

PHYSICIANS:  
STERILIZATION:

Missouri law does not prohibit the performance of voluntary contraceptive human sterilizations by licensed physicians.

OPINION NO. 393

August 19, 1971

Herbert R. Domke, M.D.  
Acting Director  
Division of Health  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Domke:

This opinion is in response to your question in which you ask:

"May a licensed physician legally perform a voluntary, contraceptive human sterilization in this state?"

In this opinion we deal with the legality of voluntary non-therapeutic sterilization. We will not attempt to describe such procedures as they are commonly presently used in other states for "family planning." They are adequately described in legal publications such as the University of Pennsylvania Law Review, No. 113, p. 415 et seq., 1964-1965 and in lay publications such as Reader's Digest, January 1971, p. 53 and Reader's Digest, August 1971, p. 153.

Further, we are not here considering the legal aspects of castration but only note the obvious that there is a difference between castration and vasectomy: castration being physically more severe than the other. Davis v. Berry, 216 F. 413, 416 (D.C. Ia. 1914).

Nontherapeutic surgical sterilization means sterilization for the purpose of limiting the size of the person's family, as distinguished from sterilization for medical or health reasons. 35 A.L.R. 3d 1444 Anno.

At the outset we are confronted with the holding of this office, Opinion No. 62 dated October 3, 1946, to Herbert S. Miller, M.D. in which we held as follows:

". . . sterilization, by vasectomy or salpingectomy, or any other method, for eugenic, thereapeutic [sic] or economic reasons is not authorized by the existing laws of this state;

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that this operation affects an inalienable right of the injured party, and that the rights of the public are invaded, and consent will not compensate, compromise or ratify such an operation so as to remove the criminal liability. A physician who performs such an operation, even with the consent of the patient may be criminally liable unless the operation is performed for therapeutic [sic] reasons necessary to preserve the life of the patient, or prevent serious impairment of health and for which there is no other adequate medical relief; and, of course, it follows that, if the operation by the physician was illegal, then it would also be illegal for the hospital to make its facilities available for the performance of such an illegal operation."

The above conclusion was primarily based upon an interpretation of what is now Section 559.200, RSMo 1969, which is Missouri's "mayhem" statute. That section states:

"Every person who shall, on purpose and of malice aforethought, cut or bite off the ear, or cut or disable the tongue, put out an eye, or slit, cut or bite-off the nose or lip, or shall cut off or disable any limb or member of any person, with intent to kill, maim or disfigure such person, shall be adjudged guilty of mayhem, and on conviction, be imprisoned in the penitentiary for a term not exceeding twenty-five years."

Missouri has never had and does not now have statutes either expressly prohibiting nontherapeutic surgical sterilization or allowing such operations.

The origin of the mayhem statute is said to be the "Coventry Act" enacted after an assault made upon Sir John Coventry in the street, ". . . and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament, . . ." Section 559.200, V.A.M.S. Anno., p. 545. And, it has been further noted that at common law the crime of mayhem consisted of the unjustified infliction of an injury which rendered the victim less able to fight for the king, to defend himself, or to earn his own living. <sup>4</sup> Blackstone, Commentaries, 205-206 (7th Oxford Ed. 1775). However, in this respect it has also been stated that since neither vasectomy nor salpingectomy have any effect upon the physical capacity of the patient

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beyond the inability to procreate, they would not constitute mayhem at common law. 113 Univ. of Pa. L. Rev., p. 428. While the Missouri statute with respect to mayhem does not require a "lying in wait" and must be considered on its own, nevertheless, it would appear to be unreasonable to judge the criminal aspects of the mayhem statute in the premises and in light of the strict construction given to criminal statutes without regard to the historical purposes of the prohibition and the evolution of the legislation.

In our previous opinion we reached the conclusion that consent to a sterilization operation did not prevent the operation from being an unlawful act. Such a conclusion, however, appears to be an improper assessment of the consequences of consent in such a situation. While consent is not considered a defense in cases such as incest, seduction, adultery, or the maiming of another so as to render him unfit for service, Section 182, Wharton's Criminal Law, Volume 1, 12th Edition, nevertheless, it strains reason to disregard the element of consent and to inject the element of malice aforethought into an area such as this which involves consensual surgical procedures which have a valid and perhaps even a constitutionally protected purpose completely unrelated to the protection of the public.

In this respect we noted, in our previous opinion, from Wharton's Criminal Law, Volume 1, 12th Edition, Section 181 that:

"In those classes of crimes and offenses in which the injury is purely personal to the party, and affects his alienable rights only, the injury may be compensated and compromised and the act ratified, thus eliminating the criminal element and relieving the offender from liability to criminal prosecution; but it is otherwise in those classes of cases in which the inalienable rights of the injured party are affected, or the rights of the public are invaded."

While we have no Missouri cases dealing with this subject, we note that the question was thoroughly reviewed in Jessin v. County of Shasta, 274 Cal.App.2d 737, 79 Cal.Rptr. 359 (1969) by the Court of Appeal, Third District of California.

In considering the legality of a voluntary nontherapeutic surgical sterilization in the State of California, the court rejected an opinion by the Attorney General of that state which advanced the view that consensual vasectomies are illegal since they counter against a public policy of a high birth rate and suggested that such vasectomies constitute mayhem. The court stated that:

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". . . This latter suggestion is unacceptable for, as the trial court pointed out, a voluntary vasectomy is in no way done 'maliciously.' . . ."

This California Court of Appeal also recognized the holdings of Custodio v. Bauer, 251 Cal.App.2d 303, 59 Cal.Rptr. 463 (1967), Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), and Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957) and noted that a sterilization operation for the purpose of family limitation motivated solely by personal or social-economic considerations is not contrary to public policy. The court stated that it is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion that a court may constitute itself the voice of the community in declaring such policy.

Therefore, while we do not purport to consider the varied aspects of civil legal liability with respect to such surgical procedures which are dealt with elsewhere, 113 Univ. of Pa. L. Rev., p. 415 et seq.; 27 A.L.R.3d 906. 22 A.L.R.3d 1441; 93 A.L.R. 573, it is our view that the reasoning of the Court of Appeal of California in Jessin v. County of Shasta is applicable to the laws of this state.

Opinion No. 62 dated October 3, 1946, to Herbert S. Miller is hereby withdrawn.

#### CONCLUSION

It is, therefore, the opinion of this office that Missouri law does not prohibit the performance of voluntary contraceptive human sterilizations by licensed physicians.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General