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The Right Over One's Own Body: Its Scope and Limits in Comparative Law*

by *M. T. Meulders-Klein***

> "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That, to secure these rights, governments are instituted among men . . . ."
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> —*Extract from the* Declaration of Independence of the of the United States of America, *July 4, 1776*

> "None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice."
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> —*Extract from* Karl Marx, The Jewish Question

I. Introduction

Of all the controversial and burning issues of the present time, the one which we approach here is without doubt one of the most difficult. However possible it may be, at least in the ideal, to arrange the answers to the great problems of today according to a fundamental principle — that of respect for the human person, his rights and his dignity — it is an infinitely more delicate matter to question the extent of these rights and freedoms when they are exercised by the individual upon his own person, upon that which is most precious and personal to the individual: his body, his physical and mental integrity and his very life itself.

Admittedly the problem is not novel.[1] One need only review the opinions and

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* The original French title is *Le droit de disposer de soi-même, étendue et limites en droit comparé*. The French "disposer de" is roughly equivalent to the English notion of *dominion* in the sense of ownership, including the power to alienate and to do anything one wants with one's self.

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1. In addition to the various treaties and texts which have confronted the question in the context of subjective law, numerous theses and essays have discussed the problem of safeguarding the individual's rights with respect to his person. *See, e.g.*, G. Sarvonat, Le principe de l'inviolabilité du corps humain en droit civil (Poitiers 1951) (thesis); J. L. Edde, Les droits extracontractuels relatifs au corps humain (Paris

diverse attitudes of the ancient Greeks and Romans regarding suicide, to mention only one example. Plato condemned suicide as an act of cowardice and the Athenians sanctioned the suicide victim after his death, whereas Seneca proclaimed that "whosoever views suicide as criminal does not realize that he is closing off the path which leads to freedom."[2] The assertion that "your body belongs to you," which caused such a scandal at the beginning of this century and has continued to serve as a slogan, is well-known. However, this view has not gained unanimous acceptance in its absolute form. Opposing it are too many contrary interests. In truth, it is and has been for a long time the very conception of man and his freedom which is at stake.

Two developments, however, have lent the current debate a new edge and dimension. Two elements which are, without doubt, known to everyone, but whose dimensions should be measured in order to better sound the depths of the problem, present as well as future, and to ponder their reach. These elements are, on the one hand, the prodigious development of biomedical technology and, on the other hand, the deep-seated changes in societal attitudes.

The growth in biomedical knowledge and technology merits discussion first, because it has given rise to an unprecedented revolution in thinking with respect to the underlying premises of the problem. No one, in effect, would have dreamed at the turn of the century that one day it would be possible not only to improve the means to save man from and cure him of illness through pharmacology and the medical-surgical technology available today, but also to manipulate life and death to the point of shattering their boundaries and rewriting their laws. Not only to decode the mysteries of heredity, but to identify its basic elements, to discover defects even before birth and to master genetic science to the point of creating new species in defiance of the laws of sexual reproduction would have been unthinkable. The ability to disassociate sexuality from procreation by near infallible methods, to proceed to human fertilization *in vitro* and to transplant the embyro into the body of a woman who is not the mother confers upon man an unprecedented mastery over himself. The ability to modify the psyche through brain surgery or drugs, to transform, however imperfectly, a person's sex, to transplant essential organs such as the heart, to prolong life not only beyond all earlier dreams of longevity which man has realized, but also beyond even the extinction of vital functions, which formerly signified the moment

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1954) (thesis); R. Domages, Le corps humain dens le commerce juridique (Nancy 1957) (thesis); A. Goergen, Les droits de l'homme sur son corps (Nancy 1957) (thesis), *cited in* Nerson, *La protection de la personne en droit privé francais*, 13 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 70 n.4 (1959-60); Saint Alary, *Les droits de l'homme sur son propre corps*, 1958 ANNALES DE LA FACULTÉ DE DROIT DE TOULOUSE; A. DECOCQ, ESSAI D'UNE THÉORIE GENERALE DES DROITS SUR LA PERSONNE (Paris, L.G.D.J. 1960); J. Pelissier, La sauvegarde de l'intégrité physique de la personne (Paris 1977) (thesis). In Belgium: R. DIERKENS, LES DROITS SUR LE CORPS ET LE CADAVRE DE L'HOMME (Paris, Masson 1966) [hereinafter cited as DIERKENS]. In Canada: A. MAYRAND, L'INVIOLABILITÉ DE LA PERSONNE HUMAINE (McGill University, Wainwright Lectures, Wilson et Lafleur 1975) [hereinafter cited as MAYRAND].

2. *See* 2 SENECA, BOOK VI (Letter no. 58 to Lucillius) (Bude ed. 1949).

of death, and to render sterilization and abortion simpler, if not more commonplace, obliges man to reexamine entirely the problem.

Second, a change of attitude has occurred, to the extent that man, freed from the need to struggle as rigorously for simple subsistence survival, at least in the West — and without overlooking the illusion of unlimited growth — has developed an immense thirst for well-being. The change has also been a decisive one to the extent that progress in medical technology, which has without doubt largely contributed to whet this thirst, has found in man's yearning a predisposition to use unconditionally everything which may allow him to tame nature and avert suffering. Viewed in this context, it is evident that although the right to deal with one's own body is not a new problem, new fundamentals in medical knowledge have uncovered a crucial, yet unknown, dimension. They have altered the very conception of man, life and death by offering the means to control them and the temptation to do so. Furthermore, whereas it is true that each step forward in scientific knowledge constitutes a point of no-return, and that each new technique beckons irresistibly its use — absent a deliberate renunciation — scientific knowledge alone cannot furnish the moral rules to govern its technical application.[3] Science has left a blank space for other disciplines to fill.[4]

The debate over the ethical and legal problems sparked by the development and application of the biomedical sciences has evolved mainly in the so-called developed countries.[5] However, responses to the problem are far from being in agreement, nor are they lacking in ambiguity. An example is the attempt to set limitations on experimentation, human or otherwise.[6] Unanimity is even more elusive when the problem concerns precisely the right over one's body: namely, the right of the individual to do with his body as he sees fit, to control his activities, his life and his power to give life.

The conflict in underlying values here concerns less the traditional problem of state-society noninterference in the fundamental rights of the individual, than the infinitely more formidable conflict between two fundamental rights of man himself: the inviolability of his person, which postulates its inalienability; and man's freedom, namely, his right to self-determination, which is precisely that which sets man apart from other creatures. Does the inviolability of the person, that we admit today constitute — or should constitute — a bulwark against all outside aggression, private or public, also act as a bulwark against the person

3. C. BRUAIRE, UNE ETHIQUE POUR LA MÉDICINE 19 (Fayard 1978).

4. L. SEBAG, MARXISME ET STRUCTURALISME 246 (Payot 1964).

5. In truth, this has been the case longer and to a greater extent in Anglo-American countries where it has provoked a great deal of literature on the subject, as opposed to European countries, which have lagged somewhat behind. This explains why the author has largely gone to Anglo-American sources, without, however, neglecting available European sources.

6. *See* Baudouin, *L'expérimentation sur les humains: un conflit de valeurs* [hereinafter cited as Baudouin]; Hennau-Hublet, *Les projets de réglementation de l'expérimentation sur les humains* [hereinafter cited as Hennau-Hublet] in LICÉITÉ EN DROIT POSITIF ET RÉFÉRENCES LÉGALES AUX VALEURS, ACTES DES XES JOURNÉES D'ETUDES JURIDIQUES JEAN DABIN OF 1930 (to be published by Bruylant, Brussels, 1982).

himself? Or, on the contrary, does man's freedom postulate that he enjoy total dominion over his body, with the unconditional right to make use of it and dispose of it as he sees fit? Formulated in these terms, the question harbors, at the very least, a contradiction.

It is this contradiction, as well as the meaning of the historical process from which it emanates, that the author explores by examining the emergence of the principle of inviolability, and the shift towards self-determination, together with a comparison of European and American law.

II. THE INVIOLABILITY OF THE PERSON AND THE UNALIENABILITY OF THE HUMAN BODY

The person is inviolable. The human body is unalienable. These principles with which we are so familiar are for us doctrines of fundamental truth. Curiously, they do not figure explicitly in the Belgian Constitution nor in the Belgian Civil Code.[7] Only the Penal Code implicitly provides a partial yet basic affirmation of these propositions.[8] Constitutions and codes of other countries are more explicit.[9]

What exactly do these principles stand for? They signify foremost a triumph, and not a mere truism, contrary to what one might be lead to believe by the very idea of "natural rights," supposedly so innate in human beings as to be directly

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7. The Old Belgian Constitution of 1830 simply advances the principle of equality of all Belgians before the law, in Article 6, and clarifies the fundamental freedoms considered to be the principal legacy of revolutionary liberalism in Articles 7 to 24. The fundamental rights of man to life and physical integrity are not formally set forth therein, and the recent efforts at constitutional revision have not created anything new. However, the doctrine sees in the declaration of the right to individual freedom in Article 7 an implicit assertion of the right to life and physical integrity, without which freedom would fall. *See* 1 F. DELPERÉE, LES DONNÉES CONSTITUTIONNELLES No. 144 DROIT CONSTITUTIONNEL (Brussels, Larcier 1980). *See also* La déclaration des droits de l'homme et du citoyen de 1789, to which reference is made by the Preamble to the French Constitution of Oct. 4, 1958. *See* M. DUVERGER, CONSTITUTIONS ET DOCUMENTS POLITIQUES 9, 233 (Paris, P.U.F. 1971).

8. Civil law, it is true, indirectly sanctions assault upon life or limb, caused by the voluntary or involuntary action of third persons, through rules of civil liability. But the Civil Code nowhere mentions the right as such. It is the Penal Code which directly provides for sanctions against murder and battery, where the right to life and physical integrity stands out most clearly. *See* 1 TROUSSE, *Les novelles,* DROIT PENAL No. 55 [hereinafter cited as TROUSSE]; Legros, *Essai sur l'autonomie du droit pénal,* REVUE DE DROIT PÉNAL ET CRIMINEL 143 (1956-1957).

9. *See* Article 2, Section 2 of the Basic Law of May 23, 1959 of the Federal Republic of Germany; Article 32 of the Constitution of the Italian Republic of Dec. 27, 1949; the Declaration of Independence of the United States of America; U.S. CONST. amends. IV, V, XIV; Article 2a of the Canadian Declaration of Rights (8-9, Ellis, II, ch. 44, S.R.C., 1970); Article 1 of the Charte des Droits et Libertés du Québec (L.Q., ch. 6, 1975); and Article 19 of the Quebec Civil Code. *See also* Articles 2, 3, 4 and 5 of the European Convention on Human Rights. As to the force of law of this Convention in the member-states of the Council of Europe which have ratfied it, *see* Susterhahn, *L'application de la convention sur le plan du droit interne,* in La protection internationale des droits de l'homme dans le cadre Européen, 10 ANNUAIRE DE LA FACULTÉ DE DROIT ET DES SCIENCES ECONOMIQUES ET POLITIQUES DE STRASBOURG 303, 304-20 (Paris, Dalloz 1961); LES DROITS DE L'HOMME EN DROIT INTERNE ET INTERNATIONAL, ACTES DU VE COLLOQUE SUR LA CONVENTION EUROPEENE DES DROITS DE L'HOMME, VIENNA 1965 (Presses Univ. de Bruxelles 1968).

accessible to reason and superior to any positive legal order.[10] The human being has not always been considered as inviolable and as the holder of a dignity so sacred as to render his body sacrosanct.[11] The notion itself of man emerging from the totality of a cosmogony[12] and that of the individual asserting himself as an entity distinct from the group is, of recent date, linked to the Western experience.[13] Even more recent is the notion that all human beings are equal in dignity. If today it is unthinkable that a newborn child be put to death, abandoned or sold, if we are repulsed by the notion of legal slavery, a corporeal chattel to be appropriated and sold, if every individual, however diminished, weak or unaware he may be, is recognized as a holder of legal rights with equal capacity for their exercise and enjoyment, then such advances represent a hard-fought and constantly-menaced triumph, which is due to the incessant efforts of a civilization inspired in the beginning by Judeo-Christian thought, secularized in the eighteenth century and given recent universal recognition by international acts such as the Universal Declaration of Human Rights of 1948, the European Convention on Human Rights and Fundamental Freedoms of 1950 and the International Convention on Civil and Political Rights of 1966.[14]

The legal status of the human body is linked to these developments. The inviolability of the body and of the person are recent concepts born of the same moment, for the body is the person incarnate.[15] Notwithstanding the voluntarist and spiritualist conception behind the French Civil Code, superbly ignorant of the realities of flesh-and-blood, the body does not perform the role of object to the thinking subject's will; our secularized conception of law does not allow us to perceive in the body the mortal, inferior envelope of a soul, which directs the body in life and would survive beyond its death, according to views which derive from religious faith or metaphysical conviction. Man is a physical and psychic

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10. As to the distinction between rights derived from natural law and those derived from positive law, and the necessary recognition of the former by the positive legal order, *see* J. RIVERO, LES LIBERTÉS PUBLIQUES 16, (Paris, P.U.F. 1973) [hereinafter cited as RIVERO]; F. RIGAUX, INTRODUCTION Á LA SCIENCE DU DROIT 19 (Brussels, Vie Ouvrière 1974). *Cf.* J. DABIN, LE DROIT SUBJECTIF 48-50 (Paris, Dalloz 1952) [hereinafter cited as DABIN]; and J. RENAULD, *Réflexions sur la nature des droits de l'homme,* REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 149, 150-67 (1968).

11. *See* Dekkers, *Le corps humain et le droit, aspects philosophiques,* in 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 1, 2-3 (1975).

12. *See, e.g.,* the conception of the individual being in the Brahman and Buddhist religious. In contrast, Christianity, by emphasizing man's individual dignity, encouraged the flowering of individualist philosophy in the West without, however, expecting its subsequent evolution. *See* M. WALINE, L'INDIVIDUALISME ET LE DROIT 35 (Paris, Domat, Montchrestien 1949); RIVERO, *supra* note 10, at 34-35.

13. *See* HOMME, ENCYCLOPEDIA UNIVERSALIS (1968); D. DE ROUGEMONT, L'AVENTURE OCCIDENTALE DE L'HOMME (Paris 1957); Foucault, *L'homme est une invention dont l'archéologie de notre pensée montre aisément la date récente, et peut-être la fin prochaine,* in LES MOTS ET LES CHOSES (Paris 1966).

14. *See* RIVERO, *supra* note 10, at 34-46.

15. *See* J. CARBONNIER, 1 DROIT CIVIL No. 48, at 225, and No. 52, at 235 [hereinafter cited as CARBONNIER]; P. VISSER T'HOFT, LES ACTES DE DISPOSITION CONCERNANT LE CORPS HUMAIN 87, (Archives Philosophiques de Droit 1979). *See also* R. Nerson, Les Droits extra-patrimoniaux Nos. 68-70 (1939) (thesis) [hereinafter cited as Nerson].

entity forming an inseparable whole. The essential point is that the dualism of subject-object does not apply to man.

Just as man is a unified whole and his person is inviolable, so too the human body is protected, at least insofar as the person is alive and such existence is legally recognized, since life alone does not suffice for purposes of such recognition. These boundaries between life and death form the eternal problem which arises in the very definition of "person," marking the beginning and the end of the legal personality.[16] After death, the body , to the extent that death has been desanctified,[17] is nothing more than the memory of a person, worthy of respect but without the same invioability.[18] The initial consequence flowing from these premises is that of the fundamental *noli me tangere,* which ideally preserves man from all exterior aggression against his life or his integrity,[19] both *a priori* — the person must consent to any compromise of his integrity, at least in private matters, and in matters regulated under public law any compromise without consent must be as minimal as possible[20] — and *a posteriori* — by dint of criminal sanctions and civil recovery for bodily harm, in the form of monetary and moral sanctions.[21] This aspect of the individual right to life, bodily integrity, security and physical liberty, in opposition both to the state[22] and to private individuals, arises in the form of an essentially negative duty — the duty to refrain from assault[23] — and finds expression both in the rules of private and public law.[24]

From this alone, however, nothing indicates that a person may not exercise total domination over himself, nor that the principle of corporeal inviolability need impose any restrictions on the autonomy of his will. On the contrary, one can

16. *See* Meulders-Klein, *Corps humanin, personnalité juridique et famille en droit belge,* in 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 19, 20-56 (1975); CARBONNIER, *supra* note 15, at Nos. 49, 50.

17. *See* MORT, LES SOCIÉTÉS DEVANT LA MORT — SUR L'EVOLUTION DU SENS DE LA MORT EN OCCIDENT, ENCYCLOPEDIA UNIVERSALIS; P. ARIES, ESSAIS SUR L'HISTOIRE DE LA MORT EN OCCIDENT, DU MOYEN-AGE Á NOS JOURS (Paris, Seuil 1975); J. CHORON, LA MORT ET LA PENSÉE OCCIDENTALE (M. Manin, trans., Paris 1963).

18. DABIN, *supra* note 10, at 117; DIERKINS, *supra* note 1, at 131.

19. CARBONNIER, *supra* note 15, at 225-27.

20. Consider, *e.g.,* medical examinations, vaccinations, drug rehabilitation and other treatment. *See* J. Robert (France), F. Mantovani (Italy), R. Kouri and M. Ouelette-Lauzon (Canada) and G. Neu (Luxembourg) on *The Human Body and Individual Liberty,* in 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, 483 et seq. (1975). *See also* A. DECOCQ, ESSAI D'UNE THÉORIE GÉNÉRALE DES DROITS SUR LA PERSONNE 381 (Paris, L.G.D.J. 1960); DIERKENS, *supra* note 1, at 100-27.

21. *See* Savatier, *Le dommage et la personne,* 1955 DALLOZ, CHRONIQUE 5; Durry, *Sanction et réparation des atteintes au corps humain, rapport général,* 26 TRAVAUX DE L'ASSOCIATION HENRÍ CAPITANT 281 (1975).

22. Practically speaking, the very nature of its opposability against the state itself, combined with constitutional guarantees, constitutes the essential victory realized by the declarations of rights in the eighteenth century. To impose self-limitation upon the public authorities themselves was infinitely more difficult. *See* The Declaration of Independence of the United States of 1776 and the Preamble to the French Declaration of the Rights of Man and Citizen of 1789.

23. More and more often, however, these negative rights tend to be accompanied by a positive right to receive at state expense, for example, the "right to health," "to work" and generally the economic, social and cultural rights, although the substance of these latter rights remains relatively fluid and indeterminate. *See* RIVERO, *surpa* note 10, at 100.

24. These concern guarantees of constitutional law, penal law and judicial law.

argue that the human body, so much a property of the person, is under the complete and supreme control of that person,[25] and further, that his liberty to exercise the power of self-determination on himself[26] should be plenary in this most intimate sphere of his life. Neither the French nor Belgian Penal Code[27] nor the Civil Code[28] expressly takes a contrary position. Must one conclude from this fact that the consent requisite to every physical assault is therefore sufficient and that an unconditional right thus exists to self-determination over one's body, similar to the proprietary right to dispose of one's chattel? The answer to this double question is obviously in the negative. Belgian and French doctrine have asserted for many years that the maxim "volenti non fit injuria" is no longer appropriate in a public criminal system[29] and that the consent of the victim generally does not vitiate an illegal act.[30] Civil law specialists maintain further that the human body is "not for sale" and cannot be viably subject to alienation or made the object of treaty conventions.[31] At this point, it is appropriate to pause and examine the objective in rendering self-alienation illegal.

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25. *See* DABIN, *supra* note 10, at 105: "Le droit subjectif est une prérogative, concedée à une personne par le droit objectif et garantie par des voies de droit, de disposer en maître d'un bien qui est reconnu lui appartenir, soit comme sien, soit comme dû."

26. RIVERO, *supra* note 10, at 14-15.

27. With certain exceptions, notably in the matter of mutilations. *See infra* note 34 and accompanying text.

28. The question is one of the more important ones regarding whether "personal rights," and more particularly, rights relating to the human body, are true subjective rights, including a complete dominion and right of alienation, or rather "judicially protected interests." On this point *compare* Nerson, *supra* note 15, and P. ROUBIER, DROITS SUBJECTIFS ET SITUATIONS JURIDIQUES 72-73, 364-65 (Paris, Dalloz 1963) who see in "personal rights" (droits de la personalité) juridically protected interests, *with* the thesis of DABIN, *supra* note 10, at 169, who sees in them true subjective rights but with some limitations with regard to the right of alienation (or the power of disposition). *See also* Dabin, Droit subjectif et prérogatives juridiques (Examination of P. Roubier, Académie Royale de Belgique, Mémoire pour la Classe des Lettres et Sciences Morales et Politiques 1960) (thesis). As to the nature of "personal rights" in private French law, *see* Nerson, *La protection de la personalité en droit privé français,* 13 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 61, 62-83 (1963); Kayser, *Les droits de la personnalité, aspects théoriques et practiques,* 1971 REVUE TRIMESTRIELLE DE DROIT CIVIL 445-509; Tallon, *Personnalité,* ENCYCLOPÉDIE DALLOZ; CARBONNIER, *supra* note 15, at 342-44.

Without broaching here the controversy regarding the very definition of "subjective rights," it will suffice to note that, whatever be their nature, personal rights, which most authors view to include the right to life, physical integrity and the free exercise of human pursuits, belong to a special category, whose restrictions relative to the power of disposition or of alienation are all the more strict when the property or the rights concerned are closely linked with the person himself. *See* 1 MARTY & RAYNAUD, DROIT CIVIL Nos. 144, 145 (1972) and vol. 2, Nos. 6 and 7 [hereinafter cited as MARTY & RAYNAUD]; WEILL & TERRE, LES PERSONNES, LA FAMILLE, LES INCAPACITÉS, DROIT CIVIL Nos. 26-29, 35-36 [hereinafter cited as WEILL & TERRE]; CARBONNIER, *supra* note 15, at 327-28; DABIN, *supra* note 10 at 174-75; Tallon, *Personnalité,* No. 139, ENCYCLOPÉDIE DALLOZ.

29. As to the origin of the maxim *volenti non fit injuria* and its application in Roman law, *see* 2 R. MONIER, MANUEL ELÉMENTAIRE DE DROIT ROMAIN 11 (Paris, Domat-Montchrestien 1948); Doublier, *Le consentement de la victime,* in QUELQUES ASPECTS DE L'AUTOMONIE DE DROIT PÉNAL 188-225 (Paris, Dalloz 1956) [hereinafter cited as Doublier]; A. FAHMI-ABDOU, LE CONSENTEMENT DE LA VICTIME No. 2 (Paris, L.G.D.J. 1971) [hereinafter cited as FAHMI-ABDOU].

30. *See* note 39 and accompanying text *infra.*

31. *See* note 84 and accompanying text *infra.*

A. *Limitations on the Autonomy of the Individual under Criminal Law*

The principle that the consent of the victim cannot excuse an offense is not absolute, even in the area of criminal law. The exceptions to the rule delimit in a more or less precise manner the boundary separating the field of action reserved to the control of public authorities and the province reserved to the freedom and discretion of the individual.[32] The author would first like to note that, in the majority of cases, acts of self-inflicted injuries and abuse, by the lone individual or with the participation of third parties, do not give rise to criminal penalties on the part of the victim. Such acts include those of suicide, or its attempt,[33]

32. Most foreign penal codes, following the example of the French and Belgian Penal Codes, do not provide any general clause recognizing the consent of the victim as grounds for justification. The role of such consent plays a part only in particular cases. *See* FAHMI-ABDOU, *supra* note 29, at Nos. 3-4.

Article 50 of the Italian Penal Code appears to be an exception in this matter. With certain exceptions, French and Belgian doctrine treat this question but sporadically except for the thesis of Fahmi-Abdou (*supra* note 29). *See, e.g.,* in France: 2 R. GARRAUD, DROIT PÉNAL GÉNÉRAL 65 (1914); VIDAL, COURS DE DROIT CRIMINEL ET DE SCIENCES PÉNITENTIAIRES No. 232 et seq. (Paris 1935); DONNEDIEU DE VABRES, TRAITÉ ELEMENTAIRE DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE No. 417 (Paris 1943); 1 BOUZAT & PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE No. 301 (Paris, Dalloz 1970) [hereinafter cited as BOUZAT & PINATEL]; 1 MERLE & VITU, TRAITÉ DE DROIT CRIMINEL 539 (Paris, Cujas) [hereinafter cited as MERLE & VITU]; G. STEFANI, G. LEVASSEUR, & B. BOULOC, DROIT PÉNAL GÉNÉRAL, No. 351 (Precis Dalloz 1980) [hereinafter cited as STEFANI]. These latter indicate that the definitive preliminary study to the French *Code Pénal* of 1978 did not retain the victim's consent as a general ground for justification "because of the dangerous extension which might possibly be given to a disposition of this nature." *See Avant-projet définitif,* at 45. The same reason has arisen in foreign law. In Belgium, *see* 1 J.J. HAUS, PRINCIPES DE DROIT PÉNAL, Nos. 603-08 (reprint, Swinnen, Brussels 1977); TROUSSE, *supra* note 8, at Nos. 2729 et seq; CONSTANT, MANUEL DE DROIT PÉNAL, 1st part., No. 222. (5th ed.).

Among the articles treating the question, *see* especially Magnol, *Le consentement de la victime dans le délit de coups et blessures volontaires,* 1937 REVUE DE SCIENCE CRIMINELLE ET DE DROIT CRIMINEL COMPARÉ 680; Hémard, *Le consentement de la victime dans le délit de coups et blessures,* 1939 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 293, 293-319; Garraud, *Le rôle de la volonté du patient et du médecin grant au traitement médical,* 1926 REVUE GÉNÉRALE DE DROIT 129. In Belgium *see* Simon, *Le consentement de la victime justifie-t-il les lésions corporelles?,* 1951-52 REVUE DE DROIT PÉNAL 323, 323-42.

Under continental European law, Italian and German doctrine appear to have devoted deeper study to this problem in the sphere of a general theory of law. *See* the numerous references cited by FAHMI-ABDOU, *supra* note 29, at No. 5; *see also* GRISPIGNI, IL CONSENSO DELL'OFFESO (Rome 1924).

Anglo-American law has touched upon the problem only incidentally in studies on theories of defense, without clearly distinguishing between excuse or privilege, and true justification. *See* Eser, *Justification and Excuse,* 24 AM J. COMP. L. 621 (1976). For English law, *see* SMITH & HOGAN, CRIMINAL LAW, CASES AND MATERIALS 397, 397-412 (2d ed. 1980) [hereinafter cited as SMITH & HOGAN]; CROSS & JONES, INTRODUCTION TO CRIMINAL LAW §§ 3-7, 7-2, 7-6, 7-10, 8-29, 9-2, 9-3, 9-9, 9-10 (9th ed. 1980) [hereinafter cited as CROSS & JONES]. For American law, *see* Beale, *Consent in the Criminal Law,* 8 HARV. L. REV. 317 (1895); R. M. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW 623 (2d ed. 1959); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 14, 233 et seq. (2d ed. 1960); Rubinstein, *The Victim's Consent in Criminal Law: An Essay on the Extent of the Decriminalizing Element of the Crime Concept,* in STUDIES IN COMPARATIVE CRIMINAL LAW 189-210 (Wise & Mueller eds. 1975); P. E. JOHNSON, CRIMINAL LAW 743-47 (1975) [hereinafter cited as JOHNSON]. For Canadian law, *see* M. Somerville, Le consentement à l'acte médical, (Commission de Réforme du Droit du Canada 119, (Document d'Etude, Série Protection de la Vie (1980) [hereinafter cited as Somerville]; Le traitement médical et le droit criminel, Commission de Réforme du Droit du Canada, 14-16, 42, Document de Travail No. 26 (1980).

As to Scandinavian law, *see* ANCEL & STRAHL, *Le droit pénal des pays Scandinaves,* in LES GRANDS SYSTÈMES DE DROIT PÉNAL CONTEMPORAINS 36-38 (L'Epargne 1969); Andenaes, *Criminal Law of Norway,* in THE COMPARATIVE CRIMINAL LAW PROJECT, 173-86 (1965) [hereinafter cited as Andenaes].

33. Great Britain has been one of the last European countries to abolish suicide as a crime as well as

voluntary self-mutilation, self-intoxication, reckless or negligent behavior hazardous to the health and life of the perpetrator and even prostitution.[34]

However, it would be going perhaps too far to conclude that a veritable subjective right of self-alienation exists. Technical reasons, criminal policy or other factual grounds may explain the non-intervention of the law in this area in a given era.[35] On the other hand, certain legislation has sought to outlaw acts of self-inflicted mutilations[36] or the deliberate suppression of procreative functions.[37] Furthermore, the impunity which certain acts may enjoy is not conclusive of legitimacy or legal acceptance,[38] even more so in that the consent of the victim does not generally relieve third parties of criminal liability.

1. European Jurisprudence and Statutory Codification

French and Belgian jurisprudence have been particularly severe in this area of the law. They have never allowed the consent of the victim to justify a criminal

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its attempt, in the Suicide Act of 1961. *See* SMITH & HOGAN, *supra* note 32, at 346-47. In Canada, attempted suicide did not cease to be against the law until the repeal of Article 225 of the Criminal Code of 1972 (S.C. 1972, ch. 13, art. 16). *See* MAYRAND, *supra* note 1. Nonetheless, Article 443 of the Criminal Code authorizes peace officers to arrest those who attempt suicide. *See* Kouri & Ouelette-Lauzon, *Le corps humain et la liberté individuelle en droit canadien,* 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 445 (1975) [hereinafter cited as Kouri]. On the history of the repression of suicide, *see* Dumont, *La répression du suicide,* 1959-1960 REVUE DE DROIT PÉNAL 547-70 [hereinafter cited as Dumont]; Rateau, *Le suicide et sa reglémentation pénale,* 1962 REVUE INT'L. CRIM. POL. TECH. No. 4.

34. *See* reports represented by J. Robert of France, R. Kouri and M. Ouelette-Lauzon of Canada, F. Mantovani of Italy, and G. Neu of Luxemburg on the human body and individual freedom, in 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 423-512 (1975) [hereinafter cited as Mantovani].

35. For reasons behind the decriminalization of suicide and attempted suicide, *see* Dumont, *supra* note 33, at 568-69 and authors cited therein. As to the decriminalization of acts of self-inflicted injury, the argument of certain authors such as Fahmi-Abdou that the same person cannot be at the same time both active and passive with respect to a crime is not persuasive, for it theorizes that criminal law aims only at protecting individual rather than collective interests. This is not the case. In the opinion of the present author, this is a question of criminal policy, influenced essentially by the degree of gravity of the act in itself and harm done to the collectivity. Once beyond a certain threshold, the principle of autonomy prevails. *See* on this subject the interesting distinction formulated by Mantovani, *supra* note 34, at 486, between acts to the detriment of the health of the person, acts to the detriment of the health of the person and third parties, acts to the benefit of the health of the person and acts to the exclusive benefit of third persons.

36. *See,* in France, Article 87, paragraph 1 of the Law of Mar. 31, 1928, and Articles 398 to 400 of the Code of Military Justice; in Belgium, Law of Nov. 13, 1915 to the Military Penal Code as to voluntary mutilation, and Article 96 of the Law of June 15, 1951; in Italy, Articles 157, 158 and 161 of the Military Code of Peace, Articles 112, paragraphs 2 and 115 of the Military Code of War and Article 642 of the Penal Code (fraudulent mutilation); in Spain, Article 426 of the Penal Code; in Switzerland, Article 95 of the Military Penal Code; in Norway, Article 134 of the Penal Code. As to the common law crime of "mayhem," *see* Bravenec, *Sterilization as a Crime — Applicability of Assault and Battery and of Mayhem,* 6 J. FAM. L. 94-128 (1966) [hereinafter cited as Bravenac], especially page 117. Fraudulent mutilation can fall under other headings, such as insurance fraud. For a case of this type *see* State v. Bass, 255 N.C. 42, 120 S.E. 2d 580 (1961), *cited by* Bravenec, *supra,* at 122.

37. Italian Penal Code, art. 552, repealed by the Law of May 22, 1978 on abortion; Turkish Penal Code, art. 471.

38. *See* Gimanovitch, *Le suicide est-il un droit de l'homme?,* 1957 REVUE INTERNATIONALE DE DROIT PÉNAL 407.

offense, at least where the affected right is not alienable.[39] Because the body is by principle inviolable, and no individual may derogate expressly from this principle, the consent of the victim constitutes neither a ground for justification nor a special ground for leniency or exoneration in matters of criminal assault.[40]

In activities where consent appears to justify flagrant intrusions on physical integrity, such as medical operations and violent sports, doctrine and jurisprudence traditionally invoke other theories of justification such as permission or favor of law and necessity,[41] which necessarily imply limitations. Consent, while necessary, is never alone sufficient. Moreover, under no circumstances is legal action left to the exclusive initiative of the victim. Consent of the victim can at best be a mitigating circumstance which judicial discretion might take into consideration,[42] just as the court has power to weigh the motive of the accused,[43] or just as the public attorney can choose not to pursue the case, at least if the gravity of the act so permits.[44]

In the context of bodily assault, other laws, however, offer the victim relatively greater discretion in the exercise of his will. The range of offenses which give rise to legal process only if the victim lodges a complaint (*délit de plainte*), or only if that complaint has not been withdrawn by the victim (*retrait de plainte*), followed by any attenuating affirmative defenses or even privilege or exoneration based on the victim's consent proceeds along a scale marked by subtle gradations. By way of example, under certain foreign laws, criminal prosecution for physical assault can only take place after the victim has lodged a complaint. Such laws create a distinction between minor breach of the peace followed by blows which do not produce injury, on the one hand, and violence resulting in damage, which is always automatically subject to arrest and prosecution, on the other hand,

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39. This hypothesis lacks an essential element. Such is generally the case in the area of offenses relative to property, freedom and morals, except when the law explicitly does away with the effect of consent. *See* French Penal Code arts. 332 and 334-35; Belgian Penal Code arts. 372, 372 bis, 375, 379, 380 bis 1 as to solicitation and sexual offenses against minors.

See STEFANI, *supra* note 32, at No. 359; MERLE & VITU, *supra* note 32, at No. 424; BOUZAT & PINATEL, *supra* note 32, at 303; DOUBLIER, *supra* note 29, at No. 11; TROUSSE, *supra* note 8, at No. 2733.

40. BOUZAT & PINATEL, *supra* note 32, at Nos. 302, 305-07; STEFANI, *supra* note 32, at No. 357; TROUSSE, *supra* note 8, at No. 2734; Cass. Fr., July 1, 1937, [1938] Sirey, I, 193, Note Tortat (the so-called case of the *sterilisateurs de Bordeaux*). As to duels, *see* Cass. Fr., ch. Réunies, June 22, 1837, [1837] Sirey I, 465; Cass. Fr. Crim., Dec. 15, 1837, [1838] Sirey I, 5. In Belgium, *see* Articles 423 et seq. of the Penal Code.

41. As to sports, *see* BOUZAT & PINATEL, *supra* note 32, at No. 308; TROUSSE, *supra* note 8, at No. 2752; Charles, *Le sport et la loi pénale,* 1952-1953 REVUE DE DROIT PÉNAL, 860; Constant, *Droit pénal et sport,* 1917 REVUE DE DROIT PÉNAL. *Cf.* FAHMI-ABDOU, *supra* note 29, at No. 285-92.

42. Art. 79, Belgian Penal Code art. 79; Cass. B., Nov. 10, 1952, [1953] Pas.I 147.

43. In neither French nor Belgian law does motive, as opposed to criminal intention, constitute a justifying factor, with exceptions provided by law. *See* MERLE & VITU, *supra* note 32, at No. 387; BOUZAT & PINATEL, *supra* note 32, at Nos. 172-74; STEFANI, *supra* note 32, at Nos. 217-22; TROUSSE, *supra* note 8, at Nos. 2582-2604; Tahon, *Le mobile en droit pénal belge,* 1948-1949 REVUE DE DROIT PÉNAL 109. *See also* Trousse, *Le mobile justificatif,* 1962-1963 REVUE DE DROIT PÉNAL 418. *Compare* English law on the irrelevance of motive as opposed to intent: *See* CROSS & JONES, *supra* note 32, at § 3-33.

44. *See* Glesener, *Le classement sans suite et l'opportunité des poursuites,* 1972-73 REVUE DE DROIT PÉNAL 353-62.

albeit along a scale of severity corresponding to the gravity of the injuries. Such is the case in Italy,[45] Switzerland,[46] Norway,[47] Denmark,[48] Sweden,[49] Finland,[50] and in the Federal Republic of Germany.[51] The situation in which the victim himself presses charges (*délit de plainte*) is distinguishable from the case in which the victim was consenting at the moment of the assault, in that the former, rather than presuming consent, allows the victim *a posteriori* to drop charges. Also different is the situation in which lack of consent is a constituent element of the offense, insofar as the act is criminal in an objective sense once the requisite elements of the offense, as defined by the criminal code, are present, whether or not the victim has consented.[52] Nonetheless, to the extent that the act concerns a minor breach or leads to minor injury, public prosecution generally gives way to a private cause of action, absent overriding considerations of public policy.

More precisely, consent of the victim sometimes may work to either mitigate or remove the penalty, if not to exclude altogether the existence of any breach on grounds of privilege. It is thus that the Danish Penal Code allows the judge to reduce the applicable penalty for assault and battery not resulting in death, as well as to remove any penalty for breach of peace, if the victim had consented to the crime.[53] The Norwegian Penal Code provides that the penalties for breach of the peace and battery, which do not result in serious physical damage, are not applicable if the victim was consenting. Where serious injury has occurred, the penalty may be reduced below the legal minimum or commuted.[54] Norwegian doctrine seems to represent the view that, although the law speaks in terms of impunity, consent renders the act permissible, and hence justifiable.[55]

Similarly, the German[56] and Austrian[57] Penal Codes provide explicitly that bodily injury (*Köperverletzung*) inflicted with the consent of the victim is not illegal (*rechtswidrig*) unless the act is contrary to social morals, without making any distinction as to gravity of the injury. This represents an almost inverted process in the determination of what constitutes impermissible behavior, in that physical assault upon the integrity of another, done with his consent, appears permissible

45. Italian Penal Code arts. 581-82.
46. Swiss Penal Code arts. 123, 125, 126.
47. Norwegian Penal Code arts. 228, para. 4, and 229, para. 2.
48. Danish Penal Code arts. 244, 5, and 249, 1.
49. Swedish Penal Code part II, ch. 3, art. 11, paras. 2 and 3.
50. Finn Penal Code ch. XXI, art. 14.
51. Strafgesetzbuch section 232.
52. *See* Andenaes, *supra* note 32, at 174-75.
53. *See* 1 Danish Penal Code art. 248.
54. Norwegian Penal Code art. 235.
55. *See* Andenaes, *supra* note 32, at 177-80. Section 235 applies to duels as well.
56. Strafgesetzbuch section 226a.
57. Strafgesetzbuch section 90. Since 1949, paragraph 2 of section 90 legalizes voluntary sterilization (non-therapeutic) performed by a physician upon a person over the age of 25, or provided that other reasons exist which are not contrary to moral standards. BGB1 92/1949, IXg 3/1. The paragraph allows medical operations not having therapeutic ends, such as plastic surgery, and scientific experimentation. *See* 5 HEINL, LOCHENSTEIN, VEROSTA, *Strafrecht,* DAS OSTERREICHISCHE RECHT § 90, notes 6 and 9 [hereinafter cited as HEINL].

provided the act does not run counter to the prevailing social standards of morality in the community. It is thus the province of the judge to evaluate what the social consciousness demands.[58] The Greek Penal Code does not go as far, in that it exonerates acts resulting in minor injuries upon a consenting party, but not those creating dangerous or serious injury. The Swiss Penal Code is silent concerning these matters.[59] However, Swiss doctrine recognizes the existence of extra-legal privileges. On this level, the consent of the victim may have an effective role to play, but only as to minor bodily injury and only insofar as judicial discretion permits.[60]

The Italian Penal Code is the only one to contain a general provision under which a person who harms or compromises an alienable right of another person with that person's consent is not criminally liable. This provision apparently has been held to confer a privilege excusing the offense rather than a mere immunity from prosecution.[61] The Italian Penal Code does not, however, indicate if and when a person can compromise his physical integrity. Article 5 of the Civil Code, on the other hand, provides that a person may not engage in acts which cause a permanent diminution of his physical integrity or which are otherwise contrary to law, public order or community morals. From this derives that part of the modern doctrine that holds willing acts of bodily assault fall within the scope of Article 50 of the Penal Code when such acts are not sufficiently serious. Here again, judicial discretion plays a role.[62] Of course, any consent must be genuine, that is, conscious, knowing and free from untoward or fraudulent intention,[63] and not otherwise barred by law.[64]

2. The Anglo-American Experience

The Anglo-American approach, viewed in the context of its historic social and philosophical attitude toward an individualistic liberalism less worried about

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58. This approach is somewhat similar to that present in Anglo-American law in that it appears to first posit the principle of self-determination, subject to the demands of public order and decency, these two concepts being themselves susceptible of developing as a function of public policy. *See* H. H. JESCHECK, LEHRBUCH DES STRAFSRECHTS, ALLGEMEINER TEIL § 34, at 246-52 [hereinafter cited as JESCHECK], according to which, under general theory, the role accorded the consent of the victim (*Einwilligung*) stems from judicial policy and the importance given individual liberty as a social value. However, the German and Austrian laws as formulated appear to go further than the common law has gone, as evidenced by the latter's jurisprudence.

59. P. NOLL, *Ubergesetzliche Rechtsfertigungsgründe im besonders die Einwilligung des Verletzten*, in 10 SCHWEIZERISCHE CRIMINALISTISCHE STUDIEN (Bâle 1955); 1 H. SCHULTZ, EINFÜHRUNG IN DEN ALLGEMEINEN TEIL DES STRAFRECHTS 153 at § 12 III i (Bern 1977).

60. P. LOGOZ, COMMENTAIRE DU CODE PÉNAL SUISSE, Partie Générale, arts. 1 to 110, 166-67 (2d ed. Neufchatel 1976).

61. Italian Penal Code art. 50. *See also* Indian Penal Code § 88 (Central Law Agency 1963).

62. FAHMI-ABDOU, *supra* note 29, at 386-97 and references cited therein.

63. Every doctrinal work has insisted on these conditions. Consent must always precede or coincide with the act. As to the requisite capacity, the predominating view is that consent, being a manifestation of will and not a legal act, requires the capacity of discernment and not legal capacity.

64. As to solicitation and protecting minors against crimes against morality, *see* note 39 *supra*.

protecting the individual against himself than as against his fellows, may appear *a priori* to be the converse, to the extent that it seems to place the principle of self-determination in the forefront.[65] However, Anglo-American jurisprudence and doctrine lead to results which are not palpably unlike those mentioned above, in that considerations of public order, interest and social morals necessarily limit individual autonomy. Society thus recognizes that, beyond a certain threshold, which is susceptible to fluctuation, the harm which an individual can cause himself is liable to produce harm to the social collective itself. Here, utilitarianism corrects the potential excesses of liberalism. Thus, in the area of assault and battery, consent of the victim is only admissible as grounds for defense to the extent that the offense does not compromise the public interest or order and that its degree of seriousness does not exceed the limitations fixed by case law.[66]

In Great Britain, these limitations have been discussed in the 1934 case of *R. v. Donovan* to the effect that no one may consent to the infliction of bodily harm, which is defined as any wound or any injury which diminishes a person's health or well-being in a serious, although not necessarily permanent, manner.[67] A more recent decision in 1954, *Bravery v. Bravery*,[68] regarding voluntary sterilization, invoked the ruling from an 1882 case, *Queen v. Coney*,[69] in which it was held that a wound must be as harmful to the public as it is to the victim. The court found that voluntary sterilization did not cause such harm.[70] In this context, situations involving medical operations have remained unclear.[71]

In the United States, consent does not deprive an act of its anti-social character if the act constitutes a breach of the peace, violates other laws, involves mayhem or causes serious bodily harm.[72] The Model Penal Code of 1962 in Section 2.11

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65. For a comparison between the attitudes of common law and civil law countries, *see* Somerville, *supra* note 32, at 3-10. For the same reason Anglo-American countries accept more readily that a free and responsible individual may submit himself voluntarily to non-therapeutic experimentations if they serve a common good.

On the other hand, an old principle of common law provides that no one is under a duty to come to the aid of another unless he has committed himself to so do. TURNER, KENNY'S OUTLINES OF THE CRIMINAL LAW 19 (19th ed. 1966), *cited in* Le traitement médical et le droit criminel 29 n.121 (Commission de Réforme du Droit du Canada, Doc. Trav. No. 26).

66. Beale, *Consent in the Criminal Law,* 18 HARV. L. REV. 317 (1895). *Cf.* Indian Penal Code § 66.

67. R. v. Donovan, Court of Criminal Appeal, [1934] All E. R. 207 (consent to voluntary sexual flagellation); SMITH & HOGAN, *supra* note 32, at 407-10; CROSS & JONES, *supra* note 32, at § 7-2.

68. Bravery v. Bravery [1954] 3 All E. R. 59 (civil suit in which a wife sued for divorce on the ground that her husband underwent sterilization without any medical reason).

69. Queen v. Correy, [1882] 8 Q.B.D. 534, 549 (Judge Steven).

70. *See,* however, the dissenting opinion of Lord Judge Denning.

For arguments in favor of expanding the scope of consent as a means of defense, *see* G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 74, 75-111 (1957); Hughes, *Two Views on Consent in the Criminal Law,* MOD. L. R. 233 (1963); G. Williams, *Consent and Public Policy,* CRIM. L. REV. 154 (1962).

71. As to sterilization, *see* note 146 and accompanying text *infra.*

72. *See* Bravenec, *supra* note 36, at 98 and 117 and cases cited therein; WHARTON, CRIMINAL LAW AND PROCEDURE § 180 (12th ed. 1957); CLARK & MARSHALL, LAW OF CRIMES §§ 143, 218 (5th ed. 1952).

takes up this latter point with respect to consent to bodily injury.[73] In Canada, the situation appears to be somewhat different to the extent that, under Article 244 of the Criminal Code, the absence of consent is a constituent element of assault and battery. Determining when an act exceeds consent, for example, in the area of sports, can be difficult.[74] However, in Article 288 of the Criminal Code, relative to intentional bodily harm having as an objective the injury, mutilation or disfiguration of a person, absence of consent is not a constitutent element. Furthermore, "intent" need only be of the willful and wanton type, and not intent to harm. It is thus far from certain whether consent alone could suffice as a defense in the absence of other types of justification, such as necessity.[75]

Speaking generally, it is thus apparent that the legislature or the courts leave the initiative to the victim, who may pursue civil remedies, if his consent is lacking, or who may consent to a compromise of his bodily integrity to the extent the harm is not excessive and the public interest or moral standards are not seriously threatened. Of course, the dictates of public interest and moral standards are themselves susceptible to evolution. Consent can never serve, *a fortiori,* as justifiable grounds for homicide requested by the victim or with his consent, nor as exemption from penalty. At most, it might result in a lighter sentence.[76] Significantly, most countries, unlike Belgium and France, treat aid-

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73. *See* JOHNSON, *supra* note 32, at 746.

74. *See also* Quebec Civil Code art. 20.

75. *See* Le traitement médical et le droit criminel, *supra* note 32, 29 et seq. Somerville, *supra* note 32, at 47-48, 119-25.

76. France and Belgium have no special provisions relative to homicide committed at the request or with the consent of the victim, or in the form of a mercy killing committed without request or consent. Such are thus considered as murder unless the actor was in a state of insanity or under the influence of an irresistible force. However, attenuating circumstances may reduce the sentence, and the jury, often moved by pity, might decide for acquittal. In France, *see* MERLE & VITU, *supra* note 32, at No. 425; BOUZAT & PINATEL, *supra* note 32, at No. 306; M.L. RASSAT, DROIT PÉNAL SPÉCIAL Nos. 147 and 150 (Precis Dalloz 1975); Toulouse, Aug. 9, 1973, [1974] Dalloz 452; Rateau, *L'euthanasie et sa réglementation pénale,* [1964] Sirey, Chronique 30; and Sirey, REVUE DE DROIT PÉNAL 38 (1964). In Belgium, *see* HAUS, PRINCIPLES DU DROIT PÉNAL, Vol. I. No. 606; TROUSSE, *supra* note 8, at Nos. 2596 and 2735; Tahon, *Le consentement de la victime,* 1951-1952 REVUE DE DROIT PÉNAL 330; Trousse, *L'orthothanasie par omission de secours,* 1950-51 REVUE DE DROIT PÉNAL 1102. Belgian doctrine, as opposed to French, accepts the possibility of homicide by omission.

Among those foreign laws which expressly provide for attentuating circumstances, most require the victim's immediate and serious request that he be put to death. Swiss Penal Code art. 114; German Penal Code § 216; Austrian Penal Code § 139; Danish Penal Code art. 239; Finn Penal Code ch. XXI., art. 3; Greek Penal Code art. 300; Netherlands Penal Code art. 293. The Italian Penal Code in Article 579 makes express reference to homicide by consent. The Norwegian Penal Code in Article 235 and Polish Penal Code in Article 227 provide for homicide out of mercy. On the other hand, the Soviet Penal Code, after accepting total immunity for murder by consent or out of compassion in 1922, has since reverted to a position similar to the French approach. For the different laws *see* FAHMI-ABDOU, *supra* note 29, at 337-41.

In Anglo-American countries, although opinion seems to lean more favorably towards euthanasia, consent can be no defense. *See,* for English law, CROSS & JONES, *supra* note 32, at § 7-2, at 114: "However excellent his motive may be, someone who kills another at that other's request is guilty of murder, unless he acted in pursuance of a suicide pact, in which case his offense is manslaughter." Homicide Act of 1957 § 4(2). For American law, *see* HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 86, 87 (2d ed. 1960);

ing and abetting suicide as a crime *sui generis.*[77] This position finds support with the *Ordres des Médecins*[78] (European medical associations with disciplinary powers) and in Recommendation No. 779 of 1976 adopted by the Parliamentary Assembly of the Council of Europe, affirming that a physician has the duty to strive to alleviate suffering, but does not have the right to intentionally hasten the process of death.[79]

Finally, the case where absence of consent constitutes an element of the crime itself deserves separate treatment and should be distinguished clearly from the preceding examples,[80] because at issue here is less the scope of culpable activity by a third party and more the freedom of action of the potential victim. For example, the criminalization of rape and crimes against decency[81] concerns less the protection of the body or the decency of the person than his freedom to consent to such an act. It is, therefore, the entire area of sexual freedom itself, and hence the right to employ the body in sexual activities, which is defined by such laws. One must conclude that this area is largely left unaddressed in Belgian

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PERKINS, CRIMINAL LAW 86 (1969); Moore, *The Case for Voluntary Euthanasia,* 1972-1973 UMKC L. REV. 327, 329-40. In Canada, Article 14 of the Criminal Code provides that no one may consent to his own murder and that any consent does not vitiate criminal liability. *See also* Danielus, *A Survey of the Jurisprudence Concerning the Rights Protected by the European Convention of Human Rights,* 1975 REVUE DE DROIT DE L'HOMME 431.

77. In France and Belgium suicide is not criminal, nor is aiding the victim to commit suicide. Assisting someone to commit suicide is not punishable since suicide itself is not an offense. Article 63 of the French Penal Code and 422 bis of the Belgian Penal Code are partially applicable. *But see* the decision of the Criminal Chamber of the French *Cour de Cassation* of Apr. 27, 1971, [1971] Bull. Crim. No. 116 at 301, which has ruled that the first paragraph of Article 63 of the Penal Code is not applicable to suicide.

Most other jurisdictions criminalize the instigation or aiding of suicide. *See* Austrian Penal Code art. 139b; Swiss Penal Code art. 115; Danish Penal Code art. 240; Norwegian Penal Code art. 236; Netherlands Penal Code art. 294; Italian Penal Code art. 580; Greek Penal Code art. 301; Soviet Penal Code art. 107. *See also* FAHMI-ABDOU, *supra* note 29, at 302-06. In English law, *see* the Suicide Act of 1961, § 2(2); CROSS & JONES, *supra* note 32, §§ 8-20, at 152.

78. *See* the opinion of the Conférence Internationale des Ordres des Médecins (Germany, France, Belgium, Denmark, Great Britain, Luxemburg, Ireland, Italy) of Mar. 4, 1976, issued on the Résolutions et Recommandations of the Parliamentary Assembly of the Council of Europe, *reproduced in* BULLETIN OFFICIEL DE L'ORDRE DES MÉDECINS BELGES, No. 25 (1976-1977). *See also* the CODE DE DÉONTOLOGIE MÉDICALE FRANÇAIS, Décret No. 79-506 of June 28, 1979, art. 20; CODE DE DÉONTOLOGIE MÉDICALE BELGE, art. 95-96.

79. Recommendation 779 (1976) of the Parliamentary Assembly of the Council of Europe relative to the rights of the ill and of the dying, point 7. *See also* the Opinion on the rights of the ill and of the dying presented in the name of the Commission of Legal Affairs by Mr. de Marco (Doc. 3735, Jan. 27, 1976) and the Report on the rights of the ill and of the dying presented by Ms. Hubinek and Mr. Voogd in the name of the Commission on Social Questions and Health (Doc. 3699, Jan. 26, 1976). In its entirety, this Recommendation, as also Resolution 613 of 1976 adopted by the Assembly on January 29, 1976, rather tends to affirm the right of the patient to refuse treatment and to avoid unremitting therapy.

80. German doctrine distinguishes clearly between agreement (*Einverstandnis*), the absence of which represents a basic element of the offense, and consent (*Einwilligung*), which is a justification. *See* JESCHECK, *supra* note 58, § 34, at 246-47.

81. Belgian Penal Code arts. 372, 372 bis and 375.

law[82] since Belgian law tolerates any sexual behavior, be it incestuous, homosexual or "contrary to nature," between consenting and competent adults and even adolescents, provided that public mores, freedom and respect for others are observed. Along similar lines of thought, the abrogation of laws prohibiting the advertisement of contraceptives[83] — Belgium never having banned the use or sale of contraceptives — shows that the freedom to engage one's body in sexual activities, while eliminating the risks of sexual procreation by preventive and non-harmful means, is equally condoned.

In summation, if the criminal laws must be regarded as a measure of the threshold of tolerance fixed by society to limit individual autonomy, then reflected in those laws is the entire range of liberties enjoyed by individuals, and notably the freedom to exercise dominion over one's body. This freedom encompasses sexual activities to which consent is freely given and which do not compromise standards of public decency or the protection of minors, the right to control one's fecundity, at least by preventive means and a certain amount of tolerance for the least serious kinds of acts against private and public interests. On the contrary, the right to consent to the alienation of one's life, or to serious injury effectuated by a third party without the privilege of necessity or permission of the law, cannot in principle be admitted.

B. *Limitations on the Autonomy of the Individual in the Area of Private Law*

It is well established in the area of civil law in Belgium and France that the human body constitutes an object which is not subject to the laws of patrimony. The body, not being a chattel, cannot be an object of the law of property or usufruct.[84] Nor can the body, being outside of commerce, be the object of treaty. Although unwritten,[85] these principles are so solidly entrenched as to be beyond doubt or need of explanation.[86]

Nonetheless, certain clarifications may be in order, for not all laws and treaties relative to the human body are necessarily void as contrary to public order and mortality. Long ago, after Dean Josserand had denounced in a rather provoca-

82. Belgian and French law on sexual offenses appears to have been for quite awhile more liberal than Anglo-American legislation criminalizing fornication, sodomy, and homosexuality. The reaction today is even stronger in these countries.

83. Belgium, Law of July 9, 1973, repealing paragraphs 7 and 8 of Article 389 of the Penal Code. France, Laws of Dec. 28, 1967 and Dec. 4, 1974.

84. Nerson, *supra* note 15, at Nos. 68-70; CARBONNIER, *supra* note 15, at 235, 328; MARTY & RAYNAUD, *supra* note 28, at Vol. 2 Nos. 6 and 7; Nerson, *L'influence de la biologie et de la médecine moderne sur le droit civil,* 1970 REVUE TRIMESTRIELLE DE DROIT CIVIL 661, 662-83, especially at 680-81; R. SAVATIER, LE DROIT DE LA PERSONNE ET L'ECHELLE DES VALEURS 590 (Homage Gothot); DIERKENS, *supra* note 1, at No. 32-40; *Cf.* David, Structure de la Personne Humaine: Essai sur la Distinction des Personnes et des Choses (Paris, P.U.F. 1955) (thesis).

85. Neither Articles 6, 1128, 1131 nor 1133 of the Civil Code supports *a priori* this position, which seems to rely rather on a general principle of law which has gone unchallenged until now.

86. Jack, *Les conventions relatives à la personne physique,* REVUE CRITIQUE DE LÉGISLATION ET JURISPRUDENCE 362-95 (1933) [hereinafter cited as Jack].

tive way the increasingly frequent appearance of the human body in the field of contracts,[87] a French scholar made a clear distinction between the legality of the purpose and the legality of the object of such agreements.[88] We shall go along with that distinction, while examining also the differing situations where the person is alive or dead.

It has long been accepted that the dead body can be the object of a voluntary disposition,[89] in whole or in part, notably by means of gift or legacy — hence, a gratuitious transfer[90] — for scientific or therapeutic purposes. Here arises the problem of the legality of the purpose.[91] Recent laws governing gifts and transplants of tissue and organs *ex mortuo* expressly provide for this form of generosity.[92] The principle questions raised in this regard henceforth concern the

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87. L. Josserand, La personne dans le commerce juridique, [1932] Dalloz, Chronique 1.

88. Jack, *supra* note 86, at 367-95.

89. Cass. B., July 3, 1899, [1899] Pas. I, 318. *See also* the French Law of November 17, 1887 on the freedom to choose the appropriate funeral service.

90. American opinion appears more uncertain on this matter, questioning the desirability of establishing a market for organs or bodies. Only Delaware expressly prohibits the sale of cadavers. *See* Dukeminier, *Organ Donation, Legal Aspects,* in 3 ENCYCLOPEDIA OF BIOETHICS (1978) [hereinafter cited as Dukeminier]. *Cf.* Article 14 of the Resolution (78) 29 adopted by the Committee of Ministers of the Council of Europe on May 11, 1978, which excludes profit motive in such transactions.

91. Matthijs, *Considérations en vue d'une loi sur les transplantations,* JOURNAL DES TRIBUNAUX 74-83, 94-99 (1972). As to the rights of the individual to the body defunct, *see* DIERKENS, *supra* note 1, at Nos. 265-66; P. J. DOLL, LA DISCIPLINE DES GREEFES, DES TRANSPLANTATIONS ET AUTRES ACTES DE DISPOSITIONS CONCERNANT LE CORPS HUMAIN 139 (Paris, Masson 1970) [hereinafter cited as DOLL]. In Canada, *see* MAYRAND, *supra* note 1, at 151-75. Naturally, the wishes of the deceased prevail over those of the family.

92. Although older laws governing the removal of human tissues, organs and substances already existed, more recent laws have been needed with the advent of artificial support systems, reanimation, removal, conservation and transplantation of organs such as the heart. In Denmark, see the Law of June of 9, 1967, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 803 (1963); in South Africa, the Law No. 24 of Mar. 3, 1970; in Norway, the Law No. 6 of Feb. 9, 1973, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 404 (1974); in Sweden, the Law No. 190 of May 15, 1975, [1975] RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 936 (1975); in Italy, the Law No. 644 of Dec. 2, 1975, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 618 (1977) and Decree No. 409 of June 16, 1977, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 623 (1979). In France, the Law of Dec. 22, 1976 RECUEIL INTERNATIONAL LÉGISLATION SANITAIRE 341 (1977) and Decree No. 78-501 of Mar. 31, 1978, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 74 (1979); in Argentina, the Law No. 21541 of Mar. 31, 1977, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 774 et seq (1978); in Greece, the Law No. 821 of Oct. 13, 1978, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 617 et. seq. (1979); in Australia, Ordinance No. 44 of Dec. 13, 1978, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 803-04 (1979). The fifty states of the United States have all adopted, with certain modifications, the Uniform Anatomical Gift Act, approved in 1968 by the National Conference of Commissioners on Uniform State Law. In Canada, see Articles 19 to 22 of the Civil Code of Quebec. As to the situation prior to 1970, *see L'utilisation thérapeutique de tissus humains, apercu de législation sanitaire comparée,* RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 3, 4-23 (1969) and accompanying references. In Europe, *see* Resolution 78 (29) on the harmonization of comparative health legislation of the member states relative to removals, grafts and transplantations of human substances, adopted May 11, 1978 by the Committee of the Ministers of the Council of Europe; Ochinsky, *Les travaux du conseil de l'Europe dans le domaine du droit de la médecine, J.T.* at 1-5 (1980) [hereinafter cited as Ochinsky]. In Belgium, the Law of Feb. 7, 1961 relative to human therapeutic substances concerns, in spite of its generous title, only blood and its derivatives. The government, on Feb. 27, 1981, proposed a bill on the removal of organs and tissues from living persons or after death. Doc. Parl., Chambre, Session 1980-1981 No. 774-1.

determination of what constitutes the exact moment of death, namely, the threshold marking the moment the person ceases to exist;[93] what technical precautions to take in order to avoid abuse;[94] and what acts of consent should be necessary.[95] Indeed, these are fundamental questions of a rare complexity.[96]

As to the living body, the initial question is whether it can be viably subject to legal acts. Any answer is necessarily colored by the fact that numerous treatises in current practice concern the human body, although not human life itself.[97] The body, therefore, can be regarded as an object of viable juridical acts, even more so to the extent that the act governs the use of parts of the body which are easily detachable and self-regenerating, or which do not cause harm to itself.[98] Thus, the objective importance of any action taken with respect to the body is a primary criterion by which to evaluate that action. This criterion is, however, insufficient.

The essential crux of the problem concerns the purpose and legitimacy of any

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93. Although the two problems are related, it is important to separate the attestation of death of a person otherwise deceased but whose functions such as circulation and respiration are artificially maintained, from the termination of extraordinary treatment. The controversy surrounding the former concerns essentially the following: 1) the necessity of adopting a new definition of death, that of brain death, at least in those cases where artificial support is provided; 2) the diagnostic criteria to adopt in order to attest to the above; and 3) the opportunity of introducing this definition, or other diagnostic criteria, into a legislative enactment.

94. This involves, for example, the place of removal and the separation of the teams attesting to death from those involved with removal and transplantation.

95. Curiously, although older laws placed the liberal intention of the donor in the form of a gift or legacy, (*see* the French Law of July 7, 1949 allowing corneal grafts from the eyes of voluntary donors), the recent tendency in Europe is towards a statutory right of removal, based on the presumed consent of the deceased, absent manifestation to the contrary prior to death. The liberal and voluntary character of the act here vanishes in favor of the social good. The same goes for the consent of one's kin, in whom remains solely a possible right of disapproval. In that field, the French Law of June 22, 1976, and the Decree of Mar. 31, 1978, have been most severely criticized. *See* Jacquinot, *Sur le prélèvements d'organes,* GAZETTE DU PALAIS 5 (1979). *See also* Article 8 of the proposed Belgian bill of Feb. 27, 1981, Doc. Parl., Chambre, No. 774-1. In the United States, on the other hand, as generally in all common law countries, the law of donative and testamentary transfers requires a written document or testament made out in the presence of witnesses and submitted for acceptance by a beneficiary, such as a physician or accredited institution. In addition, the donor or testator must be at least 18 years of age and of sound mind. Otherwise, one of the kin, according to geneological order, may give consent following death. Nonetheless, the dearth of available organs could well cause the reexamination of this procedure. *See* Dukeminier, *supra* note 90, at 1158. *See also* Somerville, *supra* note 32, at 78.

96. Remarkably, not all laws authorize indiscriminately just any organ removal, for just any purpose. Thus, the Italian Law of Dec. 2, 1975 expressly excludes the removal of the ovaries and gonads, as well as the brain. Most of the laws concern exclusively removal in view of transplantation. Certain laws include removals and autopsies for scientific purposes; others, for educational reasons. The scope of possibilities in this area is limitless.

97. French jurisprudence and doctrine themselves have buried the notion of *contrat médical* (medical contract). *See* Cass. Fr., May 20, 1936, [1936] Dalloz 88; R. SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE Vol. 2 No. 775 et seq. (Paris, Librairie Générale de Droit et Jurisprudence 1951) R. SAVATIER & H. PEQUIGNOT, TRAITÉ DE DROIT MÉDICAL, No. 309 [hereinafter cited as SAVATIER & PEQUIGNOT]. In Belgium, *see* 1 R. O. DALCQ, LES NOVELLES, RESPONSABILITÉ CIVILE No. 1001 et seq; 1021 at seq. [hereinafter cited as DALCQ].

98. *See* Nerson, *L'influence de la biologie et de la médicine sur le droit civil,* REVUE TRIMESTRIELLE DU DROIT CIVIL 676 (1970).

action compromising the body.[99] It is sometimes necessary to compromise bodily integrity in order to save a life or a person's health. In such case, it is necessity or utility, the added value or personal benefit, which legitimizes the act,[100] and hence justifies medical treatment. Far from hindering medical treatment, such compromise corresponds to the common goal of protective intervention. Furthermore, an individual may consent to such compromise as a sacrifice for the benefit of the health or life of a third person or for society. Justification is found both in altruistic purpose and collaterally in the psychological benefit or moral enhancement of the consenting person. Nonetheless, the risk thereby engendered cannot be disproportionate to the benefit designed to devolve onto third persons. When the compromise is serious, this benefit can be justified only by true necessity.[101] The giving of self-regenerating substances, such as blood, is considered enhancing both to the donor and to the recipient,[102] whereas the giving of an organ *ex vivo* causing a definitive impairment is acceptable only in exceptional cases.[103] Similarly, non-therapeutic experimentation — which to this day is not regulated in Belgium — can be regarded as legitimate only to the extent that its scientific and indispensable character is recognized, and where the accompanying risks are negligible.[104]

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99. Jack, *supra* note 86, at 369 et seq.

100. *Id.* at 375-80; DIERKENS, *supra* note 1, at 49-55.

101. DIERKENS, *supra* note 1, at 56-65; DOLL, *supra* note 91, at 83 et seq; Doll, *L'aspect moral, religieux et juridique des transplantations d'organes,* [1974] Gazette du Palais 2 et seq; A. De Coninck, P. Dor and J. R. Fagnart, Etude sur le problème de la recherche exérimentale sur l'homme et son application aux greffes d'organes, Conseil de l'Ordre des Médecins du Brabant d'expression française (1971); SAVATIER & PEQUIGNOT, *supra* note 97, at No. 276.

102. The donation of blood is the most classic example. The donation of sperm now seems to be recognized as an altruistic act, after being regarded for years with hesitancy. *See* De Cooman-van Kan, *L'insémination artificielle, recommandation du Conseil de l'Europe et perspective de réglementation Belge,* J.T. 369, 370-81 (1981) and references cited therein; Ochinsky, *supra* note 92. *Cf.* DIERKENS, *supra* note 13, at 76-88.

103. DIERKENS, *supra* note 13 at 62-64. Among the recent laws cited as note 92 *supra,* those which regulate the donation of organs *ex vivo* carefully provide that removal may take place only as a last resort in saving a life or substantially improving the health of the recipient and on condition that the risk incurred by the donor be limited if not null. Practically speaking these criteria are equivalent to those concerning necessity. Further, it is generally required that the donor be at least 18 years old. The removal of an organ from a minor is either flatly prohibited, or subject to strict conditions. *See* the Resolution No. 78 (29) of the Council of Europe, *supra* note 92.

104. European doctrine has developed relatively little in this extremely complex and controversial area, relying essentially on general principles concerning the protection of the individual. Anglo-American attitudes appear much more tolerant. *See* P. A. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS (N.Y., Braziller 1970) [hereinafter cited as FREUND]; H. K. BEECHER, RESEARCH AND THE INDIVIDUAL (1970); EXPERIMENTATION WITH HUMAN BEINGS (J. Katz ed. 1972); G. J. ANNAS, L. H. GLANTZ & B. F. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTATION, THE SUBJECT'S DILEMMA (1977) [hereinafter cited as *Annas*]; 2 ENCYCLOPEDIA OF BIOETHICS 683-710, 1764-81 (1978) (Directives for human experimentation); Baudoin, *supra* note 6; Hennau-Hublet, *supra* note at 6; Somerville *supra* note 32, at 30; Giesen, *La responsabilité par rapport aux nouveaux traitements et aux expérimentations,* in LA RESPONSABILITÉ CIVILE DES MÉDECINS, 63-116 (Masson 1976) (Fifth Colloquium on European Law, organized by the Council of Europe at Lyon, June 3-5, 1975).

On the other hand, any act which tends to demean even a consenting person is radically illicit and *a fortiori* if the act is, in addition, immoral and profit-oriented.[105] The notions of respect for the person, public order and decency are found in Article 5 of the Italian Civil Code, which provides that a person may not engage in any act which causes a permanent diminution of physical integrity or which is otherwise contrary to the law, public order and decency. The standard of proportional risk appears, albeit in very general terms, in Article 20 of the Quebec Civil Code as modified by the act of December 1, 1971: "An adult of age may consent in writing to the alienation between living persons of a part of his body or may consent to be submitted to experimentation, provided that the risk thereby engendered is not out of proportion with the expected benefit." One can debate whether this article should not also include reference to public order and decency.[106] In all cases, the question centers on the sovereign power of judicial interpretation and on praetorian law.

The requisite conditions validating consent itself are particularly delicate.[107] Consent should always be susceptible to revocation, since action taken with regard to the person as personality cannot be viewed under the same rules as those regulating true contractual arrangements, which fall within the scope of Article 1134 of the French Civil Code and cannot be revised without the agreement of both parties.[108] The above considerations also extend into the area of civil liability with respect to the role which the willingness of the victim may play as to grounds for any partial or total absolution of liability, especially as to bodily injury.

Anglo-American doctrine and jurisprudence appear to have responded to the question in a rather abrupt manner. According to the most informed authorities, consent and the accompanying assumption of risk are grounds for total elimination of liability, be it a question of personal injury or damage to property, a fundamental principle of common law being the application of the maxim "volenti non fit injuria in private matters."[109] In this area, American courts have

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105. It is the same with prostitution, although not criminalized under Belgian law, and with the sale of organs.

106. MAYRAND, *supra* note 1, at No. 5; E. DELEURY, LE SUJET RECONNU COMME OBJET DE DROIT 529 (Cahiers de Droit 1977). *See also* Rapport sur la reconnaissance de certains droits concernant le corps Humain 6, Office de Révision du Code Civil (Montreal 1971).

107. *See* Somerville, *supra* note 32, at 75-119 and references cited therein on the difficulty in clarifying the notion of free and knowing consent by a competent person, and especially the formidable problems caused by presumed or imputed consent of patients who are incompetent (*e.g.*, children, the dying, mentally handicapped). *See also* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48 (1976); Crepeau, *Le consentement du mineur en matière de soins et traitements médicaux et chirurgicaux selon le droit civil Canadien*, CAN. B. REV 247 (1974); W. GAYLIN, J. MEISLER & R. NEVILLE, OPERATING ON THE MIND (THE PSYCHO-SURGERY CONFLICT) (1975).

108. *See* Jack, *supra* note 86, at 380 et seq.; TALLON, *supra* note 28, at Nos. 139 et seq.

109. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18, at 102-10, § 67 at 450 (West 3d ed. 1964) [hereinafter cited as PROSSER], for American law; R. HEUSTON, SALMOND ON THE LAW OF TORTS 497, §§ 187, 188, at 497 (7th ed. 1977) [hereinafter cited as HEUSTON], for English law, distinguishing between the notion of consent as a defense against an accusation of intentional tort, and assumption of risk as a defense against an accusation of negligence.

adopted an attitude less paternalistic than that of the French by refusing to protect the individual from his own folly in consenting to harm at the hands of others. Consent, even implicit, eliminates even the existence of any tort.[110] Nonetheless, this harsh stance has been subject to criticism, and its walls have been partially eroded by legislative and judicial measures.[111]

French and Belgian doctrine and jurisprudence have formulated solutions in accordance with a totally different philosophy, in the absence of any express textual guidance comparable to Article 44 of the Swiss Code of Obligations.[112] Consent of the victim to an injurious act gives rise to total exoneration of the accused only to the extent that the latter is utterly without fault, or only if his fault is entirely due to that of the victim.[113]

On the other hand, the very notion of "acceptance of the risk"[114] is extremely ambiguous, be it in potentially dangerous activities such as sports, hunting, transportation, dangerous military assignment or medical treatment. Above all, the simple awareness of risk, absent express agreement of nonliability,[115] does not entail the acceptance of injury at the hands of third parties. Any acceptance of potential injury is possible only as to abnormal risks. Furthermore, French and Belgian doctrine requires that the victim knowingly and voluntarily accepted exaggerated risks[116] without any legitimate and reasonable motive, or that the victim should have known of such risks, thereby committing an act of recklessness or negligence, which may be considered a cause of the harm. Such negligence can never totally excuse an act of the defendant which has brought about the harm.[117] Because the victim must bear, in addition, the entire brunt of the

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110. According to PROSSER, *supra* note 109, § 18 at 107, the assumption of risk relieves the defendant of his duty of care towards the victim, and thus one of the essential conditions of his responsibility towards third persons under common law. *See* HANOTIAU, *Torts et responsabilité civile,* ANNALES DE DROIT DE LOUVAIN 13 (1980). The result is a total exoneration of the defendant, even if negligent himself. As to intentional torts, consent, even if only implicit, is a total defense. Compare as to English law HEUSTON, *supra* note 109, at 498 et seq.

111. *See* PROSSER, *supra* note 109, at § 67; HEUSTON, *supra* note 109, at §§ 187 and 188.

112. Under this article the judge may reduce or eliminate damages where the injured party consented to his injury or contributed towards its creation. Although German law does not expressly refer to the consent of the victim, German doctrine relies on Section 254, paragraph 2 of the BGB to determine the obligation and extent of reparation where the victim neglected to avoid or lessen the harm. As to a right of civil action in the case of a victim's consent to a penal offense, *see also* FAHMI-ABDOU, *supra* note 29, at 164 et seq.; Doublier, *supra* note 29, at No. 4.

113. 2 H. L. MAZÉAUD & J. MAZÉAUD, TRAITÉ THÉRIOQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE No. 1483 (6th ed. 1970) [hereinafter cited as MAZÉAUD]. *See also* DALCQ, *supra* note 97, at Vol. 2, No. 2690.

114. *See* MAZÉAUD, *supra* note 113, vol. II, at Nos. 1485-1500 for French law; *see* DALCQ, *supra* note 97, vol. II, at Nos. 2690-2702 and vol. I, at No. 522.

115. *See* MAZÉAUD, *supra* note 113, vol. II, No. 1490; DALCQ, *supra* note 97, vol. II., at No. 2695.

116. *See* the examples cited in MAZÉAUD, *supra* note 113, vol. II, at No. 1486.

117. *See* MAZÉAUD, *supra* note 113, vol. II, at No. 1491-93; DALCQ, *supra* note 97, vol. II, at No. 2700. This idea is related to the Anglo-American notion of contributory negligence, as well as to assumption of risk, especially in England where the contributory negligence of the victim no longer is a complete defense since enactment of the Law Reform (Contributory Negligence) Act of 1945. *See* HEUSTON, *supra* note 109, § 188, at 503.

injury caused by fortuitous events — and the more dangerous the activity, the higher the risk — certain authors conclude that the notion of acceptance of the risk is not only imprecise and dangerous, but also useless with respect to aquilian responsibility.[118]

Agreements disclaiming responsibility in advance signify anticipatory renunciation of the right to demand recovery of damages rather than an acceptance of risk or injury. The question of their validity, which has stirred up considerable controversy,[119] has provoked different solutions in France[120] and in Belgium.[121] In France, where the question remains unsettled,[122] jurisprudence and doctrine accept the validity of such agreements generally in contractual matters, with exceptions as provided by law, but excluding fraud or negligent misrepresentation, which has been traditionally assimilated to fraud,[123] whether committed by the principal or by his agent. In addition, the validity of agreements concerning bodily injury, whatever the gravity of the fault, has been largely contested.[124] Finally, disclaimers of liability are null as against public policy in matters of delictual responsibility, since Article 1382 of the Civil Code is considered a matter of *ordre public,*[125] namely, laws in the public interest which cannot be bargained for.

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118. *See* DALCQ, *supra* note 97, vol II, at No. 2694 and 2697 and vol. I at Nos. 523-31.

119. *See* P. Esmein, *Les clauses de non-responsibilité,* REVUE TRIMESTRIELLE DE DROIT CIVIL 313 (1970); 2 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL 589 (1925) (Bonnecase, Supp.); P. Durant, Des conventions d'irresponsabilité (Paris 1931) (Thesis); De Harven, *Des conventions tendant à libérer de la responsabilité,* REVUE DE DROIT BELGE 219-44 (1926-1930) [hereinafter cited as De Harven]; Van Ryn, *Les clauses de non-responsabilité,* REVUE GÉN. A. RESP. 703 (1931).

120. *See* 2 R. SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS Nos. 659-65 (2d ed. 1951); Robino, *Les conventions d'irresponsabilité dans la jurisprudence contemporaine,* REVUE TRIMESTRIELLE DE DROIT CIVIL 1 (1951); 3 MAZÉAUD & TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVIL No. 2513 (5th ed. 1960) [hereinafter cited as MAZÉAUD & TUNC]; MARTY & RAYNAUD, *supra* note 28, vol. II, at Nos. 535 (1962); P. LE TOURNEAU, *La responsabilité civile* No. 280 (Dalloz 1976); WEILL & TERRÉ, LES OBLIGATIONS Nos. 445 et seq. and 639 (Precis Dalloz 1975) [hereinafter cited as OBLIGATIONS]; B. Starck, *Observations sur le régime juridique des clauses de non-responsabilité ou limitatives de responsabilité,* [1974] Dalloz, Chronique 157 et seq. [hereinafter cited as Starck].

121. *See* 2 DE PAGE, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL BELGE Nos. 1052-58 [hereinafter cited as DE PAGE]; 2 DALCQ, RESPONSABILITÉ CIVILE, No. 4280; J. Lehrer, *Des clauses d'irresponsabilité,* REV. GÉN. A. RESP. No. 6800 (1982).

122. Starck, *supra* note 120.

123. *See also* Article 100 of the Swiss Federal Code of Obligations, which declares void every agreement which tends to hold harmless in advance a debtor from liability for fraud or misrepresentation, and Article 1229 of the Italian Civil Code. *Compare,* conversely, Article 276, paragraph 2 of the German Civil Code.

124. *See* MAZÉAUD & TUNC, *supra* note 120, at vol. III, No. 2529 and references therein, and No. 2575; P. Esmein, *Méditation sur les conventions d'irresponsabilité en cas de dommage causé à la personne,* MÉLANGES SAVATIER 271 (1965); *Cf.* MARTY & RAYNAUD, *supra* note 120, at vol. II, No. 540; Starck, *supra* note 120, at No. 37.

125. *See* MAZÉAUD & TUNC, *supra* note 120, vol. III, No. 2567; MARTY & RAYNAUD, *supra* note 120, at vol. II, No. 545 bis et seq; OBLIGATIONS, *supra* note 120, at No. 639; Starck, *supra* note 120, at Nos. 20 to 24.

In Belgium, liability for civil offenses is not a matter of *ordre public*[126] and fraud does not encompass negligent misrepresentation.[127] Starting from completely different premises, Belgian jurisprudence accepts the validity of nonliability clauses without differentiating between contractual or delictual liability,[128] nor between damage to personality or injury to persons,[129] except as to personal fraud (*dol personnel*) and other exceptions under law. In addition, no clause may operate to render null the subject of the contract.[130] The Belgian *Cour de Cassation* (court of highest instance) upholds clauses relative to fraud or negligent misrepresentation on the part of agents of the principal.[131] The result of this approach is to allow the victim to waive in advance any claim for damages the scope of which the victim cannot know, and without regard to the gravity of the offense, even when such offense constitutes a penal infraction, a civil offense being a penal one at the same time if bodily injury is involved.[132] Although this solution has found general doctrinal acceptance, it has not been without its critics.[133] In any event, such agreements are not valid in medical matters, whatever the nature and the gravity of the offense, and, *a fortiori,* when the act causing the injury is not medically justified.[134]

C. *Medical Intervention*

The medical activity which constitutes the very heart of our subject lies at the exact interface of penal and civil rules of law relative to the human body. In this context, medical action constitutes by definition an intentional physical intervention, and is the illustration par excellence of the tension which exists between

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126. Cass. B., Feb. 21, 1907, [1907] Pas. I at 135; DE PAGE, *supra* note 121, at vol. II, No. 1053; DALCQ, *supra* note 97, at vol. II, No. 4294.

127. Cass., Sept. 25, 1959, [1960] Concl. Av. Gén. Mahaux, Pas. I at 112; JOURNAL DES TRIBUNAUX 114, (1960), Note J. J. Rotthier; REVUE CRITIQUE DE JURISPRUDENCE BELGE 5, 6-30 (1960); DALCQ, *supra* note 97, at vol. II, Nos. 4301-10. *See also* Hayoit de Termicourt, *Dol et faute lourde en matière d'exécution des contrats,* JOURNAL DES TRIBUNAUX 601 (1957).

128. DALCQ, *supra* note 97, at vol. II, Nos. 4318-19.

129. *See* Van Ryn, *Les clauses de non-responsabilité, etude de quelques restrictions à leur validité,* REV. GÉN. A. RESP. 703 (1931); Gand, June 27, 1958, REV. GÉN. A. RESP. 6257 (1959); DE PAGE, *supra* note 121, at vol. II, Nos. 1053 and 1056; Cass. B., Mar. 14, 1959, [1959] Pas. I 140.

130. DALCQ, *supra* note 97, at vol. II, No. 4317; DALCQ, *Faut-il limiter la responsabilité des professions libérales?,* MÉLANGES BAUGNIET 91-112 (1976) [hereinafter cited as DALCQ-*limiter*].

131. Cass B., Sept. 25, 1959, *supra* note 127; DALCQ, *supra* note 97, at vol. II, Nos. 4311-17.

132. *See* DALCQ, *supra* note 97, at vol. I., No. 300; 1 X. RYCKMANS & R. MEERT-VAN DE PUT, LES DROITS ET LES OBLIGATIONS DES MÉDECINS No. 551 (Brussels Larcier 1971) [hereinafter cited as RYCKMANS & MEERT-VAN DE PUT].

133. De Harven, *supra* note 119, at 242-44.

134. *See* RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at Nos. 589-91; 1 DALCQ, *supra* note 97, at Nos. 1066, 1097; DALCQ-*limiter, supra* note 130, at 100-11. *See also* R. Savatier, *Imperialisme médical sur le terrain du droit, le "permis d'opérer" et les pratiques américaines,* [1952] Dalloz, Chronique 157; Article 90 of the *Loi sur les services de santé et les services sociaux de la Province du Québec,* L.Q. (1971) ch. 48, *cited in* MAYRAND, *supra* note 1, at No. 3.

the principal of conservation and protection on the one hand, and the principal of autonomy on the other hand.

Surprisingly, the law rarely defines the legal foundation and conditions of this important area, which is left to jurisprudence to regulate by drawing from general principles of criminal and civil law as well as, in a large number of countries, rules of medical deontology, or ethics.[135] Notably, such is the case in Belgium, where, aside from the rules pertaining to the practice of the healing arts,[136] which concern essentially prerequisites to professional proficiency, the law does not specifically condone the immunity from criminal prosecution which physicians and surgeons enjoy.[137]

Different explanations in support of this phenomenon have been set forth with varying degrees of persuasiveness. The absence of intent to harm,[138] without distinguishing between tortious intention and motive, or the simple intention to heal, is an insufficient explanation in that Belgian and French law do not permit motive as a ground for privilege.[139] As explained previously,[140] the mere consent of the patient is not sufficient, although indispensable, except in excep-

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135. For Anglo-American attitudes, *see* Le traitement médical et le droit criminel, (Commission de Réforme du Droit du Canada, Série Protection de la Vie, Doc. No. 26, at 13 et seq. (1980) [hereinafter cited as Le traitement]; M. Somerville, Le consentement a l'acte médical (Commission de Réforme du Droit du Canada, Série Protection de la Vie, Doc. d'Etude, at 119-25 (1980)). Under common law, medical treatment and surgery are considered prima facie offenses involving impermissible use of force against the person. Absent any other defense provided by law, such acts are not justified unless the patient has given his free and knowing consent, the acts were reasonable and for therapeutic purposes, and done by qualified persons. Necessity is also a valid justification, especially in emergencies, when the requisite consent cannot be obtained. In Canada, Article 45 of the Criminal Code expressly provides a defense on behalf of whomever performs surgery provided he applied reasonable skill and care, and the operation was reasonable and in the interests of the patient. The scope of this Article and of Article 198 as well remains unclear nonetheless. The Commission on Law Reform has thus concluded that specific provisions are in order to specifically regulate medical treatment. *See* Indian Penal Code section 88 (Central Law Agency 1963). As to European countries, *see* ANRYS, LES PROFESSIONS MÉDICALES ET PARAMÉDICALES DANS LE MARCHÉ COMMUN (Brussels, Larcier 1972).

136. Arrété Royal No. 78 of Nov. 10, 1967 relative to the healing arts, [1967] Monitor Belge, Nov. 14, 1967; RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at 1.

137. *See* P. Foriers, *De l'état de nécesité en droit pénal* No. 296 (Brussels, Bruylant 1951) [hereinafter cited as Foriers]. In France, *see* GARÇON, CODE PÉNAL ANNOTÉ, art. 311, no. 80 [hereinafter cited as GARÇON].

138. *See* R. LEGROSS, L'ELÉMENT MORAL DANS LES INFRACTIONS No. 276 (Liege 1952); 2 NYPELS, LE CODE PÉNAL INTERPRÉTÉ art. 398, at 319-20, No. 3.

139. Foriers, *supra* note 137, at Nos. 303-05; TROUSSE, *supra* note 8, at Nos. 2595 and 2746. *See also* the French authors cited at note 43 *supra*.

140. *See* TROUSSE, *supra* note 83, at No. 2746; Foriers, *supra* note 137, at No. 306-23; DALCQ, *supra* note 97, at vol. I, No. 1059; RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at vol. I, No. 588. *See also* the French authors cited at note 10 *supra*. *See* Levasseur, *La responsabilité pénale du médecin*, in ECK, LE MÉDECIN FACE AUX RISQUES ET A LA RESPONSABILITÉ 139-40 (Paris, Fayard 1968) [hereinafter cited as Levasseur].

tional cases.[141] Whatever the system, the requisite consent is never enough in itself.[142]

Traditionally in France,[143] and more recently in Belgium,[144] medical immunity has been considered as implicitly authorized by the law, based on articles regulating the legal practice of the healing arts. This explanation, however, does not imply that the mere granting of a medical diploma per se can confer upon every act taken by a physician the quality of a medical act. To be immune, such action must be within the framework of "normal" medical activity. It must clearly correspond to a medical necessity in order to protect the life or health of the patient, through diagnosis, treatment and prevention.[145]

The more the act is aleatory, traumatizing or destructive, the stricter the requirement of therapeutic necessity must be, even while conceding that "medical necessity" is a more flexible concept than that of necessity in its strictest sense, which criminal law regards as a ground for justification.[146] Whereas the legal

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141. *See* RYCKMANS & MEERT VAN DE PUT, *supra* note 132, at vol. I, Nos. 569-81; DALCQ, *supra* note 97, at vol. I, Nos. 1070 et seq. and No. 1075-78; Dalcq, *La responsabilité médicale,* TIJDSCHRIFT VOOR PRIVAATRECHT 345-62 (1974). In French law, *see* SAVATIER & PEQUIGNOT, *supra* note 97, at Nos. 247-53; MAZÉAUD & TUNC, *supra* note 120, at vol. II, No. 511, pp. 589-93; J. PENNEAU, LA RESPONSABILITÉ MÉDICALE Nos. 56-57 (Paris Sirey 1977) [hereinafter cited as PENNEAU].

142. *See,* under Anglo-American law where consent plays an extremely important role, Somerville, *supra* note 32, at 47-49 and 120-22 and references therein. In German law, it appears that medical acts, due to their social utility, cannot give rise to an offense, prima facie, absent any material illegality (materielle Rechtswidrigkeit). Jurisprudence, on the other hand, views the patient's consent as a justification, within the fluctuating bounds of public order and moral standards. *See* Section 226a, StGB. *See* JESCHECK, *supra* note 58, at 159-60 and 149-50 (1969) and references therein. The proposed new amendment to the German Penal Code of 1962 clarified this ambiguity somewhat by viewing medical treatment as not giving rise to a bodily injury (*blessure corporelle*) if such treatment is necessary and for therapeutic purposes. For the Austrian position, *see* HEINL, *supra* note 57, at vol. 5, § 90, n.6. For Swiss law, *see* M. NEY, LA RESPONSABILITÉ DES MEDECINS ET DE LEURS AUXILAIRES, NOTAMENT À RAISON DE L'ACTE OPÉRATOIRE 498-504 (Derenéaz 1979).

143. French Penal Code art. 327. *See* GARÇON, *supra* note 137, at art. 311, No. 80; Vidal, *supra* note 32, at No. 233; BOUZAT & PINATEL, *supra* note 32, at No. 309; MERLE & VITU, *supra* note 32, at No. 426; STEFANI, *supra* note 32, at No. 360; PENNEAU, *supra* note 141, at Nos. 134-35; Levasseur, *supra* note 140, at 140 et seq.; *see also* LOGOZ, COMMENTAIRE DU CODE PÉNAL SUISSE art. 31, at 165-66.

144. Corr. Bruxelles, Sept. 27, 1969, [1969] JOURNAL DES TRIBUNAUX 635; RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at vol. I, No. 543; *see* Tahon, *Le consentement de la victime,* JOURNAL DES TRIBUNAUX 496 (1951); TROUSSE, *supra* note 8, at Nos. 2606-31.

145. Foriers, *supra* note 137, at No. 324; TROUSSE, *supra* note 8, at Nos. 2746-50; Dalcq, *La responsabilité médicale,* TIJDSCHRIFT VOOR PRIVAATRECHT 352-55 (1974); Cass B., Dec. 16, 1948, JOURNAL DES TRIBUNAUX 84 (1948), n. R. Savatier (civil action). *Cf.* Corr. Bruxelles, Sept. 27, 1969, JOURNAL DES TRIBUNAUX (criminal action). In Canada, the notion of the patient's well-being, contained in Article 45 of the Criminal Code, lends itself to ambiguous interpretations. Nonetheless, under the majority view this notion appears to concern solely the medical benefit accorded the patient's physical or mental health, and not the patient's well-being in the larger sense. *See* Le traitement, *supra* note 135, at 7-9 and 46.

146. This implies that 1) the right or the interest to be protected is greater or at least equal to the right or interest to be sacrificed; 2) the danger is imminent or serious; 3) it is impossible to avoid

validity of plastic surgery for aesthetic reasons is no longer in doubt, the legal responsibility of the surgeon is all the more recognized to the extent the risks outweigh disproportionately the objectives,[147] notwithstanding the wishes of the patient or any waivers he may have signed. *A fortiori,* the same should apply to nontherapeutic experiments even with the consent of the subject,[148] or especially to sterilizations, which can be irreparable, or to sex change operations, which present the aggravating characteristic of being both mutilating and organically destructive. Since there are no specific statutes, such acts can, in principle, be justified only as therapeutic or necessary.[149]

Remarkably, those foreign laws explicitly permitting sex change operations or castration require observance of strict therapeutic standards.[150] The

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the harm otherwise; 4) the agent has himself not created the situation of necessity. *See* TROUSSE, *supra* note 33, at Nos. 2697-2728. Necessity has traditionally served to justify therapeutic abortion. *See also* Corr. Bruxelles, Sept. 27, 1969, [1969] JOURNAL DES TRIBUNAUX (transexualism).

147. *See* TROUSSE, *supra* note 8, at No. 2750; DALCQ supra note 97, at vol. I, Nos. 1066-1069; RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at vol. I, No. 599 and vol. II, Nos. 639-44. In French law, *see* MAZÉAUD & TUNC, *supra* note 120, at vol. I, No. 511, at 592-93; PENNEAU, *supra* note 141, at Nos. 30, 53; G. BOYER CHAMMARD & P. MONZEIN, LA RESPONSABILITÉ MÉDICALE 230-40 (Paris, P.U.F. 1974) [hereinafter cited as BOYER].

148. *See* TROUSSE, *supra* note 8, No. 2749; DALCQ, *supa* note 97, at vol. I, No. 1078; RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at vol. I, Nos. 593-97. *See also* H. Anrys, *L'expérimentation humaine dans les domaines médical et pharmaceutique,* BULLÉTIN DE LA SOCIETÉ BELGE D'ETHIQUE ET DE MORALE MÉDICALE 8, 9-21 (1975); Hennau-Hublet, *supra* note 6. In French law, *see* PENNEAU, *supra* note 141, at Nos. 141-43; BOYER, *supra* note 147, at 197-211; Laget, *Expérimentation et médicin* in ECK, LE MÉDECIN FACE AUX RISQUES, ET A LA RESPONSIBILITÉ (Fayard 1968); J. M. AUBY, LES ESSAIS DE MÉDICAMENTS SUR L'HOMME, PROBLÈMES JURIDIQUES, (Masson, Droit et Pharmacie 1977).

Canadian-American law emphasizes the free and knowing consent of the person while also requiring a balancing of the risks with the benefits. *See* Somerville, *supra* note 32; Baudouin, *supra* note 6; Halushka v. Univ. of Saskatchewan, 53 D.L.R. 2d 436 (1965); P. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS, (1970); G. ANNAS, L. GLANTZ & B. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT'S DILEMMA 1977).

149. As to sterilization, in Belgium *see* TROUSSE, *supra* note 8, at vol. II, No. 670; R. Grosemans, *Considérations juridiques et déontologiques sur les stérilisations opératoires sur l'homme,* 1960-1961 REVUE DE DROIT PÉNAL ET CRIMINEL 875; Meulders-Klein, *Considérations juridiques sur la stérilisation Chirurgicale,* ANN. DROIT LOUVAIN 34-54 (1967); RYCKMANS & MEERT-VAN DE PUT, *supra* note 132, at vol. II, No. 670. *See also* Article 54 of the CODE DE DÉONTOLOGIE MÉDICALE promulgated by the Conseil National de l'Ordre des Médecins, stating the requirement of necessity; BULLETIN DU CONSEIL DE L'ORDRE DES MÉDECINS DU BRABANT at 14 (1968) and at 36 (1974). In France, *see* Cass. F., July 1, 1937, [1938] Sirey 193, note Tortat; J. SAVATIER, *Aspects juridiques de la stérilisation chirugicale,* CAHIERS LAENNEC 54 (1964); Merger, *Problèmes juridiques de la stérilisation féminine en fonction de ses aspects médicaux et sociaux,* [1963] Jurisclasseur Périodique, I, 1770; Blanc, *Problèmes juridiques des stérilisations chirurgicales,* J. GYN. OBST. BIOL. REPROD. 737-47 (1977). *See also* Article 22 of the new French CODE DE DÉONTOLOGIE MÉDICALE No. 79, 80, June 28, 1979, [1979], Dalloz Législation, 233: "Aucune mutilation ne peut être pratiquée sans motif médical très sérieux et, sauf urgence ou impossibilité qu'après information des intéressés et avec leur consentement." In its original version this article explicitly encompassed sterilization.

150. *See* the Swedish Law of Apr. 21, 1972 on the determination of sex and the German Law of Aug. 15, 1969 on voluntary castration. The German Law of Sept. 10, 1980 on change of name and attestation of sex, Transsexuellengesetz-Standesamt, 1981, at 36-39, does not require authorization for the operation itself, which the law implicitly recognizes as legal, since the law requires that it be completed before allowing an attestation of change of sex. The Law of Aug. 15, 1969, applies to this

decision of the *tribunal correctionel* of Brussels, rendered September 27, 1969 in favor of acquittal following the death of a young transsexual, is a case in point.[151] It is true that some foreign authors have observed that surgical and hormonal treatment is only a palliative which does not cure the transsexual.[152] However, it is possible that such treatment improves the stituation of the patient, who is often led to suicide by the torment within him. In this case, necessity may be recognized, absent any other means of relief.[153] The principle of self-determination, however, is inapplicable. It is interesting to note in this matter that the European Commission on Human Rights, in the case of *Van Osterwijck v. Belgium,* concerning a request for a correction in the patient's civil status registration (*état civil*) following a sex change operation, recognized that the Belgian state had violated Article 8, paragraph 1 of the European Convention on Human Rights by refusing such correction, but only because the plaintiff had to give indiscreet explanations as to the discrepancy between his physical appearance and his identity papers, and not because of any violation of the plaintiff's privacy or right to sexual self-determination.[154]

The right to self-determination in the area of sterilization as a purely contraceptive matter is clearly gaining in acceptance in a number of countries.[155]

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type of operation. Absent special statutes, other countries justify treatment on therapeutic grounds. *See,* as to Great Britain, the case of Corbett v. Corbett, 2 All E. R. 47 (1966). In Switzerland, *see* Trib. Fed., July 1, 1966, [1966] JOURNAL DES TRIBUNAUX suisse, 1, at 570, note Gauthier. On the other hand, French doctrine and jurisprudence appear to regard the operation as illicit under penal law, even if no criminal action has ever been initiated. Moreover, civil law does not recognize the change which has occurred. *See* Petit, *L'ambiguité du droit face au syndrome du transsexualisme,* REVUE TRIMESTRIELLE DE DROIT CIVIL 263, 264-96 (1976) and references therein. Regarding German law, *see* N. J. Augstein, *Zum Transsexuellengesetz,* DAS STANDESAMT 10-16 (1981) [hereinafter cited as Augstein]; L. Linossier, *Le transsexualisme: esquisse pour un profil culturel et juridique,* [1981] Dalloz, Chronique, XIX [hereinafter cited as Linoissier]; D. Thouvenin, *Le transsexualisme, une question d'état méconnue,* REVUE DE DROIT SANITAIRE, 291 (1979); S. A. Strauss, *Transsexualism and the Law,* COMP. AND INT'L L. J. of SOUTHERN AFRICA 357 (1970); Groffier, *Certains aspects due transexualism en droit québecois,* in *Le corps humain et le droit,* 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 203 (1977) [hereinafter cited as Groffier]; R. Kouri, Certain Legal Aspects of Modern Medicine, Sex Reassignment and Sterilization (McGill Univ. 1978) (thesis).

151. Corr. Bruxelles, Sept. 27, 1969, [1969] JOURNAL DES TRIBUNAUX. *See also* BULLETIN DU CONSEIL DE L'ORDRE DES MÉDECINS DU BRABANT, No. 1 at 13-15 (1977).

152. *See* Groffier, *supra* note 150, at 120. *See also* Corr. Bruxelles, Sept. 27, 1969, *supra* note 144; Augstein, *supra* note 150, at 12-13.

153. According to certain authors, justification is found in the necessity of relieving psychological stress; legally recognizing the patient's sex amounts to an act of rescue of a person in distress. *See* Linossier, *supra* note 150, at 144; Augstein, *supra* note 150, at 12.

154. The European Court on November 5, 1980 dismissed the claim for failure to exhaust administrative remedies.

155. *See* the Danish Law No. 218 of June 13, 1973 on sterlization and castration, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 818 (1975); the Swedish Law No. 580 of June 12, 1975 on sterilization, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 940 (1975); the Norwegian Law No. 57 of June 3, 1977 of sterilization, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 128 et seq. (1979); section 90, paragraph 2 of the Austrian Penal Code as amended by the Federal Law of Jan. 23, 1974, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 239 (1976); the British National Health Service Amendment Act (Family Planning) of Oct. 26, 1972, ch. 72, §§ 1, 2, RECUEIL INTERNATIONAL DE

The practice is tending to spread at an increasing rate.[156] Nonetheless, the very principle of the legality of such practice remains controversial in countries such as France and Belgium, where the legislatures have taken no action.[157] As to abortion, the majority of countries expressly prohibited it on the ground that it constituted an act of dominion not only over one's self, but over that of a third person. Such rules, subject to a recent evolution which is examined further, brooked no exception except in cases of dire emergency.[158]

Thus, the unalienability of the human body does not form an absolute principle. Factors such as necessity, respect for the person, altruistic striving and the proportion of the gravity to the intended benefit have traditionally traced the boundaries limiting the autonomy of the individual's freedom of choice in a more or less strict manner. Inversely, the consent of the individual, although not sufficient to legitimize every compromise of his physical integrity, is itself an indispensable element of any legitimacy in the absence of exceptional circumstances.[159] This subtle element maintains a delicate equilibrium between the principles of inviolability and autonomy of the individual, and between protection and freedom. A particular case, which is examined later, reflects the fragility of this equilibrium and the dilemma which it envelops: the patient's refusal of medical care, thereby incurring the risk of death, places into direct conflict the obligation to provide assistance and the obligation to respect the volition of the individual over his physical integrity. At present, this equilibrium has an increasing tendency to be broken in favor of the principle of autonomy in the guise of other values which are now explored.

III. THE RIGHT TO SELF-DETERMINATION AND COMPLETE DOMINION OVER ONE'S SELF

In order to examine the process of inversion which has occurred with respect to the priorities between the principles of inviolability of the person on the one hand, and self-determination on the other, as well as the path which this inversion has taken, it is necessary to examine the evolution which had its inception around fifteen years ago in the United States. This is not to say that this evolution

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LÉGISLATION SANITAIRE, 723 (1975); the Italian Law No. 194 of May 22, 1978 on voluntary termination of pregnancy art. 22, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 859-67 (1978). In West Germany, the *Dhorn* case, BGH 20.81 (Oct. 27, 1964), recognized voluntary sterilization. Further, damages may be had against the physician who fails to perform the operation successfully. BGH 18.3 1980, FamRZ at 654 (1980). *See also* Stepan & Kellog, *The World's Law Concerning Voluntary Sterilization for Family Planning Purposes*, CAL. W. INT'L L.J. 72 (1973-1975) [hereinafter cited as Stepan & Kellog].

156. Each region of the world and various countries have adopted different methods. *See* J. P. Sardon, *La stérilisation dans le monde, données statistiques*, POPULATION 607 (1979).

157. *See* J. M. Auby, *Le consentement en matière de stérilisation, éléments de droit comparé*, ACTES DU V^e^ CONGRÈS MONDIAL DE DROIT MÉDICAL, GENT 1979 DOC. RONEO. 57; Stepan & Kellogg, *supra* note 155; Kouri, *The Legality of Purely Contraceptive Sterilization*, SHERBROOKE L. REV. 1, 1-48 (1976).

158. *See* TROUSSE, *supra* note 8, at No. 2726; Foriers, *supra* note 137, at Nos. 336, 337-46.

159. *See* MAZÉAUD & TUNC, *supra* note 120, at vol. I, No. 511, pp. 589-92; DALCQ, *supra* note 97, at vol. I, Nos. 1070.

has not appeared as well in other Western countries, notably in the areas of sterilization[160] and abortion.[161] However, the conceptual mechanism which forms its base is most clearly visible in the United States, by virtue of historic, philosophical and juridical reasons.

Since the Magna Carta of 1215, England has been the self-proclaimed champion of individual liberty, and the individualistic liberalism of Locke formed the very basis of the American Constitution. More than the Charter organizing the federal political powers, the U.S. Constitution was conceived as the guarantor of those natural and fundamental liberties which the American people held to be theirs as self-evident at the same time they consented to found the Union.[162] It is at the beginning of the Declaration of Independence where these words are inscribed: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That, to secure these rights, governments are instituted among men . . . ."

The power of the judiciary to rule on the constitutionality of the laws and any other act susceptible of compromising the exercise of the freedoms prescribed by the Bill of Rights stands as a sentinel over this solemn declaration of rights which, in opposition to the French Declaration of 1789, omits to formulate any reservation in favor of the law, regarded by the French revolutionaries as expressive of the popular will.[163] Such is the reason for analyzing the spectrum of American jurisprudence construing the constitutionality of the laws concerning the subject of this article. This approach is not the less interesting for European countries because of the possible parallel between American jurisprudence and that of the European Court of Human Rights, itself the judicial guarantor of the rights and freedoms protected by the European Convention on Human Rights, and also vested with the power to interpret this Charter.[164]

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160. *See* the laws cited *supra* note 158.

161. *See* the Danish Law No. 350 of June 13, 1973 on termination of pregnancy, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 822 (1973); the Austrian Law of Jan. 23, 1974, art. 97, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 237, 238-40 (1976); the Swedish Law No. 595 of June 14, 1974 on abortion, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 737 (1974); the French Law No. 75-17 of Jan. 17, 1975 on voluntary termination of pregnancy, Journal Officiel, Jan. 18, 1975; the West German laws of June 18, 1974 (declared unconstitutional), RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 820 (1974), and Law of May 18, 1976, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE (1976); the Italian Law No. 194 of May 22, 1978, RECUEIL INTERNATIONAL DE LÉGISLATION SANITAIRE 858 (1978).

162. *See Rivero, supra* note 10, at 37-38 and 42 et seq.

163. *See id.* at 38-42.

164. Art. 45 of the Convention. In the *Marckx* case, decided against Belgium on June 13, 1979, the European Court interpreted Article 8 of the Convention on Respect for Private and Family Life as placing an affirmative obligation on the government to modify its civil legislation on descendancy. *See* F. Rigaux, *La loi condamnée*, JOURNAL DES TRIBUNAUX 513-24 (1979). This innovative interpretation might well lead to a power of review comparable to that of the U.S. Supreme Court, especially if decisions of the European Court were to be directly applicable to the states which have ratified the Convention.

Two new and essential notions appear throughout this analysis. First, the notions of "privacy" and the "right of privacy," concepts which are not easily translated for European readers. Second, the notion of "quality of life," generally contrasted with the notion of the "sanctity of life," and thus with the inviolability of life.[165] Both ideas carry with them an ethical connotation preceding any juridical value. For an understanding of the following discussion, a brief preliminary revision of the several elements of the American system of judicial review of the constitutionality of the laws is indispensable.[166]

A. *Judicial Review of the Constitutionality of the Laws in the United States*

The power of American judges to review the constitutionality of the laws does not have its origin in legislation, but rather in jurisprudence. The decision of *Marbury v. Madison,* rendered in 1803 by John Marshall, Chief Justice of the Supreme Court, based this power upon the supremacy of the Constitution and the role which devolves upon each judge to give effect to its rules over lesser laws.[167] Invested with this vast power making them the "third giant" of the State,[168] judges since that time have continued to extend their prerogative, as much through judicial fiat as through procedures of judicial review.[169] Such has been the case with judges not only on the level of the federal Supreme Court, but in jurisdictions at all levels. Composed of nine justices, whose appointments harbor an undeniably political element which influences subsequent jurisprudence, the Supreme Court occupies within this structure the role of supreme arbiter. Through stare decisis, a law which has been declared unconstitutional by the Supreme Court ceases to exist, in a manner of speaking, without even having been officially repealed by the legislature, and the rule thereby laid down is the law which all the states must follow.[170]

The surprising extent to which the powers of judicial review have expanded is

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165. *See* W. GLANVILLE, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (London, Faber 1958); *Callahan, The Sanctity of Life,* in UPDATING LIFE AND DEATH (D. R. Cutler ed. 1968); R. MacCormick, *The Quality of Life, the Sanctity of Life,* HASTINGS CENTER REPORT, 8, 1, (1978) 30-36; A. Shaw, *Defining the Quality of Life,* 7 HASTINGS CENTER REPORT, 5, 11 (1977); E. Keyserlinck, Le caractère sacré de la vie ou la qualité de la vie (Commission de Réforme du Droit du Canada, Série Protection de la Vie, Doc. d'Etude (1979)).

166. The author has relied on the following works: L. TRIBE, AMERICAN CONSTITUTIONAL LAW (New York 1978) [hereinafter cited as TRIBE]; S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1978) [hereinafter cited as CORWIN]; A. MASSON & A. BEANEY, AMERICAN CONSTITUTIONAL LAW, INTRODUCTORY ESSAYS AND SELECTED CASES (1972).

167. *See* A. Tunc, *Le controle de la constitutionalité des loi aux Etats-Unis,* in ACTUALITÉ DU CONTRÔLE JURISDICTIONNEL DES LOIS, ACTES DES VIes JOURNÉES D'ETUDES JURIDIQUES JEAN DABIN 17-41 (Brussels, Larcier 1973).

168. M. Cappelletti, *Necessité et legitimité de la justice constitutionnelle,* 1981 REVUE INTERNATIONALE DE DROIT COMPARÉ 625, 626-57.

169. *See* G. BURDEAU, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES (Paris, Librairie Générale de Droit et Jurisprudence 1969) [hereinafter cited as BURDEAU].

170. *Id.* at 102.

of particular interest to the European observer.[171] Judicial reviews goes beyond direct review over matters pertaining to the rights and indivdual freedoms which the Constitution guarantees in the first ten amendments, in effect since 1791,[172] and in the thirteenth, fourteenth and fifteenth amendments, added in the wake of the Civil War with the objective of protecting the citizenry against the states themselves. The Supreme Court has drastically extended the scope of judicial review over both federal and state law, through expansive interpretation of two general clauses: the Due Process Clause, and the Equal Protection Clause, which the Court has furthermore combined to a maximum of efficiency.

The Due Process of Law Clause, contained in the fifth amendment[173] and also appearing in the fourteenth amendment,[174] provides that "no person shall be deprived of his life, liberty or property without due process of law." Originally designed to guarantee the right to a fair trial in the pure tradition of English criminal law, this clause has been interpreted by federal as well as state authorities as imposing upon the legislator the duty to legislate in a "reasonable" manner, for fear of unjustly depriving citizens of their freedom or property. Judges are thus, by necessity, led to examine the substantive quality of the law in view of what they consider to be reasonable and what they believe to be consistent with the concepts of freedom and property.[175]

The Equal Protection of the Laws Clause contained in the fourteenth amendment was originally designed to prevent discrimination against the black population. The Clause has been combined with the Due Process Clause to prohibit all forms of unjustifiable discrimination[176] which constitute a violation of substan-

171. Professor Tribe sets forth seven successive models in discussing this development. For the philosophical scope of these successive methods of interpretation by the U.S. Supreme Court, *see* W. FRIEDMAN, THÉORIE GÉNÉRALE DU DROIT 89-101 (Paris, Librairie Générale de Droit et Jurisprudence 1965).

172. Involved are essentially the first, third, fourth, fifth, sixth and eighth amendments. The first ten amendments only affect the federal government and Congress, but do not limit the sovereignty of the states. *See* CORWIN, *supra* note 166, at 285.

173. The Fifth Amendment States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

174. The Fourteenth Amendment states in Section 1:

> All persons born on naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See TRIBE, *supra* note 166 at 413-26. The Court, until 1954, tolerated organized racial segregation by the states. Until 1937 the Court opposed any economic and social regulation by the states by virtue of the contract clause.

175. *See* CORWIN, *supra* note 166, at 386-90 and 461 et seq.

176. This clause is comparable to Article 14 of the European Convention of Human Rights.

tive due process.[177] It is interesting to note that the word "liberty," which initially dealt exclusively with the concept of physical freedom, has been used by the Court to expand the scope of due process to include not only freedoms which the Constitution expressly protects, but also rights which the Constitution has not expressly provided for and which the Court has progressively found to exist in the "penumbras" and "emanations" of the Bill of Rights.[178] Moreover, the Court, in developing the theory of the so-called "fundamental" rights and freedoms, a rather fluid criterion,[179] has articulated special tests of particular strigency, such as "strict scrutiny." Under strict scrutiny, a law which infringes upon one of these fundamental rights is presumed to be *a priori* unconstitutional, whereas normally the opposite is the rule. The state then has the burden of demonstrating that the law is based on a compelling state interest and not excessively broad. In the usual case, the plaintiff has the burden of showing that the law is "unreasonable" under the rationality test.[180] As a general rule, the state loses when the test is that of compelling interest and wins when the applicable test is that of rationality.[181] Thus, the crux of the problem is knowing what the Court will decide to consider as a "fundamental right" on the basis of textual provsions of the Constitution or its "emanations."

Needless to say, the reach of these powers inevitably tempts judges to play the role of a super legislature which can be limited only by their own caution and wisdom. The vagueness of certain constitutional provisions, these "glorious ambiguities,"[182] furthermore permits judges to apply not the text, but the spirit of the Constitution, guided by their own conceptions or by what they believe the times require. Finding support in the individualist ideas infused throughout the Constitution, the Supreme Court long defended the postulates of economic liberalism against legislative efforts to tentatively introduce more social justice into American society, and notably opposed the New Deal policies of President Roosevelt.[183] Since the Supreme Court's stunning reversal in attitude in the 1937

177. It is thus that the equal protection clause, which does not appear in the fifth amendment, has been applied to the federal government. *See* CORWIN, *supra* note 166, at 390; Bolling v. Sharpe, 347 U.S. 497 (1954); Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

178. *See* CORWIN, *supra* note 166, at 387, 440-42; TRIBE, *supra* note 166, at 564 et seq.

179. Consider the following definitions: rights implicit in those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Herbert v. Louisiana, 272 U.S. 312, 316 (1926); "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); "rights implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319 (1937). *See also* CORWIN, *supra* note 166, at 474; TRIBE, *supra* note 166, at 564.

180. *See* CORWIN, *supra* note 160, at 306 and 493; TRIBE, *supra* note 166 at 1000. *See also* Gunther, *In Search of Evolving Doctrine on a Changing Court, a Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). *See also* Bates v. Little Rock, 361 U.S. 516, 524 (1959); MacLaughlin v. Florida, 379 U.S. 184, 196 (1964).

181. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976).

182. Hufstedler, *In the Name of Justice,* 14 STAN. LAW. 3, 4 (1979).

183. In effect, until 1937 the Court protected essentially the right to property, interpreting the term "liberty" as meaning "liberty to contract," in order to systematically combat the social and economic laws of Congress and the states. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Atkins v. Children's Hospital, 261 U.S. 525 (1923).

decision of *West Coast Hotel v. Parrish,*[184] the Supreme Court has shown greater self-restraint in economic and social matters, but appears since then to use its powers of interpretation and creation largely in the area of civil liberties and, more specifically, in the matter of privacy, which is precisely the focus of our interest.[185]

B. *The Ambiguities of the Rights of Privacy: Privacy (Intimité) or Self-Determination (Autodétermination)?*[186]

American jurisprudence and doctrine, and in certain states, legislation, did not wait until the 1960's to come to the protection of a certain sphere of privacy threatened by either individuals or excessive state incursion and investigation into private lives. Beginning with the famous article by Brandeis and Warren,[187] the law of torts has gradually formulated a right of reparation to remedy a wrong unknown under the common law — the invasion of privacy — which is appearing in increasingly diversified forms.[188] The Constitution should lend itself just as easily, moreover, to the protection of the citizen against unwarranted intrusion by the public authorities as against third persons with regard to certain areas of privacy or freedom. The two concepts of freedom and privacy are closely allied, particularly when the expansive interpretation and application of the first and fourteenth amendments, as well as the Due Process Clause of the fifth and fourteenth amendments, are involved.[189] Nonetheless, not until 1965 did the Court hold that the "right of privacy" was a fundamental, independent right which emanated from the Bill of Rights. The implications of this decision are the more serious in that the content of this right, whose basis remains obscure and controversial, is so fleeting and imprecise. Is it a right to privacy in the sense of intimacy (*intimité*) which is at issue? Or a right to freedom? And which freedom? How far does such right extend?[190]

The scope of these questions is clearly perceptible throughout the decisions which follow, starting with the decision of *Griswold v. Connecticut,* rendered May

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184. 300 U.S. 379 (1937).

185. TRIBE, *supra* note 166, at 564; CORWIN, *supra* note 166, at 389-90, 466.

186. *See Privacy,* 31 LAW AND CONTEMPORARY PROBLEMS No. 2 (1966); A. WESTIN, PRIVACY AND FREEDOM (1967); THE RIGHT OF PRIVACY, A SYMPOSIUM ON THE IMPLICATIONS OF GRISWOLD V. CONNECTICUT, (1971); A. MILLER, THE ASSAULT ON PRIVACY (1972); Henkin, *Privacy and Autonomy,* 74 COLUMN. L. REV. 1410, 1411-33 (1974); Kurland, *Some Reflections on Privacy and the Constitution,* ALUMNI MAGAZINE 7 (1976); Gross, *The Concept of Privacy* 42 N.Y.U. L. REV. 34 (1967); Parker, *The Definition of Privacy,* 27 RUTGERS L. REV., 275 (1973); Thomson, *The Right to Privacy,* 4 PHIL. & PUB. AFF. 295 (1975); Reinan, *Privacy Intimacy and Personhood,* 6 PHIL. & PUB. AFF. 26 (176); Rigaux, *L'élaboration d'un right of privacy dans la jurisprudence Américaine,* 1980 REVUE INTERNATIONALE DE DROIT COMPARÉ 701-30 [hereinafter cited as *L'élaboration*].

187. Warren & Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193-220 (1880-1881).

188. *See* W. Wagner, *Le droit à l'intimité aux Etats-Unis,* 1965 REVUE INTERNATIONALE DE DROIT COMPARÉ 365-76; W. Prosser, *Privacy,* 48 CAL. L. REV. 383-42 (1960); *L'élaboration, supra* note 186.

189. *See* the examples cited by Rigaux in *L'élaboration, supra* note 186; TRIBE, *supra* note 166, at 576.

190. For an attempt towards defining the content of this right, *see* TRIBE, *supra* note 166, at 886-990; Whalen v. Roe, 429 U.S. 589 (1977).

7, 1965 by the Supreme Court of the United States, which for the first time officially declared that a right of privacy exists.

1. The *Griswold* Decision and the Right to Marital Privacy[191]

Were it not for its landmark ruling, the *Griswold* decision would be itself of little interest in that it declares unconstitutional a law of rare absurdity. Since 1879, the state of Connecticut had prohibited all persons, married or single, the use of contraceptives — but not their sale, distribution or advertising. However, the general laws relating to complicity impose the same sanctions on those who "assist, encourage, advise, incite or command another to commit a crime," making the contraceptive law applicable to those who disseminate information or furnish contraceptives. It was on this basis that the director of a family planning center and the doctor of this center were prosecuted for having advised and furnished a married couple with contraceptives. The accused invoked the Due Process Clause of the fourteenth amendment as a defense, alleging that the Connecticut law violated the rights of the married couple. The Supreme Court granted certiorari and a majority of seven justices, in an opinion written by Justice Douglas, declared the Connecticut law unconstitutional.[192]

Several essential elements can be distilled from this decision. The first element is the judicial construction of a new "fundamental right" not expressly provided in the Constitution, nor in its amendments: the right of privacy. Interestingly, Justice Douglas, in justifying its creation, pointed to the "pneumbra of the Bill of Rights" and the "emanations" from its guarantees, whereas the other justices of the majority invoked various other bases.[193] Justices Black and Stewart, in dissenting opinions, argued that the Court had trampled upon the prerogatives of the legislature as a constitutional matter, including the police power of the states.[194] The second element is the shifting of the burden of proof to the state, which must demonstrate a "compelling interest" to the state each time a violation of this new right has been alleged. Finally, the third element is the apparently cautious and limited scope of the decision. At issue was not so much the freedom

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191. 381 U.S. 479 (1965). *See also* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case,* MICH. L. REV. 197-218 (1965) [hereinafter cited as Kauper]; McKay, *The Right of Privacy: Emanations and Intimations,* MICH. L. REV. 259-82 (1965); Sutherland, *Privacy in Connecticut,* MICH. L. REV. 213-88 (1965); Emerson, *Nine Justices in Search of Doctrine,* MICH. L. REV. 219-34 (1965) [hereinafter cited as Emerson].

192. The same law had been challenged some years before without success, the court refusing to hear the matter. *See* Poe v. Ullman, 367 U.S. 497 (1961). *See also* Tilestone v. Ullman, 318 U.S. 44 (1943).

193. *See* Emerson, *supra* note 191, at 228; Kauper, *supra* note 191, at 242-48.

194. Use of such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention. . . . Subjecting Federal and State laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactment would jeopardize the separation of governmental powers that the Farmers set up, and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

Griswold v. Connecticut, 381 U.S. 479, 520-21 (1965) (dissenting opinion).

to practice contraception, and thus whether or not to procreate, and was even less the freedom to distribute information and contraceptives. Rather, the decision stands for the inviolability of the home and marital privacy, which the justices considered to be indisputably beyond the investigatory powers of the state in its quest to ensure respect for the law.[195] In contrast, the justices repeatedly insisted this right of privacy could not be invoked as a shield against laws relative to adultery, homosexuality or other forms of sexual misconduct,[196] with Justice Douglas lauding the sacred character of marriage.[197] However, since 1965 commentators have discerned the potential for further extension of a concept "even more subjective than those of freedom and justice."[198]

2. The Decision of *Eisenstadt v. Baird* and the Right to Choose in the Matter of Procreation

Seven years later, in 1972, the Supreme Court in *Eisenstadt v. Baird*[199] settled the uncertainty hovering over the concept of "right of privacy," and in the process decisively enlarged its reach. The issue concerned a Massachusetts law, modified following the *Griswold* decision, which regulated not the use of contraceptives, but rather their distribution and sale, while discriminating between married couples and single persons. Justice Brennan, expressing the majority opinion, declared the Massachusetts law unconstitutional, on the following rationale:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Thus, the right of marital privacy, the initial object of the right of privacy, was abandoned in favor of an individual right to freedom of choice, decision and action in matters which so fundamentally affect the individual as the freedom to procreate. The Supreme Court, invoking the Equal Protection Clause of the fourteenth amendment, rejected the argument that the fact of not being married

195. *See* Griswold v. Connecticut, 381 U.S. at 485 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. . . .").

196. *See* the concurring opinion of Justice Goldberg in Griswold v. Connecticut, 381 U.S. at 498, and the dissenting opinion of Justice Harlan in Poe v. Ullman, 318 U.S. at 553.

197. "Marriage is a coming together for better and for worse hopefully enduring, and intimate to the degree of being sacred." Griswold v. Connecticut, 381 U.S. at 486.

198. *See* Emerson, *supra* note 191, at 228.

199. Eisenstadt v. Baird, 405 U.S. 438 (1972).

should affect the applicability of this right. In the wake of this case, the Supreme Court, in the 1977 decision of *Carrey v. Population Services International,* ruled that the use of contraceptives by and their sale to single minors under the age of sixteen years could not be made illegal.[200]

The right to choose not to procreate could include as well the right to voluntary sterilization for purely contraceptive purposes. Although the Supreme Court has yet to rule on this question, it now appears that states accept that the right of privacy includes the right to contraception in all its forms.[201] Logically, the right of privacy should run counter to eugenic sterilization, imposed upon mentally or physically deficient persons.[202] Long before the *Griswold* decision, the Supreme Court had upheld the constitutionality of an eugenic law imposing sterilization upon certain categories of criminals or incompetents. However, a more recent case, *Skinner v. Oklahoma,* came down in favor of the free right to procreation.[203] This issue today stands out as one of the thornier problems, in that the eugenic laws are no longer in accord with the growing respect for individual rights. The solutions to these questions are thus being sought in terms of the "best interest" of the interested party and in the latter's presumed consent, or at least in the substitution of such consent by third parties expressed under conditions which furnish adequate guarantees of sufficient objectivity. It remains unclear, however, whether the compelling interest of the state might here be determinative.[204]

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200. Carey v. Population Services International, 431 U.S. 678 (1977). *See* Isaacs, *The Law of Fertility Regulation in the United States: A 1980 Review,* 19 J. FAM. L. 65 (1980-1981) [hereinafter cited as Isaacs].

201. *See* Isaacs, *supra* note 200, at 79; *see also* Tierney, *Voluntary Sterilization, A Necessary Alternative,* 4 FAM. L. Q. 373 (1970); Pitts, *Sexual Sterilization: A New Rationale?* 20 ARK. L. REV. 353 (1972-1973); McKensie, *Contraceptive Sterilization: The Doctor, the Patient, and the United States Constitution,* 25 FLA. L. REV. 327 (1972-1973); Myers, *Comments, A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization,* 14 J. FAM. L. 67-84 (1975-1976). *See also* Stepan, *The World's Laws Concerning Voluntary Sterilization for Family Planning Purposes,* 3 CAL. W. INT'L L.J. 72 (1973); Kouri, *The Legality of Purely Contraceptive Sterilization,* SHERBROOKE U. L. REV. 1 (1976-1977). The Supreme Court of Canada has recognized the legality of purely contraceptive sterilization in Cataford v. Moreau, C.S. 933 (1978).

202. Buck v. Bell, 274 U.S. 200 (1927).

203. Skinner v. Oklahoma, 316 U.S. 535 (1942).

204. *See* Isaacs, *supra* note 200, at 81-86; Neuwirth, Meisler & Goldrich, *Capacity, Competence, Consent: Voluntary Sterilization of Mentally Retarded,* 6 COLUM. HUM. RTS. L. REV. 447 (1974-1975); Price & Burt, *Nonconsensual Procedures and the Right to Privacy,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 94-112 (M. Kindred ed. 1976); Dunn, *Eugenic Sterilization on Statutes: A Constitutional Reevaluation,* 14 J. FAM. L. 280-303 (1975-1976) [hereinafter cited as Dunn]; Ferster, *Eliminating the Unfit, Is Sterilization the Answer?* 27 OHIO ST. L. REV. 591 (1966); J. ROBITSCHER, EUGENIC STERILIZATION (1973). In 1976, 24 states still had eugenic sterilization laws which had not been declared unconstitutional. *See* Dunn, *supra,* at 280-81.

On the other hand, regulations of the U.S. Department of Health, Education and Welfare, as amended February 6, 1979 prohibit the use of federal funds for the sterilization of persons below the age of 21, the mentally incompetent and persons in internment.

In Canada, *see* La stérilisation et les personnes souffrant de handicaps mentaux (Commission de Réforme du Droit du Canada, Doc. de Trav. No. 24 (1979)). For an intriguing plea in favor of the constitutionality of a law aimed at controlling population by imposing sterilization upon every person having two children, *see* Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas,* 41 U. CIN. L. REV. 529 (1972).

Just as curiously, the Supreme Court has yet to extend the right of privacy to "sexual preferences," notably homosexuality.[205] The attitude of the Court appears ambivalent in this area, as though it were hesitating between protecting a right to self-determination pure and simple in matters of sexuality, and protecting old puritan and family values,[206] while the neo-malthusian mentality, further exacerbated by the sudden awareness of a threatening population explosion on the one hand, and an indefinite growth in the costs of maintaining a welfare state on the other, is more reconcilable with the latter factors than the concern over privacy.

Following in the footsteps of the *Eisenstadt* decision is a matter different yet related to that of contraception: the issue of abortion, to which the above explanation may equally apply. The Supreme Court, on January 22, 1973, handed down two decisive decisions, *Roe v. Wade* and *Roe v. Bolton.*[207]

3. *Roe v. Wade* and the Right to Abortion

In *Roe v. Wade,* the Supreme Court directly applied the principle that freedom of decision in matters so fundamental as the right to choose whether or not to procreate is included in the right of privacy. At issue was a Texas law which prohibited abortion except where it was needed to save the life of the mother. The appellant, who was not married, argued that the law violated her right of privacy without due process. The state of Texas contended that the Due Process and Equal Protection Clauses of the fourteenth amendment should protect the fetus against the arbitrary suppression of his life. The Supreme Court, in an opinion written by Justice Blackmun, expressly rejected the argument that an unborn child could have the quality of "person" protected under the Constitution. The rationale was based on an historical analysis which demonstrated that the common law had never recognized the unborn child as a subject of law, and that the state laws prohibiting abortion were enacted subsequent to the Constitution. Those laws were aimed at the protection of the health of the mother. In addition, the majority decided that it did not have to express an opinion on what constitutes the beginning of life, nor did it have to take sides in favor of one or more "theories of life." The Court, after an examination of the various amendments and articles of the Constitution dealing with the word "person," concluded that none of them, notably least of all the fourteenth amendment, applied to the

205. Other federal and state courts, however, appear divided on this point and it is unlikely that any islands of resistance will survive. *See* TRIBE, *supra* note 166, at 941-48; Eichbaum, *Towards an Autonomy Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy,* HARV. CIV. RTS. — CIV. LIBERTIES L. REV. 361-84 (1979) [hereinafter cited as Eichbaum]; Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory,* 45 FORDHAM L. REV. 1281 (1976-1977); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in America,* 30 HASTINGS L.J. 799-955 (1979).

206. *See* Eichbaum, *supra* note 205. *See also* Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective,* 55 N.Y.U. L. REV. 1, 1-62 (1980).

207. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

fetus. The Court consequently recognized that the mother's right of privacy is large enough to encompass the right to terminate her pregnancy. This right is not, however, absolute, and may clash after a certain point with the compelling interests of the state. Such compelling interests include protecting the health of the mother beginning with the second trimester of pregnancy, and protecting a potential life, beginning with the moment the baby is viable, namely, capable of living an independent, meaningful existence. The states thus retain the power, but not the duty, to regulate the medical conditions relating to abortion beginning with the second trimester, and to prohibit abortion beginning with the third trimester, absent danger to the health or life of the mother. In contrast, during the first trimester, the mother and her physician have the sole power of decision.

On a technical level, it is interesting to note that the decision of Justice Blackmun, in the view of critics pro and con, is based on an obsolete, if not inexact, analysis of the common law, state law and jurisprudence relative to unborn children, and on a questionable constitutional framework.[208] The common law of inheritancy has, in fact, historically recognized the maxim *infans conceptus*[209] and recent Anglo-American jurisprudence in civil matters clearly tends to grant rights to children in seeking remedy for prenatal injury and even as to the injury occurring before viability.[210] Again, historically speaking, it is incorrect to claim that the numerous anti-abortion laws enacted in the mid-nineteenth century, before the adoption in 1868 of the fourteenth amendment, were aimed solely at protecting the health of the woman, and not of the unborn child.[211] Finally, it was clearly erroneous to claim that, as of the date of the decision in 1973, the right to freedom of decision relative to abortion was "a principle of justice so deeply rooted in the traditions and conscience of the people that it can be viewed as fundamental."[212] Equally false was the assertion that a state may limit individual freedoms only on the condition that the state prove that another constitutional right is being threatened.[213] Notwithstanding

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208. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) [hereinafter cited as Ely]; Epstein, *Substantive Due Process by Any Other Name, The Abortion Cases,* SUP. CT. REV. 154 (1974) [hereinafter cited as Epstein]; Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics,* 53 B.U. L. REV. 765 (1973); Byrn, *An American Tragedy: The Supreme Court on Abortion,* 42 FORDHAM L. REV. 807 (1973) [hereinafter cited as Byrn].

209. BLACKSTONE, COMMENTARIES, § 175 (Jones ed. 1915); Brodie, *The New Biology and the Unborn Child,* 9 J. FAM. L. 391 (1970) [hereinafter cited as Brodie]; Deleuery, *La condition prénatale, la médecine et le droit,* in *Le corps humain et la droit,* 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 57-86 (1975) [hereinafter cited as Deleuery]; Winfield, *The Unborn Child,* 8 C.L.J. 76 (1942-1944).

210. *See* Brodie, *supra* note 209, at 392-93; Kruger, *Wrongful Death and the Unborn: An Examination of Recovery after* Roe v. Wade, 13 J. FAM. L. 99-114 (1973-1974); Veitch, *Delicta in Interum,* 24 N. IR. LEG. Q. 66. *See also* the British Law Commission Working Paper, No. 47, Injuries to Unborn Children (Jan. 19, 1973).

211. Byrn, *supra* note 208, at 826. As of 1868, 28 states out of 37 had enacted laws prohibiting abortion before "quickening."

212. *See* Roe v. Wade, 410 U.S. at 171 (Rehnquist, J., dissenting).

213. Ely, *supra* note 208, at 926.

the expressed intent of the majority to the contrary, the Court once again, in the name of substantive due process, appears to have done nothing less than engage in "judicial legislation," a power identical to that which the Court had appropriated for itself during the *Lochner* era of economic and social reform.[214]

Especially interesting is the fact that the Court chose not to couch its rationale in terms of medical, social or economic agruments in favor of the mother's right of privacy and her right to exercise dominion over herself and her destiny. Rather, the Court refused to accord the unborn child the legal status of "person." This denial of legal protection is strangely reminiscent of the denial to a black slave of his status as a person, achieved by the Supreme Court one hundred years before in the infamous and tragic *Dred Scott* decision.[215] Enacted in the wake of the Civil War, the fourteenth amendment was supposed to forever bar discrimination of this sort, on the part of the legislature as much as on the part of the Supreme Court itself. The Court does not indicate, however, why a state may not decide to extend its protection to cover a child at a less developed stage.[216] It is difficult to see what should prevent a democratic, civilized society from protecting such existence, even if the fetus has yet to attain the status of "person" in its own right,[217] and even if its dependence upon the mother might permit exceptions otherwise unthinkable.[218] Recommendation 874 of the Parliamentary Assembly of the Council of Europe on a European Charter of the Rights of the Child provides in this regard an interesting comparison: "The rights of every child to life from the moment of conception, to shelter, to suitable nourishment and to an adequate environment should be recognized and the national Governments should accept the obligation to do everything possible to permit the integral application of these rights."[219] The fact that six courts of highest jurisdiction in the West have decided differently on the right of the unborn child to legislative or constitutional protection illustrates the fluctuating and supremely subjective nature of the juridical person subject to legal protection.[220]

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214. *See id.* at 937-43; Epstein, *supra* note 208. *See also* the dissenting opinions of Justices Rehnquist and White in Roe v. Wade, 410 U.S. at 171, 221.

215. "We think . . . the people of the negro race . . . are not included and were not intended to be included under the word 'citizens' in the Constitution." Dred Scott v. Sandford, 60 U.S. 393 (19 How. 1857); MASSON & BEANEY, AMERICAN CONSTITUTIONAL LAW, ESSAYS AND SELECTED CASES 37 (5th ed.).

216. *See* TRIBE, *supra* note 166, at 927.

217. "[A] fetus is live enough not to be dead, not yet mature enough to be an infant, yet a human being enough to deserve protection. . . ." P. RAMSEY, ETHICS OF FETAL RESEARCH, *cited in* Deleury, *supra* note 212, at 62.

218. *See* Brodie, *supra* note 209, at 403; Glenn, *The Constitutional Validity of Abortion Legislation: A Comparative Note,* MCGILL L.J. 673-84 (1975) [hereinafter cited as Glenn]. *Cf.* Doe v. Israel, 482 F.2d 156 (1st Cir. 1973), *cert. denied,* 418 U.S. 993 (1974), which declared unconstitutional a Rhode Island law providing that life begins at conception and that the infant is a "person" from such moment on under the fourteenth amendment.

219. Text adopted by the Assembly on Oct. 14, 1979 (10th Session). *See also* the discussions contained in Document 4376 of the Report of the Commission on questions relating to social and health matters, Point VI of the Recommendation.

220. In addition to Roe v. Wade, *see* the decision of the Austrian Constitutional Court of Oct. 11,

The U.S. Supreme Court was to later confront state laws which conflicted less with the Constitution than with the Court's own doctrine.[221] Thus, the Court *inter alia* declared unconstitutional a new law of Missouri which required the consent of the husband to his wife's abortion and which, in the case of a minor under 18 years of age, required the consent of its parents or guardian. The law also prohibited certain methods of abortion and obligated physicians to do everything possible to safeguard the life of the fetus, without regard to viability.[222]

On the other hand, the Court has not had occasion within the framework of the right of privacy to convey the right of a single woman to artificial insemination. Certain authors nonetheless believe that this right is a logical consequence of the *Eisenstadt* and *Roe* decisions, and of the right to voluntarily procreate or choose not to do so.[223] This point of view is debatable.[224] The *Roe* decision is

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1974, *Europaische Grundrechte-Zeitschrift* 74 (1975) (declaring that termination of pregnancy was compatible with the Austrian Constitution and the European Convention on Human Rights, the latter protecting the individual only against interference from the state and not from private persons); the decision of the Constitutional Court of the Federal Republic of Germany of Feb. 25, 1975, 39 BvergE 1-95 (unconstitutional); the decision of the French *Conseil Constitutionel* of Jan. 15, 1975, [1975] Dalloz 2, 529, note Hamon (upholding French law on termination of pregnancy as compatible with the French Constitution); the decision of the Italian Constitutional Court of Feb. 18, 1975, *Europaische Grundrechte Zeitschrift* 162-65 (1975) (declaring unconstitutional Article 546 of the Italian Penal Code to the extent the law prohibited abortion where the health of the mother was in danger); the decision of Morgentaler v. the Queen, 53 D.L.R. 3d 161 (S.C.C. 1975) (the Supreme Court of Canada declaring provisions in Article 251 of the Criminal Code compatible with the Canadian Bill of Rights, the Code limiting abortion to cases where the life or health of the mother is in danger). *See* Glenn, *supra* note 218; Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255-85 (1977).

221. *See L'élaboration, supra* note 186, at 720 n.28 (1980). The resistance of the states to the U.S. Supreme Court decision and the talk of amending the Constitution to overturn the decision almost ten years after it was rendered show that the dust has far from settled. *See* 7 FAM. L. REP. 2759 (BNA Oct. 13, 1981) (Senate Panel Begins Consideration of Constitutional Amendment on Abortion).

222. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). *See also* Moss, *Abortion Statutes after* Danforth: *An Examination*, 15 J. FAM. L. 535 (1976-1977). *See also* Bellotti v. Baird, 428 U.S. 132 (1976); McGilvray, Baird v. Bellotti: *Abortion, The Minor's Right to Decide*, 33 U. MIAMI L. REV. 705 (1979). *Compare* the Court's apology for marriage in *Griswold* with its upholding the constitutional right of parents to control the education of their children in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). As to the refusal to recognize the rights of the husband and father to be consulted and to protect the rights of the unborn child, *see* in England, Paton v. Trustees of B.P.A.S., 2 All E. R. 987 (1978). *See also* Lynch & Bennett, *Abortion, Whose Decision?* 18 FAM. L. 35 (1979); Lynch & Bennett, *Abortion, the Female, the Fetus and the Father*, 37 CURRENT LEGAL PROB. 217 (1979). *See also* O'Neill & Watson, *The Father and the Unborn Child*, MOD. L. REV. 174 (1975).

223. *See* Shaman, *Legal Aspects of Artificial Insemination*, 19 J. FAM. L. 331 (1979-1980); Curri-Cohen, *Current Practice of Artificial Insemination by Donor in the United States*, 302 NEW ENG. J. MED. 585 (1979).

224. Article 2 of the Proposal on the Artificial Insemination of Human Beings, by the Council of Europe, does not absolutely exclude the question of artificial insemination of an unmarried woman, although providing that insemination should not be practiced unless appropriate conditions exist to ensure the well-being of the future child. Since Article 7, section 2 of the same proposal prohibits establishing the legal filiation between the child and the donor, a provision allowing an unmarried woman to get artificial insemination would be incompatible with Article 2 of the European Convention Relative to the Legal Situation of Children Born out of Wedlock, under which the paternal filiation of every child born outside of marriage can be recognized, and with the interpretation of the European Court of Human Rights of Article 8 of the Convention in the *Marckx* decision of 1979 (child's right to

applicable as well to fetal experimentation conducted in the United States.[225]

Finally, before concluding this discussion, it perhaps may be appropriate to make a brief comparison between the jurisprudence in this area fashioned by the U.S. Supreme Court and two recent decisions of the European Commission on Human Rights. In *Bruggeman & Scheuten,*[226] two German nationals alleged that the new West German law restricting abortion upon request[227] violated Article 8 of the Convention and their right to privacy, in that the complainants were obliged either to abstain from sexual relations or to practice contraception, or to bring into the world an unwanted child. The Commission unanimously dismissed the claim, on the ground that pregnancy and its termination is not solely a matter of the private life of the pregnant woman, which is closely associated with the developing fetus. The Commission, however, did not find it necessary to examine whether the unborn child must be considered as an entity under Article 8, section 2, which provides for "the protection of others." The Commission thus feels that every law governing the termination of pregnancy does not constitute an incursion into the private life of the mother. The Commission also believes that Article 8, section 1 cannot in principle signify that pregnancy and its termination are matters pertaining exclusively to the private rights of the mother.[228]

On the other hand, the Commission in *X v. United Kingdom,*[229] dismissed the claim of an Englishman as unfounded under Article 2. The wife had obtained an abortion pursuant to the Abortion Act of 1967 against the wishes of her hus-

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normal familial relations). *See* Meulders-Klein, *Les droits du père en matière de procréation, de filiation et d'autorité parentale dans les législations récentes,* colloquim, LES PÈRES D'AUJOURD'HUI, organized by the Conseil Superieure de l'Information Sexuelle et de l'Education Familiale, Paris, February 17-19, 1981 (to be completed, Stock, ed.); *see also,* M. Revillard, in LAW AND ETHICS OF A.I.D. AND EMBRYO TRANSFER, 81 (Ciba Foundation 1973); De Cooman van Kan, *L'insémination artificielle, recommandation du Conseil de l'Europe et perspectives de la réglementation belge (etude de droit comparé),* JOURNAL DES TRIBUNAUX 369, 370-81, (1981). For a severe critique of the proposal of the Council of Europe, *see also* Giesen, *Heterologe Insemination: Ein Neues Legislatorisches Problem? Zu Einer Gesetzgebungsinitiative des Europarats,* FAM. R.Z. 413 (1981). The European Assembly rejected the proposal, submitted to it on Oct. 1 and 2, 1981.

225. *See* Hellegers, *Fetal Research,* in 2 ENCYCLOPEDIA OF BIOETHICS, 489-93 (1978). As to regulation of experimentation on living and dead fetuses *see* the Recommendations of the National Commission for the Human Subjects of Biomedical and Behavioral Research, Research on the Fetus, Report and Recommendations, Dept. of Health, Education and Welfare Publications No. (OS) 76-127 and Appendix to No. (OS) 76-128, and federal regulations adopted by the Department contained in 40 Fed. Reg. 33, 528 (1975), 45 C.F.R. § 46, 201-211 (1976); Friedman, *The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis,* 61 MINN. L. REV. 676 (1976-1977). Paradoxically, these regulations attempt to treat the fetus *in intero* destined for abortion as a human subject, recommending that the experimentation not harm or expose the fetus to risk of harm. As to fetal experimentation in Great Britain, *see* The Use of Fetuses and Fetal Material for Research: Report of the Advisory Group, the Peel Commission Report, D.H.S.S., 1972, Her Majesty's Stationery Office.

226. Bruggeman & Scheuten v. Federal Rep. Germany, Report of the European Commission on Human Rights, July 12, 1977; Resolution DH (78) 1, of the Committee of Ministers, Mar. 17, 1978.

227. Fifteenth law reforming the Penal Code, Law of 21 May 1976.

228. Opinion of the Commission, §§ 54-65.

229. Request No. 8416-78. Opinion of the Commission of May 13, 1980. *See* M. Blois, *Abortus en de Artikel 2 van de Europese Conventie voor de Rechten van de Mens,* NED. JURISTENBLAD 141 (1980).

band, who alleged that this act violated both Article 2, in denying the right to life of his unborn child, and Article 8, in violating respect for the husband's own private life. The Commission, after noting that the Convention, no less than the U.S. Constitution, does not define the terms "person" or "life," held that the word "person" can only be applied to individuals already born, in view of the other provisions of the Convention.[230] In examining the word "life," the Commission held that in the absence of any provision to the contrary, Article 2 could not guarantee an absolute right to life for the fetus, since too many exceptions have long endured. The Commission, however, did not discuss the inverse hypothesis — whether the fetus had no right to life at all — and decided that Article 2 is not violated by an abortion based on protecting the life and health of the mother.[231] The Commission then decided that under these circumstances the right of the husband and future father to his family had not been violated and must yield before the right of his wife to her private life, as delineated by the *Bruggeman* decision.[232] The Commission appears to have ignored Recommendation 874 of the Parliamentary Assembly of the Council of Europe.

4. The *Quinlan* Decision and the Right to Die[233]

The *Quinlan* decision concerns the right to freely decide to die. This decision was handed down not by the Supreme Court of the United States, but by the Supreme Court of New Jersey, on January 26, 1976.[234] The tragic story of Karen Quinlan is known universally. On April 15, 1975 this twenty-two year old woman was hospitalized in a coma, caused by a prolonged respiratory arrest of unknown origin. Despite all efforts, Karen was to remain in a persistent vegetative state, characterized by a state of total unconsciousness, yet accompanied by certain neurological activity. Clinically, Karen Quinlan was alive, but had lost all cognitive functions. Her vital functions were themselves only maintained through intravenous feeding and a respirator. Her father, after enduring several months

230. Opinion of the Commission, §§ 7-9. *Cf.* Roe v. Wade, 410 U.S. 179 (1973).

231. Opinion of the Commission, §§ 10-24.

232. *Id.*, §§ 25-27.

233. *See* BIOMEDICAL ETHICS AND THE LAW, (J. Humber & R. Almeder eds. 1976), especially pages 423-532 and 533-38; E. KUBLER-ROSS, ON DEATH AND DYING (1969); A. DOWNING, EUTHANASIA AND THE RIGHT TO DIE (1970); K. BINDING & A. HOCHE, THE RELEASE OF THE DESTRUCTION OF LIFE DEVOID OF VALUE (1975); A. DOWNING, EUTHANASIA AND THE RIGHT TO DEATH (1977); P. SEINFELS & R. VEATCH, DEATH INSIDE OUT, (1974); H. TROWELL, THE UNFINISHED DEBATE ON EUTHANASIA (1973); D. HORMAN & D. MALL, DEATH, DYING AND EUTHANASIA (1977); H. KOHL, THE MORALITY OF KILLING (1974); G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1958); Kamisar, *Some Nonreligious Views against Proposed "Mercy Killing Legislation"*, 42 MINN. L. REV. 969 (1958); G. Williams, *Euthanasia*, 42 MED. LEGIS. J. 14 (1973); P. RAMSEY, ETHICS AT THE EDGES OF LIFE (1978). In Canada, *see* Commission de Réforme du Droit du Canada, Série Protection de la Vie, Euthanasie, Aide au Suicide et Interruption de Traitement, Doc. de Travail No. 28 (1981); KEYSERLINCK, LE CARACTÉRE SACRÉ DE LA VIE (Document d'Etude, Série Protection de la Vie, 1973), INSTITUT DE RECHERCHE SUR 'INTERPRÉTATION CONTEMPORAINE DE L'HOMME, DÉFINITION DE LA MORT ET EUTHANASIE (University of Sudbury 1975).

234. 70 N.J. 10, 355 A.2d 647 (1976).

of treatment and having concluded that his daughter's state was irreversible, requested that Karen's doctors halt her artificial respiration, with the belief that this treatment would end his daughter's life. However, the doctors refused on the grounds that the patient could not be considered dead under the criteria set by the Ad Hoc Committee of the Harvard School of Medicine regarding the death of the brain.[235] Joseph Quinlan then sought relief before a Superior Court of New Jersey, requesting that he be designated guardian of his daughter and given the authorization of the court to order a halt to the respirator. Mr. Quinlan invoked the constitutional guarantees of the first amendment, notably the freedom of religion clause, as well as the right of privacy recognized by the *Griswold* and *Roe* decisions, and the eighth amendment's protection against cruel and unusual punishment. The New Jersey Superior Court dismissed his complaint on the grounds that the state had a preponderant interest in protecting life despite the right of privacy and freedom of religion, and that the eighth amendment applied only to criminal punishment. In addition, the court refused to designate Joseph Quinlan as guardian of his daughter and appointed another in his place, who then refused authorization to disconnect the respirator.

The Supreme Court of New Jersey reversed the lower court's decision. Rejecting freedom of religion and the eighth amendment as an argument, the Court held that Karen Quinlan had the right to decide herself, under her right of privacy, whether to suspend her treatment. The Court also recognized the right of her father as guardian to express this wish in her name, after consulting the family, her physicians and the ethics committee of the hospital on the likelihood of Karen ever regaining consciousness. It was then decided that the respirator be disconnected. Karen, however, did not die. She spontaneously began to breathe, and is still alive as of the date this is written. The dramatic *Quinlan* case raises a number of problems with respect to the right to decide on one's own death, which must be clearly distinguished.

a. *Determining the Moment of Death*[236]

The first problem concerns the definition and determination of death, namely, the moment when a person may be medically and legally declared to be deceased, such that a voluntary discontinuation of medical treatment cannot be

235. *A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death,* 205 J.A.M.A. 335 (1968) [hereinafter cited as *Report*].

236. *See* Les criteres de la détermination de la mort, (Commission de Réforme du Droit du Canada, Série Protection de la Vie, Doc. No. 23, 1979, and Bibliography at 71); INSTITUT DE RECHERCHE SUR L'INTERPRÉTATION CONTEMPORAINE DE L'HOMME, *La definition de la mort* (University of Sudbury 1975). In the United States, *see Report, supra* note 235; CAPRON & KASS, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and Proposal in Biomedical Ethics and the Law,* 121 U. PA. L. REV. 87 (1972); Veith, *Brain Death and Organ Transplantation,* ANN. N. Y. ACAD. SCI. 417 (1978). In England, *see Diagnosis of Brain Death: Statement Issued by the Secretary of the Conference of Medical Royal Colleges and their Faculties in the United Kingdom,* 2 BRIT. MED. J. 1187 (1976); Skegg, *The Case for a Statutory Definition of Death,* 2 J. MED. ETHICS 190 (1977). In the Netherlands, *see* van Till-d'Aulnis de Bourouill, *Doodscriteria,*

considered a homicide, nor the removal of an organ illegal. Only a few years ago, cardiac and respiratory arrest were considered to be an incontestable sign of death. Medical technology now permits the revitalization of cardiac and respiratory functions and their maintenance through artificial means, even after a short arrest. Medical science has established that the deprivation of oxygen caused by a temporary circulatory arrest quickly leads to irreversible destruction of cerebral functions: first, to the superior cerebral structure which is the center of our cognitive and relational functions; then, to the inferior portions of the cerebral trunk, which is the center of our essential vegetative functions, such as the cardiac and respiratory functions. The complete and irremediable destruction of these structures constitutes what is called today "brain death" and is the true criterion of death, even when the cardiac and respiratory functions are artificially maintained. Most Western nations recognize this fact, at least implicitly, and a certain number of statutes explicitly contain this criterion.[237]

The Harvard School of Medicine established the most well-known guidelines concerning the determination of death. Under these guidelines, a hopeless coma is assimilated to death provided that, *inter alia*, the following signs are also present: (1) the absence of spontaneous respiratory movements aside from those created by the respirator; (2) the total absence of reflexive reaction to visual, audial or tactile stimulation; (3) a flat electroencephalographic reading for ten

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TIJDS V. PRIVAATRECHT 495 (1974). In Germany, *Definitions of the Signs and Time of Death: A Statement by the Commission on Reexamination and Organ Transplantion Appointed by the German Society of Surgery*, 13 GERM. MED MON. 359 (1968). In Switzerland, *see* LES DIRECTIVES POUR LA DÉFINITION ET LE DIAGNOSTIC DE LA MORT (Bâle 1968). For a discussion of the problem in France, *see* J. Savatier, *Et in hore mort is nostrae*, [1968] Dalloz, Chronique XV, 79; Définition de la mort in *Les droits de l'homme devant la mort*, REV. DR. HOMME 387 (1974); DOLL, *supra* note 91; Grenouilleau, Commentaire de la Loi No. 76-1181 of Dec. 2, 1976, relative aux Prélèvements d'Organes, [1977] Dalloz, Chronique XXIX. In Belgium, Meudlers-Klein, *Corps humain, personnalité et famille en droit belge*, 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 34-39 (1975); Matthijs, *supra* note 91.

237. In the United States, 27 states retain in their laws the cessation of cerebral functions as a criterion of death, as does the Canadian province of Manitoba. In July of 1981, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research presented its report on the new uniform definition of death. Supported by the American Medical Association and the American Bar Association, the Report proposes that the 50 states adopt as a uniform definition of death — "the irreversible cessation of all functions of the entire brain, including the brain stem." *See* MEDICINE, SCIENCE AND THE LAW 298 (1981). The Report to Parliament of the Commission on Reforming the Law of Canada on the Criteria for Determining Death, No. 15 (Ottawa 1981) opts also for legislative adoption of a definition of death corresponding to the "irreversible cessation of all functions of the entire brain." *Id.* at 27-28.

Sweden, Denmark, Great Britain and West Germany employ the concept of brain death, without having adopted any legal definition of death. In France, the criteria for determining death are defined simply by way of ministerial decree. *See* the Décret No. 78-501 of Mar. 31, 1978 applying the Law of Dec. 22, 1976 relative to removal of organs, Journal Officiel, Apr. 4, 1978, ch. IV, Modalité et procedure de constation de la mort, art. 21. In Belgium, various proposals of law relative to the transplantation of organs and tissues have not contained any definition of death, instead relying on "the most recent developments of science for determining death." *See* Projet de Loi No. 774, No. 1, Doc., Parl., Ch., 1980-81. The author believes that a precise legislative definition of death is preferable in order to avoid all uncertainty, leaving it to proclamations, decrees and decisions to clarify the applicable diagnostic methods. *See* Meulders-Klein, 26 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 37-38 (1975).

minutes; and (4) the verification of these tests within the following twenty-four hours. Such a state indicates the destruction of both superior and inferior cerebral structures.[238] However, a patient is not dead when only the superior cerebral structures are destroyed, with the vegetative functions still operating.[239] In such case, the patient's cognitive and relational functions are irremediably damaged.

In light of these criteria, Karen Quinlan could not be considered dead, neither before nor after the disconnection of her respirator. The issue in the *Quinlan* case before the Court's decision concerned — and still concerns — the termination of extraordinary treatment which would involve her death. This question, which directly concerns the civil and criminal liability of physicians,[240] is related generally to the patient's right to refuse all treatment. The question entails a consideration of other equally significant aspects, such as the relation between the quality of life which the patient could expect and the foregoing of medical care, as well as the capacity to consent.

b. *The Right to Refuse Treatment and the Quality of Life*

This problem has seen an unprecedented development as medical technology has continued to evolve, to the extent that such technology permits man to combat the process of natural selection and to push back the boundaries of death more efficiently than ever before. It proceeds also from the Western society's growing horror of suffering and degradation.

It is well established in both European and common law that the free and knowing consent of the patient, to the extent he is able to provide it, is a prerequisite to any medical treatment. A more troubling question is how far a patient's right to refuse all treatment and to ask to die extends. This question

238. This state is called appalic syndrome or vigil coma, opposed to irreversible coma, as described above.

239. Whole-brain death has been up until now the criterion accepted by all the countries which have accepted the new definition of death, even if their diagnostic tests differ somewhat. *See also* the Opinion on the Rights of the Ill and the Dying of the Commission on Legal Questions of the Council of Europe relative to the Report of the Commission on Health and Social Questions, Doc. 3735, Jan. 1976, defining death not as the irreversible cessation of the heart, but as the irreversible cessation of the brain, or brain death. Curiously, Resolution 613 of 1976 insists that only the interests of patient be considered in defining the moment of death. To define in such a subjective manner the moment of death is juridically inconceivable. On the other hand, Recommendation 779 of 1976 in point 8 speaks in terms of "the irreversible arrest of all cerebral functions."

240. In Canada, Article 199 of the Criminal Code punishes the failure to continue an act once undertaken if the omission to do so would endanger life. In France, where murder cannot be committed by omission, the provisions regarding the rescue of a person in danger are applicable. *See* the proposal of law presented by Messrs. Caillavet and Mezard, to amend Article 63 of the Penal Code by excusing the physician from this obligation under certain circumstances. Senat, 1st Session Ord., No. 29, 1978079. In Belgium, homicide by omission is recognized if the intent to murder is present. *See* Trousse, *L'orthothanasie par omission de secours,* 1950-51 REVUE DE DROIT PÉNAL 1102. Prosecution in all countries is, however, extremely rare.

goes directly to the duty of physicians to heal, using all the means at their disposal.[241]

Relatively easy to resolve is the problem of dysthanasia — therapeutic overzealousness[242] — where needless suffering is inflicted on terminally ill patients by prolonging their life, for such treatment clearly cannot be medically justified.[243] Not as clear is the situation where the patient refuses care for personal reasons, such as religious belief. The dilemma becomes most acute when medical intervention alone is capable of saving and healing a patient in danger of imminent death, as in the case of an emergency blood transfusion refused on religious grounds. In this case, are the wishes of the patient the sole determining factor? In both European and common law, hesitation is evident.[244] The cases cited in *Quinlan* contain precedent for a court to avoid a patient's refusal of a transfusion.[245] However, these cases also contain support for the patient's right to self-determination and religious freedom, provided any refusal does not create a danger to the public health, well-being and morals.[246]

The Court distinguished the *Quinlan* case by relying on criteria such as the terminal state of the patient, the patient's familial and social responsibilities and the quality of life under treatment, factors which indicate that the consent of the patient will not always be determinative. Significantly, the Court brought the *Roe* and *Quinlan* decisions together by enlarging the right of privacy to encompass,

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241. *See* the Opinion of the Commission on Legal Questions of the Council of Europe on the Rights of the Ill and the Dying, Doc. 3735, especially Nos. 23-24 and the Recommendation 779 (1976) of the Council of Europe, point 9 [hereinafter cited as the Opinion of the Commission on Legal Questions of the Council of Europe].

242. On the distinction between dysthanasia, orthothanasia (the abstention or termination of useless treatment, often called erroneously "passive euthanasia"), and active euthanasia, *see* S. Pelletier, *De l'euthanasie, l'orthothanasie et la dysthanasie,* 1952 REVUE INTERNATIONAL DE DROIT PÉNAL 217; the Report on the Rights of the Ill and the Dying of the Commission on Social and Health Questions of the Council of Europe, Doc. 3699 No. 24, and the Opinion of the Commission on Legal Questions, Nos. 3735, 9 et seq; the DIRECTIVES CONCERNANT L'EUTHANASIE, of the ACADÉMIE SUISSE DES SCIENCES MÉDICALES (Bâle 1976); the Report of the Law Reform Commission on Reforming the Law of Canada on Euthanasia, Aiding Suicide and Cessation of Treatment, Série Protection de la Vie, Doc. No. 28 (1982).

243. *See* the Opinion of the Commission on Legal Questions of the Council of Europe, *supra* note 241.

244. Certain authors maintain that necessity vitiates the lack of consent on the part of the patient. *See* MAYRAND, *supra* note 1; Somerville, *supra* note 32, at 43, 129; Cox, *The Qualified Right to Refuse Medical Treatment,* 13 J. FAM. L. 153 (1973-1974); Nerson, *Le respect pour le médecin de la volonté du malade 853, 854-80* MÉLANGES MARTY 1978; Kornprobst, *Peut-on admettre un refus de transfusion sanguine?* LA NOUVELLE PRESSE MÉDICALE (1974). *See also* Article 7 of the CODE DE DEÓNTOLOGIE MÉDICALE FRANCAIS, Décret No. 79-506, June 28, 1979 at 233: "La volonté du malade doit toujours etre respectée, dans toute la mesure du possible." (The wishes of the patient should be respected to the fullest extent possible — transl.).

245. *See* Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. 1964), *cert. denied,* 377 U.S. 978 (1964); Raleigh Fitkin Paul Morgan Memorial Hospital v. Anderson, 42 N.Y. 421, 201 A.2d 537 (1964), *cert. denied,* 377 U.S. 985 (1964); J.F.K. Memorial Hospital v. Heston, 58 N.H. 576, 279 A.2d 670 (1971). In *Raleigh Fitkin* the court ignored the refusal of a pregnant woman to undergo a transfusion, in order to save the life of the infant. Generally, in the United States and Europe, protecting the child's life comes before respecting the mother's right of refusal.

246. In re Estate of Brooks, 32 Ill. 361, 205 N.E.2d 435 (1965); In re Osborne, 294 A.2d 372 (1972).

in certain circumstances, the right to die. The Court holds that the state's preponderant interest in protecting life at the expense of the patient's freedom of choice diminishes to the extent the prognosis becomes unfavorable. Finally, a moment arrives when the right of privacy prevails over the state's right to protect life, just as the freedom of the mother at a certain threshold stage of pregnancy triumphs over the state's interest in protecting the life of the future child.[247] The effect of the two decisions is most remarkable in that it creates, at both extremities of life, a free zone: in the first case, by entitling the mother to break off her pregnancy; and in the second case, by affording the patient the right to die. Moreover, these cases establish a possible balance between the quality of life for the patient and the state's interest in protecting his existence. A "meaningful" life is contrasted with a life without meaning, and the Court's affirmation that the state's interest begins to wane after a certain point expresses this idea with rare frankness. Its impact is even greater in those situations where the patient is himself incapable of expressing his wishes.[248]

c. *The Refusal of Treatment or the Request to Die and the Capacity to Consent*

Recent developments in American, Canadian and even European jurisprudence appear to surpass the distinctions referred to in the *Quinlan* decision in favor of a tendency to recognize a general and unconditional right of every individual to refuse all treatment, even if such refusal means his death,[249] and thus to request his death.[250] To make such a request, the patient must retain a certain capacity of discernment and expression. Whatever the scope of the right,

247. In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

248. *But see* TRIBE, *supra* note 166, at 936. *See also* Bai, Implications of the Karen Quinlan Case, Real and Imaginary, 5th World Congress of Medical Law 1979, Gand., Doc. Roneo., vol. II at 278-84.

249. Common law traditionally recognized the right to refuse medical treatment except as provided otherwise by law. *See* the Law Reform Commission of Canada, in Medical Treatment and Criminal Law, Doc. No. 26 at 81, 82-85, 103. The American Hospital Association, in the Patient's Bill of Rights of Nov. 17, 1972, recognizes the right of the patient to refuse treatment to the extent authorized by law.

In France, a decision of the Chambre Criminelle de la Cour de Cassation of Jan. 3, 1973 [1973] Bulletin Criminel No. 2 at 4, acquitted a physician of charges of professional irresponsibility and involuntary manuslaughter for failing to aid a patient in danger. The doctor had chosen not to treat a woman who had tried to commit suicide and had left a note declaring her wish to refuse treatment. On the other hand, the Tribunal Correctionnel and the Cour d'Appel of Besançon, on May 9 and November 15, 1973, respectively, convicted the accused of involuntary manslaughter for having caused an accident in which the victim, because of religious convictions, refused a blood transfusion. The Decree of Jan. 15, 1974 on hospital administration provides in Article 42 that a patient may refuse treatment on the basis of a signed, written document to that effect.

250. In Great Britain, several attempts have been made to legalize active euthanasia and decriminalizing the aiding of suicide, respectively in 1950, 1969 and 1976, without success as yet. In the United States, several bills recently have been introduced along similar lines in Idaho (1969), Montana (1973), Oregon (1973) and Florida (1973 and 1976). In Switzerland, a referendum in 1977 in the Canton of Zurich on the possibility of allowing a physician, upon request of an incurably ill patient, to prescribe active euthanasia was approved by a majority but was without legal effect. *See* Euthanasie, Aide au suicide et interruption de traitement, Doc. de la Commission de Réforme du Droit du Canada, Working Paper 28, at 22 et seq. and 52 (1982).

its recognition depends on whether the person is in a state of consciousness or unconsciousness. Furthermore, among those patients who are incapable of expressing themselves or their wishes, it is necessary to distinguish between those who have fallen into such state by accident, and those who have never possessed the capacity. Numbering among the former are comatose and terminal patients whose faculties have so degenerated that they are no longer capable of knowingly expressing their free and conscious wishes. Aside from the impossibility of even formulating any request, the value of any request, which might possibly be articulated, is therefore considerably affected.[251]

To circumvent the risk, several states have enacted laws such as the California Natural Death Act of 1976,[252] which permits a person to take preventative measures in his living will, under which he may declare in advance his wish to refuse extraordinary treatment which would prolong an otherwise meaningless life.[253] Other societies which advocate active euthanasia propose "euthanasia by testament."[254]

Nonetheless, it is difficult to know whether such a will can effectively protect the wishes of the patient at the moment when it can be effectuated. It would be undoubtedly unwise to place physicians in a position where they would feel obliged to carry out an act desired by the patient which, at the very most, should serve only as an evidentiary indication of his former wishes.[255]

Absent any testamentary act, discovering the wishes of the patient or deciding on his spokesman are difficult tasks indeed. Even more difficult is the situation of those who have never been aware enough to formulate their wishes and contemplate the kind of life they might hope for: for example, newborn children and toddlers afflicted with serious congenital or accidental disabilities,[256] or

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251. *See,* as to the psychological ambivalence in requests for "death with dignity" and the termination of treatment, Jackson & Younger, *Patient Autonomy and Death with Dignity, Some Clinical Caveats,* NEW ENG. J. MED. 404 (1979).

252. *See* CALIFORNIA HEALTH & SAFETY CODE, §§ 71, 85, 95 (West 1976).

253. *See* Flannery, *Statutory Recognition of the Right to Die: The California Natural Death Act,* 57 B.U. L. REV. 148 (1977); Randall, *The Right to Die a Natural Death: A Discussion of* In re Quinlan *and the California Natural Death Act,* 46 U. CIN. L. REV. 192 (1977).

254. *See* Moore, *The Case for Voluntary Euthanasia,* UMKC L. REV. 327 (1972-74).

255. For a position against this type of legislation, *see* Death with Dignity, Report of the Committee on Medicine and Law, Record of the Association of the Bar of the City of New York 119 (1977); the Report of the Law Reform Commission on Reforming the Law of Canada, Euthanasia, Aiding Suicide and Termination of Treatment 49-59 (1982); The Opinion of the Commission on Legal Matters of the Council of Europe on the Rights of the Ill and the Dying, Doc. 3735 No. 11 (1976).

256. *See* Duff & Campbell, *Moral and Ethical Dilemnas in the Special Care Nursery,* NEW ENG. J. MED. 890 (1973); Fletcher, *Attitudes Toward Defective Newborns,* 2 HASTINGS CENTER STUD. 21 (1974); Fletcher, *Abortion, Euthanasia and Care of Defective Newborns,* NEW ENG. J. MED. 75 (1975); Robertson & Frost, *Passive Euthanasia of Defective Newborn Infants: Legal Considerations,* J. PEDIATRICS 883 (1976); Robertson, *Involuntary Euthansia of Defective Newborns: A Legal Analysis,* 27 STAN. L. REV. 213 (1975); Mueller & Phoenix, *A Dilemma for the Legal and Medical Professions: Euthanasia and the Defective Newborn,* 22 ST. LOUIS U. L. J. 501 (1978).

mental incompetents.[257] Who could decide what they would be willing to endure or not endure, and under what criteria? Anglo-American societies have already opened this debate. Two American decisions have given divergent answers to the first question. In the *Quinlan* case, the Supreme Court of New Jersey held that the decision belongs to the family, after consultation with the patient's physicians and hospital ethics committee. In the *Saikewciz* decision,[258] the Supreme Judicial Court of Massachusetts held that only a court is capable of deciding with independence and impartiality. Certain authors maintain that only the legislature can fix the appropriate authority and procedures.[259] As to the proper criteria, where the patient's wishes cannot be known, the deciding factor should be what a reasonable person would consider to be in the patient's greater interest.

The issue is not the blind protection of life for life's sake. Rather, the question concerns the applicable criteria defining the quality of life. Who can guarantee that the subjective factor of the quality of life, evaluated in the eyes of "reasonable persons,"[260] combined with the substituted consent of those same persons, will not result in a new type of social eugenism: for example, in the case of retarded children? What impact on behavior would legislation have which might purport to regulate explicitly such situations? Here again, the objective criterion of utility or uselessness of any medical treatment intended to improve the situation of an incompetent patient offers a more certain and tangible way to evaluate the proper course to take.[261]

The wishes of the conscious patient are without doubt easier to determine but are not easier to respect in every case. This situation leads us to the ultimate question: if we recognize the right of a person to voluntarily refuse medical treatment, why should we hesitate before the question of suicide and in the aiding and abetting of suicide? Why not legalize euthanasia upon request, which might be found so "reasonable" in certain circumstances?[262] Does the explana-

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257. *See generally,* Keyserlinck, The Sacred Character of Life of the Quality of Life, Law Reform Commission of Canada, Protection of Life, Study Paper 167 (1979) [hereinafter cited as Keyserlinck]; Annas, *The Incompetent's Right to Die: The Case of Joseph Saikewicz,* HASTINGS CENTER REP. 21 (1978).

258. Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 426 n.11 (1977).

259. *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State,* 51 N.Y.U. L. REV. 285 (1976); MacMillan, *Birth Defective Infants: A Standard for Nontreatment Decisions,* 30 STAN. L. REV. 599 (1978).

260. The relationship between quality of life and quality of being (*qualité de personne*), and more particularly between such quality and aptitude for consciousness of self and the ability to interact with others present some considerable hazards. *See* Keyserlinck, *supra* note 257, at 79, and the particularly radical theories of Fletcher, *Indications of Humanhood: A Tentative Profile of Man,* HASTINGS CENTER REP. 2.5 (1972) 1-4; *Four Indications of Humanhood, The Enquiry Matures,* HASTINGS CENTER REP. 4.6 (1974), 4-7.

261. *See* Euthanasie, aide an suicide et interruption de traitement, Doc. de la Commission de Réforme du Droit du Canada, Working Paper 28 (1982); McCall, *Withholding and Withdrawing Treatment and the Criminal Law, V^e Congress mondial de droit médical,* Gand, 1979, Doc. Ronéo., vol. II, pp. 266-69.

262. *See* the clear refusal expressed by Recommendation 779 (1976) of the Parliamentary Assembly of the Council of Europe, point 7, and by the Commission de Réforme du Droit du Canada, *supra* note 261.

tion for this hesitation lie in man's need to protect himself against his own weakness? What greater stakes, higher than even freedom itself, are hidden behind this last line of resistance?

IV. CONCLUSION

Having reached this stage, one might perhaps ask: why choose the American example to illustrate this problem? After all, Europeans have not been raised on the philosophies of John Locke, John Stuart Mill and Jeremy Bentham. Europeans have not been taught that the individual is only free to the extent he is the sovereign owner of his person and property, and that the sole mission of government is to guarantee these rights. Furthermore, Europeans know as well that their Declarations of Rights and Constitutions create, at the same time, both their freedom and the boundaries which limit it.

The truth is, however, that the same debate cuts across all cultures and legal systems, at least of the Western nations, on the social level with the same technical and scientific progress, and the same evolution in attitudes — as well as on the juridical level. The examples cited in the course of this article illustrate this fact. Even though until today the concept of "privacy" is more often translated as "intimacy of the private life" than as "self-determination" in European countries, Article 8 of the European Convention on the Rights of Man potentially lends itself to development in a way analogous to that of the right of privacy.[263] It would be assuredly childish and absurd on our part to disavow today the progress made in medicine, just as it would be futile to blame it for its errors or deny its problems. Science in this area, as in other domains, is nothing more than an instrument, more or less manageable, in the hands of man, for better or for worse. It is an instrument whose existence constitutes certainly a point of no-return, but whose deployment is incumbent upon us. Unless, pursuing an infinitely more subtle hypothesis, it is society itself which is struggling for its survival against an excess of life or diminished life in an overcrowded world — a hypothesis which deserves to be more closely examined — what lies ultimately at the heart of the debate is less with the conflict between protecting life and protecting freedom than the individual search for happiness in the existential triangle formed, since time immemorial, by life, sex and death. Of the three rights proclaimed at the beginning of the U.S. Declaration of Independence, it is the last one which here assuredly takes the lead. And medicine, like law, is becoming the servant of this right of happiness. It is not, however, more rational to protect life at any price than to sanctify happiness at whatever cost, even if it is

263. *See* the European Convention on Human Rights. The development in the interpretive method of the European Court is reminiscent of the U.S. Supreme Court. *See* the *Marckx* case and the decision of the European Commission on Human Rights in X v. United Kingdom, *supra* note 164.

legitimate and necessary to employ all our resources to diminish suffering. It is undoubtedly in this measured spirit that humankind must itself draw the boundaries of its own freedom.

Translated by Michael J. Matsler