in the area of voluntary sterilization. It is a synthesis of the Georgia, North Carolina, and Virginia statutes, of various articles in legal, social, and news periodicals, and of interviews conducted by the author with people concerned with this problem. Each section is footnoted and authority is given where pertinent. A few novel provisions have been introduced based upon personal observations.

Proposed Voluntary Sterilization Act

Be it enacted by the [Legislature] of the State of
[name]:

§1 Sterilization operation upon a married person
twenty-one years of age or older. It shall be lawful
for any physician or surgeon licensed by this State,
when so requested by any married person twenty-one (21)
years of age or older, to perform upon such person a
surgical interruption of vas deferens or Fallopian
tubes⁴¹ provided a request in writing is made by such
person at least thirty days prior to the date of the
operation; and provided further, that prior to or at
the time of the request a full and reasonable medical
explanation is given by the physician or surgeon⁴² and
provided that both the person requesting the operation
and his spouse put their signatures to a consent form.⁴³
Under this section no such operation will be performed
unless the person requesting the operation is the mar-
ried parent of at least two children,⁴⁴ unless it can
be demonstrated by competent medical evidence that an
additional child might be born a mental or physical
defective, due to congenital flaws in either parent,
or an additional pregnancy might endanger the mental

or physical health of the wife.⁴⁵ The husband may request the operation for himself for the purpose of relieving his wife from the danger described above. If one spouse has been found to be mentally incompetent, his consent will not be required for an operation to be performed upon his spouse.⁴⁷

§2 Sterilization operation upon a person under twenty-one years of age. It shall be unlawful for a physician or surgeon licensed by this State to perform upon a person under the age of twenty-one (21) years a surgical interruption of vas deferens or Fallopian tubes. This section shall not apply to a person under the age of twenty-one (21) years if it can be demonstrated by competent medical evidence that a child of such person might be born a mental or physical defective, or if such person be a woman, an additional pregnancy might endanger her mental or physical health. Such person, to whom this section offers an exception, shall submit a written request for the operation to the operating physician or surgeon at least thirty days prior to the date of the operation. Prior to, or at the time of such request, a full and reasonable medical explanation of the operation and its designed results shall be

given by the operating physician or surgeon to the person requesting it. And if the requesting person be married, both he and his spouse shall sign a consent form; but if such person be unmarried, he alone shall sign.⁴⁷

§3 Sterilization operation upon a person who has reached the age of forty years. It shall be lawful for any physician or surgeon licensed by this State, when so requested by any person forty (40) years of age or over, to perform upon such person a surgical interruption of vas deferens or Fallopian tubes, provided a request in writing is made by such person at least thirty days prior to the date of the operation and, provided further, that a full and reasonable medical explanation is given to the person by the operating physician or surgeon as to the nature and consequences of the operation. The person requesting the operation shall sign a consent form.⁴⁸

§4 No liability for non-negligent performance of the voluntary sterilization operation. Subject to the rules of law generally applicable to negligence, no physician or surgeon licensed by this State shall be liable civilly or criminally by reason of having performed a

surgical interruption of vas deferens or Fallopian tubes authorized by the provisions of this Act upon any person in this State.⁴⁹

§5 Punishment for non-compliance with this Act. Any physician or surgeon licensed by this State who fails to comply with requirements of this Act shall be guilty of a felony punishable by imprisonment in the state penitentiary for from one to three years, or pay a fine of \$1000, or both.⁵⁰

§6 Therapeutic and eugenic sterilizations excepted. Nothing in this Act shall restrict the performance of a surgical interruption of vas deferens or Fallopian tubes for sound therapeutic reasons, or affect the provisions of a state eugenic sterilization statute.⁵¹

§7 Definitions.--

a) Consent form: The consent form referred to under the section of this Act shall contain an admission by the person requesting the operation that he understands the nature and consequences of said operation and consents thereto.⁵²

b) Where, in this Act, a decision is called for regarding the exceptions mentioned in sections one and

two, and the application of an exception to an individual case, it shall be sufficient for compliance with this Act for the person requesting the operation to present to the physician or surgeon who is to perform the operation and who deems the operation advisable and legal under this Act, a concurring recommendation in favor of the operation by one other physician or surgeon licensed by this State.⁵³

FOOTNOTES

1. Consumer Reports, "Voluntary Sterilization", June 1971, at 384.
2. Time, Medicine; "Sterilization for Both Sexes" June 1, 1970, at 38.
3. Information obtained from a brochure printed by the Association for Voluntary Sterilization, Inc., 14 West 40th Street, New York, N. Y. 10018.
4. Champlin and Winslow, Elective Sterilization, 113 U. Pa. L. Rev. 415 (1965).
5. The ban on technical castration for the male, incidentally makes vasectomy as a birth control measure forbidden in Jewish law (Feldman, Birth Control in Jewish Law, at 241, n. 46, 1968).
6. Bravenec, Voluntary Sterilization as a Crime: Application of Assault and Battery and Mayhem, 6 Jour. Fam. L. 94, 111 (1966).
7. Wolf, Legal and Psychiatric Aspects of Voluntary Sterilization, 3 Jour. Fam. L. 103, 106 (1963).
8. Ibid., p. 106.
9. 113 U. Pa. L. Rev. 415, 424.
10. 6 Jour. Fam. L. 94, 112.
11. Op. cit., 3 Jour. Fam. L. 103, 114.
12. The author makes this statement considering the rapid increase in the popularity of the operation.
13. Gen. Stat. N.C. §90-271.
14. Code of Virginia, §32-423.
15. Code Geo. Anno., §84-932.

16. "It is adjudged that voluntary sterilization operations are legal in the state of California." (Jessin v. County of Shasta, 79 Cal. Reprtr. 359, 366 (1969)).
17. Utah Code Anno., c. 10-12, §64.
18. 6 Jour. Fam. L. 94.
19. Ibid., at 128.
3 Jour. Fam. L. 103, 123.
113 U. Pa. L. Rev. 415, 442.
20. Harris v. State, 15 Ok. Cr. 369, 177 P. 122, 123 (1919).
21. Prosser, The Law of Torts, §10 Assault, at 38 (4th ed. 1971).
22. Ibid., §9 Battery, at 36.
23. 6 Jour. Fam. L. 94, 96.
24. 113 U. Pa. L. Rev. 415.
25. 53 Am. Jur. 2d Mayhem and Related Offenses §2 (1970).
26. Op. cit., 6 Jour. Fam. L. 94, 118.
27. Anno., Consent as defence to charge of mayhem, 86 A.L.R. 2d 268 (1962).
28. Op. cit., 79 Cal. Reprtr. 359, 366.
29. Christiansen v. Thornby, 192 Minn. 123, 255 N.W. 620, 622 (1934).
30. If you are dissatisfied with the author's attempt to remove the sterilization operation from the tentacles of the crime of mayhem, see Glanville Williams, The Sanctity of Life and the Criminal Law, 104-107 (1957) for a more complete discussion.
31. 27 A.L.R. 3d 906, 909 (1969).
32. 11 Pa. D.&C. 2d 41 (1957).

33. Ibid., at 42.
34. Planned Parenthood of North Central Indiana, Inc., includes in its form entitled 'Consent for Sterilization Operation', the following clause: "We understand (that) although rare, pregnancies have been known to occur after a vasectomy." Persons submitting to a vasectomy must sign this form.
35. 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).
36. In the Griswold case, a Connecticut statute making it a criminal offense to use or counsel or aid in the use of contraceptives was held invalid as an unconstitutional invasion of the right of privacy of married persons (35 A.L.R. 3d 1445, n. 3 (1971)).
37. Op. cit., Time, June 1, 1970, at 38.
38. Op. cit., 6 Jour. Fam. L. 94.
39. Newsweek, Medicine: "The Trend to Sterilization", Dec. 12, 1970, at 90.
40. The author is not at liberty to disclose the identity of these men. Both practice and reside in South Bend, Indiana.
41. cf. Code of Va., §32-423; Gen. Stat. N.C., §90-271; Code Geo. Anno., §84-932; 113 U. Pa. L. Rev. 415, 442.
42. cf. Code of Va., §32-423; Gen. Stat. N.C., §90-273; 113 U. Pa. L. Rev. 415, 442.
43. cf. Code of Va., §32-423; Gen. Stat. N.C., §90-271; Code Geo. Anno., §84-932; 113 U. Pa. L. Rev. 415, 442.
44. cf. There is a public policy that a marriage should result in children. Since the operation is described as being irreversible, this clause insures, exceptions aside, that no married person will lose the opportunity to have children.

45. This clause was introduced by the author. It serves to further the State's interest in protecting the health of its citizens. Also see Time, June 1, 1970 at 38. Psychiatrist Helen Edey who interviews applicants for vasectomies at the Margaret Sanger Research Bureau's clinic requires, among other things, that any man over 40 have at least two children before she will pass on his application.

46. Code of Va., §32-423; Gen. Stat. N.C., §90-271; 113 U. Pa. L. Rev. 415. 442.

47. This section is a radical departure from the three statutes already enacted and the proposed act in 113 U. Pa. L. Rev. 415. Sterilization operations upon minors are permitted by the statutes above, provided in one case, a parent's or guardian's consent is given or that a designated court orders the operation. The author believes that where an operation on a minor should be necessary, the exceptions in Section 2 should suffice. The author has discovered during interviews that virtually no physician will sterilize a minor even with parental consent. This is due to the fear that later a disgruntled adult will return with a suit. Additionally, if such a person should ever marry, that person's spouse could conceivably have a cause of action against the performing physician for his or her right to have children.

48. The basis for Section 3 is that at forty years of age, the law need not protect the mentally competent person from his own decisions in this area. Additionally, at age forty, most people are no longer concerned with siring or bearing children; those that are will not likely seek such an operation. The purpose of this section of the Act (which is basically the author's creature) is to make the sterilization operation available to those men and women, whether married or unmarried, who desire to have it.

49. See also Time, June 1, 1970, at 38.

Code of Va., §32-426; Gen. Stat. N.C., §90-274; Code Geo. Anno., §84-935; 113 U. Pa. L. Rev., 415, 443.

50. 113 U. Pa. L. Rev. 415, 443.

The other states have not inserted such a section. This section is optional. The author believes, however, that without a prospective punishment for violations, the purposes of this Act could be seriously jeopardized.

51. Code of Va., §32-427; Gen. Stat. N.C., §90-275; 113 U. Pa. L. Rev. 415, 443.

52. The contents of this consent form are consistent with those required by any physician or hospital for any type of surgery.

53. Code of Va., §32-423; Gen. Stat. N.C., §90-271; Code of Geo. Anno., §84-932.