STERILISING THE APPARENTLY INCAPABLE: FURTHER THOUGHTS AND DEVELOPMENTS

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"Into her womb convey sterility
*Dry up in her the organs of increase."***

ABSTRACT

The recent decision of the English judicial hierarchy in *Re B (a minor) (wardship: sterilisation)* raises many of the issues which are involved with the difficulties inherent in attempts compulsorily to sterilise apparently incapable minors. The article contrasts the decision in *Re B* with the earlier English decision of *Re D* and the decision of the Supreme Court of Canada in *Re Eve*. It continues by discussing the policy issues which are raised by the case and by the literature.

The story of the case of *Re B (a minor) (Wardship: Sterilisation)*'s [1987] 2 All E.R. 206, passage through the hierarchy of the English courts raises, once more, the vexed and emotive question of the enforced sterilisation of the apparently incompetent minor. The facts were not, of themselves, exceptional: a local authority had the care of a mentally handicapped and epileptic 17 year old girl who had the mental age of a child of five or six. She had no understanding of the connection between sexual intercourse and pregnancy and would also be unable to cope with birth, nor would she be able to look after children. She was, likewise, incapable of giving legal consent to marriage. However, she was demonstrating the normal sexual drive and inclinations for a person of her physical age. There was expert evidence that it was essential that she shold not be permitted to become pregnant and that, at least some, contraceptive drugs would react with other drugs which were being administered in order to control her mental instability and epilepsy. Similarly, there was evidence that it would be difficult, if not actually impossible, to place her on a course of oral contraceptive. The local authority did not wish to institutionalise her and applied to the court that she be made a ward of court during the period of her minority and for the leave of the court for her to undergo a sterilisation operation. The application was supported by the girl's mother, but the Offical Solicitor, acting as the minor's guardian *ad litem,* opposed the application. The trial judge granted the application and his decision was upheld both in the Court of Appeal and in the House of Lords. Although it must be said, at the outset, that a less than uniform approach can be found in the various judgements.

At first instance, Bush J. elected not to consider any of the broader issues which the case might have involved. The major argument advanced on behalf of the Offical Solicitor, at that point in the proceedings, was that he was unwilling to submit to the view that the stage had been reached where sterilisation should be the course adopted rather than oral contraception. The judge noted (at 208) that the difficulty with that submission was that ". . . if the control procedure breaks down, untold harm will be done, or, if the regimen cannot be established, untold harm can be done . . ." In addition, sterilisation would not be possible after the child reached her majority. On that issue, it was also argued that as the state of affairs would shortly come about, the court should not intervene. Bush J. found no difficulty with that proposition in that, until the girl reached the age of 18, the court was entitled to make decisions regarding her welfare.

Bush J. also found that the case was clearly distinguishable from *Re D (a minor) (wardship: sterilisation)* [1987] Fam. 185 on the grounds that, in the earlier case, there was the probability that, when the young woman there reached the age of 18, her condition would have improved sufficiently for her to make an informed decision as to whether she should be sterilised. In the instant case, there was no possiblity that the ward would ever be in a position to make an informed decision in that regard. In *Re D.*, Heilbron J. (at 193) had referred to the basic human right of a woman to reproduce; in *Re B*, Bush J. considered that the court was depriving her of nothing because, ". . . she will never desire the basic human right to reproduce and, indeed, far from it being a question of not desiring it, on the facts of this case it would be positively harmful to her."

In the Court of Appeal, Dillon L.J. noted, [1987] 2 All E.R. 206 at 210, first, that it was common ground that the ward was, and would remain, incapable of giving any kind of relevant informed consent. His Lordship went on to refer to the statement of Heilbron J. in *Re D* (above) and commented that that represented the most anxious aspect of the case. Dillon L.J. took a similar approach to that adopted by Bush J. towards Heilbron J's *dictum*, when he stated (at 210) that, ". . . the loss of that right would mean nothing to her. She has no desire to reproduce. She does not link, and never will be able to link, sexual intercourse with the birth of babies and would be wholly unable to look after a baby or child if she were to have one. She is as a small child herself mentally. Child bearing can provide nothing of benefit to her. If she did become pregnant, it would be undesirable that her pregnancy should not be terminated. She would not understand what was happening to her if the pregnancy ran its full course and she were in natural labour, but a Caesarean delivery would present dangers, as she has the habit of tearing open scars." Dillon L.J. continued, by saying that the court in the wardship jurisdiction had the authority to authorise a sterilisation operation on a ward, but he emphasised that it was a jurisdiction whch should only be exercised in the last resort. As such, it was imperative that leave of the court be obtained. His Lordship then turned his attention (at 211) to the question whether the present case constituted a case of last resort. Having weighed the expert evidence and hesitated because of the irrevocable nature of the operation, he concluded that it was. He described the alternative possibilities in the following terms: ". . .The difficulty about the proposed alternative of the progestogen pill is formidable. Firstly, its side effects, particularly over a long term, are not clearly known. Secondly, it is not as effective as are other contracteptive pills; the failure rate is higher. In the next place there is only a 40% chance of finding it compatible for the minor in view of the other drugs she has to take and her known reaction to medicaments. Finally, it has to be taken daily, I stress daily; there would be a serious risk of loss of the efficacy of the process if she were to fail to take the pill, but can it be administered, even with a bribe of sweets, if she is in a violent or aggressive mood? There is a danger, moreover, owing to her obesity, the irregularity of her periods and her very limited powers of communication, that, if she did become pregnant, her condition would not be discovered until it was too late for abortion, with the frightening consequences that the pregnancy would have to run its full course."

Stephen Brown and Nicholls LJJ concurred in the judgment of Lord Dillon, with the former (at 211) noting that, in his view, the operation was the only possible decision for the future welfare of the ward.

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** Shakespeare, *King Lear* I. iv.

The Official Solicitor appealed to the House of Lords who, in addition, were faced with the recent decision of the Supreme Court of Canada in *Re Eve* (1986) 31 D.L.R. (4th.) 1. The major conclusion which was drawn in that case by La Forest J. (at 32) was that, "The grave intrusion on a person's right and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorised for non-therapeutic purposes under the *parens patriae* jurisdiction." Although Lord Hailsham L.C. in *Re B* (at 214) found the historical analysis of the *parens patriae* jurisdiction in *Re Eve* helpful, he was far from flattering as to the case's more general aspects. Indeed, Lord Bridge and Lord Oliver both expressed strong reservations on those issues. Lord Hailsham L.C. stated that he found La Forest J.'s conclusion to be, ". . . totally unconvincing and in startling contradictions to the welfare principle which should be the first and paramount consideration in wardship cases." The Lord Chancellor also found the distinction which La Forest J. had sought to draw between operations for *therapeutic* and *non-therapeutic* purposes, in relation to the acts of *Re B*, to be ". . . totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle. To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality." Similarly, Lord Bridge (at 214) considered that La Forest J's statement was, ". . . entirely unhelpful. To say that the court can never authorise sterilisation of a ward as being in her best interests would be patently wrong. To say that is can only do so if the operation is 'therapeutic' as opposed to 'non-therapeutic' is to divert attention from the true issue, which is whether the operation is in the ward's best interest, and remove it to an area of arid semantic debate as to whee the line is to be drawn between 'therapeutic' and 'non-therapeutic' treatment." Lord Oliver (at 219) was less overtly critical, but said that if, in La Forest J's judgment, ". . . the expression 'non-therapeutic' was intended to exclude measures taken for the necessary protection from future harm of the person over whom the jurisdiction is exercisable, then I respectfully dissent from it for it seems to me to contradict what is the sole and paramount criterion for the exercise of the jurisdiction, viz the welfare and benefit of the ward." In addition, La Forest J. had suggested (at 32) that, if sterilisation of the mentally incompetent was to be adopted as desirable for general social purposes, it was for the legislature to make that decision. Lord Oliver, agreed with that initial proposition, but emphasised that, in his view, ". . . this case is not about the convenience of those whose task, it is to care for the ward or the anxieties of her family; and it involves no general principle of public policy. It is about what is in the best interests of this unfortunate young woman and how best she can be given the protection which is essential to her future well-being so that she may lead as full a life as her intellectual capacity allows. That is and must be the paramount consideration . . ."

Before turning to the major moral issues raised by *Re B*, it should be borne in mind that that case was clearly factually distinguishable from both *Re D* and *Re Eve* in that the minor in question was substantially more retarded than was the case in the earlier decisions. In *Re D*, it was clear that the minor's condition would improve (in *Re D*, the minor was aged eleven, whilst, in *Re B*, the ward was aged 17) and in *Re Eve* the ward was aged 24, attended a school for retarded adults and had been described in a report as being mildly to moderately retarded. In fact, as La Forest J. described (at 3) the situation; "Eve struck up a close friendship with a male student; in face they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end." Given that kind of action, on the facts of *Eve*, the question of sterilisation becomes scarcely relevant!

It will be remembered that in *Re B* (above), the House of Lords were especially critical of the distinction drawn in *Eve* between therapeutic and non-therapeutic sterilisation. In *Eve*, La Forest J. referred (at 29) to, ". . . the performance of a surgical operation that is necessary to the health of a person . . ." and (at 34) to, ". . . an adjunct to the treatment of a serious malady. . ." In giving effect to the distinction, the judge (at 34) commented that, "On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure." The notion of therapeutic sterilisation did not, of course, begin with La Forest J.: in *Re D*, Heilbron J. [1976] Fam. 185 at 193 had stated that non-voluntary sterilisation, if performed for non-therapeutic reasons, would be a violation of a woman's basic right to reproduce (above). Later, the judge (at 196) had said that a decision to carry out such an operation for non-therapeutic purposes on a minor could ever be within the clinical judgment of a medical practitioner alone. Unfortunately perhaps, unlike La Forest J. in *Eve*, Heilbron J. did not attempt to define or describe when the operation became therapeutic. Indeed, given some of the facts in *Re B* – for instance, Lord Oliver [1987] 2 All E.R. 206 at 217 had specifically noted the unfortunate reaction of the ward to physical injury – it might well be argued that the operation, in that case at any rate, might be regarded as therapeutic. The present writer would adopt the comments of Lord Oliver in *Re B* (at 219) that it seemed immaterial whether measures undertaken for the protection of the ward against future and foreseeable injury were, or were not, therapeutic in any genuine sense.

However, that is obviously not the whole issue. Every student of the matter knows the *dictum* of Holmes J. of the United States Supreme Court in *Buck v Bell* 274 U.S. 200 (1927) at 207 that, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough." That famous judge continued by addressing the question of policy and stated that, ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines of similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." Yet that was not to be the end of the matter before the United States Supreme Court. In *Skinner v Oklahoma* 316 U.S. 535 (1942) at 541, the court adopted a wholly different approach, when they said that they were, ". . . dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty." Nevertheless, in *In Re Sterilization of Moore* 221 S.E. 2d 307 (1976), the Supreme Court of North Carolina upheld the constitutionality of a statute authorising the sterilisation of the retarded (see North Carolina G.S. 35-50). *Moore* is interesting for two reasons; first the petitioner, who was the Director of the Department of Social Services for the County in which the respondent lived, believed that the respondent would be likely to procreate a child, or children, who would probably have serious physical, mental or nervous diseases or deficiencies. Second, the respondent in

Moore was male. However, in the event, the operation was not carried out (Areen, 1985) as, apparently, the young man had matured to an extent that his mother considered that he was not the problem that she had initially thought him to be! Nevertheless, in two subsequent cases, *North Carolina Association for Retarded Children* v *North Carolina* 420 F. Supp. 451 (1976) and *In re Truesdell* 304 S.E. 2d 793 (1983), the constitutionality of the same statute was again upheld.

Areen (1985) estimates that more than 70,000 people in the United States have been sterilised under statutes similar to those upheld in *Buck* v *Bell* and *Moore*, and, at present, seventeen states currently authorise the sterilisation of certain groups of individuals. Here again, sterilisation of the apparently incapable may not be the end of the matter: thus, Green (1972) has written that, "There is . . . a possiblity that government will avail itself of the new genetic technology for the betterment of society. This possibility is enhanced because of the reality of international diversity. While American society may find the notion of positive eugenics thoroughly repugnant, it is by no means clear that other societies, those of China or the Soviet Union for example, will refrain from such practices. If another nation should embark upon a successful program for upgrading its people so as to produce super-intellects, super-soldiers, or even super-athletes, would it be possible for the United States to stand idly by, watching, but not seeking to emulate these accomplishments?" It must be said that that writer concludes his argument by saying that a "genes race" is potentially more dangerous than the present "arms race".

Of course, frequently suspect value judgements, are an inescapable part of the debate. As Vukowich (1971) has remarked, "In 1935, when Professor Herman Muller was somewhat sympathetic to the cause of Marxism, he listed Lenin and Marx as examples of persons whose genotypes should be propagated. In 1959, after his social views had changed, Muller's list omitted these two and included Einstein, Pasteur, Lincoln and Descartes." That same writer goes on to comment on the distinctions between negative and positive eugenics programmes. His analysis is interesting and worth quoting *in extenso*. He states that although, ". . . the state might have the constitutionally required compelling interest to adopt a negative eugenics program, the state's interest in progagating superior qualities is probably not as compelling. A negative eugenics program is designed to diminish suffering and costs occasioned by genetic disease. The goals of positive eugenics are less concrete and less necessary. The disparity of state interest lies in the merit seen in the two programs. The eradication of misery and diminution of illness are clearly good today, but the expansion of intellectual capacity and the development of more robust physiques are not valued as highly. Life can be pleasant and fulfilling without increased intellectual and physical ability, but the suffering, costs and inconvenience occasioned by genetic diseases often render life unrewarding and unbearable. The difference in state interest in negative and positive eugenics programs may also be explained by the differences in the immediacy of the results of the two programs. Suffering and debility are real, observable phenomena; their diminution has readily comprehendible value. On the other hand, the values of increased intellect and better physique are more difficult to appreciate."

These statements take us on to the consequent issue of heritability; as Ferster (1966) has pointed out, most of the laws providing for compulsory sterilisation are predicated on the notion that mental illness and mental deficiency are heritable. She goes on to state that all such laws are, thus, open to question as both to their scientific validity and social desirability. Ferster further regards such legilsative provisions as being based on outdated scientific notions, particularly as regards conceptions of intelligence and means of testing it. Modern science, she argues, has avoided the inaccurate generalisations which characterised earlier studies and, especially, genetics has, ". . . evolved into a much more precise science and very significant work is being done on the inheritance of mental illness. Nevertheless, this is a field of great conflict; there has been much learned in recent years of the impact of environment on child development; of the essential role of psychodynamic factors in personality development and production of mental illness; and of the susceptibility of the child in utero to unfavourable metabolic and infectious conditions of the mother." Hence, the present state of scientific knowledge does not justify the widespread use of sterilisation procedures in the cases of mentally ill or mentally deficient people. As is, by now, well known, the work of Sir Cyril Burt, who was committed to the view that intelligence (whatever that may mean) was determined largely by heredity has been called into serious question. (Kamin, 1974). Indeed, O'Hara and Sanks (1956) note that the daughter of the person compulsorily sterilised in *Buck* v *Bell* (above) was regarded by her teachers as very intelligent. Furthermore, Areen (1985) comments that, in 1980, it was disclosed that the state of Virginia had sterilised some 8,300 people who were confined in mental institutions between 1924 and 1972. Amongst those was the plaintiff in *Buck* v *Bell* and her younger sister. Areen refers to the Director of a hospital in that State who was of the opinion that neither would have been regarded as retarded by modern standards. That same physician also asserted that Buck had been sterilised because she was the 19 year old mother of a daughter inaccurately adjudged (O'Hara and Sanks, above) to be "slow" and was herself the daughter of the daughter of an "antisocial" woman considered to be a prostitute.

In *Re B*, it was argued that the child in question would have been unable to care for any children of her own. Murdock (1974) has queried that basis for that assertion when he comments that a programme which, ". . . would use IQ as a basis for determining fitness for parenthood must take into account the imprecision of the testing process and the fact that both functional ability and testing scores can be improved through education and behaviour modification. It must consider the possibility of cultural bias in the testing procedure. Moreover, the tests were designed only to measure suitability for placement in an educational program; any correlation to fitness for parenthood would be fortuitous." Nonetheless, Murdock argues that there is some correlation between IQ and capacity for parenthood – in particular, he notes that a parent's capacity to provide for a child's intellectual growth decreases, in all probability, with decreasing IQ. Indeed, capacity to provide for a child's physical care may be similarly impaired. At the same time, that commentator has strongly expressed the view that any such general correlation ought not to be pressed too far, since, he suggests, there are empirical studies which have demonstrated that, ". . . persons with mild or moderate forms of retardation can fulfill the responsibilities of parenthood. If help were needed in particular situations, social agencies might be used to supplement and enrich the home environment so that children of retarded parents could enjoy normal intellectual development. Moreover, persons who are moderately or even severely retarded are often warm and affectionate, and can provide suitable environments for child-raising." However, from the facts of *Re B* (above), it is clear that the ward in that case would not have been capable of being included in the category described by Murdock.

Hitherto, this article has been concerned with the *sterilisation* of the *retarded*. In other words, first, is it only mental retardation which can (or should) amount to apparent incapability? Second, is sterilisation the only way of preventing particular individuals from producing children? The problem is well illustrated by the decisions of the California Court of Appeal in *People* v *Pointer* 10 Fam L.R. 1270 (1984); first, the appellant, who had two children, was a "devoted adherent", in the words of Kline P.J., of a rigorously disciplined macro-biotic diet. In consequence, one of her children had become seriously under-developed and the other had suffered severe growth retardation. The appellant was convicted of the felony of child

endangerment (California *Penal Code* s 273a (1)) and had been sentenced to five years probation. The conditions of the probation were that she serve one year in the county jail, that she participate in appropriate counselling programmes, that she not be informed of the whereabouts of the second child (who had been placed in a foster home) and have no unsupervised visits with him and have no custody of any children, including her own, without prior court approval. The final condition of the probation was that she not conceive during the probationary period.

First of all, Kline P.J. noted (at 1270) that, although the government might impose conditions of probation which qualified or impinged upon constitutional rights when circumstances inexorably required, any such conditions must be assessed in terms of their reasonableness. In *Pointer,* the court found the key condition to be reasonable, in that it related to the crime of child endangerment for which the appellant had been convicted. (*of People* v *Dominguez* 64 Cal. Rep. 290 (1967)). However, that finding did not conclude the inquiry: where, the court thought, a condition of probation impinged upon the exercise of a fundamental right and was challenged on constitutional grounds, it fell to be additionally determined as to whether the condition was impermissibly overbroad.

On that issue, Kline P.J. (at 1270) noted that the challenged condition was not apparently intended to serve any rehabilitive purpose, but to protect the public by the prevention of injury to an unborn child. His Honour was of the view that the purpose could, "... adequately be served by alternative restrictions less subversive of appellant's fundamental right to procreate. Such less onerous conditions might include, for example, the requirement that appellant periodically submit to pregnancy testing; and that upon becoming pregnant she be required to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician. If appellant bears a child during the period of probation it can be removed from her custody and placed in foster care, as was done with appellant's existing children, if the court then considers such action necessary to protect the infant." The judge likewise rejected a submission to the effect that it would be difficult for any such order to be supervised. Moreover, it seemed that, at the initial hearing, the trial judge had stated that he would not order the appellant to have an abortion should she become pregnant, but, at the same time, the judge had let it be known that he expected total compliance with the terms of the probation order with applicable sanctions in the event of a breach. Kline P.J. remarked that the stern admonition of the trial judge, ". . . doubtless made it apparent to appellant that in the event she became pregnant during the period of probation the surreptitious procuring of an abortion might be the only practical way to avoid going to prison." In the opinion of the court, a condition of probation which could place a defendant in such a position was, if coercive of abortion, improper. At any rate, if the appellant did conceive in violation of the condition, the condition itself would render it more likely that she would conceal the pregnancy (the more so, as the conditions did not include a prohibition on sexual intercourse). Hence, "less restrictive conditions aimed at protecting the child in utero and after birth would not so clearly induce resistance to the disclosure of pregnancy. To this extent, less restrictive alternative conditions would be easier to monitor and enforce and therefore better protect against the harm sought to be avoided by the trial court." Accordingly, it was held that the condition relating to conception was excessively broad in that less restrictive alternatives were available which would feasibly provide the protection which the trial court believed to be necessary. In one sense, the decision in *Pointer* goes against some, at least, of the other recent case law: *in Pointer, it had been admitted that there* was little chance of the appellant abandoning her commitment, both in respect of herself and her children, to her diet. In other words, her decision was conscious and deliberate and one must, in consequence, wonder if sterilisation might not be more appropriate in that case than in some of the others.

Where, then, are we? On one level, *Re B*, taken together with other decisions (see, for instance, *In the Matter of Moe* 432 N.E. 2d 712 (1982)), suggests that the courts will not refuse to order sterilisation, when such an order is within their competence, if it is considered appropriate. However, the major issue refers to the circumstances in which such an order would be appropriate. *Re B* cannot, of course, be confined to its own facts and must be related to cases such as *Gillick* v *West Norfold and Wisbech Area Health Authority* [1985] 3 All E.R. 402., itself another decision of the House of Lords. Much has been written about *Gillick* (Lee, 1986; Harlow, 1986; De Druz, 1987) and Lee (1986) has properly pointed out that that decision illustrates that the law has to respond to developments in society, that it demonstrates how the courts should set about that response and demonstrates the limitations of law as an answer to moral problems. Mrs. Gillick sought to exercise control over her daughter's reproductive function which, ultimately, she was not permitted to do. In *B*, the ward's mother and a local authority were permitted to exercise control over the girl's reproductive function. Both cases demonstrate, as de Cruz 1987) notes in relation to *Gillick,* that State intervention, through the agency of judge or medical practitioner, will be justified if strict requirements are fulfilled. That writer goes on to comment that, "Conscientious and scrupulous doctors will make careful and considered assessments of their patients' emotions and capacity to understand the full implications of their contraceptive requests. Others may find that conflict arises between their professional duties and their personal moral or religious beliefs, and be forced to make agonising choices. This may well be asking too much, even of professionals, not all of whom are suited by termperament or training to be effective psychologists and social counsellors."

Although the decision in *Re B* was made easier for the courts by the overwhelming weight of evidence in favour of the operation, the moral dilemma cannot be avoided. If *Re B* and *Re D* and *Re Eve* were correctly decided – and this writer is not going to say that they were not – matters involving difficult moral decisions may be made on the basis of ultimately fine factual distinctions. Lee (1986) strongly suggests that the courts are unsuitable venues for such decision making, but it is not easy to think of any venue which would be more appropriate. Dingwall, Eekelaar and Murray (1983) have written, albeit in a rather difficult context, that inevitably, "... arbitrary lines have to be drawn and bad cases decided. These difficulties, however, are not a justification for avoiding judgments. Moral evaluations can and must be made if children's lives and well-being are to be secured. What matters is that we should not disguise this and pretend it is all a matter of finding better checklists or new models of psycho-pathology – technical fixes when the proper decision is a decision about what constitutes a good society."

It is clear that *Re B* will not be the end of the matter – the very fact that it reached the House of Lords at all is quite sufficient evidence of that – and hard decisions will continue to be made. What is important, as Lee (1986) and Dingwall, Eekelaar and Murray (1983) emphasise, is that the debate is continued on an appropriate level. Family law has not been generally well served by legal theorists (Bates, 1983), although there are signs that that situation is being remedied (Freeman, 1985). Contract law has long had its theoretical base (Gilmore, 1974; Atiyah, 1979, 1981), family law now needs similar inspiration.

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