

Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies

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On the heels of extensive public and political debate, controversy and criticism, Bill C-56, *An Act respecting assisted human reproduction*,¹ was introduced in the House of Commons on May 9, 2002.² Through this bill, Parliament has proposed to regulate practices associated with reproductive technologies by relying on its criminal law jurisdiction. Certain scientific activities are altogether prohibited, while others are subject to regulatory control. Those who breach such prohibitions or regulations can be subject to criminal sanctions – namely, a maximum fine of \$500,000 and/or a maximum ten-year prison term for prohibited activities, and a maximum \$250,000 fine and/or five years imprisonment for regulated and licensed activities.³

In this brief paper,⁴ I maintain that the criminal law is an appropriate legislative mechanism for dealing with reproductive technologies in Canada. At the same time, I underscore that Parliament must provide a clear, principled and transparent rationale for the legislative framework it has proposed in *Bill C-13*. Such a rationale has yet to be articulated by our legislators. Unless and until that occurs, use of the criminal law in this context will remain open to valid scrutiny and challenge.⁵

Part I - Response to Critics

The history of *Bill C-13* is long and turbulent, notably marked by controversy over whether certain techniques and practices associated with reproductive science – in particular, various forms of human cloning – should be subject to a criminal ban. Strong voices have marshalled several grounds for opposing such a ban, among which three arguments are most prominent: (1) the lack of social consensus in Canada regarding the criminalization of certain reproductive technologies;⁶ (2) the criminal law is too severe and rigid to regulate this area effectively, given that

reproductive and genetic science are characterized by rapid development and change;⁷ and (3) criminalizing reproductive science could deprive us of the benefits of medical and scientific progress.⁸

In my view, none of these arguments is compelling enough to justify the exclusion of the criminal law from the regulation of reproductive technologies.

(a) Absence of Social Consensus

In response to arguments regarding the absence of social consensus over the propriety of certain reproductive technologies, it is important to begin by noting that unanimous public views on the wrongfulness of an act is not necessarily a requirement for such act to be validly prohibited by Parliament. There are many acts in our society that legislators have chosen to criminalize, even though Canadians as a whole do not agree on their moral blameworthiness.

Moreover, public opinion in and of itself cannot be the sole driving force behind legislative decision making in this area. Reproductive technologies implicate the potential creation, pragmatic use, manipulation, destruction and commercialization of human life forms. Thus, in making choices about how to legislate in this domain, Parliament must consult and consider views held by Canadians, but it must also ask whether the scientific practices at issue respect the values integral to our social and cultural fabric. While these values are not always easy to discern, they are illuminated by the *Canadian Charter of Rights and Freedoms*.⁹

Two values enshrined within the *Charter* that are of particular relevance to the regulation of reproductive technologies are: (1) the sanctity and inviolability of human

life, which a majority of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney-General)*¹⁰ interpreted as flowing from s. 7 of the *Charter*; and (2) human dignity which, pursuant to the Supreme Court's decision in *Law v. Canada (Minister of Employment and Immigration)*,¹¹ is encompassed by s. 15 of the *Charter*.

The values of dignity and human inviolability also lie at the root of international perspectives on health and human rights. 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.

In examination of 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.¹²

These two values — the inviolability of human life and human dignity — are potentially threatened by certain reproductive technologies and practices associated with these technologies. For example, the creation of human embryos for use in research devalues this form of human life by allowing the embryo to be objectified and pragmatically used as a means to a separate goal. Payment for surrogacy also threatens human dignity, as it boils down to economic trade in women's bodies, in their fertility, and in their children. Given the significance of these issues, the legislative framework devised to deal with them must be premised on something more than public opinion. Rather, it must underscore the importance of values fundamental to Canadian society, and ensure that these values are not undermined by scientific activity.

(b) Severity and Inflexibility of the Criminal Law

While it is true that reproductive technologies are characterized by rapid development and change, this does not oust the possibility of regulating them through the use of the criminal law. First, criminal prohibitions are subject to change and can be amended by Parliament where this is deemed necessary to meet the ends of justice. Some have

argued that such amendments will take too long, and it is thus preferable to subject reproductive technologies to the control of an administrative agency that could implement change more swiftly.¹³

However, given the importance of the issues raised by this area of science — in particular, the extent to which we are able to create, manipulate or commodify human life — its regulation should be left to Parliament to ensure that legislative changes affecting reproductive technologies are subject to public scrutiny and accountability. Furthermore, the significance of the matters in issue warrants a legislative amendment process premised on ensuring caution and alertness over quick, reflexive changes.

Second, *Bill C-13* itself seems to recognize the importance of ensuring that this legislation reflects and keeps pace with scientific realities. More

specifically, subsection 70(1) of the bill requires Parliament to undertake a review of the legislation three years after its proclamation date. Having said this, I would stress that this provision requires elaboration, so that the necessary steps within this legislative review are made explicit, and to ensure that this review will be both meaningful and substantive.

Finally, while the process for enacting or amending a criminal prohibition might be viewed as more difficult or intricate than regulatory change, the practical application of the criminal law is not as rigid as it might first appear. Flexibility finds its way into the overarching framework of our criminal justice system through our sentencing regime. Although ss. 60 and 61 of *Bill C-13* establish that violations of the bill's prohibitive and regulatory provisions can result in the imposition of criminal sanctions, the bill sets out the *maximum* penalties for the offences it creates. Most individuals found guilty of such offences will not be subject to the maximum penalty. Rather, Canada's sentencing regime requires the penalty imposed for an offence to be tailored to reflect the gravity of the offence and the moral culpability of the offender.¹⁴

The issue of sentencing has not played a large part in the debate over the flexibility of the legislative framework proposed in *Bill C-13*. Until now, the discussion has focused on how flexibly laws can be created and amended within this framework, rather than how flexibly the legislation may in fact be applied. Having said this, sentencing may become a matter of importance once the new legislation is enacted. At that point, the stage will be better set for discussions as to the just and proper application of the specific provisions

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in the new statute, including those that create offences and impose sanctions.

c) Deprivation of Possible Medical and Scientific Breakthroughs and Benefit

The argument that criminal bans on reproductive technologies might stifle scientific progress and discovery is most frequently made with respect to the technique known as “therapeutic” or “non-reproductive” cloning. This technique involves transferring genetic material from an individual’s own 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 transplanted into the individual who donated the original cell. Some members of the scientific and medical communities believe that this technique could lead to treatments for various diseases.¹⁵ Arguments in favour of allowing research involving non-reproductive cloning have thus been quite frequent.¹⁶

While these arguments are valid and based on reasoned and sympathetic grounds, they must be balanced against the objective of protecting human dignity and the integral value of human life. Non-reproductive cloning involves the creation of a human embryo for the utilitarian purpose of further research. Whether we believe this embryo deserves the status of humanness or personhood, it is a form of human life, just like our blood, cells and bodies. 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.”¹⁷ We thus must take special care to ensure it is treated with dignity, and to protect it 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. Other, less morally problematic forms of stem cell research (such as adult stem cell research¹⁸ and research involving embryos discarded from fertility clinics) have not been proven ineffective. As such, it might be unnecessary at this point to decide whether to engage in therapeutic cloning.¹⁹

In my view then, the preferable approach for the time being is to allow the less controversial forms of reproductive science and stem cell research to proceed. If these forms of research are shown to be ineffective, it is only then that Parliament should consider and determine whether to allow more ethically problematic research.²⁰

Part II - Justifications for Relying on Criminal Law

While the foregoing discussion responds to arguments as to why reproductive technologies *should not* be regulated by the criminal law, it does not discuss why the criminal law in this context *is* appropriate. Such an explanation is necessary to ensure that the basis of *Bill C-13* is reasoned, principled and made clear to the public.

Until a clear and frank justification is provided, this legislation will remain open to criticism, scrutiny and attack.

In Canada, the criminal law is a tool to be used sparingly and must be extended only to acts that are wrongful, and seriously harmful both in nature and degree. In addition, the criminal law must be the

best method for redressing the harm at issue.²¹ The question thus arises as to whether practices associated with reproductive technologies meet these criteria and thus, whether they are appropriately regulated by the criminal law.

Because activities such as human cloning, transgenic science, and buying, selling and brokering in human embryos potentially thwart the values of human life and dignity, it is my view that they are wrongful and harmful. The harm that they threaten to engender is serious enough – both in nature and degree – to warrant the imposition of the criminal law in their regulation. This level of harm becomes apparent when we consider the disparate impact these practices could have on women,²² the poor and the disabled. As a result, society as a whole is harmed, given that some of our most fundamental principles – such as dignity, equality and respect for diversity, and the inviolability or “inalienability”²³ of the human person – clearly could be undermined by the activities at issue.

In considering the notion of “harm” in this context, I rely on the broad, collective understanding of this concept defined by McTeer in her discussion on the morality of reproductive science:

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.²⁴ [emphasis added]

In addition to the fact that activities associated with reproductive technologies can be wrongful and harmful, use of the criminal law is justified in this domain because it is the most effective mechanism for dealing with the harm in question. This harm is both individual and collective in nature, in that it has the potential to impact upon individual health and safety, as well as overall “human flourishing.” Thus, this harm is best met with a response from the community as a whole, through state intervention.

This state intervention could come in the form of administrative or criminal regulation. While some argue that administrative control is a more appropriate legislative basis,²⁵ my own view is that the criminal law provides a more effective mechanism for dealing with the concerns and issues raised by reproductive technologies. When a scientific activity has the potential to devalue human life and undermine the principles of human equality and dignity, that activity deserves to be met with a powerful and meaningful legislative response.

Legislation based on a regulatory framework would not provide such a response. This framework would be built on the presumption that activities fraught with ethical challenges are permissible, but should be controlled and monitored. The baseline assumption would be that the activities in question are acceptable. A regulatory approach therefore fails to capture and communicate the importance that should be attached to the values of human life and human dignity.

Moreover, a regulatory approach suffers from a lack of democratic responsiveness and accountability. As a less visible entity than a legislature, an administrative body might be free to make unchecked decisions without public and media oversight. To ensure that developments in the regulation and governance of reproductive science remain transparent, subject to legislative debate, and democratically accountable, decision-making authority must be left in Parliament’s hands.²⁶

Part III – The Importance of Articulating a Policy Rationale for Bill C-13

Like several other commentators who have critiqued the use of criminal prohibitions in *Bill C-13*, Caulfield underscores

the absence of social consensus within the country on this issue. However his arguments raise an important additional point that, in my opinion, must be addressed in order to legitimize the criminalization of certain practices associated with reproductive science.

Caulfield emphasizes that given the lack of social consensus, Parliament must articulate a reasoned and sound basis for relying on its criminal law power in this domain.²⁷ I entirely agree with this point. As things currently stand, *Bill C-13* does not contain any clear statement of policy or principle. It is without any preamble at all. The Report of the Standing Committee has not provided a very clear or comprehensive description or explanation of the rationale underlying this proposed legislation.

Until a clear and frank justification is provided, this legislation will remain open to criticism, scrutiny and attack. More specifically, it may not withstand a *Charter* challenge, which could viably be premised upon s. 2(b) (if the courts find that academic research amounts to expression)²⁸; 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 severe criminal sanctions to activities that are not clearly defined, and without having stated a clear purpose for the use of such sanctions).

Related to these constitutional issues are the foreseeable practical difficulties of *Bill C-13*. Aside from being quite vague in many respects, the bill’s current wording is extremely complex and scientific. It thus will be unintelligible to many, including those with the greatest interest in ensuring their complete comprehension of the statute: Crown attorneys, defence lawyers, judges, and those whose work and research interests might – although it is not entirely clear – fall within the legislation’s prohibitions. Quite arguably, then, this legislation is inconsistent with the basic principle that criminal offences – because they involve potential limits on an individual’s freedom – must be worded in clear language. As our current Chief Justice has stated: “the criminalization of conduct is a serious matter. Clear language is required to create crimes.”²⁹

Thus, from a practical standpoint, the bill’s ambiguous language and its lack of a statement of purpose might lead to any or all of the following situations:

- prohibited activities could go unprosecuted if Crown attorneys cannot interpret and apply the statute;
- conversely, Crown attorneys might be over-zealous in their prosecutions because determining who should be rightfully charged under the statute is unclear; the courts thus will be left to make that call;

- wrongful convictions or improper acquittals for charges under the statute could arise due to difficulties in understanding the legislation and its purpose; defence attorneys might not be able to represent their clients adequately because of the statute's vagueness;
- those charged under the statute might challenge their prosecutions and/or convictions on the argument that the law is unconstitutional.

These difficulties illuminate the need for Parliament to articulate the principles and purposes driving *Bill C-13*, and to ensure that these are communicated explicitly within the proposed legislation. To be equitable and principled, the policy basis underlying this bill must acknowledge and attempt to reconcile the competing values and realities affected by reproductive science. On one hand, these technologies are potentially detrimental to the inherent value of human life and human dignity. But, on the other hand, these technologies are widely perceived as holding majestic possibilities for treating serious human illnesses such as diabetes, Parkinson's disease, heart disease and spinal cord injuries.

Our legislators have a responsibility to respond to these competing concerns in a frank and meaningful way. To say that respect for human life *precludes* the creation of embryos for use in research is unsatisfactory. It ignores and conflicts with the valid argument that respect for human life *justifies* the creation of embryos for use in research aimed at finding treatments for illnesses that currently result in human suffering and diminish quality of life.

As stated by The President's Council on Bioethics, "important human goods" exist on all sides of the debate over reproductive technologies.³⁰ As such, the President's Council Report recognizes, considers and weighs the opposing positions on this issue before ultimately recommending a ban on reproductive cloning and a four-year moratorium on creating embryos for research.³¹

An approach that acknowledges and attempts to deal with the tension between the scientific goals and ethical concerns related to reproductive science is equally necessary in Canada. Parliament must be transparent about the fact that *Bill C-13* represents an effort to wrestle with the important – but often conflicting – goals of fostering research that could alleviate human suffering, and preserving the value we collectively attach to human life and dignity.

Parliament must articulate the impetus and objectives underlying this proposed legislation sooner rather than later. This will assist in explaining and lending legitimacy to the criminal prohibition of certain reproductive technologies. Moreover, a clearly stated policy rationale for *Bill C-13* will

provide guidance for future legislative amendments and developments in this area. In this way, a clear statement of policy enables us to ensure that this new legislation's rationale, as well as the substantive provisions and principles it embodies, reflect and are consistent with the scientific realities and ethical norms of the day.

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1. *An Act respecting assisted human reproduction*, 1st Sess., 37th Parl., 2002.
2. Bill C-56 was prorogued when the First session of the Thirty Seventh Parliament ended last spring. However, the bill has now been reintroduced into Parliament as *Bill C-13, An Act respecting assisted human reproduction*, 2d Sess., 37th Parl., 2002 (1st reading 9 October 2002), online: Parliament of Canada <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-13/C-13_1/C-13_cover-E.html> (date accessed: 15 October 2002) [*Bill C-13*]. *Bill C-13* was re-introduced into Parliament pursuant to an Order made October 7, 2002, in the same form as *Bill C-56*. The bill will be referred to as *Bill C-13* throughout the rest of this paper.
3. *Ibid.*, ss. 60-61.
4. A more comprehensive discussion of my views regarding Parliament's use of its criminal law jurisdiction in this context is set out A. Campbell, "A Place for Criminal Law in the Regulation of Reproductive Technologies" Health L.J. (forthcoming 2002).
5. My discussion here focuses on the need to articulate a clear and principled policy rationale for the new legislation governing assisted human reproduction. Other authors – whose work is published in this volume – have articulated valid concerns regarding the absence of *definitional* clarity within *Bill C-13*. Just as the need for a clear policy justification exists to ensure the constitutionality and legislative viability of the new statute, so too must the definitions and terms used within statute be made as explicit as possible, so as to ensure that the legislation's scope is not under-inclusive or overreaching. In this volume, see J. Foster & B. Slater, "Privacy and Assisted Human Reproduction: A Discussion Paper"; M. Herder, "Donate a Definition"; J. Robert, "Regulating the Creation of Novel Beings"; and L. Shanner, "Stem Cell Terminology: Practical, Theological and Ethical Implications".
6. See A. Harvison Young & A. Wassuna, "Wrestling with the Limits of Law: Regulating Reproductive Technologies" (1998) 6 Health L.J. 239 at 243-54; 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 at 26; 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 at 338-41["Clones, Controversy and Criminal Law"]; T. Caulfield, "Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: *The Assisted Human*



- Reproduction Act*” Alta L.R. (2002) 40 Alta. L. Rev. 451; [“Politics, Prohibitions and the Lost Public Perspective”]; and A. Daar *et al.* “Ban Cloning, Not Its Life-Saving Cousin” *The Globe and Mail* (9 May 2002) A21.
7. Daar *et al.*, *ibid.*; Caulfield, “Clones, Controversy and Criminal Law”, *ibid.* at 337; Canadian Bar Association, National Health Law and Family Law Sections, *ibid.* at 26.
 8. Daar *et al.*, *ibid.*; 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” *The Globe and Mail* (10 May 2002) A16; 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: 5 September 2002); Society for Woman’s Health Research, *Society Supports Bill Banning Human Reproductive Cloning, Allowing for Stem Cell Research* (1 May 2002), online: Society for Women’s Health Research <<http://www.womens-health.org/press/0frameset.htm>> (date accessed: 5 September 2002).
 9. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
 10. [1993] 3 S.C.R. 519.
 11. [1999] 1 S.C.R. 497.
 12. B. Knoppers & S. LeBris, “Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues” (1991) 17 Am. J.L. and Med. 329 at 361.
 13. See Caulfield, “Clones, Controversy and Criminal Law”, *supra* note 6 at 344-45; and Canadian Bar Association, National Health Law and Family Law Sections, *supra* note 6 at 26.
 14. See s. 718.1 of the *Criminal Code*; and *R. v. C.A.M.*, [1996] 1 S.C.R. 500.
 15. Medical Research Council, *Therapeutic Use of Cell Nuclear Replacement: Therapeutic Cloning* (September 2000), online: Medical Research Council <http://www.mrc.ac.uk/pdf_therapeutic_cloning.pdf> (date accessed: 13 September 2002).
 16. See Daar *et al.*, *supra* note 6; V. Brower, *supra* note 8; “Don’t Criminalize this Therapeutic Research”, *supra* note 8; Shapiro, *supra* note 8; Society for Woman’s Health Research, *supra* note 8.
 17. Knoppers & LeBris, *supra* note 12 at 337.
 18. Having said this, the author notes 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).
 19. See Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001), online: Parliament of Canada <<http://www.parl.gc.ca/InfoComDoc/37/1/HEAL/Studies/Reports/healrp01/08-rape.htm>> (date accessed: 31 July 2002) at 8, 13-14.
 20. Shanner, who notes that the science of non-reproductive cloning and stem cell research is still in its infancy, has endorsed this approach. 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, it is not ethically sound or socially acceptable to allow embryos to be created for their use in further research. L. Shanner, *Embryonic Stem Cell Research: Canadian Policy and Ethical Considerations. A Report for Health Canada, Policy Division* (31 March 2001), online: Michigan State University <http://www.msu.edu/~hlnelson/fab/Shanner_Stem_Cell_Policy.pdf> (date accessed: 27 September, 2002) at 31, 36-37.
 21. Law Reform Commission of Canada, *Report: Our Criminal Law* (1976) at 27-28.
 22. For a comprehensive discussion on the pre-eminent importance of assessing the legal and ethical propriety of stem cell research in relation to women’s interests, see Shanner, *supra* note 20.
 23. This is a civil law term used to convey a legal inability to sell or dispose of property.
 24. M. McTeer, “A Role for Law in Matters of Morality” (1995) 40 McGill L.J. 893 at 901, citing R. Hittinger, “The Hart-Devlin Debate Revisited” (1990) 35 Am. J. Jur. 47 at 49.
 25. See *supra* note 13.
 26. In this connection, it should be noted that if Parliament ultimately decides to create a regulatory framework within the legislation governing assisted human reproduction, certain provisions must be stipulated within the statute to ensure that the administrative body charged with overseeing this matter is an accessible and responsible entity. This would include provisions related to the process and standard for judicial review of the body’s decisions, and provisions that require the body to enact regulations within a given time – so as to ensure that we are not left with a legislative void created by delegating the regulation of this area to an inactive administrative body.
 27. See Caulfield, “Politics, Prohibitions and the Lost Public Perspective”, *supra* note 6.
 28. See B. Billingsley, “A Charter Perspective: Freedom of Expression, Justifiable Limits and the Ban on Therapeutic Cloning” in this volume.
 29. *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 34, McLachlin J. (as she then was), writing a minority concurring opinion, but differing from the majority on a separate point.
 30. The President’s Council on Bioethics, *Human Cloning and Human Dignity: An Ethical Inquiry* (July 2002), online: The President’s Council on Bioethics <<http://www.bioethics.gov/cloningreport>> (date accessed: 13 August 2002) at ch. 6 [President’s Council Report].
 31. *Ibid.* at ch. 8.