

A Place for Criminal Law in the Regulation of Reproductive Technologies

*Angela Campbell**

On May 9, 2002, Canadian Health Minister Anne McLellan introduced Bill C-56, *An Act Respecting Assisted Human Reproduction* (the "AHR Act"),¹ in the House of Commons. The Bill was then re-introduced in the House on October 9, 2002 as Bill C-13. This proposed legislation strives to deal with the moral and ethical concerns that surround research and science associated with reproductive technologies. At the same time, the AHR Act strives to balance these concerns with the objective of promoting scientific and medical inquiry, which ultimately could lead to finding treatments for many of the illnesses that continue to plague humanity.

In an effort to harmonize these goals, the AHR Act enumerates a series of activities that are altogether prohibited, and lists other practices that are subject to tight regulatory measures. Activities banned by the proposed legislation include: human cloning for any purpose, creating a human embryo for any purpose except reproduction, maintaining an embryo outside a woman's body after its fourteenth day of development, gender determination and selection of a human embryo, paying for surrogacy services and brokering or arranging surrogacy services.²

Other activities, though not prohibited, would be subject to regulatory control. Provisions concerning controlled activities regulate: the collection, retention and dissemination of personal information collected from sperm, ova and embryo donors;³ the reimbursement of these donors and surrogate mothers for expenditures incurred by their donations or surrogacy;⁴ the combination of human and non-human genomes;⁵ and the use, storage and transport of sperm, ova or embryos.⁶ Controlled activities are subject to licensing provisions, and may not be carried out in the absence of a license granted by the Assisted Human Reproduction Agency of Canada, a new administrative body that would be created by Bill C-13.⁷

* Angela Campbell, Assistant Professor, University of Ottawa. The author wishes to thank Timothy Caulfield and Kathy Glass for their helpful comments and suggestions.

¹ Bill C-56, *An Act respecting human reproduction*, 1st Sess., 37th Parl., 2002.

² See AHR Act, ss. 5-9, which sets out all of the activities prohibited by the proposed legislation.

³ AHR Act, ss. 14-19.

⁴ AHR Act, s.12.

⁵ AHR Act, s.11.

⁶ AHR Act, s.10.

⁷ AHR Act, ss. 21(1) and 40(1).

The development of the AHR Act as a law that merges prohibited and regulated activities results from its prolonged and difficult history. An initial step in its evolution occurred with the formation of the Royal Commission on New Reproductive Technologies in 1989, and the completion of its final report.⁸ This report recommended that the federal government ban certain activities (such as human cloning, creating animal-human hybrids and commercial surrogacy), and establish an independent regulatory body to govern other permissible activities related to reproductive technology.

The *Royal Commission Report* was followed by a voluntary moratorium in 1995 on many activities that the Royal Commission found unethical and unacceptable, and later by the introduction of Bill C-47, the *Human Reproductive and Genetic Technologies Act*.⁹ Bill C-47 was heavily criticized for the fact that it prohibited and criminalized problematic reproductive technologies, and failed to create a regulatory body that would monitor and control permitted activities.¹⁰ However, when Bill C-47 was tabled, Health Canada also published *Setting Boundaries, Enhancing Health*¹¹ which outlined the federal government's intention to establish a regulatory framework for monitoring reproductive technologies that had not been banned by Bill C-47.

Although a parliamentary sub-committee was constituted to hear evidence on Bill C-47 in early 1997, the Bill died on the order paper on April 28, 1997, when a federal election was called. Since that time, Health Canada has set to work on creating a Bill that amalgamates criminal and regulatory approaches to human reproductive and genetic technologies. To this date, the end result is the proposed AHR Act, which delineates prohibited and controlled activities, and distinguishes each from the other.

Even though this new legislation incorporates the regulatory strategy that critics claimed was lacking from its predecessor, Bill C-47, the AHR Act has, since its inception, been subject to debate and controversy. Once again, the sticking point is the prohibition and criminalization of activities that Parliament has deemed

⁸ Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vols. 1, 2 (Ottawa: Supply and Services Canada, 1993) [hereinafter *Royal Commission Report*].

⁹ Bill C-47, *An Act respecting human reproductive technologies and commercial transactions relating to human reproduction*, 2d Sess., 35th Parl., 1996.

¹⁰ See A. Harvison Young and A. Wasunna, "Wrestling with the Limits of Law: Regulating Reproductive Technologies" (1998) 6 Health L.J. 239; B. Dickens, "Do Not Criminalize New Reproductive Technologies" (1996) 17 Policy Options 11; and T. Caulfield, M. Hirtle & S. LeBris, "NRTs: Is Criminalization the Solution for Canada?" (1997) 18:1 Health L.Can. 3. See also P. Healy, "Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada" (1995) 40:4 McGill L.J. 905, which critiques the recommendations made by the Royal Commission on New Reproductive Technologies concerning statutory prohibitions and offences relating to reproduction and reproductive technologies.

¹¹ Government of Canada, *New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health* (Ottawa: Government of Canada, June 1996).

unacceptable within our social and moral culture. While some commentators¹² endorse the prohibitions formulated by the AHR Act and by the earlier draft of this new law,¹³ others have criticized them, marshaling a host of rationales as to why regulation of the impugned activities is preferable to their criminalization.¹⁴

In this paper, I address the primary concerns raised by critics, and maintain that none of them is compelling enough to exclude criminal law from legislation governing human reproductive and genetic science. This response to critics will form the first part of this work. The second part examines the justifications for extending and applying criminal prohibitions and sanctions to the realm of science and biotechnology involving human health, safety and integrity. Ultimately, I conclude that Parliament must articulate more explicitly and transparently the policy rationales underlying its decision to legislate these matters through the exercise of its criminal law power. Absent such a policy explanation, use of the criminal law in this context will remain open to valid scrutiny and challenge.¹⁵

Criminal Law and Human Reproductive Technologies: What the Critics are Saying

Commentators who take issue with the criminal prohibitions in the proposed legislation governing assisted human reproduction have cited several concerns. The most prominent arguments voiced are: (1) that members of Canadian society do not agree on the criminalization of these technologies; (2) that criminal law is too blunt and rigid a tool to wield in this domain; and (3) that criminalization could preclude viable scientific and medical breakthroughs, which could ultimately alleviate human suffering.

In the discussion that follows, I consider each of these arguments in turn. This analysis demonstrates that, whether these arguments are considered individually or collectively, they lack the persuasion necessary to convince legislators and policy

¹² See F. Baylis and J. Downie, "Ban Cloning. Do You Copy?" *The Globe and Mail* (3 July 2002) A13; M. Somerville, "A Clone by any Other Name" *The Globe and Mail* (15 May 2002) A19; and F. Baylis, "Brickbats and Bouquets for the Draft Legislation on Assisted Human Reproduction" (2001) 10:1 Health L.R. 3.

¹³ Health Canada, *Proposals for Legislation Governing Assisted Human Reproduction: Draft Legislation* (May 2001), online: Health Canada <http://www.hc-sc.gc.ca/english/pdf/reproduction/legislation.pdf> (date accessed: 29 July 2002) [hereinafter *Proposals for Legislation*].

¹⁴ A. Daar *et al.*, "Ban Cloning, Not Its Life-Saving Cousin" *The Globe and Mail* (9 May 2002) A21; "Don't Criminalize this Therapeutic Research" *The Globe and Mail* (10 May 2002) A16; Canadian Bar Association, National Health Law and Family Law Sections, "Submission on Draft Legislation on Assisted Human Reproduction" (2002) 10:2 Health L.R. 25 [hereinafter "Submission on Draft Legislation"]; and T. Caulfield, "Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39:2 Alta. L. Rev. 335 [hereinafter "Clones, Controversy and Criminal Law"].

¹⁵ My views on the need for Parliament to articulate a clear policy justification for relying on its criminal law jurisdiction in the proposed AHR Act are discussed in greater detail in A. Campbell, "Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies" (2002) 11:1 Health L. Rev. 26.

makers that criminal law should not be brought to bear on human genetic and reproductive science and medicine.

(a) Lack of Social Consensus

Several critics have argued that the controversy surrounding reproductive science and research make it an improper target of the criminal law. According to Harvison Young and Wasunna, the *Royal Commission Report* and subsequent initiatives by the Canadian government have exaggerated the level of social consensus in Canada on the issue of reproductive technologies. Given this divergence in views, they take the position that criminal law is ill-suited to regulate in this area. More specifically, they argue that the absence of social consensus will not prevent controversial activities from being carried out, even if they are criminalized. Rather, they will be forced underground, where their control and regulation will be much more difficult, if not impossible.¹⁶

Although Harvison Young and Wasunna raised these concerns with respect to the AHR Act's predecessor, Bill C-47, similar arguments were voiced following Health Canada's introduction of *Proposals for Legislation Governing Assisted Human Reproduction* in May 2001,¹⁷ and again after the introduction of the AHR Act itself in May 2002. This is exemplified in the Canadian Bar Association (CBA)'s National Health Law and Family Law Sections' "Submission on Draft Legislation". This paper emphasizes that the only activities targeted by the *Proposals for Legislation* that Canadians agree should be prohibited are commercialized surrogacy and reproductive cloning. Thus, because "[c]riminal law should be reserved for those areas where there is a high degree of social consensus," these are the only activities that should be criminalized. In contrast, other activities dealt with in the draft legislation should be controlled through a regulatory, rather than a criminal, scheme.¹⁸

Caulfield takes a similar view in his commentary on the *Proposals for Legislation*. Like the CBA's Health and Family Law Sections, Caulfield maintains that criminal law should be restrictively applied and only to areas where there is a high degree of social consensus. In this connection, he refers to various academic writings that debate the morality of the prohibited activities, as well as surveys that reflect the public's divergent perceptions and opinions regarding these activities. Caulfield thus maintains that there is no consensus, either in Canada or internationally, on how to address a number of the activities that the *Proposals for Legislation* (and now, the AHR Act) would criminalize. Further, because social attitudes with respect to reproductive technologies are in a constant and rapid state of flux, it is unlikely that there will ever be significant social agreement on this topic. As such, a regulatory framework is preferable to criminal prohibitions, since it is more

¹⁶ Harvison Young and Wasunna, *supra* note 10 at 243-54.

¹⁷ *Proposals for Legislation*, *supra* note 13.

¹⁸ Canadian Bar Association, National Health Law and Family Law Sections, *supra* note 14 at 26.

flexible, and thus better able to keep up with and reflect changing social views and understandings.¹⁹

Caulfield's more recent article on the AHR Act again emphasizes the lack of social consensus on this issue. He maintains that absent strong public agreement regarding how reproductive technologies should be regulated, Parliament should refrain from criminalizing activities associated with this area of science and research. This remains the case unless legislators can articulate strong policy grounds to support criminal prohibitions.²⁰

Arguments related to social consensus also resound in Daar *et al.*'s editorial on the proposed legislation, written just prior to the AHR Act's introduction in the House of Commons last May. The authors' comments are directed specifically at the technique of "therapeutic cloning." This practice involves transferring the genetic material of one cell into an egg cell whose own genetic material has been removed. The new cell then divides and stem cells can be removed from the newly created cells and made into cells or tissue to be placed again into the individual who donated the original cell. Some members of the scientific and medical communities believe that this technique has the capacity to treat various diseases.²¹ Daar *et al.* note that a PricewaterhouseCoopers poll found that over 75 per cent of Canadians approve of cloning human tissue for medical purposes, thereby suggesting their acceptance of therapeutic cloning. As such, Daar *et al.* argue against the criminal prohibition of this technique, which is banned by the AHR Act.²²

Criticisms premised on the absence of social consensus are important to consider and, at first glance, quite compelling. Parliament is proposing to enact legislation that arguably fails to reflect the will of most of the citizens it has been elected to represent. Surely this must be problematic in a liberal democracy such as ours in Canada?

However, a closer look at the way criminal law figures into Canadian society reflects that social consensus is not always a necessary precondition to the implementation of a legally valid criminal prohibition. A quick flip through the *Criminal Code*²³ reveals a number of activities that are criminally banned in Canada – such as bigamy, prostitution or assisted suicide – which might not be viewed as morally blameworthy by all Canadians, and which arguably could be dealt with more

¹⁹ Caulfield, "Clones, Controversy and Criminal Law", *supra* note 14 at 338–41.

²⁰ T. Caulfield, "Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: *The Assisted Human Reproduction Act*" (unpublished manuscript, on file with the author, 2002) [hereinafter "Politics, Prohibitions and the Lost Public Perspective"].

²¹ Medical Research Council, *Therapeutic Use of Cell Nuclear Replacement: Therapeutic Cloning* (September 2000), online: http://www.mrc.ac.uk/pdf_therapeutic_cloning.pdf (date accessed: 13 September 2002).

²² Daar *et al.*, *supra* note 14.

²³ R.S.C. 1985, c. C-46 as am.

effectively through other means, such as social, cultural or institutional norms, policies and practices.

In raising the examples of bigamy, prostitution and assisted suicide, I do not wish to insinuate or comment on the legal or social propriety of criminalizing these activities. Rather, I use them to highlight that unanimity in social views is not, in every case, necessary before Parliament can enact a valid criminal prohibition.

Furthermore, while there is no question that Parliament has a responsibility to ascertain the public's views on an issue that it intends to legislate, we must also ask whether this should be its sole or even its primary basis for decision-making. In my view, it is not. While social views are relevant, social *values* have an even more important role to play. The ideals that we as a society espouse and consider fundamental to our ability to thrive both individually and collectively must always illuminate the legislature's decision-making process.

These values are not always evident. However, they are reflected, in a general way, by the *Canadian Charter of Rights and Freedoms*.²⁴ While the *Charter* sets out the specific rights of individuals, its tone and content also illuminate the more general, overarching principles that constitute our legal and social bedrock. As such, the *Charter*, and the judiciary's interpretation of it, provide useful guidance for legislators and policy-makers attempting to discern what would or would not be a valid enactment of legislation, criminal or otherwise.²⁵

Legislators thus should be asking themselves two principal questions when engaging in the process of law-making. First, they should question: "What do Canadians want?" or, usually the more relevant question is: "What do *most* Canadians want?" Once that question is resolved, the second question legislators must pose is: "Is what [most] Canadians want consonant with the values that are integral to Canadian society?" It is only when this second question is answered affirmatively that legislators should engage in formulating legislation that reflects public opinion.

With this analytical approach in mind, we see that it is not necessarily problematic that public opinion might not be clearly reflected in the AHR Act. Rather, we must also examine whether social views on this topic harmonize with our social values. As such, we must begin by considering what values and principles are called into play by assisted human reproduction and the technologies associated with this. Thinking about the potential impact of these activities and technologies

²⁴Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

²⁵As McTeer notes, guarantees set out in the *Charter* and in provincial and federal human rights legislation must be taken into consideration when assessing the societal interests at stake in the context of reproductive technologies, and how these interests may be impacted or threatened by these technologies or their related activities. See M. McTeer, "A Role for Law in Matters of Morality" (1995) 40:4 McGill L.J. 893 at 900-01.

– such as payment for or brokering surrogacy services, or creating human embryos for use in research – it becomes apparent that they raise issues about the extent to which human life can be created, manipulated and commodified. Acknowledging this, we are then faced with the question of where we turn for guidance on how the state can deal with these issues most appropriately and effectively.

While the *Charter* does not provide explicit guidance in this regard, certain *Charter* guarantees, in particular the right to life, liberty and security of the person in s.7, and the equality right in s.15, can inform our analysis. In *Rodriguez v. British Columbia (Attorney-General)*,²⁶ the Supreme Court of Canada was called upon to determine the constitutionality of s.241(b) of the *Criminal Code*, which prohibits assisted suicide. A majority of the Court upheld the validity of s.241(b). Writing for the majority, Sopinka J. based his analysis on the premise that s.7 of the *Charter* enshrines the “sanctity of life” principle. He found that there is a “generally held and deeply rooted belief that human life is sacred or inviolable,” and that our society has a respect for human dignity and human life, each having a deep intrinsic value of its own.²⁷

Canada’s highest Court has also considered the meaning of human dignity. In *Law v. Canada (Minister of Employment and Immigration)*,²⁸ the Supreme Court unanimously held that the notion of human dignity is fundamental to the equality guarantee enshrined in s.15(1) of the *Charter*. Writing for the Court, Iacobucci J. held that s.15(1) exists to promote human dignity and prevent its violation through discrimination.

While a *Charter* analysis suggests – in quite a general way – the values that might be affected by activities and technologies associated with assisted human reproduction, it is bolstered by international perspectives on health and human rights in this context. Pursuant to a worldwide review of reports, bills and legislation regarding assisted human reproduction, Knoppers and LeBris found that certain core principles consistently emerged from legislative and policy initiatives in this area:

Having examined the general tendencies and differences revealed in the reports of commissions, as well as in the limited legislation that exists, common normative values that transcend cultural and jurisdictional differences emerge. These values take the form of common bioethical principles: the inherent dignity of the human person, the security of human genetic material, the quality of services and the inviolability and inalienability of the human person.²⁹

²⁶ [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

²⁷ *Ibid.*, at 585.

²⁸ [1999] 1 S.C.R. 497.

²⁹ B. Knoppers and S. LeBris, “Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues” (1991) 17:4 *Am. J.L. and Med.* 329 at 361.

As such, we see that the sanctity or inviolability of human life and human dignity are viewed both internationally and domestically as fundamental values worthy of state protection. This principle must inform the implementation of legislation regulating assisted human reproduction. Our Supreme Court's reasoning in *Rodriguez*, as well as international perspectives, indicate that human life should be treated as an end in itself, and not be used to achieve a separate objective. This analytical approach thus appears inconsistent with legislation that would allow surrogate mothers or ova or sperm donors to be paid for their services, as this would essentially commodify human life and the human body. It also would not harmonize with permitting embryos to be created solely for research purposes. In this context, the problematic issues that require reconciliation with legal and ethical principles are the commercialization of human reproductive "material," human embryos and human life, and the creation of life for utilitarian purposes.³⁰

Moreover, the Supreme Court's recognition of the intersection between human dignity and equality would support a statutory prohibition on human reproductive cloning, as this technique has the potential to undermine human individuality and diversity. In the result, human dignity and the guarantee of equality could undeniably be affected.

Given the values associated with reproductive technologies and the manner in which these values have been interpreted by our Supreme Court and internationally, it would be improper for Parliament to rest its decision-making solely on the basis of consulting public opinion. In addition to social interests and concerns, our legislators must also consider the values potentially affected by this new area of

³⁰ A distinction made here is one between research using pre-existent embryos, and research that relies on human embryos created solely for use in research. The former are embryos created at infertility treatment clinics for the purpose of reproduction, and are "left behind" once fertilization has successfully occurred. These embryos will be discarded once they are no longer needed for reproduction. In contrast, embryos can also be created through *in vitro* fertilization and somatic cell nuclear transfer solely for the purpose of using them for research. Use of the latter types of embryos in research is generally viewed as more morally problematic, seeing as the purpose of their creation is research, rather than reproduction. See M. Herder, "The UK Model: Setting the Standard for Embryonic Stem Cell Research?" (2002) 10:2 Health L. Rev. 14 at 15.

But, members of The President's Council on Bioethics who argued in favour of allowing embryo creation for the purposes of therapeutic cloning have challenged this view. They argue that the purpose for which an embryo is created does not affect the morality of using that embryo in biomedical research. Rather, the ethics of such research should be determined by the moral status of the embryo itself, more specifically, the extent to which it is perceived as being similar to a human person, and the nature and scope of the respect it is accorded. These members have further argued that the morality of creating embryos for research or for reproduction is similar since, in both scenarios, the embryos are created with the knowledge that at least some will be discarded:

[T]he moral responsibilities for producing extra IVF embryos *later used* in research are not really so different [from creating embryos for use in research]. In the case of IVF and leftover embryos, the individuals who create them for reproductive purposes typically and deliberately create more embryos than they are likely to use, and therefore know in advance that some will probably be destroyed. [emphasis in original text]

The President's Council on Bioethics, *Human Cloning and Human Dignity: An Ethical Inquiry* (July 2002), online: <http://www.bioethics.gov/cloningreport> (date accessed: 13 August 2002) at ch. 6.

science, namely respect for human life and human dignity. Because the activities prohibited under the AHR Act have the potential to jeopardize and undermine these values, Parliament is right to look beyond public opinion in its legislative and policy decision-making in this area.

At the same time, the federal government must be explicit and frank about the fact that the AHR Act does not rest on social consensus, but on certain fundamental values lying at the core of Canadian society. As some commentators have pointed out, statistics reflect that there is in fact no real social consensus on some of the prohibited activities under the proposed legislation.³¹ Therefore, it is up to Parliament to explain more precisely to its constituents why it has chosen to legislate in this domain, and why it has done so through the use of criminal bans. Relying on the contention that there is social consensus on this issue is not convincing, as it is unsupported by the social science evidence. Until a more comprehensive legislative justification is articulated, Parliament's activities in this area will be perpetually scrutinized and challenged, thereby revoking attention from the more important social and scientific issues sure to arise in the area of reproductive technologies.

(b) Criminal Law's Severity and Inflexibility

A second argument commonly raised by those who oppose the criminal regulation of reproductive technologies maintains that criminal law is to be used sparingly in our society, and is too blunt and rigid a tool for dealing effectively with such technologies.³² Because scientific change in this area is so rapid, and because public opinion tends to shift with scientific developments, a malleable and simplified regulatory structure is needed in order to reflect and respond to these scientific and social changes. Critics thus argue that regulation, as opposed to outright prohibition, is the preferable focus for legislation in this area.

Caulfield's position reflects this view. He maintains that criminalizing controversial reproductive practices is problematic, since such prohibitions are unnecessary, and not the best way to regulate these matters. He states: "Criminal laws are blunt, inflexible, and require a good deal of time and political energy to change – terminal characteristics in an area as dynamic and controversial as reproductive technologies."³³

Thus, according to Caulfield, a regulatory body should be charged with determining which reproductive techniques should be permitted or prohibited. This body also should be responsible for amending and interpreting this list of activities

³¹ See Daar *et al.*, *supra* note 14; Caulfield, "Clones, Controversy and Criminal Law", *supra* note 14; Caulfield, "Politics, Prohibitions and the Lost Public Perspective", *supra* note 20; Canadian Bar Association, National Health Law and Family Law Sections, *supra* note 14.

³² See Daar *et al.*, *supra* note 14.

³³ Caulfield, "Clones, Controversy and Criminal Law", *supra* note 14 at 337.

as biotechnological changes occur. He argues that this regulatory approach will be better able to respond to the continuously changing issues arising in this area than would a legislative scheme based on criminal prohibitions.³⁴

The CBA's National Health Law and Family Law Sections take a similar position. They underscore that reproductive technologies are characterized by their quick pace of change. The legislation created for dealing with these technologies thus must be able to respond to the emerging and changing social concerns, public opinions and scientific developments that arise in this area.³⁵ Creating a regulatory body responsible for defining, interpreting and amending a list of prohibited reproductive technologies is thus preferable to criminally banning these activities, as a regulatory approach could respond quickly and effectively to scientific and social change.³⁶

Harvison Young and Wasunna place a somewhat different value on a regulatory scheme. They maintain that prohibiting controversial activities related to reproduction and research might drive these practices underground, and result in the exploitation of vulnerable members of society, particularly women. In contrast, regulation would provide a framework through which the activities in question could be carefully monitored to ensure they are conducted in a safe and ethical manner.³⁷

These arguments raise several valid points. It is true that reproductive technologies are marked by rapid change. In just the last few years, we have witnessed numerous scientific developments in this area, which have raised an array of new social and ethical concerns.³⁸ Because reproductive technologies are in an almost constant state of flux, the legislation that we have in place for regulating them must indeed be able to recognize and accommodate the developments that unfold.

At the same time, this does not necessarily preclude the application of criminal law in this domain. Criminalization is not immutable. Because an act is prohibited by Parliament today does not mean that this will remain the case in 10, 5 or even 1 year from now. Admittedly, the process of legislative change takes time, probably more time than it would take for an administrative regulatory body to amend a list of prohibited activities. However, where there is political and social

³⁴ *Ibid.*, at 344-45.

³⁵ Canadian Bar Association, National Health Law and Family Law Sections, *supra* note 14 at 26.

³⁶ *Ibid.*

³⁷ Harvison Young and Wasunna, *supra* note 10 at 268-70.

³⁸ See e.g. "Stem Cells Useful Against Parkinson's" Applied Genetics News (July 2002), online: LEXIS: (News, APPGEN); "Therapeutic Cloning Works for Cows" Applied Genetics News (June 2002), online: LEXIS: (News, APPGEN); "Pigs Cloned for the First Time" Applied Genetics News (April 2000), online: LEXIS: (News, APPGEN); and M. Pezzella, "Test-Tube Baby Born to be Cell Donor for Ailing Sister" Biotechnology Newswatch (16 October 2000), online: LEXIS (News, BIOTEC).

will to change the Canadian legal landscape, Parliament can be swift to act, even in the area of criminal law.³⁹

A recent – albeit dramatic – example of this is Bill C-36, the new anti-terrorism legislation that was created in the aftermath of September 11.⁴⁰ The passage of this Bill was swift, even though it was hotly debated in Parliament and in Canadian society more generally.⁴¹ Its first reading was October 15, 2001, and it received royal assent just over two months later, on December 18, 2001. Such quick passage of a bill is rare, and largely reflects a visceral and highly emotive reaction to a new perceived threat of terrorism. As such, Bill C-36 should not be used as an example of how future legislative change in the area of reproductive technologies is likely to occur. At the same time, it does serve to illustrate the pace with which Parliament can act when legislative action is deemed critical and necessary.

Further, because the issues raised by reproductive technologies – in particular, the degree to which we should create, manipulate and potentially commodify human life – are so fundamental, their regulation should not be left in the hands of an administrative body that is unaccountable to the public. Unlike Parliament, such a regulatory entity would not democratically represent Canadian society. It also would not fall under the same level of public and media scrutiny, nor make decisions with the same level and intensity of political debate.⁴² Considering these factors, it becomes difficult to argue that Parliament should delegate control over the scientific activities in question to administrators.

It has been argued that the inherent deficiencies of administrative regulation can be overcome. The CBA's National Health Law and Family Law Sections state that the body created to regulate reproductive technologies can and should become more accountable. As such, it should be composed of members of both the public and of Parliament, its decision-making process should be as transparent as possible, and it should be required to engage in an interdisciplinary and public consultation process before amending its list of prohibited activities. The CBA also suggests a "negative resolution" process, whereby regulations that the body proposes would not come into effect if rejected by a resolution of the House of Commons and the Senate.⁴³

³⁹ As Baylis and Downie note, "with political will, legislation can be changed in as little as 24 days." See Baylis and Downie, *supra* note 12.

⁴⁰ Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2002.

⁴¹ See e.g., "Anti-Terrorism Bill Protesters Sit-In at Justice Minister's Edmonton Office" *Canadian Press Newswire* (9 December 2001), online: LEXIS (News, CBCA); C. Hebert, "Put Brakes on Liberal Steamroller" *The Toronto Star* (30 November 2001) A25; and T. Harper, "Big Brother Looms with Terrorism Bill: Watchdog" *The Toronto Star* (24 October 2001), online: LEXIS (News, TSTAR).

⁴² This argument has also been made in Baylis and Downie, *supra* note 12.

⁴³ Canadian Bar Association, National Health Law and Family Law Sections, *supra* note 14 at 26-27.

While these proposals might allow an administrative body to be more receptive and responsive to public opinion and social concerns, they still hold only a diminished promise of public accountability. Moreover, if a "negative resolution" process is accepted and implemented, this could make the administrative entity's decision-making process equally, or perhaps even more cumbersome than the legislature's. This negative resolution process might be engaged more often than we currently anticipate, given that we cannot presently gauge what the future of reproductive and genetic science will hold. What we *can* say with a fair amount of certainty is that these developments will be controversial. A negative resolution process would be fair game for legislators to seize upon any time they disagree with a change proposed by the administrative body. In this way, the inflexibility sought to be averted by regulating rather than criminalizing reproductive technologies will resurface, and may even be more difficult to overcome.

Furthermore, a review of the AHR Act and the draft of this proposed legislation reveals that Parliament did not overlook the importance of keeping this legislation flexible. The 2001 *Proposals for Legislation* required that the legislation be reviewed by Parliament within five years of its enactment.⁴⁴ After hearing evidence on the draft legislation from numerous witnesses, the Standing Committee on Health found that a five-year term for review was too long. In its recommendations to Health Canada, the Standing Committee wrote:

Once the legislation is adopted by Parliament, regulations essential to its application will have to be developed. The regulatory body will also have to be set up and be ready to go. It may therefore take months before the legislation can be proclaimed in force. In the meantime, the technology employed in assisted human reproduction and related research may evolve at such a rapid pace that the new legislation will require updating.

Because of the rapidly changing scientific and technological environment, we feel that a parliamentary review within three years would be more appropriate. The subject matter of this legislation is highly sensitive and controversial. Parliament must carry out an earlier, more timely review to ensure that the legislation is still in tune with the changing times and technologies.⁴⁵

As such, the Standing Committee's Recommendation 32 stated that the new legislation should require its review by Parliament within three years of its proclamation date.

⁴⁴ *Proposals for Legislation*, s.42, *supra* note 13.

⁴⁵ Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001), online: <http://www.parl.gc.ca/InfoComDoc/37/1/HEAL/Studies/Reports/healrp01/08-rap-e.htm> (date accessed: 31 July 2002).

Parliament has followed this recommendation. Subsection s.70(1) of the proposed AHR states:

70.(1) The administration of this Act shall, within three years after the coming into force of section 21, be reviewed by any committee of the Senate, the House of Commons or both Houses of Parliament that may be designated or established for that purpose.

This provision provides built-in flexibility for the legislation and addresses concerns related to its ability to keep pace with scientific change. In the event that science has progressed within three years such that a specific technique currently prohibited is actually shown to be safe, viable, and ethical, Parliament will have the opportunity to consider this at the time of the mandatory review, and might then reflect a new acceptance of this activity through a legislative amendment.

Having said this, however, I would note that the terminology in s.70(1) is quite vague, and leaves the notion of a mandatory three-year “review” quite open to interpretation. In my opinion, Parliament would do well to elaborate on this provision, so as to provide some assurance that this review of the AHR Act will be carried out with careful scrutiny and with a view to making meaningful and substantive amendments where necessary.

In addition to the legislative flexibility created by the s.70(1) mandatory three-year review, the apparent rigidity of the criminal law in this context is somewhat diminished when we consider the key principles of Canada’s criminal sentencing regime. Until now the issue of sentencing has not played a large role in the debate over the propriety of relying on the criminal law to regulate reproductive technologies. Yet, the importance of this issue cannot be underestimated. The real impact and application of a decision to criminalize the activities envisaged by the AHR Act will be brought to bear when we consider the Act’s potential penal sanctions.

The offences created under this legislation are set out at ss. 60 and 61. Section 60 deals with prohibited activities, and provides that anyone who carries out such an activity is liable on an indictable offence, to a maximum fine of \$500,000, and/or a maximum ten-year prison term. Section 61 states that breach of any license term or condition, or breach of any provision in the AHR Act (except those which stipulate prohibited activities) can result in a maximum fine of \$250,000 and/or a maximum of five years imprisonment.

There is no question that the maximum penalties set out for the offences created by the AHR Act are harsh. I even question whether they are unduly harsh. That aside, it is essential to underscore that the law sets out maximum penalties, and most offenders will not be subject to them. Rather, our sentencing structure requires the sanction imposed for any given offence to be tailored to the offender’s culpability and the specific circumstances of the offence. This is embodied in s.718.1 of the *Criminal Code*, which defines the fundamental principle of sentencing. It states:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This language resonates with Lamer C.J.'s reasons for judgment in *R. v. C.A.M.*,⁴⁶ where he discussed the purpose and principles of sentencing in substantial detail. In his analysis, the Chief Justice emphasized the importance of a "reasoned and measured determination" of a sanction that adequately reflects an offender's moral culpability.⁴⁷ He thus held:

In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.⁴⁸

In light of *C.A.M.* and s.718.1, the true degree of moral blameworthiness we attach to an impugned act is seen not only by virtue of the act's criminalization, but more importantly, by the way that act is punished. The nature and severity of any sanction, including the sanction for an offence created by the new AHR Act, must reflect the particularities of that offence and of the offender. So, for example, a researcher who clones humans for eugenic purposes surely should receive a harsher sentence than an individual who fails to comply with a technical term of a license, or who compensates a surrogate mother for more than the expenditures of her pregnancy.

Thinking about the role of the Canadian sentencing regime enables us to see that our criminal law system is not as blunt and inflexible as it may first appear. Our sentencing rules and principles vest courts with an extensive amount of discretion as to how specific crimes should be penalized. Although Parliament in the AHR Act has set out maximum punishments for offences created in the legislation, the rest is left up to sentencing judges who are bound to follow the principles set by the *Criminal Code* and the Supreme Court of Canada's jurisprudence. These principles inject flexibility into our criminal justice system, and allow the severity of the criminal law to be adjusted to reflect the specific factual circumstances at hand.

(c) Potential Loss of Medical and Scientific Benefit

A third common argument frequently advanced in connection with the criminalization of reproductive technologies is that criminal prohibitions will create a chill factor in scientific and biomedical communities. As a result, Canadians will face the potential loss of scientific progress and the health benefits that could follow from this. It is also argued that scientists and researchers who seek a more liberal

⁴⁶ [1996] 1 S.C.R. 500 [hereinafter *C.A.M.*].

⁴⁷ *Ibid.*, at 557-58.

⁴⁸ *Ibid.*, at 559.

working environment will not move to, or remain in Canada. Rather, they will choose to work in other jurisdictions, where fewer restrictions are placed on reproductive and genetic science and research.⁴⁹ Canada thus risks losing its status of being home to cutting-edge research and the sharpest scientific minds. Daar *et al.* articulate these concerns in their article, published just before the AHR Act was introduced in the House of Commons:

By establishing a progressive regulatory climate in Canada, the best scientific minds will be drawn here. This, in the long run, is good for the health of Canadians and for economic growth. That is not to say that economics should determine a morally complex issue – on the contrary, the social and ethical issues should take precedence – but at some stage, potential economic benefit is a consideration.⁵⁰

Daar *et al.* made these comments with specific reference to the technique known as therapeutic cloning, which is prohibited under the AHR Act.⁵¹ As described above, this process involves the substitution of a donor's DNA for the nucleus of an egg from another donor. After several days, cell division occurs and stem cells are removed from the days-old embryo, which are then used to create the particular form of tissue required by the original DNA donor. This tissue is subsequently transplanted in that donor. Because the donor's own DNA makes up the new tissue, many scientists believe there is a diminished risk that the newly created cells and tissue would be rejected.

Therapeutic cloning is widely perceived as holding a great potential to develop therapies for a range of severe illnesses such as spinal cord injury, diabetes, Parkinson's disease, and heart disease. It is thus not surprising that arguments in favour of allowing research involving therapeutic cloning have been frequent and vocal.⁵²

⁴⁹For example, England's *Human Fertilisation and Embryology Act, 1990*, c.37 permits therapeutic cloning to be carried out as a licensed activity.

⁵⁰Daar *et al.*, *supra* note 14. Similar arguments have been raised in the American context. See R.S. Shapiro, *Statement on the Ethics of Cloning* (7 June 2001), online: U.S. House of Representatives Committee http://www.house.gov/judiciary/shapiro_060701.htm (date accessed: 1 August 2002).

Baylis has responded to concerns regarding the potential loss of scientists to countries with more liberal research environments. See Baylis, *supra* note 12 at 4. She maintains that these arguments are "mostly scare-mongering" and that even if there is truth underlying them, they are still an insufficient basis for allowing research that is considered ethically unsound.

⁵¹Section 5(1)(a) of the AHR Act bans the creation of any human clone, or the transplant of a human clone into a human being. This provision does not distinguish between reproductive cloning and therapeutic cloning.

⁵²See Daar *et al.*, *supra* note 14; V. Brower, "Experts Question Utility of Adult Stem Cells for Transplantation" *Biotechnology Newswatch* (3 June 2002), online: LEXIS (News: BIOTEC); "Don't Criminalize this Therapeutic Research", *supra* note 14; Shapiro, *supra* note 47; Society for Woman's Health Research, *Society Supports Bill Banning Human Reproductive Cloning, Allowing for Stem Cell Research* (1 May 2002), online: www.womens-health.org (date accessed: 1 August 2002).

The way that this research and its potential benefits have been heralded in the media and within academic circles makes it hard to resist a very natural, instinctive reaction, which is to say that this research should be permitted to proceed. If it has the potential to lead to treatments for so many of the serious illness that cause human suffering, then scientists should undoubtedly be allowed to explore this avenue of research.

On the other hand, as discussed earlier, we as a society and as a nation attribute an inherent value to human life and human dignity. We therefore acknowledge that a human embryo, regardless of the purpose for which it is created, deserves special treatment and respect. Whether we believe the embryo deserves the status of humanness or personhood, the fact remains that like our blood, cells and bodies, it is a form of human life. As Knoppers and LeBris note, "while there may be an ongoing discussion as to personhood, no one denies that the human embryo constitutes human life."⁵³ We thus must ensure it is treated with dignity, and protected from objectification and commodification.

Furthermore, therapeutic cloning is still in its very early stages and has not been shown to be entirely effective or safe. Because other, less morally problematic forms of stem-cell research (such as adult stem-cell research⁵⁴ and research involving embryos discarded from fertility clinics) have not been shown to be ineffective, it is arguable that it is not yet necessary to decide whether to engage in therapeutic cloning.⁵⁵ As Françoise Baylis writes:

I stand firmly with those who maintain that "just because we can, doesn't mean we should." Unless and until we are confident that we should proceed with the novel and ethically controversial activities identified, it is imperative that they be prohibited. A moratorium is simply not an effective alternative, presuming that the goal is to ensure that these activities are not undertaken before a critical evaluation can be conducted on the merits of highly questionable practices that threaten core concepts such as identity and justice.⁵⁶

Shanner, who notes that the science of non-reproductive cloning and stem cell research is still in its infancy, has endorsed a similar view in regard to therapeutic cloning. While she would allow research involving "supernumerary embryos" (i.e., embryos that would otherwise be discarded from fertility clinics after the completion of fertility treatment), she concludes that at the present time,

⁵³ Knoppers and LeBris, *supra* note 29 at 337.

⁵⁴ At the same time, I note that there has been increasing scientific support for research involving embryonic stem cells in preference to adult stem cells, as the latter might lack the same degree of scientific and medical promise. See S. Mitchell, "Adult Stem Cells Not Promising" (23 September 2002), online: Technology Review, www.technologyreview.com/offthewire/3001_2392002_4.asp (date accessed: 1 October 2002).

⁵⁵ See Standing Committee on Health, *supra* note 45 at pp. 8, 13-14.

⁵⁶ Baylis, *supra* note 12 at 4.

it is not ethically sound or socially acceptable to allow embryos to be created for their use in further research.⁵⁷

Reconciling the competing and compelling arguments related to therapeutic cloning and other reproductive technologies is a formidable, if not impossible task. It is a challenge that involves such important value weighing and decision making that it should not be left to a regulatory administrative entity. Rather, this responsibility must be placed in the hands of Parliament, which is accountable to the Canadian public, and which comes under close and regular scrutiny throughout the course of its policy making and legislative activity.

Yet, while Parliament should have authority to determine whether therapeutic cloning and other reproductive technologies are permitted, legislators must also respond candidly to the concerns voiced in the debate surrounding these activities. Because there is so much controversy, Parliament owes it to Canadians to explain, in a principled and meaningful way, why it has chosen to prohibit rather than regulate therapeutic cloning for the time being. It is not enough to say that fundamental respect for human life prevents us from using the embryo as a means for further research. This does not accord with the reality that respecting human life insofar as the embryo is concerned arguably undermines respect for the life, health and dignity of those whose suffering might be alleviated from various forms of embryonic research and science.

As noted by The President's Council on Bioethics, there are "important human goods" on all sides of the debate over reproductive technologies. Social benefit thus will be found by listening to, understanding and respecting opposing views, rather than belittling or demonizing them. Recognizing this, the report sets out the contrasting positions on this issue, within a discussion regarding our societal obligations to the human embryo, to society more generally and to those who suffer from illness.⁵⁸ Ultimately, a majority of The President's Council on Bioethics recommends a ban on reproductive cloning, and a four-year moratorium on creating embryos for research purposes.⁵⁹

Because The President's Council on Bioethics' report addresses the competing ethical and social concerns over reproductive technologies so thoroughly, its ultimate conclusions and recommendations are rooted in a reasoned and solid basis. By recognizing and addressing the conflicting views on this issue, the report shows respect for the value and importance of embryonic life, and for the health and dignity of those who stand to benefit from embryonic research.

⁵⁷L. Shanner, *Embryonic Stem Cell Research: Canadian Policy and Ethical Considerations. A Report for Health Canada, Policy Division* (31 March 2001), online: <http://www.msu.edu/hlnelson/fab/Shanner_Stem_Cell_Policy.pdf> (date accessed: 27 September 2002) at pp. 31, 36-37.

⁵⁸The President's Council on Bioethics, *supra* note 30 at ch. 6.

⁵⁹*Ibid.*, at ch. 8.

Legislation and policy that acknowledge the tension between the important scientific objectives and ethical concerns related to reproductive technologies is equally important in Canada. As such, Parliament must recognize the significance of fostering research that could alleviate human suffering. At the same time, it must clearly indicate that the value we attach to human life and dignity prevents legislators from opening the door to any and all forms of embryonic research. Rather, an approach that allows for slow and cautious movement in this area is preferable. Thus, research must begin with the most obtainable and least contentious sources. Only after this preliminary research is shown to be ineffective should Parliament consider permitting other, more ethically controversial techniques. Of course, when faced with a decision about whether to permit a new type of research, legislators must also examine other factors that contribute to its overall moral propriety.

This type of incremental approach is thus more palatable from an ethical standpoint, since it links the moral basis and legal permissibility of research to its scientific necessity.⁶⁰ This ensures that all research conducted will be purposeful and specifically directed at improving the human condition. In addition, it provides greater recognition for the life and dignity of those whose health and well-being could be greatly enhanced by this research if it ultimately proves to be successful.

This approach is also beneficial from a legal perspective. By recognizing the tensions that lie at the core of the debate over the use of embryos in research, and by attempting to address and harmonize the important but conflicting perspectives on this issue, Parliament's decision to legislate in this area, and the manner in which it has done so, will be clarified and more readily justified.

So Why Rely on Criminal Law?

Until now, this discussion has responded to arguments as to why the criminal law is *not* appropriate for regulating reproductive and genetic technologies. This is helpful only insofar as it engages in a debate with critics of the criminal aspect of the AHR Act. However, Parliament cannot justify its decision to exercise its criminal law power in this domain only on a negative basis. That is, the basis of the legislation requires more than showing why not using criminal law would be a bad idea.

Rather, the policy rationale for the AHR Act requires the legislature to show why criminal law **is** appropriate in this context. Absent a clear policy justification,

⁶⁰Indeed, the California Advisory Committee on Human Cloning has endorsed such a cautious, incremental approach, even though it ultimately recommended allowing therapeutic cloning to proceed. The Committee stated: "In such an atmosphere of ambiguity and potential benefit, **it appears appropriate to try to work out incrementally and with great care** the kinds of pluripotent stem cell research that are morally justified." [emphasis added]. California Advisory Committee on Human Cloning, *Report of the California Advisory Committee on Human Cloning* (January 2002), online: www.sfgate.com/chronicle/cloningreport (date accessed: 13 August 2002).

this statute will continue to be the target of scrutiny and criticism, which ultimately will undermine the virtuous and important objectives that lie at the heart of this proposed legislation. As such, this section examines the possible underpinnings and justifications of Parliament's use of the criminal law for the regulation of reproductive technologies.

In Canada, it is well accepted that criminal law is a tool that must be used restrictively and cautiously:

So criminal law must be in instrument of last resort. It must be used as little as possible. The message must not be diluted by overkill – too many laws and offences and charges and trials and prison sentences. Society's ultimate weapon must stay sheathed as long as possible. The watchword is restraint – restraint applying to the scope of criminal law, to the meaning of criminal guilt, to the use of the criminal trial and to the criminal sentence.⁶¹

Canada's Law Reform Commission has stated that an act is justifiably criminalized if it is wrongful, if it does harm to other people, if that harm is serious in both nature and degree and if that harm is best dealt with through the mechanism of the criminal law.⁶² It is thus clear that the standard to be met before Parliament should take the step of classifying an activity as a criminal offence is quite onerous. The question in the present context is whether this standard is met by the activities involved in reproductive technology.

At the outset, it is important to note that Parliament does have constitutional jurisdiction to legislate with respect to assisted human reproduction. More specifically, the AHR Act appears to be a valid exercise of its criminal law power conferred by s.91(27) of the *Constitution Act, 1867*. The Supreme Court of Canada has interpreted Parliament's jurisdiction to legislate in the area of criminal law quite broadly. In *Scowby v. Glendinning*, Estey J. found that "[t]he terms of s.91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term."⁶³ Further, the Supreme Court has held that health is one of the "ordinary ends" of the criminal law.⁶⁴ Parliament's jurisdiction to criminalize activities related to health was recently affirmed in the *RJR-MacDonald* decision.⁶⁵ In its reasons, the majority defined the sole requirements of a valid exercise of criminal law over health matters in the following way.

⁶¹ Law Reform Commission of Canada, *Report: Our Criminal Law* (Ottawa: Law Reform Commission of Canada, 1976) at 27-28.

⁶² *Ibid.*

⁶³ *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at 238.

⁶⁴ *Reference re. Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 50.

⁶⁵ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil.⁶⁶

Thus, as Martha Jackman has commented, *RJR-MacDonald* extends considerable scope to the federal government to rely on its criminal law jurisdiction to legislate in the area of health. Most notably, it may use this power to create regulatory schemes within its public health legislation.⁶⁷ As such, both prohibition and regulation can be valid measures for dealing with health issues through the use of criminal law.

While this discussion sets out the basis of Parliament's jurisdiction to exercise its criminal law power over health matters, it does not answer the more policy-oriented and specific question of why the criminal law should be extended and applied to reproductive technologies. In my view, there are at least two fundamental bases for the use of criminal law in this domain: the importance of the values and interests at stake, and the goal of conveying a powerful social message.

(a) Importance of the Interests and Values at Stake

As discussed earlier, science and research related to assisted human reproduction have the potential to alter our perception of human dignity and integrity. Whether we are dealing with the use of embryos in research, the donation of ova or semen, or surrogacy arrangements, human life and the value we attribute to it lie at the root of the ethical debate in this area. These concepts are so important that any activity that threatens to alter the way we perceive, treat and value human life deserves to be met with a weighty and meaningful legislative response. As Baylis and Downie have stated:

[C]ritics of the proposed legislation suggest that criminal law is too "severe" a tool. To that objection, we say: If Canadians think prohibiting human cloning is a serious matter, then a severe response is appropriate.⁶⁸

Moreover, where an act is found to jeopardize the values that are central to the way that we as a society understand and define ourselves, that act merits a

⁶⁶ *Ibid.*, at 246.

⁶⁷ See M. Jackman, "The Constitutional Basis for Federal Regulation of Health" (1996) 5:2 Health L. Rev. 3. See also M. Jackman, "Constitutional Jurisdiction over Health in Canada" (2000) 8 Health L.J.95, where the author also discusses the Supreme Court's decision in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. This judgment was rendered after *RJR-MacDonald*, and the majority decision affirmed that regulatory legislation aimed at protecting public health (in that case, from toxic substances) could be a valid exercise of Parliament's criminal law power.

⁶⁸ Baylis and Downie, *supra* note 12.

response from the community as a whole, acting through its representatives. As Marshall and Duff indicate in their discussion of what types of conduct deserve to be criminalized, a key consideration is whether the act in question constitutes a communal affront:

We must ask, in part, what kinds of wrongs should be seen as wrongs against 'us'; and this is to ask which values are (which should be) so central to a community's identity and self-understanding, to its conception of its' members' good, that actions which attack or flout those values are not merely individual matters which the individual victim should pursue for herself, but attacks on the community.⁶⁹

According to McTeer, certain activities related to human reproductive technologies do engage and bring into question society's core values. Her analysis of this issue emphasizes the public nature of the activities in question, given that their impact "inevitably extends beyond the users and providers to the community as a whole." Her particular concerns with respect to reproductive technologies are the possibility that they could erode our social understanding of, and support for human equality, and their potential to harm individuals, especially society's most vulnerable members. Within her analysis, McTeer espouses a broader understanding of the notion of "harm", which transcends individual, physical well-being and encompasses a concern for the social health of an entire community:

The basis of this broad approach must be an enlarged concept of societal harm, which goes beyond a preoccupation with mere physical security to include what one author refers to as a "substantive vision of human flourishing." The notion of harm, broadly defined as such, would reflect a more accurate view of human life as more than a mere exercise of physical survival. It would also allow for the protection of those most vulnerable to any abuses that might result from the use and development of technology in the field of human reproduction and genetics, such as women, the physically and mentally handicapped, the disempowered and the poor.⁷⁰

Although McTeer's discussion justifies state involvement in the regulation of human reproductive and genetic science, she does not indicate *how* the law should act to protect the interests that she identifies. As such, her analysis does not explicitly endorse the application of criminal law in this area. Nevertheless, her emphasis on the potential of these technologies to devalue human integrity, equality and justice is important. Because these principles are so fundamental to the way that we understand human society and interact within it, acts which threaten to

⁶⁹ S.E. Marshall & R.A. Duff, "Criminalization and Sharing Wrongs" (1998) 11:1 Can. J.L. & Juris. 7 at 21-22.

⁷⁰ McTeer, *supra* note 25 at 901, citing R. Hittinger, "The Hart-Devlin Debate Revisited" (1990) 35 Am. J. Jur. 47 at 49.

devalue them are, as Marshall and Duff have written, “not merely individual matters...but attacks on the community.” As such, these activities merit a collective legislative response that deals with them in a cautious and serious manner.

While this legislative response could come in the form of regulatory or statutory control, in my view, the latter approach is preferable. A legislative framework premised on parliamentary – rather than administrative – oversight and control is necessary, given the importance of the values that might be undermined by the activities in question, and the potential social and individual harm these activities might engender.

(b) Conveying a Powerful Social Message

Marshall and Duff write that the criminal law “is a way of indicating a serious condemnation of an activity or action.”⁷¹ Somerville states, “we use criminal law not only to punish people, but also to state our most important social values.”⁷² These comments reflect on the way that legislators use criminal law to send a clear message expressing society’s rejection of, and intolerance for a specific act.

Certain activities associated with reproductive technologies deserve to be targeted by such a powerful message. Because acts such as human cloning and paying for human life strike at the basic values of respect for human life, dignity and diversity, our baseline assumption must be that such acts are unacceptable and thus should be prohibited. At the same time, if it can be shown that an activity is morally justified and promotes human health and dignity, an exception can be carved out within the legislative scheme to make it permissible.

Criminal law is not the only, nor always the best way to convey a social message. In some cases, civil law or social and cultural norms and institutions can go far further in expressing what is or is not tolerable within a community, and in shaping the behaviour of members of that community. However, the particular context that we are considering is one that does not readily lend itself to social or cultural governance or to the civil law. The importance of the matters at issue and the fact that they affect society as a whole results in the need for some form of state intervention.

As discussed, some have argued that state intervention in the area of reproductive technologies should occur in the form of regulation, rather than criminalization. However, the powerful message that can be sent through the use of criminal law in this area could not be conveyed through regulatory legislation. As Somerville writes:

⁷¹ Marshall and Duff, *supra* note 69 at 7.

⁷² Somerville, *supra* note 12.

[I]f cloning is inherently wrong (as some believe), then the issue is not simply a matter of regulating it. Rather the issue is prohibiting it. Adopting a regulatory approach would signal that cloning is inherently acceptable, but that to prevent possible abuses it should comply with certain conditions.⁷³

A regulatory approach suggests a diminished importance for the interests affected by reproductive research, given that the permissibility of the activities associated with this can be determined and altered without parliamentary debate or approval.⁷⁴ Moreover, a regulatory framework starts from the basic premise that all activities associated with this area of science and research are acceptable, even though they might require regulation and control. Within this framework, morally problematic practices are seen as the exception, while as a general rule, we would tolerate science and research that could objectify and commodify forms of human life. As such, a regulatory approach is ineffective for fully expressing the value that our society vests in human life and human dignity.

Do these Interests Warrant Criminal Prohibitions?

Turning back to the outset of this discussion on why the criminal law is appropriate for the regulation of reproductive technologies, we recall the Law Reform Commission's comments to the effect that criminal law must be used sparingly. Moreover, an act should not be considered a crime unless it does harm to others which is serious in both nature and degree, and that harm is best dealt with through the mechanism of the criminal law.

Relying on the broader, collective notion of "harm" that McTeer has described and relied on in her analysis of the state's intervention in reproductive technologies, it becomes easier to identify and understand the harm that these technologies could inflict. Such harm could be experienced not only by individuals who make choices about assisted reproduction, but also by society more generally, given that these activities touch upon core social values. In addition, the importance of these values and the extent to which they could be affected by reproductive technologies reflect the severity – both in nature and degree – of the potential harm that we may incur as a result.

Furthermore, the discussion here has demonstrated why the criminal law is the most effective mechanism for addressing the harm at issue. First, the signifi-

⁷³ *Ibid.*

⁷⁴ The Standing Committee on Health noted this point as a basis for recommending the retention of prohibited activities within the new legislation on reproductive technologies. The Committee stated:

An outright statutory ban signals more clearly that certain activities are either unsafe or socially unacceptable. The use of the statutory ban also signals that these activities are of such concern to Canadians that their status as a prohibited activity may not be altered except with the approval of Parliament.

Standing Committee on Health, *supra* note 45 at 8.

cance of the issues and dilemmas raised by reproductive technologies require a serious and cautious legislative response. Second, legislation in this area must convey an appropriate and powerful social message in regard to the way that we collectively value human life and wish to protect it from unethical manipulation. Finally, as discussed earlier, a framework premised on administrative control lacks democratic responsiveness and accountability. Less visible than a legislature, an administrative body might be free to make unchecked decisions, without public and media oversight and awareness. The importance of the decisions to be made in this area – and the need for scientists, jurists, academics and the public to be kept abreast of these decisions – calls for a greater degree of scrutiny than would likely be available or possible through a regulatory framework. For these reasons, the legislative scheme underpinning the AHR Act can be justifiably premised on the criminal law.

Conclusion

Whether or not controversial practices associated with assisted human reproduction should be criminalized is an issue that does not lend itself to a ready or unequivocal response. The legal, moral and scientific dynamics affecting this issue suggest that we will be wrestling with this debate for many years to come. But while this debate might not be resolved for some time, this should not – indeed it must not – preclude legislators from taking steps to ensure activities associated with reproductive technologies remain safe and ethical.

In setting out to regulate these technologies, our legislators were faced with a formidable task. The competing concerns, values and goals in this domain frustrated any attempt to arrive at legislative and policy decisions that could please everyone. As such, legislators were forced to devise a law that represents an effort to reach a compromise palatable to all those with views on this matter.

In this paper, I have argued that the legislative framework within Bill C-13 – the *Assisted Human Reproduction Act* – strikes a fair compromise. While the AHR Act permits more ethical forms of stem cell research to proceed (such as adult stem cell research and research using stem cells from discarded embryos), more controversial techniques are criminally prohibited. However, these prohibitions are not indefinite – they are subject to change pursuant to an ordinary legislative amendment, or pursuant to the review of the AHR Act that must be undertaken three years after this legislation has come into force.

As discussed here, the criminal prohibitions that the AHR Act proposes to implement are appropriate, despite arguments to the contrary. Practices associated with assisted human reproduction that have yet to be proven safe and ethical are prohibited, as are research activities that are not yet necessary. An outright ban on these activities and practices is acceptable, given that they involve the creation and manipulation of forms of human life. Moreover, given the importance of the values at stake, this ban must be implemented and reviewed by legislators rather than by an administrative agency, to ensure that all changes and developments are subject to close and regular scrutiny.

Yet, while the criminal prohibitions that Parliament has proposed in the AHR Act are appropriate from both a legal and ethical standpoint, a difficulty arises when we search for a policy justification for these prohibitions. Right now, Parliament has failed to provide us with any such justification. Bill C-13 does not contain any clear statement of policy or principle, and contains no preamble. Until a clear and frank justification is provided, this legislation will remain open to criticism. There is also a possibility that it will not withstand a *Charter* challenge.⁷⁵ In setting out to articulate a policy rationale for the new AHR Act, legislators must keep in mind that any contention that there is a social consensus in Canada about the criminalization of reproductive technologies is unpersuasive. More convincing is the argument that the AHR Act must be consonant with, and based upon the fundamental values of Canadian society. It is imperative that Parliament voice this point and articulate the real impetus underlying the proposed legislation. Absent such a statement, the new law will remain subject to ongoing scrutiny and challenge, thereby giving us less time and opportunity to think about the benefits of the new law, and the way it should develop in the future as inevitable scientific changes unfold.

⁷⁵ Such *Charter* challenge could viably be premised upon s.2(b) (if the courts find that academic research amounts to expression); s. 15 (given the distinctions drawn in the proposed legislation between those able and unable to conceive); or s. 7 (given that the proposed statute purports to extend criminal sanctions to activities that are not clearly defined, and without having stated a clear purpose for the use of such sanctions). For an analysis on the potential inconsistency between the AHR Act and s.2(b) of the *Charter*, see B. Billingsley, "A Constitutional Analysis of the Proposed Ban on Non Productive Human Cloning: An Unjustified Violation of Freedom of Expression?" (2002) 11:1 Health L. Rev. 32.

