Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law

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Through an examination of cases of non-consensual sterilization for learning disabled persons in Canada and England, this article considers the role that law plays in framing the thoughts, beliefs, and norms that fashion the way we think about bodies, sex, gender, and sexuality. The author asks how it is that Canadian and English law, while both claiming to protect bodily integrity, have reached opposing conclusions about whether non-therapeutic sterilization can be in a person's best interests. She hypothesizes that the answer could lie in the manner in which courts have constructed the bodies of learning disabled men and women in the sphere of sexuality and reproduction.

Where the overriding concern in the sterilization cases is the containment of the sexuality of a learning disabled person perceived as "out of control" or "vulnerable to seduction", sterilization is cast as a just and humane solution that will advance the welfare of the individual concerned. Conversely, where the overriding concern is the preservation of the integrity of a law committed to the principle of equality, sterilization is thought to be a violation of the bodily integrity of the person. The author shows that these two views engender very different legal and cultural discourses about best interests and bodily integrity. The debate highlighted by the sterilization cases and the commentary surrounding them reflect larger tension within legal discourse between the commitment to liberal values and the maintenance of a particular social order.

Par un examen des cas de stérilisation non consensuelle chez les handicapés de l'apprentissage au Canada et en Angleterre, cet article examine le rôle du droit dans la construction des pensées, croyances et normes qui façonnent la manière par laquelle nous pensons au corps, au sexe, au genre et à la sexualité. L'auteure se demande pourquoi les droits canadien et anglais en sont parvenus à des conclusions opposées à propos de la stérilisation non thérapeutique, même si chacun affirme vouloir protéger l'intégrité physique des personnes. Elle conjecture que la réponse pourrait se trouver dans la manière dont les tribunaux ont, dans les cas des hommes et femmes souffrant de handicaps d'apprentissage, construit les corps de ces personnes dans la sphère de la sexualité et de la reproduction.

Là où la considération primordiale dans les cas de stérilisation est l'endiguement de la sexualité de la personne handicapée de l'apprentissage perçue comme «hors de contrôle» ou «vulnérable à la séduction», la stérilisation est présentée comme une solution juste et humaine propre à contribuer au mieux-être de la personne concernée. À l'inverse, là où la considération principale est la préservation de l'intégrité d'une loi consacrée au principe de l'égalité, la stérilisation est considérée comme une violation de l'intégrité physique de la personne qui la subit. L'auteure montre que de ces deux points de vue surgissent des discours juridiques et culturels fort différents concernant le meilleur intérêt et l'intégrité physique. Le débat mis en lumière par les cas de stérilisation et les commentaires qui s'y rattachent reflètent une tension d'ordre plus général entre la souscription aux valeurs libérales et le maintien d'un ordre social donné.

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Introduction

In 2002, the public trustee of British Columbia sparked a national debate when, after discovering that a twenty-five year old learning disabled man had been castrated without his consent, it decided to sue the man's mother, the health professionals, and the hospital involved in carrying out the procedure.[1] In addition to being unlawful, the public trustee alleged that the defendants' actions had subjected the man, known as A.R., to "embarrassment, humiliation, loss of sexual drive, psychological trauma and the opportunity to become a parent."[2] The man's mother, Sandra Crockett, saw things differently. She feared his "sexual urges" and "violent outbursts" would eventually lead to permanent institutional confinement. She also feared that he would father a child that he was unable to care for. For her, the decision to have her son castrated was borne out of genuine anxiety and concern for her son's liberty and future well-being.

A close reading of the public debate that followed this case reveals a profound lack of agreement about the issues at stake. In particular, there was disagreement about whether A.R.'s sexuality was problematic, whether castration could be justified, and whether the law was out of step with community sentiment on these matters. At a very fundamental level, these disagreements tended to converge around competing constructions of community and subjectivity, in which the body functioned as both a symbol and a norm. The integrity of the body, in particular, was used as a means of conveying competing ideas about the threat posed by A.R.'s sexuality, on the one hand, and the threat posed by compulsory castration on the other. Where A.R.'s body was constructed as threatening precisely because it could not be contained sexually, castration was viewed as a means of achieving integrity and, therefore, order at the level of the individual and the social body. Conversely, where A.R.'s body was constructed as emasculated and lacking integrity as a result of having been castrated, castration was viewed as a violation of the individual body and a threat to social cohesion. The multiplicity of meanings ascribed to the body in this debate suggests that the body, rather than simply a biological given, is open to cultural interpretation. It is also suggestive of the extent to which the body can be used to shape ideas about the social world. In a broader theoretical sense then, A.R.'s case, and others like it, issue the twin challenges of understanding the body as culturally determined and understanding law as having a key role to play in these processes of definition.

This article considers the role that law plays in framing the thoughts, beliefs, and norms that fashion the way we think about bodies, sex, gender, and sexuality. The

[1] For a selection of media reports on the case, see Mindelle Jacobs, "Sterilization Issue in Court's Hands" *Edmonton Sun* (2 June 2002) 27; W. Gifford Jones, "Sterilization Can Be Decision of a Loving Mother" *The Halifax Daily News* (8 October 2002) 28; Helen Henderson, "Case Reignites Debate on Forced Sterilization" *Toronto Star* (8 June 2002) M15; Alastair Jamieson, "Parents Wrestling with Sterilization Issues Deserve Compassion" *Vancouver Sun* (5 June 2002) A15; Jackie Smith, "Burden of Care v. Burden of Proof" *National Post* (1 June 2002) A23.

[2] Jacobs, *ibid.*

legal analysis will centre on the common law with respect to non-consensual sterilization in Canada and England. There are two reasons for choosing these particular case studies. First, although both legal cultures place considerable importance on the principle of bodily integrity, each jurisdiction has arrived at different conclusions about the lawfulness of non-consensual sterilization. This is suggestive of tensions surrounding the legal meaning of bodily integrity in the context of sexuality and reproduction. Accordingly, the comparison provides a rich source of material from which to draw in examining the way the body is constructed within these discourses and the relevance of these constructions to the question of legality. Second, these discourses can be understood as regulatory strategies in which bodies are produced and contained in the interests of a particular conception of social order. Although in a concrete sense these cases are concerned with what might be described as marginal bodies and expressions of sexuality, they can also be understood as constituting normative bodies and expressions of sexuality. It will be suggested that these cases form part of a larger set of discourses through which the norms of heterosexual reproduction are instantiated.

Part I sets out the theoretical framework for this analysis. Part II considers the ways in which the historical concerns with the health of the social body interpolate contemporary legal reasoning. It also examines some of the correspondences that exist between past and present discussions about compulsory sterilization, in particular the co-existence of individual and social reasons for sterilization. Part III focuses on the contemporary law as a regulatory strategy through which normative and deviant sexualities are constructed and acted upon (or not) by medical professionals. This analysis examines the tensions surrounding judicial interpretations of "best interests" in England and Canada. It will be argued that these competing interpretations reflect a larger tension within legal discourse between the commitment to liberal values and the maintenance of a particular social order. This tension is, in turn, played out through competing visions of the relationship between the body, law, and society.

I. The Body in Focus

The body was central in the discussion surrounding A.R.'s castration. At one level of analysis, A.R.'s physical body was the focus of debate. At another level, however, the discussion was concerned with the regulation, surveillance, and control of sexuality and reproduction. Thus, certain ideas about the individual and the collective (or social) body were expressed through thoughts and beliefs about appropriate sexuality and reproductive responsibility and, alternatively, anxieties about the sort of society that uses sterilization to control its members.

A. The Social Body

Anthropologists Margaret Lock and Nancy Scheper-Hughes have provided a useful framework for bringing together these varying levels of analysis of the body.

They describe three levels of analysis—the individual body, the social body, and the body politic. The individual body refers to the lived experience of the body-self. Analysis at this level concerns the component parts of the body-self (mind, body, psyche, etc.) and the way in which these components relate to one another.[3]

The social body is a concept that concerns "the representational uses of the body as a natural symbol with which to think about nature, society, and culture."[4] Mary Douglas regarded the body as a "natural symbol" in the sense that it is used as a medium for describing social relations and perceiving the social world.[5] The body, she observes, is a "model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or precarious."[6] The converse is also true. Thoughts and beliefs about the social world impact upon the way in which the physical body is understood:

> The social body constrains the way the physical body is perceived. The physical experience of the body, always modified by the social categories through which it is known, sustains a particular view of society. There is a continual exchange of meanings between the two kinds of bodily experience so that each reinforces the categories of the other.[7]

The arena of human sexuality is especially amenable to an examination of the "symbolic equations"[8] between the individual and social bodies. Medical anthropologists have observed that symbolic equations can be used to construct the two bodies with respect to notions of health and illness: "The body in health offers a model of organic wholeness; the body in sickness offers a model of social disharmony, conflict, and disintegration. Reciprocally, society in 'sickness' and in 'health' offers a model for understanding the body."[9] In the discussion surrounding A.R.'s castration, symbols were an important means of communicating beliefs about the individual and social body and the relationship between them. Several commentators who appeared supportive of Sandra Crockett's actions described A.R. as the "man/child" or the "man/boy" and many commentators described A.R. as a juxtaposition of his mental and chronological ages. These images evoke a failure of the usual order of human development and, in particular, the failure of A.R.'s embodiment to observe the boundary between child and adult. In other words, the

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[3] Margaret Lock & Nancy Scheper-Hughes, "A Critical-Interpretive Approach in Medical Anthropology: Rituals and Routines of Discipline and Dissent" in Thomas M. Johnson & Carolyn F. Sargent, eds., *Medical Anthropology: Contemporary Theory and Method* (New York: Praeger, 1990) 47 at 50.

[4] *Ibid.*

[5] Mary Douglas, *Natural Symbols: Explorations in Cosmology* (New York: Pantheon, 1970) at xiv [Douglas, *Natural Symbols*].

[6] Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (New York: Praeger, 1966) at 115 [Douglas, *Purity and Danger*].

[7] Douglas, *Natural Symbols*, *supra* note 5 at 65.

[8] Lock & Scheper-Hughes, *supra* note 3 at 61.

[9] *Ibid.* at 50.

"man/boy" image expresses the transgressive nature of A.R.'s embodiment, and in particular, his sexuality. A.R.'s sexuality, both unrestrained and potentially reproductive, threatened to upset the social order with respect to proper heterosexual relations and responsible reproduction and, accordingly, became the focus of social concern. For some, that concern was sufficiently serious to justify castration.

For those commentators who did not condone the actions of Sandra Crockett, the "violated" body of A.R. operated as a symbol for a society that lacked cohesion and failed to offer the necessary support to its struggling members:

> A.R. was horribly violated. Still, one can't help but feel compassion for his mother. A financially strapped, single mother of five, Ms. Crockett lacked the means to care for a handicapped adult. Had A.R. been born into a richer household, with a supportive network of family, friends and community, he might be a whole man today. ... [I]t is a shame in which we all share.[10]

This commentary illustrates well the operation of a symbolic equation between the physical and social bodies. The castration of A.R.'s body was regarded as a horrible violation, in part, because it involved an assault on the integrity of his body. The removal of A.R.'s testicles relegated him to something less than a "whole man", altered physically and psychologically, humiliated, and embarrassed. These images not only convey the sense in which A.R.'s body was vulnerable and depleted, they also convey something of the importance of the notion that bodies should be "whole". Furthermore, the image of A.R.'s violated, castrated form was symbolic of a broken society that, lamentably, was no longer able to look after its vulnerable members.

The violation of A.R.'s body also recalled the widespread violations of countless numbers of people who were subjected to compulsory sterilization by governments under the auspices of eugenics:

> For much of the 20th century, the actions of Ms. Crockett and her son's doctors would barely have raised an eyebrow. Medical paternalism was rife, and discrimination against the mentally disabled rampant. Government eugenics boards in many countries were only too willing to give their nod of approval to forced sterilization. Respect for the bodily integrity of people with mental disabilities was dismissed in less time than it took to get scalpel to skin. That is, until so many people were sterilized and so many atrocities committed during the Second World War that the pendulum swung the other way, and governments started to put a halt to the whole sorry mess.[11]

In this passage, the "whole" body operates as a symbol for an enlightened society that, in contrast to those societies that have committed atrocities, is committed to respect for the bodily integrity of all its members. Significantly, the collective bodies being invoked in the above passage exercise actual (not merely symbolic) control in

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[10] "Compassion and Castration: A Retarded Man's Testicles Were Removed. Was There a Better Choice?" *The Ottawa Citizen* (13 June 2002) A16.

[11] Smith, *supra* note 1.

relation to individual bodies. This speaks to the third level of analysis, also known as the body politic.

B. The Body Politic

The concept of the body politic, like the social body, concerns the relations between the individual and social bodies. It does not, however, focus on symbolic representations of the body but rather, the manner in which power and control is exercised in relations between the individual and the collective body, in particular, control over fertility and reproduction.[12] As Browner and Sargent observe:

> Human reproduction is never entirely a biological affair; all societies shape their members' reproductive behavior. This cultural patterning of reproduction includes the beliefs and practices surrounding menstruation; proscriptions on the circumstances under which pregnancy may occur and who may legitimately reproduce ... the circumstances under which interventions occur and the form such interventions may take ... [13]

Non-consensual sterilization, especially when carried out pursuant to government objectives or, at any rate, under the aegis of law, provides a clear illustration of one way in which the body politic exercises power over the bodies of individuals. Indeed, non-consensual sterilization often raises the spectre of state tyranny, due in large measure to its association with fascist states and its service in the cause of eugenics in the early decades of the twentieth century. There is also evidence, however, that the practice continued as a means of controlling the fertility of certain individuals well after the demise of eugenic thinking. In Peru, it is alleged that more than 250,000 indigent women were sterilized in the period 1995-1998 pursuant to a government campaign to reduce poverty by cutting family sizes.[14] In Australia, the government has conceded that two hundred young learning disabled women were illegally sterilized between 1992 and 1997, and this may be a conservative estimate.[15] In France, it is

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[12] Lock & Scheper-Hughes, *supra* note 3 at 65.

[13] Carole H. Browner & Carolyn F. Sargent, "Anthropology and Studies of Human Reproduction" in Johnson & Sargent, *supra* note 3, 215 at 215.

[14] Christina Lamb, "Peru Condemned Over Mass Sterilisation Abuses" *The Daily Telegraph* (10 January 1999), online: The Telegraph Group <http://www.telegraph.co.uk>. Lamb reports that the Peruvian government set quotas for regional administrators of the program with the result that coercion, threats, bribery, and fraud have been used to ensure the co-operation of women. She cites evidence that women (especially "mixed-race" women) have been bribed with offers of food, threatened with arrest, taken by force to health facilities, and misled about the permanence of the procedure.

[15] Barbie Dutter, "200 Impaired Girls Illegally Sterilised in Australia" *The Daily Telegraph* (25 August 1998), online: The Telegraph Group <http://www.telegraph.co.uk>. The former Disability Commissioner reported that 1,045 sterilizations had been performed on girls with learning difficulties under the age of 18 during the five-year period. The Minister for Health admitted that 202 sterilizations had been performed in breach of the law but said "that the remainder had comprised routine gynaecological procedures."

estimated that fifteen thousand learning disabled women were illegally sterilized without their knowledge between the 1970s and the 1990s.[16] In Austria, where it is not illegal to sterilize mentally handicapped children with parental consent, it is alleged that hundreds of women and children have been sterilized against their will.[17] And in Japan, more than sixteen thousand learning disabled women were compulsorily sterilized with government approval between 1949 and 1995.[18] In other words, there is evidence that the practice of compulsory sterilization has been used in a repressive fashion in order to curb the fertility of certain individuals in the perceived interests of society. Equally, there is evidence that compulsory sterilization has been practiced lawfully in accordance with notions of individual welfare and, finally, by health professionals in accordance with notions of welfare, but in the absence of legal justification. These various manifestations of the practice of compulsory sterilization are not comparable from a legal perspective. Clearly, some enjoy the legitimacy conferred by law, while others do not. But, although these situations may be analyzed differently, they also share a common basis, namely, they each involve the exercise of power over the body. This raises a question of considerable significance: how are we to understand the workings of power in the field of compulsory sterilization? In particular, to what extent can law and medicine be understood as mechanisms of power in this field?

C. Law, Discipline, and the Body

The question of precisely how power is exercised over bodies has been the subject of sustained discussion in the social sciences and, in this field, the work of Michel Foucault has been very influential. His understanding of the manner in which power operates in relation to the body provides a useful starting point for a theoretical examination of cases like A.R.'s.

The classic or liberal conception of power tends to equate power with law:

> In the case of the classic, juridical theory, power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate ... Power is that concrete power which every individual

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[16] Susannah Herbert, "15,000 Forcibly Sterilised in France" *The Daily Telegraph* (11 September 1997), online: The Telegraph Group <http://www.telegraph.co.uk>. Herbert notes that the numbers are surprising given that French law prohibits sterilization except where the operation is justifiable on strong medical grounds. The women concerned were "lightly afflicted individuals with learning difficulties, below average IQ's or social adjustment problems [and] were sterilised at the request of their parents or on the initiative of supervising institutions."

[17] Mike Leidig, "Austria Guilty of Child Sterilisation" *The Daily Telegraph* (31 August 1997), online: The Telegraph Group <http://www.telegraph.co.uk>.

[18] "16,000 Disabled Japanese Women Sterilized Since 1949" *The Seattle Times* (17 September 1997) A17.

> holds, and whose partial or total cession enables political power or sovereignty to be established.[19]

Foucault was critical of this liberal conception of power on the basis that it makes certain erroneous assumptions, in particular, that power can be possessed, that it is repressive, and that it emanates from a central source.[20] Through a series of major historical studies in the arenas of mental illness,[21] medicine,[22] crime,[23] and sexuality,[24] Foucault traces transformations in the organization and growth of new knowledges (referred to as "the disciplines") and analyzes these discourses, and the practices associated with them, as new mechanisms of power. Thus, he offers an alternative conception of power which focuses on the relationship between knowledge and the body.

The concept of discourse is key to understanding the connections that Foucault emphasizes between truth, knowledge, and power. Discourses are particular domains of language-use—that is, particular ways of talking, thinking, and writing based on shared assumptions.[25] They comprise legitimized and sanctioned knowledge and are, accordingly, one of the mechanisms by which power operates (in combination with practices and their effects):[26]

> [I]n a society such as ours ... there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.[27]

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[19] Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, ed. by Colin Gordon (New York: Pantheon, 1980) at 88 [Foucault, *Power/Knowledge*].

[20] Alec McHoul & Wendy Grace, *A Foucault Primer: Discourse, Power, and the Subject* (Carlton: Melbourne University Press, 1993) at 60.

[21] Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. by Richard Howard (New York: Vintage, 1973).

[22] Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception*, trans. by A.M. Sheridan Smith (New York: Vintage, 1994).

[23] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (London: Penguin, 1977) [Foucault, *Discipline and Punish*].

[24] Michel Foucault, *The History of Sexuality: Volume I: An Introduction*, trans. by Robert Hurley (New York: Vintage, 1978) [Foucault, *History of Sexuality, Vol. I*]; *Volume Two: The Use of Pleasure*, trans. by Robert Hurley (New York: Random House, 1985); *Volume Three: The Care of the Self*, trans. by Robert Hurley (New York: Random House, 1986).

[25] Catherine Besley, *Critical Practice* (London: Methuen, 1980) at 5.

[26] Elizabeth Grosz, "Contemporary Theories of Power and Subjectivity" in Sneja Gunew, ed., *Feminist Knowledge: Critique and Construct* (London: Routledge, 1990) 59 at 89.

[27] Foucault, *Power/Knowledge*, *supra* note 19 at 93.

In other words, Foucault argued that it is not possible to distinguish power from knowledge because the relationship is symbiotic.[28] This method involves understanding "truth" and "knowledge" not as determinate concepts, but rather as products of these processes of inclusion and exclusion. Thus, when Foucault uses the concept of truth, he does not mean that which is discovered and accepted as being fact.[29] Rather, he means "the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true."[30] Foucault is "interested in discovering how certain discourses claim to speak the truth and thus can exercise power in a society that values this notion of truth."[31]

There are a number of implications that flow from the claim that discourses shape, rather than merely reflect, reality. One important implication is that the capacities, habits, and desires of the physical body are produced through the processes of investigating, talking about, and representing them in discourses.[32] The ways in which discourses about the body are produced—observation, normalizing judgment, and examination—are collectively referred to by Foucault as "techniques of power". Examination "combines the techniques of an observing hierarchy and those of a normalizing judgement"[33] making it possible to "extract and constitute knowledge."[34] It is the technique "by which power ... instead of imposing its mark on its subjects, holds them in a mechanism of objectification."[35] Thus, the power of examination lies in its ability to objectify individuals by describing, judging, measuring, and comparing them with others.[36] It also focuses attention on "the individual who has to be trained or corrected, classified, normalized, excluded, etc."[37]

These techniques of power are less spectacular than juridical forms of power over the body but they are effective nonetheless:

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[28] This can thus be seen as part of a larger attempt to rethink the relationship between power, truth, and knowledge. He states:

> We should admit ... that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations (Foucault, *Discipline and Punish*, *supra* note 23 at 27).

[29] Foucault, *Power/Knowledge*, *supra* note 19 at 132.

[30] *Ibid.*

[31] Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 9 [Smart, *Feminism and Law*].

[32] Foucault, *Power/Knowledge*, *supra* note 19 at 26.

[33] *Ibid.* at 184.

[34] *Ibid.* at 185.

[35] *Ibid.* at 187.

[36] *Ibid.* at 191.

[37] *Ibid.*

> Disciplinary power ... is exercised through its invisibility; at the same time it imposes on those whom it subjects a principle of compulsory visibility. In discipline, it is the subjects who have to be seen. Their visibility assures the hold of the power that is exercised over them. It is the fact of being constantly seen, that maintains the disciplined individual in his subjection.[38]

Disciplinary control over bodies finds its ultimate expression in what Foucault sees as the emergence of the disciplinary society, marked by an "increasingly medicalized discourse with health, well-being, clinical supervision, and surgical intervention [becoming] ever more crucial to legal, juridical, and political domains."[39] His argument, is that power in its juridical form, that is, a form based on the distribution of rights and penalties through centralized state instrumentalities, has largely given way to a new form of power. This change has been brought about by the growth of new knowledges (medicine, psychiatry, criminology, pedagogy, epidemiology) which have "create[d] new fields of exploration and bring within them new modes of surveillance and regulation of the population."[40]

To return to A.R., it was not the state that compelled his castration. Accordingly, it is not plausible to analyze this case in terms of any simple equation between state power and the repression of sexual potentiality. As we know, it was Ms. Crockett, together with a group of medical professionals, who implemented the decision to use castration as a means of pacifying A.R. and rendering him infertile. This measure may, however, be rendered sensible in a context within which A.R.'s sexuality is understood as threatening and in need of containment, and the surgical means of achieving this result, framed as humane. Those commentators who supported the decision expressed their justifications for castration by reference to larger discourses about appropriate sexual expression and responsible reproduction. A.R.'s mother explained that as he entered his teens he became sexually aggressive. She saw castration as a way of curbing that aggression. She also explained the personal benefits that he enjoys as a result:

> Most of his caregivers are female and around his age. He goes now to places where he's alone with them. He couldn't do that before, because we couldn't trust he wouldn't have aggressive sexual behaviours.[41]

The is struck a chord with at least one commentator who remarked:

> Advocates for the disabled argue that what happened to this man/boy was a violation of human rights. But doesn't this man also have a right to be protected from being a parent? Or from being ridiculed? Or perhaps going to jail?[42]

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[38] *Ibid.* at 187.

[39] Elizabeth Grosz, *Space, Time, and Perversion: Essays on the Politics of Bodies* (New York: Routledge, 1995) at 35.

[40] Smart, *Feminism and Law*, *supra* note 31 at 7.

[41] Mitchell Gray, "Mother Defends Sterilizing Her Son" *Calgary Herald* (13 May 2002) A9.

[42] W. Gifford-Jones, "The Doctor Game: Sterilization Is Not Always Inhumane" *Windsor Star* (10 October 2002) B5.

This commentator is expressing the idea that castration offered a beneficent means of protecting the man/boy from the likely consequences of his problematic sexuality (being incarcerated for his sexual urges and becoming a parent). Whether or not these outcomes would have eventuated cannot be known. It is, however, clear that, within this framework, these outcomes were enough to justify radically altering A.R.'s body. The same commentator continued:

> Today, everyone talks about the need for responsible sex. But how can a 25-year-old man with the mental age of four who has sexual desires know the true meaning of sex or the responsibility that goes with it?[43]

A fertile man engaging in sexual activity implies parenthood and, therefore, reproductive responsibility. A.R.'s sexual urges were, by contrast, uncivilized, and he was innocent of this "true meaning of sex". The significance of this notion of reproductive responsibility becomes even more apparent when this commentator asked "how could any reasonable person believe he could be a responsible parent? ... And who among us would elect to have him as a parent?"[44] These questions imply a norm, that is to say, they imply that there is some general understanding about the sort of person who will make an adequate parent. And since A.R. was not a person who could or would ever engage in reproductive sex responsibility, he was not such a person. This "truth" not only provides the justification for sterilization, it also has the effect of framing sterilization as a beneficent measure. These commentaries provide some insight into the way in which norms concerning sexuality were central to the case in favour of castrating A.R.

D. The Discursive Production of Sexed Bodies

Foucault was interested in how "particular kinds of subject (the mad, the ill, the criminal, the sexual pervert, for example) were *produced* as effects of discursive and power relations."[45] His ideas about power and the body have been a fertile source of critical and feminist legal theorizing.[46] Perhaps the most significant contribution made by these theorists has been to reject the claim that there is a natural body, which is overlain with cultural meanings. Lacey explains that "law plays an active role in

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[43] *Ibid.*

[44] *Ibid.*

[45] McHoul & Grace, *supra* note 20 at 91.

[46] See Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (London: Routledge, 1993); Rosalyn Diprose, *The Bodies of Women: Ethics, Embodiment, and Sexual Difference* (London: Routledge, 1994); Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994); Anthony Synott, *The Body Social: Symbolism, Self and Society* (London: Routledge, 1993); Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985); Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio) Ethics* (London: Routledge, 1997); Brian S. Turner, *The Body & Society: Explorations in Social Theory*, 2d ed. (London: Sage, 1996).

producing its subjects as sexual beings."[47] It does this both by constructing certain sexualities, practices, and identitites as having particular social meaning[48] and by constituting "the actual shapes, powers, and capacities of human bodies, in their sexual and other spheres of being."[49] The argument here is that discourses, including legal discourses, construct bodies each time they assign certain "qualities to the body, seeing the body in terms of some things and not others, seeing some bodies in certain ways and other bodies in others."[50] A further implication of this analysis is that bodies are not always constructed, symbolically or literally, in the same way.

Hyde argues that law has no coherent conception of the body. The body has been analogized to a machine, a zone of privacy, as property, and as a right to bodily integrity. He argues that an "assortment of representations and vizualizations"[51] are deployed "to solve political problems internal to legal discourse."[52] In other words, legal discourses are replete with symbolic representations of the body, and these representations can be central to legal outcomes. With echoes of Mary Douglas' theorizing of the body, Hyde claims that law's traditional liberal conception of the body is "an individuated entity with distinct boundaries, an outside and an inside."[53] Within the framework of liberalism, "[d]efining those boundaries is an individuated judgment that calls for no consideration of other legal subjects."[54]

The frequently cited origin of the common law principle of bodily integrity is William Blackstone. Blackstone conceptualized the body as sacred and this conception formed the basis of the claim that no one has "a right to meddle with"[55] another's body "in any the slightest manner."[56] Although the term "sacred" is no longer used in modern jurisprudence, more recent formulations of the principle of bodily integrity have retained the essence of Blackstone's claim, characterizing the body as "inviolate", that is, not to be violated or dishonoured. In *Collins v. Wilcock*, the English Court of Appeal articulated the nature and breadth of this principle:

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[47] Nicola Lacey, "On the Subject of 'Sexing' the Subject..." in Ngaire Naffine & Rosemary J. Owens, eds., *Sexing the Subject of Law* (Sydney: Law Book Company, 1997) 65 at 67.

[48] *Ibid.*

[49] Lacey warns that "law's contribution to the production of sexed legal categories" must be understood as continuing process and therefore contingent. She also urges feminists engaged in the sexing project to assume the "intellectual responsibility" of thinking beyond the particular history of law's sexing in order to "re-imagine legal categories ... in less hierarchical and more heterogeneous terms" (*ibid.* at 68).

[50] Ngaire Naffine, "The Body Bag" in Naffine & Owens, *supra* note 47, 79 at 84.

[51] Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997) at 84.

[52] *Ibid.*

[53] *Ibid.* at 258.

[54] *Ibid.* at 258-59.

[55] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, vol. 3 (Chicago: University of Chicago Press, 1979) at 120.

[56] *Ibid.*

> The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to battery. ... The breadth of the principle reflects the fundamental nature of the interest so protected.[57]

Indeed, the principle of bodily integrity is so fundamental that even socially desirable activities, such as the provision of medical treatment, are not excluded from its scope: "Any treatment given by a doctor to a patient which is invasive (i.e. involves any interference with the physical integrity of the patient) is unlawful unless done with the consent of the patient: It constitutes the crime of battery and the tort of trespass to the person."[58] "Trespass" is a term that is commonly used to describe the unlawful transgression of privately owned land and it vividly evokes the idea of a body that is marked off by distinct physical boundaries. In this sense, the principle of bodily integrity posits a normative physical body that occupies a bounded space. Furthermore, as Douglas observed, the boundary metaphor also speaks to broader notions of order and disorder. The purpose of a boundary is to contain and delineate and, in so doing, simulate a sense of order. When boundaries are breached or threatened, so too is the sense of order they denote. Within this framework, unwanted bodily intrusions disrupt order and thus warrant legal prohibition.

At this level of abstraction, these claims about the principle of bodily integrity are unlikely to provoke radical disagreement. It is by no means clear, however, that the model of the bounded, physical body will always provide an adequate model for describing human experience or, for that matter, law's attitude to the integrity of particular bodies. It is not surprising therefore that, in addition to the bounded inviolable body, Hyde finds evidence of alternative, less inviolable bodies:

> The legal subject must, however, tolerate or consent to some fairly massive social uses of the body, which law facilitates by constructing that body so as to permit such social use. ... While all these represent permissible social uses or invasions of the body, law facilitates these by constructing various discursive bodies, sometimes defined as interests in liberty or property, sometimes as things or property, sometimes through euphemistic language that makes the body disappear.[59]

Sexual connection and pregnancy are two spheres of human experience in which, arguably, the symbol of the bounded body does not offer an adequate model. Haraway contends that pregnancy places women in a "more shocking relation than men to doctrines of unencumbered property in the self."[60] This is because:

> In "making babies," female bodies violate western women's liberal singularity during their lifetimes and compromise their claims to full citizenship ...

[57] [1984] 1 W.L.R. 1172 at 1177, [1984] 3 All E.R. 374 (Q.B.).

[58] *Airedale N.H.S. Trust v. Bland*, [1993] 1 All E.R. 821 at 881-82, [1993] A.C. 789 (H.L.) [*Bland* cited to All E.R.].

[59] Hyde, *supra* note 51 at 259.

[60] Donna Jeanne Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (New York: Routledge, 1989) at 353.

> Ontologically always potentially pregnant, women are both more limited in themselves, with a body that betrays their individuality ... [61]

Haraway's analysis implies a comparison between the maternal body and an abstract ontological understanding or personhood which, like law's principle of bodily integrity, fixes upon a distinct, individuated body. In this comparison, women are never really able to meet the requirements of the normative physical body and are politically compromised as a result. Indeed, it is suggestive of the power of the normative "inviolate body" that Haraway describes the maternal body as an entity that "violates" liberal singularity.

Naffine applies a similar analysis to the law of assault. She argues that because law's principal concern "is (the policing of the boundaries of) the bounded heterosexual male body. Bodies that are not like this, or are not allowed to be like this, are somehow deviant and undeserving bodies. They are 'unnatural', even 'loathsome' because they have apparently lost their clear definition."[62]

Naffine claims that "the criminal law of human contact presupposes ... a standard, uniform, bounded human body which is really an extrapolation from a certain liberal conception of the male body, not a woman's body."[63] Thus, the body implied by the principle of bodily integrity, is not only a bounded body, it is a masculine body. This raises the question of what the unbounded body represents. Smart contends that "[w]omen's bodies have given rise to a 'problem of order.'" She argues that "women's bodies are constituted as the archetypal site of irrationality"[64] because the female body has historically been constructed as failing "the test of subordinating desire to reason."[65] This idea can be reformulated in light of Naffine's framework to argue that female bodies pose the "problem of order" because they have not been perceived as "bounded" in an equivalent manner to men's bodies. In this sense, menstruation and pregnancy might be regarded as a failure on the part of women to keep their bodies separate and hidden. This might also explain why women's bodies tend to be regarded as open, pierced, or otherwise incomplete[66] and thus produced in law as "non-standard or aberrant (not-male) bodies."[67]

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[61] *Ibid.*

[62] *Ibid.* at 84.

[63] *Supra* note 50 at 86. She goes on to say: "Inevitably, this is very much a matter of construction, not a literal reading of the body, for, to my mind, the body does not possess a nature which can simply be read off" (*ibid.*).

[64] Carol Smart, *Law, Crime & Sexuality: Essays in Feminism* (London: Sage, 1995) at 227.

[65] *Ibid.*

[66] Naffine, *supra* note 50 at 88.

[67] *Ibid.*

E. Medical Categorizations and Welfare-Oriented Practices

The notion that the inviolable or sacred body functions as an ideal against which real bodies are compared offers further clarification of the manner in which legal discourses construct bodies. But law does not necessarily operate autonomously in these processes of examination, classification, and comparison. Non-juridical discourses also have a role to play both in identifying bodies as deviant or problematic in some way and in providing authoritative solutions to the dilemmas these bodies pose. It is here that the tensions and connections between juridical and disciplinary power are most obvious.

Although Foucault arrives at a different understanding about the manner in which power operates in modern society than that envisaged by liberal conceptions of power, he concedes that juridical power still appears to have force. He speculates that the apparent tenacity of juridical power might be explained by the fact that the two forms of power are intertwined.[68] The result, according to Foucault, is that "power is exercised simultaneously" through the discourses of right and the discourses and techniques of normalization "to which the disciplines g[a]ve rise".[69] However, he sees disciplinary power "invad[ing] the area of right so that the procedures of normalisation come to be ever more constantly engaged in the colonisation of those of law."[70] He specifically uses "the extension of medicine"[71] to illustrate this point:

> It is precisely in the extension of medicine that we see, in some sense, not so much the linking as the perpetual exchange or encounter of mechanisms of discipline with the principle of right. The developments of medicine, the general medicalisation of behaviours, conducts, discourses, desires, etc., take place at the intersection between the two heterogenous levels of sovereignty and discipline.[72]

It is thus possible to incorporate Foucault's conception of power operating through discourses of normalization, without ignoring the operations of traditional forms of juridical power. Smart contends that discourses of rights and discourses of normalization constitute two parallel systems of power that merge in the context of law's relationship to the body:

> Through the appropriation of medical categorizations and welfare-oriented practices, rather than judicial practices, law itself becomes part of a method of regulation and surveillance. Law, therefore, has recourse to both methods, namely control through the allocation of rights and penalties, and regulation

[68] For a discussion of the relationship between medical power and law in the context of medical killing, see Kristin Savell, "Human Rights in the Age of Technology: Can Law Reign in the Medical Juggernaut?" (2001) 23 Sydney L. Rev. 423.
[69] Foucault, *Power/Knowledge*, *supra* note 19 at 107.
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*

> through the incorporation of medicine, psychiatry, social work and other professional discourses of the modern episteme.[73]

The law, therefore, can be seen as "stand[ing] in a symbiotic relationship to other forms of disciplinary power relations."[74]

Foucault's suggestion that juridical and medical forms of power are intertwined provides a surprisingly useful staring point for a consideration of the common law concerning compulsory sterilization in England and Canada. The specific points of connection and departure between these bodies of law will be discussed in some detail in Part III. On the broader question of how medical and juridical forms of power operate within these discourses, however, it is desirable to make some general observations at this stage.

In Canada, the *parens patriae* jurisdiction empowers courts to make decisions in the best interests of an incapacitated adult.[75] On one analysis, the very existence of a "welfare jurisdiction" is illustrative of an exchange between juridical and disciplinary power. In this field, there is a mingling of concerns about individual rights and notions of welfare. This mingling, however, does not always lead to predictable results. Thus, in *Re Eve*, where the question of whether compulsory sterilization could be justified on welfare grounds arose for determination, the Court of Appeal of Prince Edward Island and the Supreme Court of Canada reached opposing conclusions on the matter.[76] A striking difference between the approaches taken by each court concerned the weight to be accorded to the physical integrity of the body. The Supreme Court of Canada was extremely resistant to arguments that sought to diminish Eve's legal right to physical integrity on the basis of speculative judgments about the medical and social benefits of sterilization. In particular, the Supreme Court appeared to have been greatly influenced by historical abuses of sterilization and the normalizing judgments that supported them. Accordingly, the Supreme Court of Canada rejected welfarist discourses that declared Eve to be better off sterilized, in favour of a rights-based approach that prohibited non-consensual surgical sterilization as an infringement of Eve's bodily integrity. In Foucauldian terms, this might be regarded as a triumph of the discourses of right over the discourses of normalization.

Further evidence of the unpredictability of the confrontation between juridical and medical power can be found in the approach taken by English courts, which have reached substantively different conclusions on the question of whether the practice of non-therapeutic sterilization can be justified in terms of "best interests". In contrast to Canada, there is no *parens patriae* jurisdiction over incapacitated adults in English

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[73] Smart, *Feminism and Law*, *supra* note 31 at 96.

[74] Annie Bunting, "Feminism, Foucault and Law as Power/Knowledge" (1992) 30 Alta. L. Rev. 829 at 837-38.

[75] *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1 [*Re Eve* cited to S.C.R.].

[76] *Ibid.* See Part III ("Sex, Integrity, and the Individual Body") for a full discussion of these decisions.

law. This jurisdiction was abolished by the *Mental Health Act, 1959*.[77] In *Re F. (Mental Patient: Sterilisation)*,[78] the House of Lords was confronted with the question of whether and, if so, how to legitimate the non-consensual medical treatment of incapacitated adults in the vacuum created by the abolition of the *parens patriae* jurisdiction. This case involved an application for a declaration from the court that it would be lawful to sterilize F., a learning disabled adult woman.[79]

Lord Bridge noted "[a] paucity of clearly defined principles in the common law,"[80] which could be applied to the question before the court.[81] But he thought it "axiomatic that treatment which is necessary to preserve the life, health or well being of the patient may lawfully be given without consent."[82] Lord Brandon noted that the "common law would be seriously defective if it failed to provide a solution to the problem ... [o]therwise [incapacitated patients] would be deprived of medical care which they need and to which they are entitled."[83] Lord Jauncey was also compelled by the potential injustice of depriving incapacitated patients of medical treatment. He cautioned against "erecting ... legal barriers against the provision of medical treatment for incompetents"[84] lest they be "deprived of treatment which competent persons could reasonably expect to receive in similar circumstances. The law must not convert incompetents into second class citizens."[85]

In a manner consistent with this concern that the medical and nursing needs of incapacitated patients should not be unduly constrained, it was decided that "a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable ... provided that the operation or other treatment concerned is in the best interests of such patients."[86] This still leaves unanswered the question of what constitutes "best interests" and, more importantly, who will decide this question. Lord Brandon thought that treatment is in a patient's best interests "if, but only if, it is carried out in order either to save their lives, or to ensure improvement or prevent deterioration in their physical or mental health."[87]

Thus, if the medical treatment is in the best interests of the patient, it is lawful, with the result that the consent of the court is not necessary. This, as Lord Brandon pointed out, was "just as well" otherwise "the whole process of medical care for such

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[77] (U.K.), 7 & 8 Eliz. II, c. 72.
[78] [1990] 2 A.C. 1 (H.L.) [*Re F.*].
[79] In the case of a minor, an English court has power to order a sterilization in the exercise of its wardship jurisdiction: *Re B. (a Minor) (Wardship: Sterilisation)* (1987), [1988] 1 A.C. 199, [1987] 2 All E.R. 206 (H.L.) [*Re B.* (H.L.) cited to A.C.].
[80] *Re F.*, *supra* note 78 at 51.
[81] *Ibid.*
[82] *Ibid.* at 52.
[83] *Ibid.* at 55.
[84] *Ibid.* at 83.
[85] *Ibid.*
[86] *Ibid.* at 55.
[87] *Ibid.*

patients would grind to a halt."[88] There was, however, disagreement about whether there might be special situations, sterilization being one of them, where the court's consent should be obtained. Lord Griffiths thought that leaving the sterilization decision to doctors, acting in the best interests of their patients, was not adequate to safeguard the rights of the patient:

> I cannot agree that it is satisfactory to leave this grave decision with all its social implications in the hand of those having the care of the patient with only the expectation that they will have the wisdom to obtain a declaration of lawfulness before the operation is performed. In my view the law ought to be that they must obtain the approval of the court before they sterilise a woman incapable of giving consent and that it is unlawful to sterilise without that consent.[89]

Lord Griffiths was aware that in order to achieve this result a new common law rule would need to be developed. He thought that the public interest could justify such a rule. The other members of the court thought it impossible to extend the common law in this manner[90] and rejected the proposal. They did, however, agree that, even though it was not required as a matter of law, it was desirable as a matter of good practice that a court declaration be sought prior to the performance of a sterilization operation. Lord Brandon enumerated some of the reasons for this decision including the risk that the operation could be carried out for "improper reasons or with improper motives"[91] and the need to protect the doctors involved "from subsequent adverse criticisms or claims."[92]

The role of the court in such an application is to satisfy itself that the proposed treatment is in the best interests of the patient. Lord Brandon thought that the best interests of the patient should be determined by reference to the professional standard (known in English law as the *Bolam* standard),[93] which is to say, the treatment must

[88] *Ibid.* at 56.
[89] *Ibid.* at 70.
[90] *Ibid.* at 63, Brandon L.J.
[91] *Ibid.* at 56.
[92] *Ibid.*
[93] The professional standard was elaborated in *Bolam v. Friern Hospital Management Committee*, [1957] 1 W.L.R. 582, [1957] 2 All E.R. 118 (Q.B.) [*Bolam* cited to W.L.R.]. The plaintiff in *Bolam* was a voluntary psychiatric patient whose doctor had recommended electro-convulsive therapy ("ECT"). During the course of that treatment, the patient sustained fractures. He alleged that the doctor was negligent in failing to provide an adequate form of restraint and/or administer muscle relaxant drugs prior to the ECT. In addition, he alleged that the doctor was negligent in failing to disclose the risks involved in the treatment. In his direction to the jury, McNair J. stated that the test that they were required to apply in order to determine whether the doctor's practice had been negligent was "the standard of the ordinary skilled man exercising and professing to have that special skill ... it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art" (*ibid.* at 586). In other words, a doctor was not negligent "if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art" (*ibid.* at 587).

be in accordance with a practice accepted as proper by a responsible body of medical opinion. If a more stringent test was applied, he reasoned, the result would be that some incapacitated adults would be deprived of the benefit of medical treatment that competent patients could enjoy.[94]

More recently, the Court of Appeal has sought to re-assert judicial authority over the determination of best interests. In *Re M.B.*, the Court of Appeal held that "best interests are not limited to best medical interests"[95] and in *Re A. (Medical Treatment: Male Sterilisation)*,[96] Butler-Sloss P. added that "best interests encompasses medical, emotional and all other welfare issues."[97] Furthermore, in *Re A.*, Butler-Sloss P. made it clear that "in the case of an application for approval of a sterilisation operation, it is the judge, not the doctor, who makes the decision that it is in the best interests of the patient that the operation be performed."[98] Thus, in *Re S.L. (Adult Patient)(Medical Treatment)*,[99] the Court of Appeal held that where there were two responsible bodies of medical opinion, each supporting different remedial treatment for excessive menstruation, it was for the court (rather than the patient's mother in consultation with doctors) to decide which of the two treatments was in the patient's best interests.

Thus, within English law, the confrontation between juridical and medical power appears to have produced a dynamic field. But, despite the Court of Appeal's concern to assert greater authority over the determination of best interests, it is nonetheless clear that English courts have been comparatively deferential to medical testimony concerning the risks associated with pregnancy, the extent to which labour would deviate from the norm, and the benefits accruing to certain learning disabled women as a result of sterilization. Accordingly, English courts have been considerably more willing to perceive sterilization as a welfarist intervention.[100]

II. Sex, Bodily Integrity, and the Body Politic

The connections between legal and medical discourses concerning the body have deep roots. In the context of non-consensual sterilization, it is possible to show how eugenic theory inspired law reform agendas in both England and parts of Canada. The relationship between the sexuality of certain individuals and the health of the social body was a primary concern for the reformers of the 1920s and 1930s who agitated, with success in Alberta and British Columbia, for the legalization of eugenic sterilization. Similar arguments circulated in Britain and these animated the

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[94] *Supra* note 78 at 68.

[95] *Re M.B. (Medical Treatment)*, [1997] 2 F.L.R. 426 at 439 (C.A.) [*Re M.B.*].

[96] (1999), [2000] 1 F.L.R. 549, [2000] 1 F.C.R. 193 (C.A.) [*Re A.* cited to F.L.R.].

[97] *Ibid.* at 556. The question is whether this expansion might lead to the recognition of third party interests. The President and Thorpe L.J. each left this question open (*ibid.* at 556, 558).

[98] *Ibid.* at 556.

[99] *Re S.L. (adult patient) (medical treatment)*, [2000] 3 W.L.R. 1288, [2000] 2 F.C.R. 452 (C.A.).

[100] These matters are discussed in some detail in Part III.

recommendations of the 1934 Departmental Committee on Sterilisation ("Brock Committee" or "Committee"),[101] although eugenic law reforms were never ultimately adopted in England.

A. The Menacing Presence of Delinquent Bodies

Eugenic theory became popular in the early twentieth century and was concerned with reducing the number of people in society with hereditary deleterious characteristics for the purpose of improving the "race".[102] At the time that eugenic sterilization enjoyed widespread support, it was described as "a purposeful attempt, consciously made by a group of the species man, to direct, in some small degree, their own evolution."[103] This theory became the inspiration for legislative reform in a range of jurisdictions including Alberta and British Columbia and, most notoriously,[104] Germany.[105] In Sweden, a racial hygiene program instituted in 1935 and not dismantled until 1976, saw 63,000 Swedes (mainly women) sterilized without their consent.[106] In the United States, many states enacted eugenic sterilization legislation,[107] and these statutes even survived constitutional challenge. In *Buck v.*

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[101] U.K., "Report of the Departmental Committee on Sterilization", Cmd 4485 in *Sessional Papers*, vol. 15 (1933-34) 611 (President: Brock) [*Brock Report*].

[102] The *Canadian Oxford Dictionary* (1998) defines "eugenics" as "the science of improving the ... population by the controlled breeding for desirable inherited characteristics".

[103] Harry H. Laughlin, *Eugenical Sterilization, 1926: Historical, Legal and Statistical Review in the United States* (New Haven, Conn.: American Eugenics Society, 1926) at 1.

[104] It is estimated that within the first year of the enactment of the Third Reich's *Law to Prevent Offspring with Hereditary Diseases* ((14 July 1993) *Reichsgesetzblatt* ("Reich Law Gazette") 1933, I., No. 86, Berlin: 25 July 1933, 529, trans. online: <http://earning.data.at/res/pdf/B018TO6E.pdf>) 56,244 people were compulsorily sterilized. Although there are no official records for the total number of people sterilized before the law was repealed in 1945, the estimates range from 200,000 to 2 million. See Natasha Cica, "Sterilising the Intellectually Disabled: The Approach of the High Court of Australia in *Department of Health v. J.W.B. and S.M.B.*" (1993) 1 Med. L. Rev. 186 at 225.

[105] *Law to Prevent Offspring with Hereditary Diseases* (*ibid.*) provided that a person could be sterilized if medical opinion considered it probable that his or her offspring would suffer from serious heritable physical or mental defects. A person was considered to be hereditarily diseased within the meaning of the law if they suffered from congenital feeble-mindedness, schizophrenia, manic-depression, congenital epilepsy, Huntington's chorea, hereditary blindness or deafness, or a serious hereditary physical abnormality (*ibid.*, art. 1(2)). In addition to these categories, a person suffering from chronic alcoholism was also subject to the law (art. 1(3)). Article 6 established the Hereditary Health Court, which was responsible for determining sterilization applications, and was constituted by a lower court judge and two doctors (online: document Archiv® de <http://www.documentarchiv.de/fehler.html>).

[106] See Stephen Bates, "Sweden Pays for Grim Past" *The Guardian* (6 March 1999), online: Guardian Unlimited <http://www.guardian.co.uk>; Julian Isherwood, "Sweden Damages Hope for the 'Race Purity' Victims" *The Daily Telegraph* (26 August 1997), online: The Telegraph Group <http://www.telegraph.co.uk>.

[107] By 1 January 1934, 27 states had enacted eugenic sterilization laws pursuant to which 9,067 women and 6,999 men had been sterilized. See *Brock Report*, *supra* note 101, Appendix VIII. For a review of the legislative regimes current at 1926 and statistics recording the numbers of men and

Bell, an unsuccessful Supreme Court challenge to the constitutionality of Virginia's sterilization law, Justice Oliver Wendell Holmes infamously said:

> 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. ... Three generations of imbeciles are enough.[108]

Glanville Williams, a British proponent of eugenic sterilization, noted that the "obvious social importance" of preventing the births of children who are affected by congenital diseases "has naturally given rise to the proposal to use sterilisation of the unfit as a means of racial improvement."[109] To this, he added that "[w]hether or not a genetic decline has set in, the fact remains that the community is burdened with an enormous number of unfit members, and that every humane person must concur with the eugenist in wishing to see an improvement."[110]

As these passages show, the vocabulary of eugenics spoke to a profound concern with the health of the social body. The groups targeted as mental defectives or subnormals, to use the language of the day, were constructed as unhealthy bodies that posed a threat to social order and the continuing health of the social body. As such, society needed to consider what measures might be taken to prevent further deterioration of its health and, as Glanville Williams contends, perhaps even effect some kind of overall improvement.

Alberta and British Columbia enacted sexual sterilisation statutes in 1928 and 1933 respectively.[111] Under these statutes, a board was established for the purpose of authorizing the surgical sterilization of inmates of psychiatric institutions. The board could authorize the sterilization of an inmate in circumstances where it was satisfied that "the patient might safely be discharged if the danger of procreation with its attendant risk of multiplication of the evil of transmission of the disability to progeny were eliminated ... "[112] In Alberta, the board constituted under the act was called the

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women sterilized to that point, see Laughlin, *supra* note 103. For a slightly more critical assessment of the principal arguments for eugenical sterilizations, a review of the scientific literature, and the recommendations of the Committee of the American Neurological Association for the Investigation of Eugenical Sterilization, see American Neurological Association Committee for the Investigation of Eugenical Sterilization, *Eugenical Sterilization: A Reorientation of the Problem* (New York: MacMillan, 1936).

[108] 274 U.S. 200 at 207 (1927), 47 S. Ct. 584. According to Robert Lee and Derek Morgan, the principle elaborated in *Buck v. Bell* was being applied well into the 1970s. See Robert Lee & Derek Morgan, "Sterilisation and Mental Handicap: Sapping the Strength of the State?" (1988) 15 J. L. & Soc'y 229 at 244, n. 10.

[109] Glanville Llewelyn Williams, *The Sanctity of Life and the Criminal Law* (New York: Knopf, 1957) at 80.

[110] *Ibid.* at 81.

[111] *The Sexual Sterilization Act*, S.A. 1928, c. 37 [*Sexual Sterilization Act* (Alta.)]; *Sexual Sterilization Act*, S.B.C. 1933, c. 59.

[112] *Sexual Sterilization Act* (Alta.), *ibid.*, s. 5.

Board of Examiners, and it comprised four members, two of whom were medical practitioners. In British Columbia, the board was called the Board of Eugenics, and it comprised three members, a Judge of the Court of Record, a psychiatrist, and a person experienced in social work. Under both statutes, the written consent of the person to be sterilized was required. If, however, the relevant board found that that person was incapable of consenting, the consent of the spouse if married, parent or guardian, or the Minister for Health (in Alberta)[113] or provincial Secretary (in British Columbia) would suffice.

There is evidence to support the contention that, in Alberta at least, concerns about the health of the social body were compounded by racial antipathy and a preoccupation with crime and delinquency:

> Like all eugenicists, the proponents of the *Act* considered their ultimate goal to be the improvement of the overall gene pool—the betterment of the human race, by reducing or eliminating procreation by individuals with undesirable, hereditary characteristics, primarily mental illness and deficiency. Important though this objective was to eugenists, their more immediate goal in advocating and ultimately securing passage of the *Act* was to address what was perceived to be a serious and growing problem of public order and public health—namely the problem of the feebleminded as a menace to society, as a source of rampant crime and moral delinquency. The perception was rooted in the belief that criminality was either hereditary or closely linked to mental deficiency, that mental deficiency and criminality were especially prevalent among immigrants, and that they were increasing at an alarming rate.[114]

Robertson concludes that the act "was a social control measure, aimed at preventing (or at least reducing) criminal and morally delinquent behaviour in Alberta."[115] This analysis suggests that the sterilization program in Alberta was motivated by complex social relations in which race, class, gender, disability, and sexuality played a part. Moreover, in a larger sense, sterilization was a response to a perceived threat to the integrity of Albertan society. Mary Douglas describes the "idea of society"[116] as a powerful image with a particular form—"external boundaries, margins, internal structure"[117]—and she demonstrates how the body's boundaries can be used to

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[113] The act was subsequently amended twice, first in 1937 (*The Sexual Sterilization Act Amendment Act, 1937*, S.A. 1937, c. 47) and then in 1942 (*The Sexual Sterilization Act*, R.S.A. 1942, c. 194). Following the 1937 amendments, the grounds for sterilization were expanded to include the risk of mental injury to the individual or to his or her progeny. The consent requirements were also amended so that although consent was required in order to sterilize a "psychotic" individual, it was no longer needed in order to sterilize a mentally defective person. The 1942 amendments expanded the classifications of mental disability or illness to which the act applied and thus, the power of the board to authorize the sterilization for a broader range of individuals: *Muir v. Alberta* (1996), 179 A.R. 321 at 360-61, 132 D.L.R. (4th) 695.

[114] *Ibid.* at 370.

[115] *Ibid.*

[116] Douglas, *Purity and Danger*, *supra* note 6 at 114.

[117] *Ibid.*

express danger to the boundaries of the group.[118] Drawing on Douglas' work, Lock and Scheper-Hughes observe that:

> [W]hen a community experiences itself as threatened, it will respond by expanding the number of social controls regulating the group's boundaries. Points where outside threats may infiltrate and pollute the inside become the focus of regulation and surveillance. The three bodies—individual, social, and body politic—may be closed off, protected by a nervous vigilance about exits and entrances.[119]

This would seem to dovetail with Robertson's analysis of the operation of the *Sexual Sterilization Act* in Alberta. By locating the threat of "mental deficiency" predominantly in the immigrant classes, sexual sterilization was a means of simultaneously closing off certain individual bodies (to reproduction) and of surveilling and regulating the boundaries of the body politic.

B. Citizenship and Reproduction

Although Britain did not ultimately legislate to permit compulsory sterilization for eugenic or social reasons, the theme of regulating the boundaries of the body politic permeates the *Report of the Departmental Committee on Sterilisation.*[120] The Brock Committee was established by the Minister for Health in 1934 to review the evidence concerning the hereditary transmission of illness and to make recommendations about the use of sterilization as a preventative measure. The Committee recommended a liberalization of the law in respect of persons who would (or might) transmit deleterious genetic characteristics to their children. This recommendation was based on two major conclusions. The first concerned the social harm engendered by the reproductive capacities of people who were classified as "mentally defective".[121] The second concerned the injustice of denying mental

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[118] *Ibid.* at 122-28.

[119] *Supra* note 3 at 65.

[120] *Brock Report*, *supra* note 101. The terms of reference for the committee were:

> To examine and report on the information already available regarding the hereditary transmission and other cause of mental disorder and deficiency; to consider the value of sterilisation as a preventative measure having regard to its physical, psychological, and social effects and to the experience of legislation in other countries permitting it; and to suggest what further inquiries might usefully be undertaken in this connection (*ibid.* at 3).

[121] The *Mental Defective Act 1913* (3 & 4 Geo. V, c. 28) established powers and procedures for ascertaining, certifying, and detaining mental defectives. Section 1 established four classes of persons who were deemed to be "defectives" within the meaning of the act. These were:

> (a) Idiots; ... persons so deeply defective as to be unable to guard themselves against common physical dangers;
>
> (b) Imbeciles; ... mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, being taught to do so;

defectives the right to be sterilized. Accordingly, the Committee framed its recommendations both in social and individual terms.

The Committee's first conclusion reads:

> In the first place we were impressed by the dead weight of social inefficiency and individual misery which is entailed by the existence in our midst of over a quarter of a million mental defectives and of a far larger number of persons who without being certifiably defective are mentally subnormal. This mass of defectives and subnormals is being steadily recruited and is probably growing. Certainly nothing is being done to diminish it beyond the segregation of a portion of those more obviously unfitted for community life.[122]

The above passage provides an example of the symbolic use of the body to sustain a view of society as sick and burdened. The targeted bodies were a "dead weight" that was threatening to bring down the ailing social body. Similarly, the metaphor of contagion (evoked by the threat "in our midst ... being steadily recruited and probably growing") is a potent means of communicating the relationship between individuals thought to be unhealthy and a dysfunctional and endangered society. These "symbolic equations" between the individual and social body are evidenced by the Committee's explicit concern with the impact of mental deficiency on citizenship. The Committee was all but unanimously in agreement "as to the disastrous social and economic results of ignoring defect and allowing defectives to undertake the ordinary responsibilities of citizenship."[123] This characterizes the question of "mental defect" as a matter of grave social and economic concern and then projects this concern onto overtly political terrain. The social world is thus divided into normal and defective, where the former enjoys the benefits (and bear the worries) of citizenship, and the latter are literally cast to the margins of civil society.

> (c) Feebleminded persons; ... mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision and control for their own protection or the protection of others ...
>
> (d) Moral imbeciles; ... persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has little or no deterrent effect.

The meaning of "mental defectiveness" received further statutory elaboration with the passage of the *Mental Deficiency Act 1927* (17 & 18 Geo. V, c. 33) which, among other things, amended section 1 of the principal act. The definitions of idiot, imbecile, and feeble-minded persons were substantially returned, although the requirement that the defect have been present from "birth or an early age" was removed. The class "moral imbecile" was replaced by "moral defective" which was defined as "persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require supervision and control for the protection of others." Furthermore, a new subsection (2) provided that for the purposes of section 1:

> "mental defectiveness" means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury.

[122] *Brock Report*, *supra* note 101 at 55.
[123] *Ibid.* at 31.

This construction of sterilization as a question of civil responsibility also encompassed a notion of reproductive responsibility. This responsibility was framed in economic terms. The Committee observed that many of the “mental defectives” were economically disadvantaged and living in slum conditions.[124] It found further that “mental defectives” made inefficient parents and “the vast majority of [them] are temperamentally and socially unfitted for parenthood.”[125] This alone was reason enough for sterilizing them:[126]

> We know also that mentally defective and mentally disordered parents are, as a class, unable to discharge their social and economic liabilities or create an environment favourable to the upbringing of children, and there is reason to believe that sterilisation would in some cases be welcomed by the patients themselves. This knowledge is in our view sufficient, and more than sufficient, to justify allowing and even encouraging mentally defective and mentally disordered patients to adopt the only certain method of preventing procreation.[127]

These passages disclose a significant overlapping of eugenic, social, and individual best interests as grounds for sterilization. Within the Committee’s framework, sterilization was not only good for society and the family, it was also good for the individuals being sterilized.

C. Multiple Motives

Although eugenic sterilization was commonly endorsed in terms that focused on the urgent need to relieve the social burdens associated with mental deficiency, this was not exclusively so. There is evidence to suggest that compulsory sterilization was also framed as a measure that would serve the best interests of the individuals concerned. In a report entitled *Some Aspects of Sterilization in British Columbia with Special Reference to Patients Sterilized at Essondale Provincial Mental Hospital*

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[124] The *Brock Report* adopts the classification “social problem group” to describe the concentration of mental defectives and subnormals in lower socio-economic conditions:

> High grade mental defect occurs proportionately more frequently in the lowest social stratum than in the rest of the population. In this stratum there appears to be an unduly high incidence of mental defect, insanity, intellectual dulness [*sic*], epilepsy, as well as tuberculosis and other physical defects. Cause and effect of the conditions found in the social problem group are debatable, but it is possible that selective mating may to a large extent account for this concentration of physical defects and mental defects and disorders. There is evidence that in the poorest districts neighbour marries neighbour, and like marries like (*ibid.* at 21).

[125] *Ibid.* at 37.

[126] “Defectives make inefficient parents; if only for social reasons they should not have children” (*ibid.* at 31).

[127] *Ibid.* at 39.

since 1935,[128] the perceived benefits of the British Columbia legislation were articulated in the following way:

> It is a protection, not a punishment, it therefore carries no stigma or humiliation. ...
>
> It permits many patients to return to their homes, who would otherwise be confined to institutions for years. ...
>
> It protects children from being born to be brought up by mentally diseased or mentally deficient parents or by the state. ...
>
> It takes a great burden of expense off the taxpayers, and enables the state to care for more patients than would otherwise be possible. ...
>
> It enables many handicapped persons to marry and have a life normal in most respects. ...
>
> It is a practical and necessary step to prevent racial deterioration.[129]

As this list indicates, there was a preparedness to rationalize compulsory sterilization in terms of individual benefit. Indeed, three of the six reasons offered as justifications for compulsory sterilization concerned benefits that would accrue directly to the individual, namely, protection, autonomy, and normality.

The second major conclusion of the *Brock Report* also illustrates this point:

> In the second place, we were increasingly impressed by the injustice of refusing to those who have good grounds for believing they may transmit mental defect or disorder and who are in every way unfitted for parenthood the only effective means of escaping from a burden which they have every reason to dread. ... Without some measure of sterilisation these unhappy people will continue to bring into the world unwanted children, many of whom will be doomed from birth to misery and defect. We can see neither logic nor justice in denying these people what is in effect a therapeutic measure.[130]

The switch in focus from the social body to the individual body highlights some interesting interpretations both of sterilization as a social practice and of its value to the individual bodies targeted. The Committee interpreted sterilization as a therapeutic measure because it would unburden the targeted groups from the onerous responsibility of child bearing and rearing.[131] Moreover, as a therapy that would

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[128] [*Stewart Report*]. This report, dated 17 August 1945, was authored by M. Stewart. The *Stewart Report* was discovered in the provincial archives among documents catalogued as records of the Provincial Secretary from 1929 to 1947. Extracts of the *Stewart Report* appear in *D.E. (Guardian ad litem of) v. British Columbia*, [2003] B.C.J. No. 1563 (QL), 18 C.C.L.T. (3d) 169, 2003 BCSC 1013 (Sup. Ct.) at paras. 40-55 [*D.E. v. B.C.*].

[129] *D.E. v. B.C.*, *ibid.* at para. 48, citing the *Stewart Report*. In this quotation, the *Stewart Report* quotes passages from a paper published by the Human Betterment Foundation of Pasadena, California, describing the perceived benefits of eugenic sterilization.

[130] *Brock Report*, *supra* note 101 at 55.

[131] It is worth bearing in mind that reliable contraception was not available at the time that the committee compiled its report.

improve individual well-being, it was considered unjust to deny access to the procedure. There are clear echoes of this thinking in the commentary surrounding the sterilization of A.R. This reading of the Committee's report demonstrates the extent to which the practice of compulsory sterilization, even within the framework of eugenic theory, was simultaneously justified as a social benefit and as an individual benefit.

D. Imagining the Past

Eugenic theory has been roundly discredited as scientifically invalid and is widely regarded as morally repugnant. But, as mentioned already, it remains a critical reference point for contemporary sterilization discussions. Arguments on both sides of the sterilization debate are framed in ways that draw upon the collective sense of repugnance aroused by the spectre of eugenic sterilization. In the media flurry that surrounded the castration of A.R., for example, one commentator observed:

> We have a sad history of eugenics in this country, especially in Alberta, where thousands of people were sterilized against their will between 1928 and 1972 because they were deemed mentally incompetent.
>
> Alberta, in fact, was the model for the eugenics movement that sprang up in Nazi Germany and led to the slaughter of six million Jews as well as countless others considered sub-human.
>
> Perhaps in a bid to assuage our guilt, we have let the pendulum swing too far to the other side.[132]

The contention here appears to be that, notwithstanding a history of abuse that truly shocks the conscience, compulsory sterilization may not be problematic in every case. Indeed, the implication seems to be that A.R.'s case may well be one in which the Canadian law with respect to sterilization has led to injustice. The manner in which the issue has been framed in the passage above acknowledges the historical misapplication of compulsory sterilization, but does not take the additional step of questioning its legitimacy per se.

This distinction between the basic legitimacy of compulsory sterilization and its practical application appears to underpin the manner in which English courts have approached its legality. *Re B.*,[133] the first House of Lords case of its kind, held that the wardship jurisdiction could be used to justify the non-consensual sterilization of an incapacitated minor.[134] The case involved an application for the sterilization of a

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[132] Jacobs, *supra* note 1.

[133] *Supra* note 79.

[134] The Law Lords decided that non-consensual sterilization could only be lawful if it was in the best interests of the woman concerned to become permanently prevented from becoming pregnant. In relation to women under the age of majority, the juridical basis for the declaration was the court's wardship jurisdiction, which confers the court with power to act in the best interests of the ward. The later decision, *Re F.*, *supra* note 78, found that in the case of an adult woman with learning difficulties, the sterilization may also be declared by a court to be lawful if it is shown to be in her best

seventeen-year-old woman, who had significant learning difficulties. She was showing signs of sexual awareness, and her caregivers thought that pregnancy would be an "unmitigated disaster" for her. They also thought that other contraceptive options were unsuitable. The Law Lords emphatically rejected that social or eugenic reasons might be relevant to the decision to sterilize:

> My Lords, none of us is likely to forget that we live in a century which, as a matter of relatively recent history, has witnessed experiments carried out in the name of eugenics or for the purpose of population control, so that the very word "sterilisation" has come to carry emotive overtones. It is important at the very outset, therefore, to emphasise as strongly as it is possible to do so, that this appeal has nothing whatever to do with eugenics.[135]

Lord Oliver's disclaimer is repeated with equal force in the speeches of Lords Hailsham and Bridge.[136] The sterilization of B. was in her best interests and had "nothing whatsoever to do with eugenic theory."[137] Insofar as the Law Lords had in mind the sort of sterilization program that was implemented in Alberta in 1933, there is obvious force in the disclaimer. However, as the above analysis shows, the eugenic reforms of that era were not without supporting arguments that spoke to the question of individual best interests. The House of Lords did not address the possibility that "best interests" might not always be clearly distinguishable from other reasons for sterilization:

> [T]his case is not about sterilisation for social purposes; it is not about eugenics; it is not about the convenience of those whose task it is to care for the ward or the anxieties of her family; and it involves no general principle of public policy. It is about what is in the best interests of this unfortunate young woman and how best she can be given the protection which is essential to her

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interests. The juridical basis for the sterilization of an adult woman in these circumstances is the doctrine of necessity. This permits a doctor to provide medical treatment to a person who is unable to consent if the treatment is in their best interests. Medical treatment is thought to be in a person's best interests when it is necessary to preserve the life or prevent a deterioration of the physical or mental health of the person.

[135] *Supra* note 79 at 207, Oliver L.J.

[136] Lord Hailsham says, "In particular there is no issue of public policy other than the application of the above [best interests] principle which can conceivably be taken into account, least of all (since the opposite appears to have been considered in some quarters) the question of eugenics" (*ibid.* at 202).

[137] A further point that emerges from Lord Oliver's passage concerns the labelling of potential critics of sterilization practices as emotive. This has a familiar ring about it. In 1957, Glanville Williams said "[s]o deeply is the sexual instinct implanted within us that the word 'sterilization,' until one gets used to it, gives an unpleasant emotion" (*supra* note 109 at 74). Eugenics campaigners in the 1920s also adverted to the irrationality of their detractors by labelling objections to the practice as emotive. As a measure of its continuing resonance, it is worth noting that this reference has also found its way into subsequent judgments. In *Re D. (a Minor) (Wardship: Sterilisation)* (1975), [1976] 1 All E.R. 326, 2 W.L.R. 279 (Fam. Div.) [*Re D.*], Heilbron J. records the view of D.'s doctor that "[s]terilisation is now an emotive word, and we must try to change its image" (at 331). Similarly, in *Re M. (a Minor) (Wardship: Sterilization)* (1987), [1988] 2 F.L.R. 497 (Fam. Div.) [*Re M.*], the court records an expert witness's opinion that "he regards the operation more as one of contraception than sterilization, with all the emotive feelings that the use of the word 'sterilization' arouses" (at 298).

> future wellbeing so that she may lead as full a life as her intellectual capacity allows.[138]

There are two important points that emerge from this passage. The first is that there are legitimate (best interests) and illegitimate (social, eugenic) reasons for non-consensual sterilization. The second important point is that the Law Lords seem to have assumed that the two sets of considerations (best interests and eugenic or social interests) were conceptually distinct, so that the latter were merely irrelevant to the best interests test.

Like the House of Lords, the Supreme Court of Canada was also conscious of the problematic application of eugenic theory in the recent past. Accordingly, past eugenic practice was a reference point in the court's deliberations in *Re Eve*[139] on whether the *parens patriae* power could be used to justify compulsory sterilization of an incapacitated woman. Unlike the House of Lords, however, the Supreme Court was more circumspect about the discontinuity between sterilization for eugenic reasons and sterilization in an individual's best interests:

> There are other reasons for approaching an application for sterilisation of a mentally incompetent person with the utmost caution. To begin with the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude had been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States.[140]

The approach taken here is quite different from the approach taken by the House of Lords. Both courts acknowledge the "wrongness" of eugenically or socially motivated sterilization. But whereas the House of Lords sought to establish two distinct conceptual spaces—one for "problematic" sterilization practices and one for sterilization in an individual's best interests, the Supreme Court of Canada resisted such distinctions. It did so on the basis that the "problematic" sterilization practices, and the theories that underpinned them, have an enduring legacy. This legacy echoes in the manner in which disabled people are constituted as less than human and are, therefore, more susceptible to reproductive regulation.

Whether the strategy is to disclaim or acknowledge connections with the past, it seems apparent that eugenic practices, and the theories of subjectivity that sustained them, are particularly difficult to escape. The bodies politic that encouraged eugenic sterilization continue to function symbolically for modern law as a terrifying reference point, which either demands containment or serves as a reminder of the need for vigilance. In this sense, the abhorrent body politic operates as a limit and a threat to the self-image of legal cultures wishing to present themselves as liberal, open, and democratic.

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[138] *Supra* note 79 at 212.
[139] *Supra* note 75.
[140] *Ibid.* at para. 78, La Forest J.

III. Sex, Integrity, and the Individual Body

At the very least then, the practice of non-consensual sterilization poses a challenge to liberal understandings of the role of law as a mediator between the individual and the social body. Non-consensual sterilization prima facie offends the principle that individuals are entitled to have their bodies protected from intrusion. On the other hand, pregnancy and birth involve considerable bodily changes, which may negate the best interests of the individual or social body. Thus, another notable correspondence between past and present sterilization practices is the theme of bodily integrity and, in particular, the relationship between the notion of integrity and social order. In the past, sterilization was framed primarily as a measure necessary to protect the integrity of the social body. That primary focus has now shifted to the individual body, with the result that the Canadian common law prohibition on non-therapeutic sterilization has been framed in terms of law's commitment to the bodily integrity of all individuals. English law also respects the bodily integrity of individuals, although this has not prevented English courts from deciding that the non-therapeutic sterilization of learning disabled women is permissible. How is it that Canadian and English law, while both claiming to protect bodily integrity, have reached opposing conclusions about whether non-therapeutic sterilization can be in a person's best interests? The answer could lie in the manner in which courts have constructed the bodies of learning disabled men and women in the sphere of sexuality and reproduction.

The manner in which a dilemma is framed involves political and moral judgments.[141] It follows that the solutions offered to resolve the dilemma will, in large measure, have been shaped by the original conception of the problem and the perceptions upon which this conception relied.[142] Perceptions are not, of course, uniform and nor, accordingly, are the ways in which dilemmas are framed. This much has already been demonstrated in the discussion of A.R., where the dilemma was framed differently according to the dominant concerns of the commentators. Thus, when a commentator agreed that A.R. was a subject in need of control in his own and others' interests, the legal action taken against his mother seemed unjust and unfair. Conversely, when a commentator was concerned about the implications for society of allowing castration to control individual members, the legal action taken against A.R.'s mother seemed just.

Robert Cover conceptualizes narratives as "models through which we study and experience transformations that result when a given simplified state of affairs is made

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[141] See Carl Elliot, "Where Ethics Comes From and What To Do About It?" (1992) 22:4 Hastings Center Report 28. Elliot observes that "in describing a given case, one has done much of the ethical work already. A person's moral judgement is reflected in what he [or she] chooses to include in a description" (at 28).

[142] See Mary Segers, "Abortions and the Culture" in Sidney Callahan & Daniel Callahan, eds., *Abortion: Understanding Differences* (New York: Plenum Press, 1984) at 247.

to pass through the force field of a similarly simplified set of norms."[143] This form of analysis is relevant to law because narratives serve the purpose of locating and giving meaning to legal prescriptions.[144] Perhaps this can explain why English and Canadian courts tell different versions of the story of compulsory sterilization, which is to say, different ways of conceptualizing the learning disabled body and relating that conception to norms and values as a basis for formulating a legal response.[145]

There are two narratives that have been developed by English and Canadian courts in respect of applications for contraceptive sterilization. The "invasion" narrative prevents doctors from interfering with bodies without consent, in anything other than exceptional circumstances. This narrative engages the concepts of "dignity", "inviolability of the person", and "bodily integrity" and deploys metaphors of invasion to problematize the imposition of sterilization without consent. This narrative is framed by Blackstone's "sacred" body.

The second narrative gives a different complexion to non-consensual sterilization. Like the inviolate body of the invasion narrative, the body is in need of medical attention. Within this narrative, however, sterilization constitutes a rescue. Accordingly, the body within this framework does not (indeed, cannot) resist medical interference in the name of inviolability, freedom, or dignity, in large measure because the interference itself has been re-characterized as benign, even virtuous. Within the rescue narrative, the body represents "disorder" because its reproductive capacities are not contained. Once characterized as disordered in this symbolic sense, attempts to restore order (by removing the threat of pregnancy) can be cast as acts of liberation rather than invasion. In this larger sense, actions that might, at first blush, appear oppressive, are recast as freedom-enhancing and thus brought within liberal understandings of the relationship between the individual and the state.

A. Eve and the Sacred Body

The inviolability of the person was a central concern in *Re Eve*, the leading Canadian decision on non-consensual sterilization. Eve was a twenty-four-year-old woman who suffered from a condition known as extreme expressive aphasia. The condition made it difficult for her to communicate with others and, according to the

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[143] Robert M. Cover, "The Supreme Court 1982 Term-Forward: Nomos and Narrative" (1983) 97 Harv. L. Rev. 4 at 10.

[144] While Cover seems more interested in the broader point that narratives give meaning to legal institutions and their processes, he also acknowledges the relationship between narrative and legal prescriptions: "We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void ... No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" (*ibid.* at 4).

[145] According to Cover, "[t]he codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative" (*ibid.* at 10).

medical evidence, she was "at least mildly to moderately retarded."[146] From the age of twenty-one, Eve had been attending boarding school during the week and spending weekends with her mother, Mrs. E. While at the school, Eve had "struck up a close friendship with a male student" that was "brought ... to an end"[147] by the school authorities. Nonetheless, Mrs. E. became anxious "that [Eve] might quite possibly and innocently become pregnant." She felt that Eve would be adversely affected by pregnancy and birth and, moreover, that Eve "could not adequately cope with the duties of a mother."[148] Mrs. E. was concerned that the responsibility to care for Eve's prospective child would fall on her. However, as a widow approaching sixty, she felt unable to assume this role.

Mrs. E. decided that Eve should be sterilized so that she would be protected from the consequences of pregnancy and birth. She applied to the Supreme Court of Prince Edward Island for an order recognizing that she could consent to a tubal ligation being performed on Eve. The application was denied. McQuaid J. concluded that:

> the court had no jurisdiction to authorize a surgical procedure on a mentally retarded person, the intent and purpose of which was solely contraceptive. It followed that, except for clinically therapeutic reasons, parents or others similarly situated could not give a valid consent to such a surgical procedure either, at least in the absence of clear and unequivocal statutory authority.[149]

The fact that the sterilization was not medically necessary persuaded McQuaid J. that no basis existed for the granting of Mrs. E.'s application. At the root of this objection lay McQuaid J.'s conviction that "Eve, like other individuals, was entitled to the inviolability of her person."[150] As Mrs. E. had contended that Eve had a right to be protected from pregnancy, McQuaid J. resolved the apparent conflict by appealing to "physical integrity" as the "higher right".[151]

This decision was overturned by the Prince Edward Island Court of Appeal, which held that the court's *parens patriae* power did confer jurisdiction to authorize a non-therapeutic sterilization. But although the judges agreed on the question of jurisdiction, there were differences in approach to the substantive question. McDonald J.A., dissenting, would not have authorized Eve's sterilization on the evidence before the court. Large and Campbell JJ.A., thought that the sterilization offered Eve protection from pregnancy and that this outweighed her interest in bodily inviolability. Campbell J.A. thought that a court could only reach a decision about contraceptive sterilization by examining the particular circumstances. He took the view that:

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[146] *Supra* note 75 at para. 4.
[147] *Ibid.* at para. 2.
[148] *Ibid.* at para. 3.
[149] *Ibid.* at para. 7.
[150] *Ibid.*
[151] *Ibid.*

> The real and genuine object of the proposed sterilization was [Eve's] protection. There was no overriding public interest in it. And there was a likelihood of substantial injury to her if the operation was not performed. ... In the absence of permanent sterilization, the protected environment Eve enjoyed would become a guarded environment. This would deprive her of social options and relative freedom.[152]

It is apparent from this passage that the court regarded pregnancy as a "substantial injury". Furthermore, it is implied that Eve's fertility was also a source of injury to her to the extent that it prevented caregivers from allowing her to explore "social options and relative freedom". Framed in this way, the sterilization operation was not primarily an infringement of her rights and bodily integrity. It was, rather, a measure adopted to enhance her freedom and well-being. Finally, it is also noteworthy that the court mentioned the absence of any overriding public interest in Eve's sterilization. This observation echoes with the disclaimers issued by the House of Lords in *Re B.*, and it would appear that the intention is the same, namely to dismiss any suggestion that there is a social or eugenic dimension to the authorized sterilization.

The Supreme Court of Canada overturned this decision and, accordingly, refused to exercise its *parens patriae* jurisdiction to authorize the compulsory sterilization of Eve. It held that although the jurisdiction was broad enough to cover the provision of medical treatment necessary to protect the mental or physical health of a person,[153] it would not extend to non-therapeutic sterilization. This is because it was doubtful whether sterilization for contraceptive purposes could be in the best interests of a woman.[154] Sterilization involved irreversible and, in the case of hysterectomy,[155] major invasive surgery. It also involved a deprivation of "the great privilege of giving birth".[156] There was also evidence before the Court that sterilization had a considerable negative psychological impact:

> Sex and parenthood hold the same significance for [learning disabled people] as for other people and their misconceptions and misunderstandings are similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.
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> In a study by Sabagh and Edgerton it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. ...

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[152] *Ibid.* at para. 16.

[153] *Ibid.* at para. 77.

[154] "To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom the court purports to act, let alone one in which that procedure is necessary to his or her best interest" (*ibid.* at para. 87).

[155] A majority of the Court of Appeal held that it was in Eve's best interests to be sterilized and reserved its approval for the method of sterilization to be followed, pending further submissions. Notably, although Mrs. E. originally applied for authorization for a tubal ligation, after hearing submissions regarding the medically preferred procedure, the court ordered a hysterectomy.

[156] *Supra* note 75 at para. 79.

> The psychological impact of sterilization is likely to be particularly damaging in cases where is a result of coercion and when the mentally handicapped have no children.[157]

Many of the arguments advanced to support the contention that sterilization was in Eve's best interests were rejected. In response to the claim that Eve needed protection from the trauma of birth, the Court found that "there is no evidence that giving birth would be more difficult for Eve than for any other woman."[158] In response to the claim that Eve was not fit to parent a child, the Court was equally circumspect:

> Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people. Many, it is true, may have difficulty coping with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem, and one, moreover, that is not limited to incompetents. ... Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes between men and women, the poor and the rich, and people of different ethnic backgrounds.[159]

Thus, the Court was acutely aware of the intersection of sex, ethnicity, and class with disability in the manner in which sterilization decisions had been made in the past, casting doubt on the impartiality of the "unfitness to parent" ground for seeking sterilization. This particular anxiety dovetailed with the Court's broader concern about the impact of history and social disadvantage in shaping negative beliefs about the personhood of learning disabled people. One of the key concerns for the Supreme Court of Canada in *Re Eve* was the manner in which learning disabled men and women had been socially constructed as qualitatively different from other people in terms of sexuality, reproduction, and capacity to fulfill the social roles of parenting. These constructions developed against a legal and social background in which the bodily integrity of learning disabled people was disregarded and their reproductive contributions to the social body considered unnecessary and undesirable.

The Law Reform Commission of Canada found evidence to suggest that disabled people have been constituted in social terms as less than human. In the *Working Paper on Sterilization*, the Commission uses the phrase "presumption of qualitative difference" to describe one of the most problematic features of social perception concerning disability:[160]

> Mental handicap becomes translated as a characterization of the whole person rather than just one aspect of that person. The danger in such characterization is that all problems that arise in relation to this class of people are seen as a

[157] *Ibid.* at para. 80.
[158] *Ibid.* at para. 21.
[159] *Ibid.* at para. 84 [references omitted].
[160] Law Reform Commission of Canada, *Working Paper 24: Sterilization: Implications for Mentally Retarded and Mentally Ill Persons* (Ottawa: Law Reform Commission of Canada, 1979) at 66.

> function of the handicap. Such persons are thereby *a priori* defined as deviants and the implication is that they cannot be entrusted to understand their own situation or to make decisions concerning their own welfare.[161]

One of the forms that this presumption might take concerns the identification of the mentally disabled person with a "*subhuman* organism"[162] with different needs and feelings and therefore not entitled to the same rights and privileges as others.[163] According to the Commission, this presumption denies the unique identity of the person and it denies them social status.

The Supreme Court was quite obviously careful to avoid perpetuating the presumption of qualitative difference. There was no attempt to frame Eve's procreative powers as less important to her than other women, nor to minimize the significance of her bodily integrity:

> The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.[164]

Thus, sterilization was not a protective but rather an intrusive measure that caused physical damage and a "grave intrusion on rights". In short, the court interpreted the right to bodily integrity strictly so that Eve's body was inviolable to the social and medical pressures to render it "closed off" to reproduction.

B. The Disordered Body

In contrast to the Supreme Court of Canada, the House of Lords in *Re B.* rejected the therapeutic/non-therapeutic distinction as a basis for determining the lawfulness of sterilization. Lord Hailsham found this distinction "totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle."[165] Lord Bridge also thought it unhelpful and likely to "divert attention from the true issue, which is whether the operation is in the ward's best interest, and remove it to an area of arid semantic debate as to where the line is to be drawn between 'therapeutic' and 'non-therapeutic' treatment."[166] The House of Lords, unlike the Supreme Court, accepted the conceptual possibility that a non-therapeutic sterilization could be in a woman's best interests, and seemed to have few (if any) doubts about the court's ability to make the correct assessment.

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[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Re Eve*, *supra* note 75 at para. 86.
[165] *Supra* note 79 at 204.
[166] *Ibid.* at 205.

Since *Re B.*, English courts have heard a number of applications for non-consensual sterilization of learning disabled women, many of which have been granted.[167] There has been one application in respect of a learning disabled man, which was refused.[168] In other words, to date, only women have been the subject of declarations that sterilization is in their best interests. This alone raises some interesting questions in light of the foregoing analysis concerning the masculinity of the inviolable body of law. Three considerations have almost always formed part of the best interests determination: the risk of pregnancy, the trauma of pregnancy and childbirth, and the unfitness of the woman to parent. In each of these categories, norms of sexual behaviour and reproductive responsibility function to produce the learning disabled woman as marginal and, therefore, in need of sterilization for her own protection.

C. Sexuality: The Available Body

The claim that sterilization will promote sexual autonomy in an individual's best interests requires some analysis. In order to understand and test the claim, it is important to consider the ways in which English courts have conceived of the sexuality of learning disabled women. In *Re B.*, the House of Lords regarded B.'s sexuality as dangerous. Lord Hailsham stated that B. "has all the physical sexual drive and inclinations of a physically mature young woman of 17"[169] and moreover, that "she has already shown that she is vulnerable to sexual approaches, she has already once been found in a compromising position in a bathroom."[170] Lord Oliver added that the "signs" of B.'s sexual awareness were exemplified by "provocative approaches to male members of the staff and other residents and by touching herself in the genital area."[171] Lord Hailsham expressed the view that B. "would not be able to give informed consent to any act of sexual intercourse and would thus be a danger to others."[172] Although it is not clear what Lord Hailsham meant by this,[173] it is possible that he was adverting to one of two possibilities: either to the possibility that a man who did not recognize B.'s incapacity may be exposed to an allegation of sexual assault, or that this man, or society generally, would be exposed to the "danger" of becoming responsible for a child.

McCarthy suggests that historically, learning disabled people have been constructed as either oversexed or eternally childlike. The former is "based on the idea that they were unable to control themselves and historically it had sometimes also

[167] These cases are discussed in some detail below in Sections C-E.
[168] *Re A.*, *supra* note 96.
[169] *Supra* note 79 at 202, Hailsham L.J.
[170] *Ibid.*
[171] *Ibid.* at 208, Oliver L.J.
[172] *Ibid.* at 202.
[173] Dillon L.J. also adverted to the possibility that B. could be a danger to others.

been believed that they possessed a 'super-human' strength, so they could not easily be controlled by others."[174] McCarthy adds that

> [w]ithin the belief system that saw people with learning disabilities as potentially dangerous, the effect this had on ideas about their sexuality are clear: it was thought that people with learning disabilities would have an uncontrolled sexuality, that they would be "over-sexed", sexually promiscuous. In short, they were thought to be a potential sexual threat to others.[175]

There are traces of this thinking in A.R.'s case as well as *Re B*.

The second of these historical constructions is the stereotype of the "eternal child". The effect of this stereotype is to associate people with learning difficulties with "child-like interests and pursuits" and to treat them "as if they were children." This stereotype stands in contradiction to the first, so that within the "eternal child" framework, "people with learning disabilities were thought quite simply not to be sexual beings."[176]

The English sterilization cases decided since *Re B.*, have not openly embraced either the "oversexed" or "eternal child" stereotypes. But they have hinted at imagined sexual promiscuity on the one hand, and childlike vulnerability, on the other. Many courts have adopted the descriptive phrase "normal sexual urges" to describe the sexual drive of the woman in respect of whom the application has been made. This assessment of "normality" of sexual drive is, however, juxtaposed with the abnormality of the woman's intellectual development, suggestively expressed in equivalences to the "mental age" of children. To the extent that the juxtaposition of adult sexual feeling with child development creates a sense of incongruity, this approach may fall somewhere between the stereotypes outlined by McCarthy.

To illustrate, in *Re P. (a Minor) (Wardship: Sterilization)* T. was described as having an intelligence "limited to that of a child of 6 ... [but] the sexual libido appropriate to a girl of 17 ... "[177] There were some differences of opinion between the psychiatrists who gave evidence, but the court preferred the view of psychiatrist Dr. Michael Heller that:

> She appears to be the possessor of a normal libido (sexual drive) and when in an unsupervised setting with a sexually active male the likelihood of intercourse is high, especially if he should be unscrupulous and ready to take advantage of her. Theoretically, she might be "warned off" but girls like T are readily seduced, particularly if their inhibitions are allayed by alcohol. I rate her as very vulnerable in this context.[178]

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[174] Michelle McCarthy, *Sexuality and Women with Learning Disabilities* (London: Jessica Kingsley, 1999) at 53.

[175] *Ibid.*

[176] *Ibid.*

[177] *Re P. (a Minor) (Wardship: Sterilisation)* (1988), [1989] 1 F.L.R. 182 at 183 (Fam. Div.) [*Re P.*].

[178] *Ibid.* at 192.

He also attested that "[T.] is quite an attractive girl and could be at risk of influence or exploitation."[179] The court concluded "the evidence is that she is attractive, her sexual urges are appropriate to her age and people of her limited intellect are particularly vulnerable."[180] In short, this woman was regarded as sexually suggestible and, therefore, vulnerable to seduction. A similar construction is at work in *Re W. (Mental Patient) (Sterilisation).*[181] W. was described as a "friendly outgoing girl"[182] who, although not "promiscuous", might be led into a position where "someone might take advantage of her."[183]

One of the disconcerting aspects of these judicial engagements with the vulnerable/suggestible woman is the extent to which this body is constructed as an object of sexual gratification for a man. In *Re P.*, T. was described as "a perfectly normal and reasonably attractive young lady of 17."[184] Given that T. was specifically before the court because she lacked capacity, it is reasonable to assume that the use of the term "normal" here should be read as a reference to her physical appearance. In another case, L.C. was described as "physically very attractive".[185] She was, furthermore "very demonstrative and accordingly ... vulnerable to abuse."[186] Similarly, S. was described as a "charming and attractive young woman and to all outward appearances entirely normal"[187] so that "the anxiety is that ... some man will be able to contrive a situation in which S is subjected to sexual intercourse and may become pregnant."[188] The suggestion is that women who, in the court's estimation, are physically attractive to men will engage in sexual activity with men. Furthermore, the assumption seems to be that such sexual activity will be welcomed.

In *T. v. T.*, T. was already fourteen weeks pregnant. She was described as "attractive to look at" and therefore in need of protection to "avoid further pregnancies."[189] According to the evidence, T. was completely dependent, her communication extremely limited, doubly incontinent and in need of changing six to eight times a day. She had "no understanding of the physical workings of her body,"[190] and she was often destructive and uncooperative. Yet she was pregnant "despite the

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[179] *Ibid.* at 191.
[180] *Ibid.* at 194.
[181] (1992), [1993] 1 F.L.R. 381, [1993] 2 F.C.R. 187 (Fam. Div.) [*Re W.* cited to F.L.R.].
[182] *Ibid.* at 382.
[183] *Ibid.* at 383.
[184] *Supra* note 177 at 182.
[185] *Re L.C. (Medical Treatment: Sterilisation)* (1993), [1997] 2 F.L.R. 258 at 258 (Fam. Div.).
[186] *Ibid.*
[187] *Re S. (Medical Treatment: Adult Sterilisation)*, [1998] 1 F.L.R. 944 at 944, [1999] 1 F.C.R. 277 (Fam. Div.) [*Re S.* cited to F.L.R.].
[188] *Ibid.* at 945.
[189] *T v. T* (1987), [1988] 1 All E.R. 613 at 616, [1988] 1 F.L.R. 400 (Fam. Div.) [*T. v. T.* cited to All E.R.].
[190] *Ibid.* at 615.

excellent care of all those around her."[191] This case, in particular, highlights limitations in the manner in which English courts have constructed learning disabled women as attractive and therefore vulnerable to seduction. Another possible interpretation of the evidence is that T. was sexually assaulted rather than seduced.

Admittedly, the distinction between welcome and unwelcome sexual activity is often difficult to draw. Even so, the issue of sexual assault appears to be secondary to the question of whether or not sexual intercourse will happen. In *Re H.G. (Specific Issue Order: Sterilisation)*, T. who was seventeen-years-old and not sexually active, was described as "a happy person with a great fund of sociability" and "very trusting because she has been dealt with throughout her life lovingly."[192] The court did not distinguish between voluntary and non-voluntary sexual intercourse in the decision to sterilize:

> She is physically mature. She is a woman. She is sexually at risk from hostile strangers. She is, more encouragingly, able—and perhaps more so as time passes—perhaps to form a sexual relationship, perhaps amongst her peer group at the school where she lives, from which she will derive satisfaction and of which no one would seek to deprive her.[193]

This passage echoes vividly with Frug's contention that the female body as it is constituted in law is a body for sex with men.[194] Moreover, this attitude of resignation to the possibility of sexual assault obviated the need to look to the quality of care she was receiving to judge whether more could be done to protect her from the openly recognized risk of sexual assault.

The questions raised by the sexuality of learning disabled women are complex. At one end of the spectrum, a court may identify the woman as unable and unlikely to engage in voluntary sexual intercourse with men so that the risk of pregnancy is only likely to arise from a sexual assault. Since sexual encounters of this sort are unwelcome it might be persuasively argued that supervision to prevent sexual assault, rather than sterilization, is in the woman's best interests. At the other end of the

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[191] *Ibid.* at 614.

[192] (1992), [1993] 1 F.L.R. 587 at 590 (Fam. Div.).

[193] *Ibid.* at 590-91.

[194] In her analysis of the relationship between legal rules and the body, Frug identifies three meanings for the female body: the terrorized, the sexualized, and the maternalized body. Each of these is in turn rationalized "by an appeal to ... 'natural' differences" (Mary Joe Frug, "Commentary: A Postmodern Feminist Legal Manifesto (An Unfinished Draft)" (1992) 105 Harv. L. Rev. 1045 at 1049). Frug contends that laws that "inadequately protect women against physical abuse and ... encourage women to seek refuge against insecurity" support the meaning of a female body as "a body that is 'in terror'" (*ibid.* at 1049). Similarly, laws that concern the prohibition or regulation of commercial sex, rape, homosexuality, and pornography support the meaning of a female body as "a body that is 'for' sex with men, a body that is 'desirable' and also rapable" (*ibid.* at 1050). Finally, laws that reward women for child-bearing and rearing and penalize them for having abortions or working when they have dependent children, support a meaning of the female body as "a body that is 'for' maternity" (*ibid.*).

spectrum, a court may decide that the woman can claim some sexual autonomy for herself and that sterilization will protect her from pregnancy.

In both *Re B.* and *Re F.*, the House of Lords was satisfied that the women concerned wished to engage in sexual intercourse with men. At first instance, the court found that B. "is one of those small band of people in the mentally handicapped range in respect of whom it is desired to give as much freedom as in the circumstances is possible."[195] The Court of Appeal and the Law Lords agreed. Dillon L.J. spelt out the implications of this position:

> Not that many years ago the risk [of pregnancy] would have been avoided because a girl with her disabilities would have been strictly institutionalised all her life. Now the best opinion is that such a person should be allowed as much freedom as possible to enjoy such a quality of life as her limited abilities will permit, with no danger to others and as little danger to herself as reasonable care can achieve.[196]

This analysis places considerable weight on the desirability of increasing B.'s sphere of liberty as she matured. But the greater the freedom she is given, the greater the risk that she will have sexual intercourse and become pregnant.[197] This view was also accepted by the House of Lords. Lord Oliver made reference to "the increasing freedom which must be allowed her as she grows older and the consequent difficulty of maintaining effective supervision."[198] Lord Hailsham stated that "[t]o incarcerate her or reduce such liberty as she is able to enjoy would be gravely detrimental to the amenity and quality of her life."[199] Putting the matter this way, one can see an argument that *not sterilizing* her could be characterized as contrary to her interests.

In her empirical research on the sexuality of women with learning disabilities, McCarthy found that most of the women she interviewed "did not consider themselves to *be* sexual, despite regularly engaging in sexual activity."[200] McCarthy attributed this generally negative view of sex to four main factors. First, a lack of sexual agency among the women (meaning a deficit of women deciding for themselves what they wanted to do, with whom, when, and how);[201] second, the nature of the sexual activity (half the study reported having only penetrative sex and the remainder, predominantly penetrative sex; over half reported anal sex which was rated negatively by all of them);[202] third, the women were not generally psychologically engaged by the sexual experience; and finally, eighty-two per cent of

[195] *Re B. (a Minor) (Wardship: Sterilisation)*, [1987] 2 All E.R. 206 at 207, Bush J. (Fam. Div.)
[196] *Re B. (a Minor) (Wardship: Sterilization)*, [1987] 2 All E.R. 206 at 209 (C.A.).
[197] *Ibid.*
[198] *Re B.* (H.L.), *supra* note 79 at 209.
[199] *Ibid.* at 203.
[200] McCarthy, *supra* note 174 at 202.
[201] *Ibid.* at 203.
[202] *Ibid.* at 205.

the women interviewed described at least one act of sexual abuse. McCarthy observed that

> it was often difficult to distinguish between what was abusive and what was not. This must also have been difficult for the women themselves. Consider KN, for example, who would "give in" to men's demands and pressure and have sex she neither liked nor wanted, to "shut them up" and stop the pressure. Or EY who said she sometimes let men continue to have sex with her, even though it was painful, because of fears that they would hit her if she told them to stop. Or TC who was quite sure the price to be paid would be physical violence and the end of the relationship if she refused to have sex with her boyfriend. Are these acts of consented sex, pressured sex or sexual abuse?[203]

These findings suggest that the expression of sexuality is far more ambiguous than the reductive framework adopted by English courts suggests. It is undoubtedly the case that sexual intercourse will have different meanings for the same woman at different times according to the context. It does not necessarily follow that because a woman is sexually aware, she desires penetrative intercourse with men of her choosing, let alone men generally. Nor does it follow that because she obtains pleasure from particular sexual encounters, she obtains pleasure from them all. The central problem is that it is very difficult to know whether facilitating sexual intercourse is going to promote sexual autonomy or whether it will multiply the possibilities for the women to fall victim to sexual assault. Unfortunately, English courts are yet to engage with these complexities and have effectively only considered the woman's sexuality to the extent that it bears upon the issue of pregnancy. This means that the questions of whether sexual encounters will be welcomed or not, or how they might be managed, is subordinated to the primary question of whether they are likely to occur.

D. Reproduction: The Traumatized Body

The second set of reasons that have persuaded English courts that sterilization is in the woman's bests interests concerns the physical aspects of pregnancy and childbirth. In *Re B.*, Lord Bridge found it "clear beyond argument that for her pregnancy would be an unmitigated disaster."[204] The evidence was that although B. would "tolerate the condition of pregnancy without undue distress,"[205] she would not have understood the process of childbirth. According to Lord Oliver:

> [T]he process of delivery would be likely to be traumatic and would cause her to panic. Normal delivery would be likely to require heavy sedation, which could be injurious to the child, so that it might be more appropriate to deliver her by Caesarean section. If this course were adopted, however, past experience of her reactions to injuries suggests that it would be very difficult to

[203] *Ibid.* at 211.
[204] *Re B.* (H.L.), *supra* note 79 at 205.
[205] *Ibid.* at 208, Oliver L.J.

> prevent her from repeatedly opening up the wound and thus preventing the healing of the post-operative scar.[206]

Lord Hailsham reached a similar view on the evidence, adding that "she would be 'terrified, distressed and extremely violent' during normal labour."[207] The apparent paradox is that although sterilization constitutes an interference with the subject's bodily integrity, the measure protects her from an even greater level of interference, namely, pregnancy and birth.

A specific factor that courts have taken into account in determining pregnancy and labour to be dangerous for the woman concerned is the long term psychological effects of a forced medically assisted delivery. This was raised by the psychiatrist in *Re P.* who took the view that although T. would be as capable of carrying a pregnancy and giving birth as "any other very dull girl", "special measures" might need to be adopted during labour. He added that there was "small reason to suppose that the psychological effects of these would be particularly detrimental in the long term."[208] In *Re M. (a Minor) (Wardship: Sterilization)*, this view was put with greater force, Bush J. stating that "[f]rom the point of view of J, to go through the experience of pregnancy, possibly leading at the end to a caesarean operation, would be a traumatic experience which might harm her mental health."[209]

There are also concerns about the efficacy of antenatal care from the perspective of the medical profession. The consultant in *T. v. T.* gave evidence that T. was unable to understand the concept of pregnancy, a matter that presented the following problems:

> It was thought that she could not cope with the difficulties or complications which might arise during the pregnancy and certainly could not cope with labour. It would be impossible to provide the usual level of antenatal care, as the defendant would not allow examination of her abdomen or allow blood samples to be taken ... [210]

It was further noted that the "difficulties" which could be expected in "monitor[ing the] progress in pregnancy" and the "delay[s]" in recognizing any complications that may develop, increased the risks associated with proceeding with the pregnancy.[211]

There is an important, broader point to be considered here. Quite apart from whether it was in T.'s best interests to have her pregnancy terminated and for her to be sterilized, it seems clear that her participation in antenatal care is perceived as a necessary precondition to considering her as a suitable candidate for reproduction. A norm of maternal co-operation with medical staff is thus instantiated. The same

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[206] *Ibid.* at 208-209.
[207] *Ibid.* at 202.
[208] *Re P.*, *supra* note 177 at 192.
[209] *Re M.*, *supra* note 137 at 498.
[210] *Supra* note 189 at 616.
[211] *Ibid.*

argument can be made for the medical monitoring of her pregnancy. It is arguable that T.'s deviance from this norm of maternal co-operation with doctors during the antenatal period, contributed to the court's decision to terminate her pregnancy and permit her sterilization. A final point to note is that the courts' willingness to account for the trauma associated with a non-consensual Caesarean section in these sterilization cases is not reproduced in the English case law concerning non-consensual Caesarean sections.[212]

These discourses construct the bodies of the women concerned as inappropriate for reproduction on the basis that they would suffer as a result. Their bodies would suffer, in some cases, through the pregnancy, but in most, through the labour unless sedated or delivered surgically. The surgical delivery is constructed as a further form of assault on the suffering body of the labouring woman. In *Re X. (Adult Sterilisation)*,[213] the court notes that the anticipated Caesarean section "would be no less invasive than sterilisation itself."[214] The suggestion is that an interventionist labour is itself an infringement of bodily integrity that the learning disabled woman should be spared in her own best interests.

In contrast, the sterilization procedure referred to variously as "sterilisation by occluding the fallopian tubes" and a "simple operation for occlusion of the fallopian tubes,"[215] was not conceived as traumatic for the body. It was "a relatively minor operation carrying a very small degree of risk to the patient, a very high degree of protection and minimal side effects."[216] Lord Hailsham echoed this with the view that "apart from its probably irreversible nature, the detrimental effects are likely to be minimal."[217]

E. Parenting: The Gendered Body

The third consideration examined by English courts in the determination of best interests is the woman's ability to parent a child. The courts' analyses typically include a consideration of whether the woman has the capacity to marry, whether it is likely that she will find a mate, and whether she could care for a child with that mate. It was held that the women in *Re B.*, *Re F.*, *Re P.*, *Re M.*, *Re H.G.*, and *Re W.* were all

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[212] See *Re L. (Patient: Non-consensual Treatment)* (1996), [1997] 1 F.L.R. 837 (Fam. Div.); *Re M.B.*, *supra* note 95; *Norfolk and Norwich Healthcare (N.H.S.) Trust v. W.*, [1996] 2 F.L.R. 613 (Fam. Div.); *Rochdale Healthcare (N.H.S.) Trust v. C.*, [1997] 1 F.C.R. 274; *St George's Healthcare N.H.S. Trust v. S.*, *R. v. Collins*, *ex parte S.*, [1998] 3 All E.R. 673, 2 F.L.R. 728 (C.A.). For an extended analysis of these cases, see Kristin Savell, "The Mother of the Legal Person" in Stephanie Palmer & Susan James, eds., *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart, 2002) 29.

[213] [1998] 2 F.L.R. 1124 (Fam. D.).

[214] *Ibid.* at 1127.

[215] *Re B.* (H.L.), *supra* note 79 at 205, Bridge L.J.

[216] *Ibid.* at 209, Oliver L.J.

[217] *Ibid.* at 203, Hailsham L.J.

unfit to mother children and were subsequently sterilized in their best interests. There are two factors that make the judicial assessment of the social interests of the woman problematic. The first is that the claim "unfitness to parent" can reflect the problems that women might genuinely experience in a parenting role. But it can also reflect a belief that "mentally handicapped women" as a category cannot be good parents and/or that the community is burdened by their parenting either because their children are disadvantaged by their disabilities or because the support needed to assist them in parenting is costly. In this sense, the claim "unfitness to parent" can be regarded as concerning the individual and social body.

It will be recalled that fitness to parent was cited as a basis for sterilization by the Brock Committee, which espoused the belief that "mental defectives" make "inefficient parents." In *Re B.*, the evidence of the consultant child and adolescent psychiatrist was that there was "no prospect of her being capable of forming a long-term adult relationship, such as marriage, which is within the capacity of some less mentally handicapped persons."[218] Lord Oliver noted that:

> She has displayed no maternal feelings and indeed has an antipathy to small children. Such skills as she has been able to develop are limited to those necessary for caring for herself as the simplest level and there is no prospect of her being capable of raising or caring for a child of her own. If she did give birth to a child it would be essential that it be taken from her for fostering or adoption although her attitude towards children is such that this would not cause her distress.[219]

The measurement of "maternal feelings" is surely a difficult one at best, especially given that many of the applications are in respect of young women. It does not seem unlikely that there are many women between the ages of seventeen and nineteen who show little or no "maternal instinct" and who would not make ideal parents. Nonetheless, it is not unreasonable to consider whether the presence of a child might disturb or cause distress to the woman concerned.

At the same time, there will be learning disabled women who, with additional help, could raise children, and who may wish to do so. The issue in *Re P.* was that T. did show "maternal instinct", so much so that it was thought that removing the child would constitute an "emotional trauma of an extreme kind which should be avoided."[220] The view of another expert was that "the removal of a child at birth or after a period of time when she had grown attached to it is likely to be as difficult for T as any other mother."[221] It was thought that T. may have had the intellectual capacity to marry and, in the view of both psychiatric experts, could have married and founded

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[218] *Ibid.* at 208, Oliver L.J. It is interesting to note, by contrast, that the sterilization decision went the other way in *Re D.* (*supra* note 137), where the evidence indicated that D. "was of intellectual capacity to marry and would in the future be able to make her own choice" (*ibid.*).

[219] *Re B.* (H.L.), *ibid.* at 208.

[220] *Supra* note 177 at 192.

[221] *Ibid.* at 191.

a family if she had a competent partner to support her. In other words, what T. needed to enable her to care for children was extra help. But the preferred view was that T. had "no realistic prospect of ... entering into a marriage of any meaningful kind."[222] This stemmed from the belief that her marriage to a competent man was only a "theoretical possibility" because "such a man is singularly unlikely to show sustained interest in her."[223] Thus, in the opinion of the expert whose evidence was ultimately accepted, "it would be indefensible to allow the faint possibility of a[n appropriate mate] entering her life to influence the decision."[224]

By implication, the decision to sterilize T. was influenced by the speculations of a group of psychiatrists as to whether any "competent" man would want to love and support her and start a family. The court only briefly considered whether T. might have been furnished with the needed assistance from other sources or people. T.'s mother said that she would be prepared to care for any child that T. might have, but that she would not tolerate the three of them living together. Her view was based on the belief T. would become difficult if her mother's attentions were divided between T. and a child.[225] In any event, the court showed obvious preference for a family unit based on heterosexual marriage. The possibility that T. would ever find any such situation was too remote for a court to take into account.

The question of whether non-consensual sterilization might nonetheless constitute an infringement of a person's right to found a family has received judicial consideration. In *Re D.*,[226] Heilbron J. thought that such a right existed at common law and, on that basis, refused to order the sterilization of D. The decision was cited with approval by the Lord Hailsham in *Re B.* (H.L.):

> We were invited to consider the decision of Heilbron J. in *In Re D.* ... when the judge rightly referred to the irreversible nature of such an operation and the deprivation, which it involves, of a basic human right, namely the right of a woman to reproduce. ... I have no doubt whatsoever that that case was correctly decided ... [227]

Lord Bridge also thought that Heilbron J. had "correctly described the right of a woman to reproduce as a basic human right,"[228] and Lord Templeman referred to "the fundamental right of a girl to bear a child."[229] Notwithstanding this, their Lordships thought that the right to reproduce was contingent upon the woman being able to value their right. Lord Bridge stated that: "[t]he sad fact in the instant case is that the mental and physical handicaps under which the ward suffers effectively render her

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[222] *Ibid.* at 192.
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.* at 184.
[226] *Supra* note 137.
[227] *Supra* note 79 at 203, Hailsham L.J.
[228] *Ibid.* at 205, Bridge L.J.
[229] *Ibid.* at 206, Templeman L.J.

incapable of ever exercising that right or enjoying that privilege."[230] The reasoning is perhaps even clearer in the judgment of Lord Hailsham who said that the "right is only such when reproduction is the result of informed choice of which this ward is incapable."[231] In short, the common law right to found a family, as understood by the House of Lords, would appear to be contingent upon the court's assessment of an individual's ability to appreciate that right. In the result, the right to found a family posed no barrier to the lawfulness of non-consensual sterilization.

It is interesting to note that English law appears to distinguish the sexuality and reproductive responsibility of learning disabled men and women. In *Re A.*[232] an application for a declaration that it would be lawful to sterilize a mentally disabled adult man was denied. The evidence was that A. did not understand the connection between sexual intercourse and pregnancy, nor did he understand the purpose of the sterilization operation. He was, however, sexually active and fertile. A.'s mother was concerned about the possibility that he might father a child that he would not subsequently care for. Although A. was not capable of consenting to the procedure, he had expressed his opposition to it.

The principal argument in support of the application concerned A.'s freedom of movement. It was argued that his "quality of life" "should not be unnecessarily cut down"[233] by imposing restrictions on his ability to develop relationships of a sexual nature. At first instance, the court rejected the application:

> It will not protect him from being exploited or from a risk of sexually transmitted diseases. ... It follows that because there are other risks involved in any sexual relationship that A may have with a young woman, the degree of vigilance and supervision is not likely significantly to decrease, whether he is or is not at home ... Thus I do not accept that the operation would add value to the quality of A's life to any significant extent... Faced with the alternative of an invasive operation not without risk, I do not regard the risks that would otherwise face A as warranting such a course, nor the advantages to A as sufficiently positive.[234]

The Court of Appeal affirmed this decision. Butler Sloss P. distinguished the case from the sterilization of learning disabled women on the basis that A. could not become pregnant. There were "obvious biological differences" between men and women. She remarked further that "there is no direct consequence for a man of sexual intercourse other than the possibility of sexually transmitted diseases."[235] She also suspected that A.'s mother was motivated by the concern to protect vulnerable women from the consequences of an unintended pregnancy and possibly "the undesirability in

[230] *Ibid.* at 205.
[231] *Ibid.* at 203.
[232] *Supra* note 96.
[233] *Ibid.* at 550.
[234] *Ibid.* at 551.
[235] *Ibid.* at 554.

the public interest of allowing a pregnancy or birth to occur." These were clearly identified as third party concerns:

> Those are understandable concerns in the wider context of society but are not relevant in themselves to the issue before this court. Social reasons for carrying out of non-therapeutic invasive surgery is not part of the present state of the law.[236]

Arguments that appeal to natural differences between the sexes can be especially difficult to critique precisely because they appear to rest on facts that are beyond social control. It is curious, however, that two key reasons commonly cited by English courts to justify female sterilization—liberty to claim sexual autonomy and unfitness to parent—appear to have little force in *Re A*. The liberty argument, which was so important in the leading cases, *Re B.* and *Re F.*, did not persuade the court that sterilization was in A.'s best interests. It was thought that because A. was vulnerable to sexually transmitted diseases he would be closely supervised in any event. Perhaps more startlingly, A.'s unfitness to parent was regarded as a social reason for sterilization and therefore outside the ambit of the best interests test. Finally, the sterilization procedure was described as invasive, a description rarely applied in the cases concerning women.

Conclusion

There is ample evidence that the social and legal meaning of compulsory sterilization remains contested today. For the Supreme Court of Canada, the practice is a violation. It is an intrusion into the body of the woman, it is a permanent deprivation of her capacity to have children, and it is, at least potentially, an infringement of her human and constitutional rights. The Court demanded a strict and compelling justification in order to sanction what it saw as a violative act, and it was unable to find any. Eve's body was sacred in the Blackstonian sense and the common law of Canada would not permit her body to be surgically altered in an effort to contain her sexuality.

For the House of Lords, sterilization offers protection to learning disabled women. The intrusion into the body is minimal, the capacity to have children is of marginal importance to her, and her right to found a family cannot be valued by her in any event. The significant considerations, as far as the Law Lords were concerned, were the discomforts, traumas, and intrusions that the woman would experience if she were to become pregnant. From this perspective, maternity posed risks to the learning disabled woman far greater than the "simple occlusion of the Fallopian tubes". Thus, sterilization was given the meaning of an act done *for* her, rather than *to* her; an act of protection rather than violation.

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[236] *Ibid.* at 553.

At the heart of this legal disagreement lie competing constructions of body, sexuality, and community. Where the overriding concern is the question of how to contain the sexuality of a learning disabled person perceived as "out of control" or "vulnerable to seduction", sterilization is cast as a just and humane solution that will advance the welfare of the individual concerned. Legal and cultural discourses that understand the sexuality of learning disabled individuals within this frame of reference tend to be heavily influenced by medicalized notions of the body, especially as regards pregnancy and birth. In this sense, these discourses illustrate the "perpetual exchange" between juridical and normalizing discourses. They constitute a site of production for norms of maternal co-operation with medical professionals in the antenatal period and during labour. They are also laden with moral concerns about fitness to parent and single motherhood and, in this sense, instantiate a normative heterosexual family. Against this background, the legal right to bodily integrity, though proclaimed to be a fundamental right ascribed to all persons, has not prevented English courts from declaring non-consensual sterilization to be lawful, at least in relation to women. Within this discourse, there does not appear to be a conflict. It is arguable that the right to bodily integrity does not trouble the English courts precisely because sterilization is understood as protecting the bodily integrity and enhancing the freedom of the learning disabled woman.

Conversely, where the overriding concern is the question of how to preserve the integrity of a law committed to the principle of equality, sterilization is thought to be a violation of the bodily integrity of the person. Legal and cultural discourses that attempt to understand the sexuality of learning disabled people against a background of legal and social discrimination tend to frame the dilemma in terms that emphasize the potential for creating an oppressive and overbearing body politic. These discourses engage less with the specific mechanisms of sexuality and they are skeptical about welfare-oriented claims. They focus instead on the legal right of every person to be free from non-consensual bodily interferences. Within these discourses, there is a direct conflict between compulsory sterilization and the right to bodily integrity such that the only way to resolve the dilemma is to dismiss the possibility that compulsory sterilization can be in an individuals' best interests.

It may be that the Supreme Court of Canada's circumspection was justified. It was once thought that sterilizing people with mental disability was desirable because they made inefficient parents and, moreover, that sterilizing learning disabled people was desirable because their lives would be enriched by the absence of parenting responsibilities. There are clear echoes of these historical arguments in modern English law. These echoes may represent limits on law's capacity to better understand the sexuality of learning disabled men and women. In the absence of greater attempts at genuine understanding, however, courts can only speculate whether non-consensual sterilization will be beneficial or violative. Attempts to improve the lives of men and women by removing their fertility requires a sensitivity to the significance of the bodily incursion and the deprivation entailed. It also requires a sensitivity to our own assumptions about sexuality and disabled bodies and an openness to the possibility that negative assumptions about these may taint our reasoning.