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## *Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada*

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This paper reviews recommendations made by the Royal Commission on New Reproductive Technologies concerning statutory prohibitions and offences relating to reproduction and reproductive technologies. The recommendations are criticized on three grounds. First, the *Report* offers no analysis of the legislative authority that would enable Parliament to enact its recommendations. Second, it offers no consideration of principles of criminal jurisprudence that would justify the prohibitions proposed. Third, the *Report* fails to advance arguments or rationales that would justify each of the specific recommendations concerning statutory prohibitions. In short, the *Report* fails to make a case for implementation of the Commission's recommendations with respect to statutory prohibitions because the legal aspects of those proposals are ill-developed or misconceived. A further conclusion is that the only effective legislative response to issues raised by reproductive technologies is concerted action, including regulatory measures, by Parliament and the provincial legislatures.

Dans cet article, l'auteur passe en revue les recommandations faites par la Commission royale d'enquête sur les nouvelles techniques de reproduction quant aux infractions et interdictions statutaires relatives à la reproduction et aux techniques de reproduction. Le *Rapport* de la Commission est critiqué sous trois différents aspects. Premièrement, celui-ci ne procède à aucune analyse de l'autorité législative qui permettrait au Parlement de les adopter. Deuxièmement, il ne traite pas des principes issus de la jurisprudence en matière pénale et qui, pourtant, pourraient justifier les interdictions proposées. Troisièmement, il évite de mettre de l'avant des arguments ou des raisonnements susceptibles de soutenir chacune des recommandations relatives aux interdictions statutaires. Bref, ce *Rapport* ne soutient pas la mise en place de ces recommandations puisque celles-ci reposent sur une base juridique mal conçue. En outre, il n'existe qu'une seule réponse législative efficace à ces questions soulevées par les techniques de reproduction : l'action concertée, incluant les mesures réglementaires, du Parlement et des législateurs provinciales.

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## Introduction

The Report of the Royal Commission on Reproductive Technologies, *Proceed with Care*, was published in 1993 and includes many recommendations for the reform of federal law by the Parliament of Canada.<sup>1</sup> The terms of reference for the Commission's inquiry were sweeping, as is apparent in this extract:

... inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied.<sup>2</sup>

The Commission makes several recommendations for the enactment of offences to sanction specific types of scientific research and specific medical practices relating to human reproduction. Another cluster of proposals recommends the enactment of legislation for the regulation of new reproductive technologies by a national commission.

A metaphor with which the Commission repeatedly states its conclusions is that, first, Parliament, through legislation, should draw a boundary between permissible

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<sup>1</sup> Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) [hereinafter *Report*]. The Commission was created on 25 October 1989 by Order-in-Council (P.C. 1989-2150) and it reported on 15 November 1993. References in this paper to "the Commission" refer to the Royal Commission on New Reproductive Technologies unless otherwise specified.

<sup>2</sup> P.C. 1989-2150, reproduced in part in *Report, ibid.* at 3. The Commission's terms of reference were varied in 1990 by P.C. 1990-1801. This latter Order-in-Council ostensibly modified the manner in which the Commission would conduct its deliberations and make its report to the Government of Canada. There was no variation of the terms of reference with respect to the substantive issues upon which the Government sought the advice of the Commission but the changed conditions of operation obviously had a significant effect on the Commission's research and conclusions. The *Report* does not reproduce in full the orders-in-council that constituted it. For critical discussion, see M. Eichler, "Frankenstein Meets Kafka: The Royal Commission on New Reproductive Technologies" in G. Basen, M. Eichler & A. Lippman, eds., *Misconceptions: The Social Construction of Choice and the New Reproductive and Genetic Technologies*, vol. 1 (Hull, Que.: Voyageur, 1993) 196.

The Royal Commission was not the first inquiry undertaken by a public body into issues relating to aspects of human reproduction and scientific research. In 1985, the Ontario Law Reform Commission published its *Report on Human Artificial Reproduction and Related Matters* (Toronto: Ministry of the Attorney General, 1985) [hereinafter O.L.R.C.]. Also of importance is the work of the Law Reform Commission of Canada, notably two working papers: *Biomedical Experimentation Involving Human Subjects* (Working Paper 61) (Ottawa: Law Reform Commission of Canada, 1989) [hereinafter *Biomedical Experimentation*] and *Medically Assisted Procreation* (Working Paper 65) (Ottawa: Law Reform Commission of Canada, 1992) [hereinafter *Medically Assisted Procreation*]. These papers are important because they cover much of the same ground covered by the Royal Commission. The second of these papers is also especially valuable for the thoroughness of its research, which relates not only to Canadian materials but also to materials drawn from around the world. Many of the Commission's recommendations have analogues in the Working Papers of the Law Reform Commission of Canada.

conduct and impermissible conduct punishable by criminal sanction or other prohibition; and, second, that Parliament should provide for the regulation of activity within the boundary of permissible and lawful conduct. The core of the Commission's recommendations is summarized as follows:

We conclude that government, as the guardian of the public interest, must act to put boundaries around the use of new reproductive technologies, and must put in place a system to manage them within those boundaries, not just for now, but, equally important, in an ongoing way. We therefore have two recommendations. First, we recommend legislation to prohibit, with criminal sanctions, several aspects of new reproductive technologies, such as using embryos in research related to cloning, animal/human hybrids, the fertilization of eggs from female fetuses for implantation, the sale of eggs, sperm, zygotes, or fetal tissues, and advertising for, paying for, or acting as an intermediary for preconception (surrogacy) arrangements.

Second, we recommend that the federal government establish a regulatory and licensing body — a National Reproductive Technologies Commission (NRTC) — with licensing required for the provision of new reproductive technologies to people. Only the federal government can set up such a system, and it is important that the government fulfil its responsibility to protect citizens and society by doing so.<sup>3</sup>

While the broad contours of the recommendations are clear, many aspects require clarification and further assessment before the Government can decide whether, or how, to implement new initiatives through legislative action.

The importance of the Commission's work is self-evident, as is the seriousness of its conclusions and recommendations. The sense of urgency in the proposals is explicit:

After wide consultation with Canadians, ethical and social analysis of the implications, and careful examination of the scientific evidence relating to the current use of new reproductive technologies during the course of our mandate, the Commission has concluded that Canada must respond decisively and comprehensively to control development and use of these technologies; clear boundaries must be set and the technologies managed within these boundaries. As the Commission's detailed review of technologies and practices in Part Two of our report demonstrates, this response is necessitated by the technologies' profound ethical, social, health-related, and legal implications, both now and in the future.

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<sup>3</sup> *Report, ibid.* at xxxii; see also *ibid.* at 15, 22, 107, ch. 31. See *ibid.* at 14-15 for an interesting discussion of how the "boundaries" should be drawn and managed. One option considered by the Commission was a moratorium on new reproductive technologies, but it was rejected for several reasons, including these: some technologies are to be encouraged; it is difficult to distinguish clearly between activities that should be repressed and those that should be encouraged; a moratorium in Canada would not stop research from continuing elsewhere; and a moratorium in Canada might drive researchers from Canada.

The issues are not merely hypothetical; new reproductive technologies are already the subject of individual and systemic decisions about reproductive health, family formation, medical treatment, research, and health care resource allocation. Moreover, the field is evolving rapidly in Canada and elsewhere. As a society, we cannot turn back the clock. Nor can we live with the status quo, allowing the technologies to develop without clear societal direction grounded in collective values and priorities.

Canada must move forward into the new reality with a clear, coordinated approach that permits us to resolve and manage the critical issues involved. To allow Canada's response to be delayed or fragmented by the existing web of jurisdictional and administrative arrangements would, in the view of Commissioners, be a mistake of enormous proportions. Failure to intervene constructively and decisively would amount to an abdication of social responsibility and a failure of political will.<sup>4</sup>

As a matter of law, of course, the constitutional arrangements of Canadian federalism cannot be ignored. At the very least, the existing web of Canadian constitutional law will determine whether the Government and the Parliament of Canada can act in relation to reproductive technologies.<sup>5</sup>

This paper examines the options available to the Government of Canada in formulating legislation for prohibitions and for regulation of issues relating to reproductive technologies, with emphasis on the former. Although the proposals for penal offences and for regulation are distinct, they are advanced as two aspects of the initiatives that the Government should take on reproductive technologies. Penal prohibitions and regulation are not mutually exclusive options and could be complementary elements in a coordinated legislative initiative relating to reproductive technologies.<sup>6</sup> Thus, to achieve a higher measure of coherence, it is desirable that these two aspects ultimately form part of a single undertaking. Indeed, it is possible that legislative action on both criminal offences and regulatory control could be undertaken in a single initiative, and for this reason too, it is desirable that this paper proceed with both aspects in view.

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<sup>4</sup> *Ibid.* at 10.

<sup>5</sup> See Part I.C, below.

<sup>6</sup> This is the approach taken in every jurisdiction of the Commonwealth that has enacted legislation in relation to reproductive technologies (see L.S. Williams, "Legislation, Inquiries, and Guidelines on Infertility Treatment and Surrogacy/Preconception Contracts: A Review of Policies in Seven Countries" in Research Studies of the Royal Commission on New Reproductive Technologies, *Treatment of Infertility: Assisted Reproductive Technologies*, vol. 9 (Ottawa: Minister of Supply and Services Canada, 1993) 279; J.R. Guichon, "Surrogate Motherhood: Legal and Ethical Analysis" in Research Studies of the Royal Commission on New Reproductive Technologies, *Legal and Ethical issues in New Reproductive Technologies: Pregnancy and Parenthood*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1993) 457; B. Knoppers & E. Sloss, "Legislative Reforms in Reproductive Technology" (1986) 18 *Ottawa L. Rev.* 663).

## I. The General Position of the Royal Commission on New Reproductive Technologies

### A. The "Ethic of Care"

The premise from which the Commission's recommendations were developed is described as an "ethic of care".<sup>7</sup> It was apparent to the Commission from the moment of its creation that the mandate confided to it was fraught with difficulty, controversy and uncertainty.<sup>8</sup> Like any policy-maker in such circumstances, the Commission had to consider how to identify and express its own normative perspective on the issues it confronted. On this preliminary matter the Commission reports that it rejected adherence to any "overarching ethical theory".<sup>9</sup> Instead, it adopted "a broader ethical orientation — called the ethic of care — and, within that orientation, a set of guiding principles to serve as a prism for moral deliberations."<sup>10</sup> The "ethic of care", as explained by the Commission, eschews dogma and adopts a broad approach to principles that will promote mutual flourishing.<sup>11</sup>

The Commission did not coin the phrase "ethic of care". This term has been current since it was developed by Carol Gilligan in her book entitled *In a Different Voice*.<sup>12</sup> The thrust of her claim cannot easily or fairly be reduced, nor can the subsequent debate surrounding use of the phrase "ethic of care". At its core, argued Gilligan, the ethic of care is a point of view shared by women in which a sense of personal responsibility and personal autonomy proceeds from an empathetic and altruistic sense of concern and responsibility for others, and not from a selfish absorption in formal constructions of rules or rights. It has been debated whether Gilligan's claim for an ethic of care among women can be sustained in the terms stated by her,<sup>13</sup> but the idea of an ethic of care has been developed as a broader moral virtue and it is this wider notion that animates the *Report* of the Commission:

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<sup>7</sup> See *Report*, *supra* note 1, ch. 3. The "ethic of care" explained in the Report is adopted and adapted from a research paper prepared for the Commission by Professor W. Kymlicka, "Approaches to the Ethical Issues Raised by the Royal Commission's Mandate" in *Research Studies of the Royal Commission on New Reproductive Technologies, New Reproductive Technologies: Ethical Aspects*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1993) 1. The *Report* distorts Kymlicka's paper in several respects and close comparison of the two texts is recommended. A signal distortion is that the Commission ascribes to the "ethic of care" a broader application than that suggested by Kymlicka, which results in a manipulation of the phrase by the Commission that does not coincide with usage of it by others in political and ethical debate.

<sup>8</sup> *Report*, *ibid.* at 49-51.

<sup>9</sup> *Ibid.* at 49.

<sup>10</sup> *Ibid.* at 49-50.

<sup>11</sup> *Ibid.* at 52.

<sup>12</sup> C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982).

<sup>13</sup> For general discussion, see e.g. D.L. Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge, Mass.: Harvard University Press, 1989) at 308-10; W. Kymlicka, *Contemporary Political Philosophy* (Oxford: Clarendon Press, 1990) at 262-86.

[T]he ethic of care holds, broadly speaking, that moral reasoning is not solely, or even primarily, a matter of finding rules to arbitrate between conflicting interests. Rather, moral wisdom and sensitivity consist, in the first instance, in focussing on how our interests are often interdependent. And moral reasoning involves trying to find creative solutions that can remove or reduce conflict, rather than simply subordinating one person's interests to another. The priority, therefore, is on helping human relationships to flourish by seeking to foster the dignity of the individual and the welfare of the community.<sup>14</sup>

The essence of this ethic of care is therefore the maximization of responsible concern for others not only in personal decision-making but also in decision-making by public authorities.

The Commission acknowledges that the ethic of care, when described only in general terms, provides little prescriptive guidance for making practical decisions on specific issues;<sup>15</sup> its defining characteristics are so open that they can provide sufficient justification for entirely contradictory views. The core of this ethic of care is described as a "moral point of view", but this perspective provides little more guidance than does the ethic of care itself.<sup>16</sup> To address this difficulty, the Commission identified eight guiding principles that it would observe in the application of the ethic of care to the determination of particular questions: individual autonomy; equality; respect for human life and dignity; protection of the vulnerable; non-commercialization of reproduction; appropriate use of resources; accountability; and balancing individual and collective interests.<sup>17</sup>

The Commission acknowledges that the ethic of care cannot resolve all problems to unanimous agreement.<sup>18</sup> The ethic of care implies the preference of some principles and the subordination or exclusion of others. It cannot entail unanimous agreement on the manner in which specific problems should be given specific solutions and, for this reason, it ultimately fails to justify many choices made by the Commission among various options. It is inherently ambiguous as to the definition, priority, and application of its central principles.<sup>19</sup> In short, it is arguable that the adoption of eight guiding principles in no way resolves the ambivalence of the ethic of care as a justification for the decisions taken by the Commission. Indeed, the *Report* itself provides a striking illustration of this ambiguity in Dr. Scorsone's dissenting views.<sup>20</sup> Dr. Scorsone objects to some conclusions reached by the majority of Commissioners and specifically observes that, in her view, the ethic of care should have led the majority to a different re-

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<sup>14</sup> *Report, supra* note 1 at 52.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* at 50ff; compare Kymlicka, *supra* note 7 at 16ff.

<sup>17</sup> *Report, ibid.* at 52-59; compare Kymlicka, *ibid.* at 18-27.

<sup>18</sup> *Report, ibid.* at 59.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 1053ff; see especially *ibid.* at 1098.

sult. Thus, the dissenter and the majority equally claim fidelity to the guiding principles and to the ethic of care.<sup>21</sup>

The ambiguity of the ethic of care is such that it does not readily explain many of the recommendations made by the Commission. It also does not allow a satisfactory explanation for the manner in which some subjects are treated in the recommendations. The Commission says, for example, that postmenopausal women "should not be candidates" for embryo implantation, but it does not recommend that such activity be made the subject of a criminal offence.<sup>22</sup> It says that gametes and embryos should not be objects of sale, but it does not say that the creation of embryos for the express purpose of research should be prohibited.<sup>23</sup> It recommends that some forms of commercial participation in a surrogacy arrangement be criminalized, but it does not recommend that all forms of commercial participation be criminalized.<sup>24</sup> These decisions, and others, might be sound, but they are not easily explained by reference to the "ethic of care".

The ethic of care is problematic for another reason. The Commission embraces this multi-faceted principle, but in the *Report* it evades, or does not fully confront, other issues concerning reproductive technologies. The Commission does not, for example, state a clear position with respect to eugenic practices or the eugenic implications of reproductive technologies.<sup>25</sup> A position can be inferred from the totality of the Com-

<sup>21</sup>This observation clearly does not imply that either the majority or the minority has the better view of the "ethic of care". It implies only that the "ethic of care" provides no basis on which to tell who has the better of any argument.

<sup>22</sup>*Report*, *supra* note 1 at 600.

<sup>23</sup>*Ibid.* at 643.

<sup>24</sup>*Ibid.* at 690.

<sup>25</sup>And yet this was the premise for an extensive paper prepared for the Commission by Dorothy Wertz (D.C. Wertz, "Prenatal Diagnosis and Society" in *New Reproductive Technologies: Ethical Aspects*, *supra* note 7, 191). Chapter 28 of the *Report*, which draws heavily on Wertz's paper, disregards the discussion of eugenics. Instead it refers euphemistically to "sex selection for non-medical reasons." See also Basen, Eichler & Lippman, *supra* note 2, Part II; *Biomedical Experimentation*, *supra* note 2 at 46ff. The failure of the Commission to address issues of eugenics was also considered and criticized by the National Action Committee on the Status of Women, *Eugenics — The Hidden Agenda* (Working Paper #35) (Annual General Meeting: 10-13 June 1994). See also National Action Committee on the Status of Women, *NRT Committee Resolutions for the NAC Annual General Meeting — June 1994*, Resolution 2:

BE IT RESOLVED THAT NAC demand that the Federal and Provincial governments immediately impose a moratorium on the following:

- the opening of any new IVF clinics
  - the introduction into clinical practice of any new reproductive technology or genetic technology
  - the expansion of existing technologies
- until such time as democratically determined regulatory agencies have been put in place.

BE IT FURTHER RESOLVED THAT NAC demand that the Medical Research Council of Canada and any other funding agency, including those controlled by private

mission's recommendations, but the *Report* lacks a thorough review of its proposals and their rationales within a broad ethical discussion of eugenics. The distinction between negative and positive eugenics is increasingly difficult to draw in practical terms and thus the omission of eugenics from the Commission's discussion of the ethic of care is somewhat startling. Equally startling is the absence of discussion concerning the relevance of freedom of choice to the ethic of care or, more generally, to issues concerning reproductive technologies.<sup>26</sup> One notion of the freedom of choice leads to the view that reproductive technologies facilitate personal choice and should therefore not be regulated in the absence of a good reason for doing so.<sup>27</sup> For some years, however, this view of choice has been debated, not least because it would implicitly allow reproductive technologies to be directed in large measure by market forces, which in turn would imply substantial commercialization of reproductive technologies.<sup>28</sup> In the women's movement, there has been considerable and growing uncertainty about the nature, role and importance of choice in all aspects of reproductive technologies.<sup>29</sup> Given the exceptional importance that notions of choice have played in relation to abortion and other issues, the Commission can fairly be criticized for not explaining the place of choice in the ethic of care.

It is, however, no part of the present exercise to examine or criticize the ethic of care adopted by the Commission, except to query generally how the ethic of care led the Commission to its recommendations. It will suffice at this point to observe that acceptance of the ethic of care does not lead ineluctably to acceptance of the precise proposals advanced by the Commission. Indeed, for the sake of argument, it can be said

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industry, impose a moratorium on the funding of any research projects aimed at expanding the clinical applications of reproductive and genetic technologies, until such time as a democratically determined agencies [*sic*] have been put in place.

<sup>26</sup> This issue was specifically addressed by several of the Commission's consultants (see *e.g.* Wertz, *ibid.*; Guichon, *supra* note 6; S.L. Martin, "An Overview of the Legal System in Canada" in Research Studies of the Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies*, vol. 3 (Ottawa: Minister of Supply and Services Canada, 1993) 85; S. Rodgers, "Juridical Interference with Gestation and Birth" in *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood*, *supra* note 6, 1; M. Martin *et al.*, "The Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services" in *Overview of Legal Issues in New Reproductive Technologies*, *ibid.*, 401; M.M. Rachlis, "The Canadian Health Care System" in Research Studies of the Royal Commission on New Reproductive Technologies, *New Reproductive Technologies and the Health Care System: The Case for Evidence-Based Medicine*, vol. 11 (Ottawa: Minister of Supply and Services Canada, 1993) 1). Apart from papers prepared for the Commission, there is a substantial and growing body of literature on the various meanings of choice in the context of human reproduction, science and medical services.

<sup>27</sup> This is the position espoused by John A. Robertson in a long series of writings. For a consolidated statement of his views, see J.A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, N.J.: Princeton University Press, 1994).

<sup>28</sup> There are stronger and weaker views in favour of the commercialization of reproductive technologies (see *e.g.* R.A. Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992) at 409-17). The Commission was advised to adopt a position of "constrained commercialization" by Martin *et al.*, *supra* note 26.

<sup>29</sup> For a recent discussion, see J.G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (San Francisco: Harper, 1993).

that the ethic of care could be invoked to justify the conclusion that many of the proposals are unnecessary. The ethic of care might also be invoked to support conclusions that contradict those of the Commission, not least because criminal or penal prohibitions are blunt instruments that are often antithetical to anything that might be called the ethic of care. This is not a sophomoric debating point. It is important to note that the Commission's conclusions proceed from principles and values that are matters of choice and that the recommendations for legislative action are also choices or preferences among relative values, supported more or less by the Commission's "moral point of view" and its empirical findings. If the title of the Commission's *Report* can be related to the "ethic of care", it would appear that the Commission has concluded that the "ethic of care" is best fulfilled by proceeding to the development and implementation of reproductive technologies, subject to isolated prohibitions and a general licensing scheme. Many will argue that this conclusion evinces a lack of concern for many people, especially women, and affords too much opportunity for the commercialization of genetic research and assisted conception. Indeed, the absence of specific controls upon medical practices and scientific research implies tacit approval of them.<sup>30</sup> The brunt of these criticisms will be that the Commission betrays even its own ethic of care by placing the exploitation of scientific opportunity before a higher responsibility, which is to state a clear policy with respect to reproductive technologies and the nature of human beings, the status of persons in society and in families, and the nature of persons in time.<sup>31</sup>

### ***B. Prohibition and Regulation***

As previously noted, the Commission makes repeated reference to the need to draw a boundary between permissible and impermissible conduct and to the need for regulation of permissible conduct within that boundary. This figurative language tinctures the Commission's *Report* from beginning to end. The first point suggests that there is, or should be, a forbidden realm of knowledge and experience upon which Canadians must not trespass. The second holds that, upon the familiar territory of permissible science and social practice, Canadians require close regulation in matters relating to reproductive technologies so as to secure the public interest. The recommendations that flow from these two general propositions presuppose great faith in the power of the positive law to realize the *desiderata* of social policy. Indeed, it would appear axiomatic in the Commission's view of legal measures that the probability of realizing policy objectives rises in direct proportion to the intensity of legal control.

The recommendations for prohibitions and regulation raise fundamental questions about the exercise of authority by the state. Closer attention is given them below,<sup>32</sup> but, by way of introduction, it is important here to identify two basic issues. One is that the

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<sup>30</sup> See e.g. Basen, Eichler & Lippman, *supra* note 2, vol. 1, Part I; *ibid.*, vol. 2, Parts IV, V.

<sup>31</sup> The "nature of persons in time" refers to the situation where embryos are frozen and can potentially skip the generation in which they would naturally have been born. Another example of such generation-skipping would be the use of eggs from aborted fetuses.

<sup>32</sup> See Parts II.A.1.bff, below.

Commission is unclear as to the nature of statutory prohibitions. In several instances it suggests that conduct be prohibited "under threat of criminal sanction".<sup>33</sup> In others it identifies conduct that should be "subject to prosecution".<sup>34</sup> In yet other instances it urges that specified forms of conduct just be "prohibited"<sup>35</sup> or that specified activities "not be permissible".<sup>36</sup> Thus, it is not clear why some forms of activity should be made the object of criminal prohibition and others the object of a different type of statutory prohibition. Nor is it clear what is meant by "criminal" sanction.

Second, with respect to regulation, the *Report* urges massive federal intervention in relation to reproductive technologies but the modalities of regulation are not made explicit. Such detail is perhaps unnecessary in a report because it concerns options for implementation rather than broad outlines of policy. It is more conspicuous in this instance, however, as there is little discussion of the scope for regulation of various aspects of reproductive technologies at the provincial and federal levels. As noted, several of the Commission's consultants made clear their opinion that many aspects of the matters considered by the Commission were within provincial jurisdiction and it is surprising that this conclusion did not affect more directly the Commission's recommendations for regulation.<sup>37</sup> The lack of attention to this matter is also surprising because other public bodies have considered aspects of reproductive technologies and noted that the division of responsibility between Parliament and the provincial legislatures is an issue that is central to effective policy-making and implementation.<sup>38</sup>

### C. *The Legal Basis for the Commission's Recommendations*

Its two main recommendations — to prohibit several aspects of new reproductive technologies and to establish a regulatory and licensing body — reflect the Commission's conclusion that issues relating to new reproductive technologies have acquired a "critical mass" that requires comprehensive and uniform treatment. Whether this conclusion is sound, of course, is primarily a political judgment that must be made by elected representatives in Parliament and in the provincial (and territorial) legislatures.

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<sup>33</sup> See e.g. Recommendation 184, *Report*, *supra* note 1 at 637; Recommendation 192, *ibid.* at 643; Recommendation 199, *ibid.* at 690.

<sup>34</sup> See e.g. Recommendation 86, *ibid.* at 475; Recommendation 131, *ibid.* at 566; Recommendation 196, *ibid.* at 646; Recommendation 234, *ibid.* at 833; Recommendation 291, *ibid.* at 1006-1007.

<sup>35</sup> Recommendation 199, *supra* note 33; Recommendation 265, *Report*, *ibid.* at 907; Recommendation 284, *ibid.* at 1000.

<sup>36</sup> Recommendation 185, *ibid.* at 638; Recommendation 241, *ibid.* at 835; Recommendation 271, *ibid.* at 945; Recommendation 273, *ibid.* at 964.

<sup>37</sup> See e.g. Williams, *supra* note 6; Martin, *supra* note 26; Rodgers, *supra* note 26; Royal Commission on New Reproductive Technologies, "Judicial Intervention in Reproductive Processes: A Policy Profile" (Background Paper) by J.A. MacKenzie (1991).

<sup>38</sup> See e.g. *Medically Assisted Procreation*, *supra* note 2; Law Reform Commission of Saskatchewan, *Tentative Proposals for a Human Artificial Insemination Act* (Saskatoon: Law Reform Commission of Saskatchewan, 1981); British Columbia, Royal Commission on Family and Children's Law, *Ninth Report of the Royal Commission on Family and Children's Law: Artificial Insemination* (Vancouver: Royal Commission on Family and Children's Law, 1975); O.L.R.C., *supra* note 2.

Even assuming that there is political agreement with the Commission, it is quite another matter whether issues relating to reproductive technologies have *in law* a distinctiveness or coherence that will suffice for Parliament to act as the Commission proposes. If they do not, the scope of Parliament's competence in the field will not allow sweeping intervention by the national government and comprehensive regulation of the matter will have to be achieved by an imaginative exercise in cooperative federalism.

Much of what the Commission concludes about the appropriate legal response by Parliament is fuelled by the urgency, if not emergency, that it perceives in these issues. A sense of urgency alone will not allow even Parliament to disregard the distribution of legislative competence between the national government and the provinces, unless it can further be said that a "matter" of sufficient coherence has emerged as a national crisis.<sup>39</sup> This is a weak basis upon which to argue for the implementation of the Commission's recommendations.

The legal foundation for the Commission's recommendations is not a major part of the *Report*, although there is some attention to the issue in Chapter One and some passing mention of it elsewhere. Given the recommendations of the Commission, it could be expected that the *Report* would provide legal analysis on three points: the constitutional authority for those recommendations,<sup>40</sup> and, flowing from this, close explanation of the scope and rationale for penal prohibitions and for comprehensive federal regulation of reproductive technologies.<sup>41</sup> If Parliament lacks the constitutional authority to enact measures of the kind proposed by the Commission, the recommendations themselves are unworkable. The central assertion of the *Report* on the constitutional foundation for the Commission's two main recommendations is the following:

Considering the overarching nature, profound importance, and fundamental inter-relatedness of the issues involved, we consider that federal regulation of new reproductive technologies — under the national concern branch of the peace, order, and good government power, as well as under the criminal law, trade and commerce, spending, and other relevant federal constitutional powers — is clearly warranted.<sup>42</sup>

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<sup>39</sup> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 25 B.C.L.R. (2d) 145 [hereinafter *Crown Zellerbach*]; see also P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 452-61.

<sup>40</sup> The Commission appears to have obtained only one legal opinion on the constitutional authority for federal action (see M. Jackman, "The Constitution and the Regulation of New Reproductive Technologies" in *Overview of Legal Issues in New Reproductive Technologies*, *supra* note 26, 1).

<sup>41</sup> Compare:

When introducing legal changes that directly affect people's lives, decision makers are expected to justify their choices. The legitimacy of what some see as an essentially subjective determination may depend on how well the decision makers have outlined the factors that led them to their conclusion (Martin, *supra* note 26 at 100).

<sup>42</sup> *Report*, *supra* note 1 at 18; compare *Medically Assisted Procreation*, *supra* note 2 at 116.

This assertion is not explained at length. Although it is not part of the present exercise to examine the constitutional basis of the Commission's recommendations, it is important to note briefly the significance of the Commission's claim and some objections to its legal validity.

As presented by the Commission, the legal claim made above is that plenary authority in the matter of reproductive technologies may be found in the power to make laws for the peace, order, and good government of Canada. Secondary or supplementary support may be found in other enumerated heads of power. The *Report* provides no argument of law to substantiate the legal foundation for any of the powers asserted except for a brief passage concerned with Parliament's authority to act for the peace, order, and good government of Canada. The core of that passage is as follows:

The Supreme Court has decided that the peace, order, and good government power can be invoked in support of federal legislative action, provided the matter Parliament seeks to regulate is of genuine national concern and possesses a degree of singleness, distinctiveness, and indivisibility that renders federal regulation compatible with provincial control over matters within their legislative jurisdiction.

The Supreme Court has held that provinces' ability to deal with a matter effectively through cooperative action, and the effect on extraprovincial interests of a province's failure to regulate the intraprovincial aspects of the matter, are of particular relevance, since it is the inter-relatedness of the intra- and extraprovincial dimensions of the problem that creates the need for single or uniform legislative treatment. We are firmly of the belief that new reproductive technologies, as defined in our mandate, meet the criteria established by the Supreme Court, so that federal intervention under the peace, order, and good government power is constitutionally justified.

New reproductive technologies possess a conceptual and practical integrity and distinctiveness. Their fundamental object is human reproduction, with all its distinct historical, social, and ethical implications. Viewed as a biological function, reproduction is easily distinguishable from other matters of human health. It has particular social significance, has particular ethical, political, and economic dimensions, and creates particular legal relations and responsibilities. Thus, although health issues are certainly involved, numerous other individual and societal issues converge in reproductive technologies, necessitating a broad, inclusive approach to dealing with them.<sup>43</sup>

Stripped to its essential assertions, this passage claims that federal jurisdiction is justified by the conceptual coherence of the subject matter, the harm that flows from the absence of uniform law on these matters, and the need for urgent action.

The Supreme Court of Canada has shown considerable reluctance to accept claims of jurisdiction based on the theory of national concern<sup>44</sup> and it cannot easily be argued

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<sup>43</sup> *Report, ibid.* at 19.

<sup>44</sup> Compare *Crown Zellerbach*, *supra* note 39 at 401; see generally Hogg, *supra* note 39 at 441 ff.

that reproductive technologies have become a national concern that justifies legislation for the peace, order, and good government of Canada. The argument that the many issues associated with human reproduction are interrelated is simply a description of a practical and scientific reality. That description does not lead to a conclusion in law that “[n]ew reproductive technologies possess a conceptual and practical integrity and distinctiveness.”<sup>45</sup> It certainly does not allow the assertion that “reproduction is easily distinguishable from other matters of human health.”<sup>46</sup> Indeed, the observation that reproductive technologies are so tightly related with many areas of provincial concern is fully consistent with a conclusion that they have not emerged as a national concern in the strict sense required by the courts. There is no apparent evidence that the provinces have failed to act in relation to the matter or that they are unable to do so. Nor is there evidence to support a conclusion that material harm will result if the provinces fail to take uniform measures with respect to matters within their authority. There is no apparent vacuum in Canadian public policy on reproductive technologies that only the national government can fill. Indeed, if it were arguable that reproductive technologies have become a matter of national concern warranting a breach of Canadian federalism in favour of uniform action by the national government, it would lead easily to the surprising proposition that any matter of national concern is inconsistent with the basic tenets of federalism. Canadian courts have resisted arguments of this kind, and it is difficult indeed to envisage a successful legal and factual basis on which to argue that reproductive technologies present a matter of “great and manifest necessity”<sup>47</sup> that cannot be addressed adequately by continued respect for the distribution of legislative competence. In short, the desire for a coherent national policy on reproductive technologies is not a case in law for allowing Parliament to assume sweeping legislative responsibility.

From the Commission’s discussion of the constitutional foundation for its recommendations, it seems clear that the authority for it is uncertain or weak and that the conclusion of wide federal authority is overstated. The better view, it is submitted, can be stated in the following propositions:

1. The primary grounds of legislative authority upon which Parliament could act are criminal law and the spending power. The former provides authority for direct prohibitions of specified conduct; the latter allows some scope for regulatory control over matters otherwise provincial in nature, at least to the extent that federal funds are contributed to policy initiatives. There might be scope for action under Parliament’s authority in matters of trade and commerce, intellectual property, and some other limited heads of authority. There might also be some scope to act in relation to matters of health that are of national concern, without relying on Parliament’s power over matters of peace, order, and good government, provided that

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<sup>45</sup> *Report, supra* note 1 at 19; compare Jackman, *supra* note 40 at 6.

<sup>46</sup> *Report, ibid.*; compare Jackman, *ibid.*

<sup>47</sup> *Severn v. R.* (1878), 2 S.C.R. 70 at 96, as quoted in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at 372, 107 D.L.R. (4th) 457.

there is no clear provincial jurisdiction over the matter.<sup>48</sup>

The claim that Parliament could act for the peace, order, and good government of Canada is the weakest claim under any of the doctrines that have been developed by the courts. The reason for this is given by the Commission itself: the matters touched by reproductive technologies are so disparate that they affect a wide variety of federal and provincial powers and thus defy any finding that reproductive technologies have the singleness or coherence required for federal action.

2. The provinces have general authority to legislate in relation to matters of health and other matters specifically assigned to their jurisdiction by section 92 of the *Constitution Act, 1867*,<sup>49</sup> including hospitals. Of special importance is provincial jurisdiction over most aspects of family law and the law of persons, the latter including status, filiation, adoption, and the like.
3. Reproductive technologies do not comprise a single matter over which Parliament or the provinces can assert sole legislative jurisdiction. It is not one matter but many matters. Thus comprehensive legislative regulation of reproductive technologies in all of the aspects identified by the Commission would require the collaboration of Parliament and the provincial and territorial legislatures, each acting within their respective spheres of authority and cooperating to achieve a coherent policy on the various matters that comprise reproductive technologies.

The remainder of the discussion in this paper rests on the above three assumptions. In Part II, attention is given to the Commission's recommendations for the enactment of statutory prohibitions.

## II. Prohibitions

### A. *The Commission's Recommendations*

1. On the Use of Prohibitions Generally
  - a. *The Views Expressed in the Report*

In its "Overview of Recommendations", the Commission summarizes the rationale for its recommendations of criminal offences in the following terms:

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<sup>48</sup> Legislation dealing with health matters has been found within the provincial power where the approach in the legislation is to an aspect of health, local in nature. On the other hand, federal legislation in relation to "health" can be supported where the dimension of the problem is national rather than local in nature ... or where the health concern arises in the context of a public wrong and the response is a criminal prohibition (*R. v. Schneider*, [1982] 2 S.C.R. 112 at 141, 139 D.L.R. (3d) 417, Estey J. [references omitted]; see also *ibid.* at 114, Laskin C.J.C.).

<sup>49</sup> (U.K.), 30 & 31 Vict., c. 3.

We have judged that certain activities conflict so sharply with the values espoused by Canadians and by this Commission, and are so potentially harmful to the interests of individuals and of society, that they must be prohibited by the federal government under threat of criminal sanction. These actions include human zygote/embryo research related to ectogenesis, cloning, animal/human hybrids, the transfer of zygotes to another species [184], or the maturation and fertilization of eggs from human fetuses; the sale of human eggs, sperm, zygotes, fetuses, and fetal tissues [192, 286, 287]; and advertising for or acting as an intermediary to bring about a preconception arrangement, receiving payment or any financial or commercial benefit for acting as an intermediary, and making payment for a preconception arrangement [199].

We also recommend that unwanted medical treatment and other interferences or threatened interferences with the physical autonomy of pregnant women be recognized explicitly under the *Criminal Code* as criminal assault. To ensure that medical treatment never be imposed upon a pregnant woman against her wishes, we also recommend that the criminal law, or any other law, never be used to confine or imprison a pregnant woman in the interests of her fetus, and that the conduct of a pregnant woman in relation to her fetus not be criminalized [273, 274].<sup>50</sup>

This explanation is amplified slightly in the text of the *Report*,<sup>51</sup> but the Commission's rationale for invoking the criminal law remains broad and largely unqualified. Conflict with fundamental values and the spectre of harm are two orthodox rationales that have long been viewed as sufficient for the imposition of criminal liability over specified forms of conduct. It would seem, therefore, that either of these rationales will be sufficient justification for criminal sanction if the Commission concludes that a given practice imperils values cherished by it and by Canadians who participated in polls conducted by the Commission or who made submissions directly to it.<sup>52</sup> While these rationales might be sufficient for the enactment of criminal law in general terms, it does not necessarily follow that either is sufficient for the enactment of the specific offences proposed by the Commission. Of equal importance, moreover, given the crude bluntness of the criminal law as an instrument of social control, is the principle of restraint. This principle, which embodies values of elementary prudence, cautions that the criminal sanction be deployed only where necessary and effective. In this section of the paper, therefore, relying on the *Report* itself and on other sources of jurisprudence, the rationales for criminal sanction of the conduct identified by the Commission will be assessed.

At no point does the Commission provide a considered exposition of the reasons for which it recommends use of the criminal law as opposed to any other form of legal

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<sup>50</sup> *Report*, *supra* note 1 at 1022. The numbers in square brackets refer to the Commission's recommendations.

<sup>51</sup> See especially *ibid.* at 15, 108-109.

<sup>52</sup> See *e.g. ibid.* at 11, 14, 15, 47. The Commission undertook an extensive exercise in public polling in an attempt to gauge the attitude of the public to issues relating to human reproduction (see *ibid.*, ch. 2, for a general discussion of its methods in this respect; see also *ibid.* at 58-59).

control over conduct. It typically says that criminal sanctions are necessary to deter, to prevent harm, and to vindicate moral values. These expressions can be linked with all of the major theories of criminal responsibility and of use of the criminal sanction, but the Commission makes no attempt to do so, presumably on the premise that it is unnecessary given its commitment to the ethic of care. Of particular significance, however, is the absence of any explanation by the Commission of what it means by "criminal" sanctions. There are several means by which a specified type of activity can be prohibited under the law. Prohibitions might be penal in nature but they are not necessarily criminal. Thus, there is a distinction between criminal and regulatory sanctions. Among regulatory sanctions there is a further distinction between a direct prohibition and an indirect prohibition in the form of non-compliance with the terms of a regulatory scheme. Moreover, there is a distinction between prohibitions created by Parliament and prohibitions created by the provinces for the enforcement of valid provincial legislation. These distinctions, difficult as they are, are not considered by the Commission. But for its discussion of Parliament's authority to act for the peace, order, and good government of Canada, the Commission presents its recommendations as if it were in a unitary state such as the United Kingdom or a federal state such as Australia in which almost all of the relevant legislative powers are vested in the member states.<sup>53</sup>

In Canadian law, there is no satisfactory definition of the normative justification for the use of criminal sanctions. This means that the use of the criminal law is always a point for debate and disagreement. The courts have sometimes resorted to a descriptive definition of crime. Viscount Haldane said that the criminal law power should be used "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence."<sup>54</sup> Lord Atkin later wrote for the Privy Council:

The criminal quality of an act cannot be discerned by intuition: nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?<sup>55</sup>

Still later, Rand J. wrote in the Supreme Court of Canada that a statutory prohibition could be characterized as criminal law if it serves "a public purpose which can support it as being in relation to the criminal law."<sup>56</sup> He added that "[p]ublic peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law."<sup>57</sup>

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<sup>53</sup> In Australia, the national government possesses limited jurisdiction in criminal law and only limited grounds on which it could address matters relating to reproductive technologies. The issues are addressed by state legislation, which has raised some issues relating to inconsistent policies between states.

<sup>54</sup> *Re Board of Commerce Act* (1921), [1922] 1 A.C. 191 at 198-99, 60 D.L.R. 513 (P.C.).

<sup>55</sup> *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310 at 324, [1931] 2 D.L.R. 1 (P.C.).

<sup>56</sup> *Reference Re Validity of Section 5(a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45* (1948), [1949] S.C.R. 1 at 50, [1949] 1 D.L.R. 433, aff'd [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.).

<sup>57</sup> *Ibid.*

Expressions such as these do not provide useful instruction on whether, or how, the coercive force of criminal sanctions ought to be used as an instrument of social control. Indeed, each of them is in some measure tautological or circular. Viscount Haldane refers to a domain of criminal jurisprudence on the assumption that the boundaries and the contours of that domain are so fixed and well known that they can be taken for granted. Yet, hard cases only prove that the domain of criminal jurisprudence is not fixed. Lord Atkin's description of the criminal sanction is not the end of any inquiry but only the beginning. It makes no distinction between murder or fraud and littering and thus fails to provide any substantive guide to the distinction between crime and other forms of statutory prohibition. Mr. Justice Rand's approach is more helpful because it stipulates that a statutory prohibition must be justified by a "criminal purpose" and it also identifies some objectives that might qualify as valid justifications for the enactment of criminal prohibitions. However, his approach is not a definition of "criminal law" or of "criminal purpose", not least because many of the objectives that might validly serve a "criminal purpose" can equally serve a purpose that is not criminal. In sum, the propositions quoted above provide no criteria by which to map the domain of criminal jurisprudence or to enumerate the purposes of the criminal law. They do not define criminal law but rather, at their highest, provide some guidance by which the courts and the legislatures might recognize a matter of criminal law.

In general terms, the most common rationale for the use of the criminal law is the protection of society from harm.<sup>58</sup> The generality of these words obviously allows for considerable divergence of interpretation, not least because there is no settled basis for recognizing a harm that is sufficient to warrant criminal prohibition. Also, in very general terms, the objective of protection from harm can be explained and justified with reference to two broad rationales which are neither mutually exclusive nor necessarily complementary. According to one, the criminal law serves an essential moral function by identifying and vindicating fundamental social values. The dominant view of murder and theft, for example, is that they sanction a violation of moral values such as the value of life, the integrity of the person, honesty between persons, and the right to privacy in the enjoyment of property. The same rationale informs many other offences, including offences such as blasphemy, bigamy, or libel. According to another view, the protection of society from harm is essentially a function of utility; that is, repressive sanction by the state may be justified if it will effectively protect society from discernible harm and, for this rationale to suffice, it is not necessary to act for the protection of specific moral values. This is true of most offences involving the use of vehicles, aircraft, and vessels. It is true of most offences involving the possession of firearms. It is true of many offences involving drugs. And it is certainly true for the tens of thousands of regulatory offences that reinforce the administration of statutes that set standards of behaviour in the market, in the use of technology, and the like.

The dichotomy between rationales of moral purpose and utility is not stark or even clear. Many offences in the criminal law can be justified by both. Offences related to

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<sup>58</sup> See Law Reform Commission of Canada, *Our Criminal Law: Report* (Ottawa: Information Canada, 1976).

impaired driving, for example, are intended to punish conduct that imperils the lives and safety of other people, but the accent of those offences is typically utilitarian to the extent that the repression of impaired driving is also intended to secure the safety of the roads for all other users. While prostitution itself is not an offence under the *Criminal Code*,<sup>59</sup> solicitation for the purpose of prostitution is an offence that can be justified alternatively on moral grounds or on grounds of utility. There is no calculus in Canadian law or policy-making by which to determine when the use of criminal sanctions is appropriate. Both of the rationales identified above may be sufficient as a matter of political judgment. Several observations of a general nature can be made, however, before turning to a closer examination of the proposals made by the Commission and their rationales.

The use of the criminal law to protect fundamental values requires clear identification of a value that is imperilled by a type of conduct and a consensus that repression is a necessary means to prevent the erosion or destruction of that value by continuation of the activity in question. The protection of moral values by the criminal law is typically, though not necessarily, a reaction against conduct that *actually* threatens those values. It is arguable that the creation of criminal liability for conduct that does not now actually threaten fundamental values is justifiable as a prophylactic measure for the protection of society but this, it is submitted, is a premature use of coercive power by the state.

The primary justification for offences created for reasons of utility is deterrence. Here too, the force of the law lacks legitimacy if it seeks to deter conduct that does not actually occur. Thus, the criminal law should not be used for symbolic or hortatory purposes to repress problems that are hypothetical or that pose no material threat of harm to society at the moment. A variant of this theme is that criminal sanctions, or other statutory prohibitions, should not be created if they are unlikely to be effective. This means that prohibitions must be capable of investigation and prosecution.

Assuming a discernible threat of harm, another principle of cardinal importance is that criminal sanctions not be used as a primary instrument of social control. The criminal law should be used only when the magnitude of the threatened harm justifies firm repression and when no other, and lesser, form of legal control can adequately achieve the same result. This is the principle of restraint, which is not only a recognized principle of criminal jurisprudence in Canada, but was clearly adopted as an article of policy by the federal government in 1982, as part of what was then known as the Criminal Law Review.<sup>60</sup> There is no indication that the Government of Canada, through successive governments, has repudiated this principle.

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<sup>59</sup> R.S.C. 1985, c. C-46.

<sup>60</sup> Canada, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982) at 43-46, 52-54, 59.

b. *Prohibitions: Criminal, Penal, and Administrative*

The exercise of coercive power by the state over the behaviour of natural and moral persons takes many forms. The criminal law is the most severe and, in various respects, the least effective. In the absence of a clear consensus that the conduct prohibited is generally offensive to some identifiable norm of acceptable behaviour, and in the absence of the means by which to implement a criminal prohibition by investigation and prosecution, the enactment of criminal offences lacks legitimacy, utility, or both. Regulatory constraints, including regulatory prohibitions, can offer equally effective means of controlling undesirable conduct, not least because regulatory mechanisms are more readily adaptable to the quick pace of developments in the field to be regulated. However, regulatory constraint lacks the power of denunciation that flows from criminal prohibition.

Before turning to the range of prohibitions in more detail, it will be useful to sketch in a few broad strokes some elementary constraints in Canadian penal law, and for convenience, three can be listed.

First, as already noted, the division of powers enforces a distinction between penal law that is criminal *stricto sensu* and penal law that is not. Criminal law in the strict sense exists by the exercise of Parliament's power under subsection 91(27) of the *Constitution Act, 1867*. By definition, therefore, the provincial legislature cannot validly enact criminal law, but it does not follow that the provinces cannot enact penal offences for the enforcement of valid provincial legislation.<sup>61</sup> Nor does subsection 91(27) mean that *any* offence enacted by Parliament is enacted pursuant to the criminal law power, because Parliament also has the authority to enforce valid federal legislation with penal provisions that do not derive from the power over criminal law and procedure.

Second, there is no coherent distinction in Canadian law between criminal and regulatory offences.<sup>62</sup> This is not to say that there is no such distinction. In *R. v. Sault Ste. Marie (City of)*,<sup>63</sup> the Supreme Court of Canada identified three classes of liability in Canadian penal law:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prose-

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<sup>61</sup> *Constitution Act, 1867*, *supra* note 49, s. 92(15).

<sup>62</sup> This issue has benighted Canadian law for many years, and there is still no sign of progress toward resolution of it. A strong illustration is found in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 [hereinafter *Wholesale Travel*]. For a useful survey of the literature and jurisprudence, see K.R. Webb, "Regulatory Offences, The Mental Element and the Charter: Rough Road Ahead" (1989) 21 *Ottawa L. Rev.* 419. For further discussion of the theoretical issues, see P. Healy, "Regulatory Offences: The Case for a Purposive Test of Proportionality in Public Liability" in Meredith Memorial Lectures, *Commercial Crime and Commercial Law* (Cowansville, Que.: Yvon Blais, 1990) 195.

<sup>63</sup> [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161 [hereinafter *Sault Ste. Marie* cited to S.C.R.].

cution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.<sup>64</sup>

These are analytical classifications that abstractly describe the characteristics of different offences. It follows from them that offences of strict and absolute liability are, presumptively, regulatory offences because they are not true crimes. But these analytical distinctions do not coincide with the formal distinction between penal offences that are criminal in the strict sense and offences that are not. Provinces can validly enact offences that require a mental element (*mens rea*) and Parliament can enact offences by relying upon the criminal law power or the implied power of enforcement under a head of legislative authority that is expressly assigned to it by the *Constitution Act, 1867*. The criminal law power can be used to create offences that are not true crimes and, conversely, the power to enforce valid legislation by penal offences can be used to

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<sup>64</sup> *Ibid.* at 1325-26 [references omitted]. It is now arguable that the threefold model described by Dickson J., and especially the distinction between true crimes and offences of strict liability, has been obscured by recent developments. So too has the distinction between true crimes and regulatory offences. In a series of cases, the Supreme Court of Canada has affirmed that objective standards of fault for many serious crimes do not offend section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. Thus, it can no longer be said that true crimes necessarily require an element of *mens rea* or awareness in the commission of the act. The climax of these recent cases was *R. v. Creighton*, [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632. See also the discussion of the case in "Criminal Reports Forum: Objective Fault in the Supreme Court" (1993) 23 C.R. (4th) 240; A.-M. Boisvert, "Les exigences constitutionnelles en matière de faute pénale: Un bilan critique" (1994) 73 Can. Bar Rev. 161.

create true crimes. Within the criminal law *stricto sensu*, there are offences of three analytical types. In sum, despite a formal distinction between criminal and regulatory offences that is recognized and enforced by the Canadian Constitution, there is no correspondence between that distinction and the analytical classification of penal offences as true crime, strict liability, or absolute liability. This normative incoherence has inhibited the development of Canadian penal law. There is as yet no distinct and general body of administrative penal law in Canada.<sup>65</sup> Offences that are non-criminal in nature are typically investigated and prosecuted on a model of substantive and adjectival principles that, with some slight variation, mimics the administration of criminal justice.

The third constraint is that any regime of penal liability, federal or provincial, be consistent with the *Charter*. As part of the "supreme law of Canada",<sup>66</sup> the *Charter* governs how Parliament and the legislatures can make and administer penal law. The interpretation of the *Charter* by Canadian courts has to date given little impetus to the development of a distinct body of principles relating to regulatory liability. As the courts have tended to assimilate regulatory enforcement to the administration of criminal law, many principles of criminal due process have been invoked for the enforcement of regulatory law. This posture has given way recently to a more flexible approach in which the courts, especially the Supreme Court, have increasingly accepted that the rigour of constitutional constraint can vary with the nature and purpose of a legislative scheme.<sup>67</sup> Thus, the particular context may allow for differentiated standards of constitutional protection, and indeed, it might justify differentiated application of the law to natural and moral persons.<sup>68</sup> This is the case both for substantive offences and for adjectival law.

The principle of legality is of paramount significance in the definition of penal liability. This principle was long recognized at common law in Canada but has recently been recognized as a principle of fundamental justice under the *Charter*.<sup>69</sup> The essence of the principle of legality is that no definition of liability is valid unless the state gives every person subject to its laws adequate notice of the offence and of its content. This obligation is satisfied in part by the publication of laws in proper form. Of more immediate importance, however, is the requirement that the terms of liability be defined

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<sup>65</sup> This remains so even though, in *Sault Ste. Marie, ibid.*, Dickson J. expressly noted that regulatory or public welfare offences are essentially instruments of administrative law, not of criminal law. It would appear self-evident that it is inappropriate to adapt the criminal process for strictly administrative purposes.

<sup>66</sup> *Charter, supra* note 64, s. 52.

<sup>67</sup> See e.g. *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577; *Kindler v. Canada (A.G.)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438; *Pearlman v. Manitoba Law Society (Judicial Committee)*, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105; *Wholesale Travel, supra* note 62; *R. v. Généreux*, [1992] 1 S.C.R. 259, 88 D.L.R. (4th) 110.

<sup>68</sup> See *Reference Re Section 94(2) of the British Columbia Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536; *Wholesale Travel, ibid.*

<sup>69</sup> *Canada v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289; *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348.

with sufficient clarity. In some areas of the law, this can lead to quite complex statements of the law. For example, it might seem clear and simple enough to say that possession of dangerous drugs should be unlawful, but this only begs for definition of the drugs that Parliament considers dangerous. The *Food and Drugs Act*<sup>70</sup> contains a series of simple prohibitions, but the Act is complemented by a long and elaborate set of schedules that define more closely the object of those prohibitions. It is a convenient approach because it allows the ambit of liability to be adjusted by subordinate legislation without requiring amendment of the Act. With respect to reproductive technologies, this technique would also have great merit, but it must be emphasized that the problems of definition in this area are deep and severe. These technologies can have multiple purposes, some of which might be encouraged and some of which might be suppressed. These technologies are constantly evolving and greater novelty in technique will be accompanied by novelty in application. The challenge in any attempt to create effective prohibitions is to identify with sufficient clarity what should be prohibited and to do it in a manner that has some enduring value.

Against this background, a few general principles can be stated. It is clear in principle that criminal and regulatory prohibitions reflect different types of coercive power that may be exercised by the State; but in practice, especially at the federal level, the distinction is clouded in obscurity. Criminal and regulatory prohibitions have different legal sources in the sense that crime *stricto sensu* must be rooted in the criminal law power and regulatory offences must necessarily be rooted in some other legislative head. It is therefore a truism that, to the extent that it does not or cannot rely upon the criminal law power, Parliament can only create statutory prohibitions by relying upon the regulatory power to enforce valid federal legislation.

c. *A Continuum of Coercive Measures*

Although the categories are not easily drawn, there exists a continuum of sanctions imposed by the state that runs from criminal prohibitions in the strict sense through penal offences that are not strictly criminal and ends with informal administrative sanctions.<sup>71</sup> Some examples can be identified along this continuum.

i. Criminal Prohibition in the Strict Sense (Subsection 91(27))

This class of offences includes all those in the *Criminal Code*. It should be noted that the *Criminal Code* contains offences that relate to non-compliance with regulatory provisions at the provincial or at the federal level.<sup>72</sup> The Supreme Court

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<sup>70</sup> R.S.C. 1985, c. F-27.

<sup>71</sup> In *Sault Ste. Marie*, *supra* note 63 at 1325-26, Dickson J. observed that any offence that is not criminal in the strict sense is really administrative in nature and function.

<sup>72</sup> Examples include firearms offences and gaming offences not exempted by provincial authorization of a lottery. This is also true of abortion, which was upheld in 1975 and 1988 as a valid aspect of criminal prohibition (see *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161

of Canada has ruled that the criminal law power can support a regulatory scheme in which an administrative agency or official exercises discretionary authority.<sup>73</sup> One means by which the criminal law power can be used in a regulatory manner is to provide for exceptions or dispensations from existing criminal prohibitions.<sup>74</sup> There is no indication that this is the only valid way in which the criminal law power can be used in a regulatory manner. This leaves open the possibility that a legislative scheme that has a conspicuous regulatory aspect might yet be criminal law according to its dominant purpose.

It is important to note clearly that the Supreme Court ruled that provisions of the *Criminal Code* allowing the licensing of lotteries by provincial authorities was itself a "constitutionally permissive [*sic*] exercise of the criminal law power."<sup>75</sup> A regulatory scheme that consists wholly of federal action is plainly valid, provided that the legislation and any regulatory measures can be characterized as serving a "criminal purpose".<sup>76</sup> This proposition appears to be consistent with judicial decisions, but has not been tested by a substantial measure of litigation.

Criminal offences are also scattered throughout other federal statutes, which is to say that criminal offences in the strict sense can be found in statutes that otherwise provide for regulatory control over designated activities. The *Income Tax Act*,<sup>77</sup> for example, is chiefly regulatory in nature but it includes a variety of offences that are criminal law in the strict sense that they are based upon subsection 91(27) of the *Constitution Act, 1867*.

In sum, then, the form of criminal prohibitions can include regulatory aspects, but, it would seem, the measures must be characterized by an underlying criminal purpose. To the extent that the regulatory structure appears only to put conditions on otherwise lawful conduct, it is improbable that the courts will characterize the matter of the legislation as being in relation to a criminal purpose. It is not solely a question of the complexity of the regulatory scheme: it is also whether the dominant purpose of the legislation is to define unlawful conduct or to define the conditions under which lawful conduct may be pursued.

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[hereinafter *Morgentaler (1975)* cited to S.C.R.]; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler (1988)*].

<sup>73</sup> See *R. v. Furtney*, [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498 [hereinafter *Furtney*]; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 85 C.C.C. (3d) 118.

<sup>74</sup> Compare *Morgentaler (1975)*, *supra* note 72 at 627, Laskin C.J.C. (dissenting, but on this point there was no conflict with the majority).

<sup>75</sup> *Furtney*, *supra* note 73 at 106.

<sup>76</sup> *Labatt Breweries of Canada Ltd. v. Canada (A.G.)* (1979), [1980] 1 S.C.R. 914, 9 B.L.R. 181; *R. v. Kripps Pharmacy Ltd.*, [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577.

<sup>77</sup> R.S.C. 1952, c. 148.

ii. Direct Prohibitions that are Part of a Regulatory Scheme

This class of offences typically resembles a criminal prohibition in the strict sense because these offences comprise a prohibition punishable by a stated penalty and enforceable in the ordinary courts. It is often a matter of controversy whether such offences are criminal in the strict sense or regulatory, although in many instances the distinction is academic or moot. The matter can be essential for several reasons, however, not least being the constitutional jurisdiction to legislate over the matter. At the federal level, these offences are distinguishable from crime in the strict sense only by reference to express statutory language, the purpose, and context of the relevant legislation. These offences derive their validity not from subsection 91(27) of the *Constitution Act, 1867*, but from the implied power of enforcement that inheres in the substantive heads of power allocated to Parliament.<sup>78</sup> The purpose of these offences is to remedy non-compliance with the terms of a regulatory scheme.

It is axiomatic that any federal offence that is not criminal in the strict sense that it is based on subsection 91(27) of the *Constitution Act, 1867* must be grounded in some other basis of federal power. However, federal legislation includes a large number of offences that are not easily characterized as exclusively federal or provincial matters.<sup>79</sup>

iii. Offences for Breach of Regulation

Many regulatory schemes include omnibus offences that create liability for non-compliance with a regulation.<sup>80</sup> Regulatory offences of this kind are slightly more indirect as statutory prohibitions because the substance of the offence is not defined in the Act itself. Some offences of this kind are expressly exempted from the ambit of ordinary prosecutions and included within a so-called "ticketing" scheme whereby liability and penalty are assessed on a strictly administrative basis, without recourse in the first instance to the ordinary courts.<sup>81</sup>

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<sup>78</sup> *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338 at 358, 73 D.L.R. (4th) 110; see also *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255. A practical test of the distinction between criminal and regulatory liability is the scope for claims of double jeopardy (see *e.g. R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 37 C.C.C. (3d) 385; *R. v. Shubley*, [1990] 1 S.C.R. 3, 65 D.L.R. (4th) 193).

<sup>79</sup> See *e.g. Animal Pedigree Act*, R.S.C. 1985 (4th Supp.), c. 8, s. 63; *Textile Labelling Act*, R.S.C. 1985, c. T-10; *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16, ss. 111ff; *Meat Inspection Act*, R.S.C. 1985 (1st Supp.), c. 25, ss. 21ff.

<sup>80</sup> See *e.g. Explosives Act*, R.S.C. 1985, c. E-17, s. 22, as am. by S.C. 1993, c. 32, s. 12.

<sup>81</sup> See *e.g. Canada Agricultural Products Act*, R.S.C. 1985 (4th Supp.), c. 20, s. 34, as rep. by S.C. 1992, c. 47, s. 84. See more generally the *Contraventions Act*, S.C. 1992, c. 47. This Act provides a broad scheme of regulatory enforcement but remains not in force.

## iv. Administrative Sanctions for Non-compliance

Offences or sanctions of this type focus on non-compliance within a regulatory scheme, but the administration of them can vary from formalized decision-making by impartial adjudicators to informal procedures by decision-makers who administer a regulatory scheme. These sanctions often do not correspond to offences in the orthodox sense of a prohibition punishable by the imposition of a penalty. They include statutory powers of prohibition that are granted to particular decision-makers for the enforcement of a regulatory scheme. Under the *Aeronautics Act*,<sup>82</sup> for example, there are broad powers of prohibition that may be exercised by statutory decision-makers to ground aircraft that might be unsafe.

Once again, it must be emphasized that the distinction between criminal and regulatory prohibitions is often difficult to make, but that difficulty in no way compromises the validity of the distinction itself. The criteria for distinguishing between them include the legal source of the prohibition, the legislative context in which it is found (and the form of the legislation), the substantive content of the prohibition itself, the penalty, and the adjectival law provided for its administration.

For the reasons given above, the conclusion of this section is that Parliament has the option to use either or both of criminal and regulatory sanctions as a response to the *Report of the Commission*. This option exists within a wider constitutional problem, which is the extent of federal authority (regulatory or criminal) and the extent of provincial authority. The criminal law power is seemingly quite elastic, extending to the exercise of some regulatory powers, provided that the dominant characteristic of the governing legislation is a criminal purpose. The range of other statutory prohibitions is broad, too, but their validity derives from the constitutional basis of the legislation of which they are a part.

## 2. Specific Prohibitions

In the discussion that follows, attention will be focused on the Commission's recommendations for the use of criminal sanctions. With respect to each of these proposals, two questions must be asked. Is each recommendation justified by reference to a principle of value or utility sufficient to warrant use of the criminal law? Is it clear that the use of criminal sanctions is justified because no other form of regulation or control can achieve the appropriate measure of protection? The Commission's recommendations with respect to prohibitions fall broadly into two groups: the first concerned with scientific research and preconception arrangements; and the second with protection of the personal autonomy of pregnant women.

As noted previously, the Commission's recommendations are not uniformly clear and, for this reason, it is important to attempt a more precise identification of its proposals for use of the criminal sanction. There are seven specific recommendations

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<sup>82</sup> R.S.C. 1985, c. A-2, s. 5.1, as added by R.S.C. 1985 (1st Supp.), c. 33, s. 1.

identified by the Commission that call for the enactment of criminal legislation. Some of these are unclear on their own terms. The *Report* contains many recommendations for the control or prohibition of specified activities without explicit reference to the use of criminal sanctions, and it is thus necessary to consider whether the criminal law would be appropriate for the implementation of some recommendations apart from the seven expressly identified by the Commission itself. This point can be taken in two ways. If the Commission is clear in making recommendations with respect to criminal sanctions in seven of its proposals, are there other proposed prohibitions in the *Report* that might be made the subject of criminal or penal sanction? This question will be addressed below.<sup>83</sup> The second approach is the reverse: given the recommendations respecting criminal law, is it possible that some of these matters might best be addressed without reference to the criminal law, chiefly in deference to the principle of restraint?

The next sections consider specific prohibitions in two groups. Parts II.A.2.a through II.A.2.d focus on recommendations by the Commission that refer explicitly to the criminal law. Part II.A.2.e adverts to other matters identified in the *Report* that might be the subject of statutory prohibition.

a. *Embryo Research*

Chapter 22, "Embryo Research", includes two recommendations for the enactment of criminal sanctions.

184. Human zygote/embryo research related to ectogenesis, cloning, animal/human hybrids, and the transfer of zygotes to another species be prohibited, under threat of criminal sanction.<sup>84</sup>

192. The sale of human eggs, sperm, or zygotes be prohibited, under threat of criminal sanction.<sup>85</sup>

The rationale for the first of these proposals is that the identified forms of research "violate basic norms of respect for human life and dignity," "would contravene the Commission's ethical principles," and "would be contrary to the values of Canadians."<sup>86</sup>

Recommendation 192 seeks to prohibit commercial interests in the exchange or transfer of human eggs, sperm, or zygotes. The central rationale for this recommendation is that commercialization of reproductive materials and the commodification of human life are no less offensive than is the commercialization of other forms of human life that would not be tolerated under the law, such as selling children. It might be asked, however, whether the type of conduct that the Commission seeks to suppress is adequately described as sale. Presumably the Commission wishes to sanction all trans-

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<sup>83</sup> See Part II.A.2.e, below.

<sup>84</sup> *Report*, *supra* note 1 at 637.

<sup>85</sup> *Ibid.* at 643.

<sup>86</sup> *Ibid.* at 637.

actions that have as their direct object the use or transfer of reproductive materials for a commercial gain. As a matter of policy, this scope might be too wide if it is intended to include fees for sperm donation, for example. It might also be too narrow if it is intended solely to prohibit the sale of gametes or zygotes for purposes of research rather than for assisted conception. Once again, however, it must be asked whether it is most appropriate to condemn such transactions by a direct prohibition, as opposed to the more indirect prohibition of not allowing such activity to be licensed under a regulatory scheme.

Recommendations 184 and 192, and indeed all of the prohibitions proposed in Chapter 22 of the *Report*, raise several problems. One such problem concerns the manner in which the Commission identifies the subject matter of the proposed prohibitions.<sup>87</sup> It is unclear and possibly misleading to describe these matters by reference only to "embryo research". The activities in both recommendations are important both in research and, actually or potentially, in relation to assisted conception. To the extent that they relate to assisted conception, they also suggest reasons for action that are not squarely addressed by the Commission in Chapter 22, or elsewhere for that matter, including the extent to which reproductive technologies will force policy-makers to draw a distinction between permissible and impermissible eugenics. The formulation of Recommendation 184, in particular, appears to presuppose a distinction between matters of research and matters related to medically assisted conception, yet the recommendation does not make plain that the enumerated activities may be permissible in other contexts where human gametes are used. A wider issue that deserves attention is whether the Commission's recommendations for prohibitions on embryo research are not under-inclusive. Of particular importance in this regard is the production of human embryos specifically for purposes of research. A significant body of opinion, and one reflected in the legislation of several jurisdictions, holds that the creation of human embryos for non-therapeutic purposes should not be permitted. Neither the Commission nor the Warnock Committee<sup>88</sup> takes this position but it certainly is one of the most controversial aspects of new reproductive technologies and should be examined again if statutory prohibitions are contemplated.<sup>89</sup>

A further question is why the activities identified in these two recommendations are targeted specifically for prohibition "under threat of criminal sanction" while other activities described in Chapter 23 are recommended for some other form of prohibition

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<sup>87</sup> Compare J.B. Dossetor & J.L. Storch, "Roles for Ethics Committees in Relation to Guidelines for New Reproductive Technologies: A Research Position Paper" in *New Reproductive Technologies: Ethical Aspects*, *supra* note 7, 333 at 349: "There is a serious problem relevant to NRTs stemming from the difficulty in clearly distinguishing that which is an *innovative therapy* from that which is *clinical research*."

<sup>88</sup> Great Britain, Committee of Inquiry into Human Fertilisation and Embryology, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: H.M.S.O., 1984).

<sup>89</sup> For a review of this issue, see A. McLaren, "Human Embryo Research: Past, Present, and Future" in *Research Studies of the Royal Commission on New Reproductive Technologies, Background and Current Practice of Fetal Tissue and Embryo Research in Canada*, vol. 15 (Ottawa: Minister of Supply and Services Canada, 1993) 249.

or, even more obliquely, are identified as activities that "should not be permitted."<sup>90</sup> This imprecision not only demonstrates the Commission's failure to make clear its use of terms such as "criminal" and "prohibition", but it also fails to address whether the appropriate source of prohibition in each instance is federal or provincial. This question puts in issue precisely why or how the Commission concluded that one form of sanction was more appropriate than another. Parliament could create criminal offences to implement both Recommendations 184 and 192, but it is not clear that regulatory prohibitions would fail to realize the same objectives.

Reliance upon enforcement by ordinary criminal offences would raise practical problems. Investigation would lie chiefly with the police, which is to say that enforcement would depend in the first place upon information of sufficient clarity to warrant inquiries. The police would have to be told, for example, that Dr. White at Blackstone Hospital is conducting research or performing medical procedures contrary to a specified criminal offence. Assuming that they have such information, the police would likely require a search warrant to enter upon the premises of the hospital to ascertain whether there is evidence of the offences alleged. Unfortunately the police in Canada have comparatively little expertise in matters relating to genetic research or the finer points of medical practice. The preparation of an information for presentation before a justice will require careful attention, not least because the activities of a hospital are likely to be varied and numerous. If the activities of Dr. White take place in a large laboratory, the police will require skill in identifying the objects they seek. Assuming that they execute a successful search and seizure, expert forensic analysis will be required to corroborate any other information the police might have acquired. If the evidence suggests a basis on which to commence a prosecution, a prosecutor (or in some places the police) will have to decide whom to charge and for what offence. The identification of the accused could be difficult indeed, as the net of liability could include not only Dr. White but any natural or moral person participating in the alleged activities. It is entirely conceivable that Blackstone Hospital Inc. could be charged on the principles of corporate criminal liability.<sup>91</sup> If charges are laid, and brought to trial, the prosecutor would have to prove beyond reasonable doubt not only that the accused committed the alleged acts, but did so with any element of fault required by the definition of the offence. A successful prosecution would, of course, demand the imposition of sentence upon Dr. White and any other person convicted; however, due to the judge's discretion with respect to sentencing, it is unlikely that they would be imprisoned.

This quick sketch is only a caricature of the hurdles that must be cleared in the investigation and prosecution of criminal offences. It is enough, however, to suggest that the practical obstacles to criminal prosecution are sufficient to create an inhibition to investigation and to the commencement of proceedings.

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<sup>90</sup> See *supra* note 36.

<sup>91</sup> Some statutes provide expressly for the liability of corporations (see *e.g. Infertility (Medical Procedures) Act*, No. 10163 (1984) (Victoria), s. 28).

The approaches taken in Recommendation 184 and Recommendation 192 can be contrasted with those taken in other jurisdictions. In the United Kingdom, for example, it is an offence punishable by imprisonment of ten years for anyone to implant in a woman a live embryo other than a human embryo or any live gametes other than human gametes.<sup>92</sup> It should be noted that this prohibition is narrower in scope than either Recommendation 184 or Recommendation 192. This restriction on implantation is virtually the only outright prohibition in the British legislation. Almost all other activities relating to reproductive technologies are subject to control by a regulatory body that is authorized to issue licences relating to treatment, storage and research. The *Human Fertilisation and Embryology Act 1990* imposes strict conditions on licences that may be issued by specifically excluding some types of activity and specifically limiting the issuance of licences to the pursuit of particular objectives.<sup>93</sup> Thus, in the United Kingdom, the principal means for achieving the aims stated by the Commission in Recommendation 184 and Recommendation 192 is regulatory control. There is no indication to date of any prosecutions having been undertaken under section 41 of the British statute. The same is true of several jurisdictions in the Commonwealth, and there is no indication in those states of any prosecutions.

In sum, there is no doubt that Parliament could enact crimes in response to Recommendation 184 and Recommendation 192. The value in doing so would lie chiefly in a symbolic declaration of public policy with respect to human life and the non-commercialization of human reproduction. As an empirical proposition, however, there is little evidence that the matters addressed in these two recommendations now arise in numbers sufficient to warrant criminal sanction, as opposed to other forms of control. Indeed, there is every reason to believe that the values protected by these two recommendations could be secured as effectively, or more, by regulatory control.

#### *b. Preconception Arrangements*

In Chapter 23, "Preconception Arrangements", the Commission makes one recommendation for the enactment of a criminal offence.

199. The federal government legislate to prohibit advertising for or acting as an intermediary to bring about a preconception arrangement; and to prohibit receiving payment or any other financial or commercial benefit for acting as an intermediary, under threat of criminal sanction. It should also legislate to prohibit making payment for a preconception arrangement, under threat of criminal sanction.<sup>94</sup>

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<sup>92</sup> *Human Fertilisation and Embryology Act 1990* (U.K.), 1990, c. 37, s. 3(2), para. 4(1)(c).

<sup>93</sup> See *ibid.*, ss. 3, 12-15, Sch. 2.

<sup>94</sup> *Report, supra* note 1 at 690. Here too, the Commission expresses no view as to whether this matter should be the subject of outright criminal prohibition or of prohibition within a regulatory context. It should be noted that the range of conduct prohibited under the British Act is wider than that proposed by the Commission because the Commission defines activity that cannot be licensed and provides offences for unlicensed activity.

This proposal might seem another manifestation of the general principle that human reproduction not be commercialized. The Commission amplifies this rationale with the following observations:

Our first goal is to ensure that the status of this practice is uniform across the country, to discourage people from travelling to parts of the country where it is permitted. Evidence before the Commission shows that arrangements can take place across provincial/territorial borders. Thus, prohibition only at the provincial level would not be effective with respect to such arrangements. Hence, we sought a comprehensive, uniform, and effective approach to pre-conception arrangements across the country. This can be achieved by prohibiting certain activities aimed at facilitating such arrangements for gain.<sup>95</sup>

The Commission further adds that “[t]his proposed criminal prohibition will serve as an effective deterrent to commercial pre-conception arrangements.”<sup>96</sup>

It is dubious, to say the least, that the criminal law should be invoked as a means by which to ensure uniform treatment of a legal issue in all parts of Canada. The matter of criminal prohibition must be criminal in “pith and substance”, and if it is not, it is a colourable use of Parliament’s power. Moreover, it cannot reliably be claimed that enactment of an offence as suggested in this recommendation will be an “effective deterrent”. Even on the assumption that it would have some deterrent effect, it is not apparent that the effect would derive solely from the invocation of criminal sanctions. It might as effectively stem from inclusion within the terms of a federal regulatory scheme or in provincial legislation.<sup>97</sup>

Recommendation 199 is not entirely clear in its scope or its rationale in that it seeks the prohibition of conduct relating to participation as an *intermediary* in arranging surrogacy agreements, and conduct concerning payment for such agreements. It does not seek the prohibition of surrogacy arrangements as such and thus, in principle, the Commission would not seek to censure surrogacy arrangements. The *Civil Code of Québec* does not prohibit surrogacy arrangements but it does make plain that any contractual agreement for such an arrangement is unenforceable at law.<sup>98</sup> This is not quite the same as penal prohibition of any surrogacy arrangement for a financial consideration, but it is nonetheless a clear declaration of legislative policy that the commercialization of surrogacy arrangements is contrary to the public interest. There is no reason

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* There are, of course, variations on the theme of surrogacy. For present purposes, “surrogacy” will be taken to mean any arrangement whereby a woman agrees to carry to term a fetus conceived without sexual intercourse, using the gametes of at least one other person who will later assume custody of the child born to her. For a survey of the law in other jurisdictions, see Guichon, *supra* note 6 at 597-618; Williams, *supra* note 6.

<sup>97</sup> This was recommended to the Commission by Guichon, *ibid.* at 592.

<sup>98</sup> See M. Ouellette, “The Civil Code of Quebec and New Reproductive Technologies” in *Overview of Legal Issues in New Reproductive Technologies*, *supra* note 26, 625. This means that money not paid cannot be claimed and that money paid cannot be recovered for breach of the agreement.

to believe that the approach taken in the *Civil Code of Québec* is or would be ineffectual in achieving the same objectives as the Commission identifies in Recommendation 199. And if the other provinces were to reach the same position as that taken by Québec, whether through the determination of the courts, through individual legislation, or through coordinated legislation of a model statute, there is no strong argument for the use of criminal sanctions. The argument for criminal sanction must rest on the premise that provincial law rendering arrangements for commercial surrogacy unenforceable is not sufficient to deter or suppress such activity and, moreover, that there is some criminal purpose that justifies the creation of a criminal prohibition.

In 1992, the Law Reform Commission of Canada recommended that acting as a paid intermediary in a surrogacy agreement be a criminal offence.<sup>99</sup> As noted by the Commission, the objective of this recommendation was to "stigmatize traffic in human beings."<sup>100</sup> The proposal was not unanimous among the Commissioners, however. A minority took the view that the recommendation was either under-inclusive or unnecessary. It would be under-inclusive, they said, in the sense that it should not be limited only to paid intermediaries but, in keeping with its stated objective, extended to anyone who participates in a surrogacy arrangement in any material way. In what appears to be a stronger objection, the minority expressed the view that the recommendation was unnecessary because there was sufficient deterrent effect in the unenforceability of surrogacy contracts. To ensure repression of such arrangements, the minority added that the unenforceability of arrangements "could be supplemented by regulatory offences carrying substantial fines or other penalties."<sup>101</sup> Such offences, it should be noted, could be enacted by provincial governments.

The difference of opinion within the Law Reform Commission replicates a division found in many other jurisdictions. There is a consensus that commercial surrogacy arrangements be repressed, but there are disputes as to whether the law should repress all forms of participation in a surrogacy arrangement and as to which legal means are most appropriate for the stated objective.<sup>102</sup> The position taken by the Commission and by a majority of the Law Reform Commission is obviously problematic for the reasons given by the minority of the Law Reform Commission. If surrogacy arrangements represent so profound an affront to fundamental values, it cannot be said that the affront lies only in the activities of paid intermediaries. Thus the options now before the Government of Canada would seem to be one of two. One would be to enact criminal prohibitions on all forms of paid or unpaid participation in a surrogacy arrangement, including not only intermediaries but immediate participants, while the other would be to enact no prohibitions and to allow the matter to be dealt with under provincial law. The accent in these options is obviously different. In the first option, the premise is the integrity of the human person and its relations to other persons, whereas in the other, the

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<sup>99</sup> *Medically Assisted Procreation*, *supra* note 2 at 138.

<sup>100</sup> *Ibid.* at 132-39.

<sup>101</sup> *Ibid.* at 139.

<sup>102</sup> See the review by the Law Reform Commission of Canada in *Medically Assisted Procreation*, *supra* note 2 at 65-68, 132-39; Williams, *supra* note 6; Guichon, *supra* note 6.

emphasis is placed on discouragement of the commercialization of human reproduction.

Two specific reasons militate against the enactment of legislation to create an offence of the kind proposed in Recommendation 199. First, there is no evidence in Canada that commercial surrogacy arrangements have been made, or are being made, in numbers significant enough to warrant immediate enactment of criminal sanctions to prevent further social harm.<sup>103</sup> Second, while repressing the commercialization of human reproduction is unimpeachable as a value, there is no reason why this objective cannot effectively be met under laws within the province. As noted above, the desire for uniform legislative treatment of this issue is not a sufficient basis upon which to ground federal authority over the matter.

c. *Judicial Intervention in Pregnancy and Birth*

In Chapter 30, "Judicial Intervention in Pregnancy and Birth", there are two recommendations that bear upon the use of the criminal law.

273. Judicial intervention in pregnancy and birth not be permissible. Specifically, the Commission recommends that
- (a) medical treatment never be imposed upon a pregnant woman against her wishes;
  - (b) the criminal law, or any other law, never be used to confine or imprison a pregnant woman in the interests of her fetus;
  - (c) the conduct of a pregnant woman in relation to her fetus not be criminalized;
  - (d) child welfare or other legislation never be used to control a woman's behaviour during pregnancy or birth; and
  - (e) civil liability never be imposed upon a woman for harm done to her fetus during pregnancy.<sup>104</sup>

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<sup>103</sup> It should also be noted that empirical research conducted for the Commission evidences no overwhelming revulsion among Canadians towards surrogacy, paid or unpaid. The results suggest that the respondents to the Commission's inquiries were evenly divided on many aspects of the issue (see Decima Research, "Social Values and Attitudes of Canadians Toward New Reproductive Technologies" in Research Studies of the Royal Commission on New Reproductive Technologies, *Social Values and Attitudes Surrounding New Reproductive Technologies*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1993) 35; M. de Groh, "Reproductive Technologies, Adoption, and Issues on the Cost of Health Care: Summary of Canada Health Monitor Results" in *Social Values and Attitudes Surrounding New Reproductive Technologies*, *ibid.*, 297; M. de Groh, "Key Findings from a National Survey Conducted by the Angus Reid Group: Infertility, Surrogacy, Fetal Tissue Research, and Reproductive Technologies" in *Social Values and Attitudes Surrounding New Reproductive Technologies*, *ibid.*, 203).

In 1985, the Ontario Law Reform Commission, *supra* note 2, recommended that surrogacy arrangements be regulated. This position has only a few analogues in the United States (see Guichon, *supra* note 6; Williams, *supra* note 6).

<sup>104</sup> Report, *supra* note 1 at 964.

The premise of this recommendation is that, in a conflict of values between those relating to “the chances for the birth of a healthy child”<sup>105</sup> and those relating to the personal autonomy of a pregnant woman, the latter should prevail. The Commission thus disparages the use of legal constraints as patronizing and ineffectual. Moreover, the Commission suggests that the types of legal and judicial intervention described in these recommendations are inconsistent with the ethic of care.

Because the woman’s consent and cooperation are needed to ensure a positive outcome for the fetus, it follows that the most effective way of caring for the fetus is through appropriate support and caring for the pregnant woman. ...

In the Commission’s view, extending care to the fetus by giving the pregnant woman the support she needs provides the best hope for enhancing the health and well-being of both the fetus and the woman carrying it.<sup>106</sup>

Recommendation 273 is different from the others seen thus far because it proposes to exclude the operation of the criminal law rather than to extend it. It remains to be seen, therefore, whether the criminal law is capable of application in the manner described in that proposal.

Recommendation 273 is not specifically concerned with forms of research or with aspects of assisted conception. It seeks the advancement and vindication of a principle by urging restraint in the uses of the law. The forms of legal or judicial intervention identified in this recommendation are not entirely concerned with the criminal law. Indeed, for the most part, the possibility of judicial intervention contemplated by the Commission is chiefly a matter of provincial law relating to mental health and the welfare of children.<sup>107</sup>

Recommendation 273(b) presumably means that no *existing* law should be used, and no *new* law should be created, that would allow a pregnant woman to be confined or imprisoned in the interests of her fetus. On the first point, this would mean more specifically that no prosecutor should charge an offence that could have this outcome and, if there were a conviction, no judge should order confinement or imprisonment for this reason. In a conflict of values relating to the personal autonomy of a woman and the prospects of the fetus, the former should prevail. Thus a woman should not be treated by the law in a manner that regards her as an instrument for the health of her fetus. The Commission does not clearly express the circumstances envisaged by this recommendation. One possibility would be instances in which a woman might be prosecuted for some offence that involves causing death or bodily harm to her fetus.

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 964, 965.

<sup>107</sup> Rodgers, *supra* note 26 at 2; see also J.E. Hanigsberg, “Power and Procreation: State Interference in Pregnancy” (1991) 23 *Ottawa L. Rev.* 35.

There is little law on this matter in Canada,<sup>108</sup> but what there is must be derived from section 223 of the *Criminal Code*, especially subsection 2:

A person commits homicide when he causes injury to a child before or after its birth as a result of which the child dies after it becomes a human being.

Although subsection 2 specifically defines an instance of homicide, it is arguable that the same provision could be applied in respect of offences of causing bodily harm. The Supreme Court has ruled that, for the purposes of criminal liability, a fetus is not a human being or person unless it is born alive.<sup>109</sup> It is possible, therefore, that a person could be charged for bodily harm or death caused to a fetus that is born alive. It is on this basis, for example, that there have been prosecutions in the United States against pregnant women for harm that they have allegedly caused to a fetus that was subsequently born alive.<sup>110</sup>

Recommendation 273(c) is intended specifically as an injunction to Parliament not to use its power to create an offence that would allow a pregnant woman to be prosecuted for conduct that might adversely affect the fetus she carries. The rationale for this, and indeed for the whole of Recommendation 273, is the primacy of personal autonomy in a conflict of values. The immediate causes for this recommendation are twofold. One is the spectre of prosecutions in the United States on grounds similar to those disparaged in the recommendation.<sup>111</sup> There is no evidence that such prosecutions have taken place in Canada, and thus the recommendation can be seen in large measure as prophylactic. It seeks to enjoin a potential use of the criminal law, not to correct a current and entrenched use of the criminal law in current practice. The second and more pressing reason for Recommendation 273, especially paragraph (c), is that the Law Reform Commission recommended in 1989 that Parliament create a crime of fetal destruction or harm:

Everyone commits a crime who ...

being a pregnant woman, purposely causes destruction or serious harm to her foetus by any act or by failing to make reasonable provision for assistance in respect of her delivery.<sup>112</sup>

This proposal has been firmly opposed by many, including the Canadian Bar Association, on the ground that it would violate the personal autonomy of a pregnant woman

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<sup>108</sup> Rodgers, *ibid.* at 4.

<sup>109</sup> *R. v. Sullivan*, [1991] 1 S.C.R. 489, 63 C.C.C. (3d) 97; see also M. Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39 McGill L.J. 58.

<sup>110</sup> See Rodgers, *supra* note 26 at 72-76.

<sup>111</sup> *Ibid.*; see generally Raymond, *supra* note 29.

<sup>112</sup> Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper 58) (Ottawa: Law Reform Commission of Canada, 1989) at 64 [hereinafter *Crimes Against the Foetus*].

and constitute an intolerable measure of state control over conduct during pregnancy.<sup>113</sup> The Law Reform Commission stated that the "requisite culpability should be limited to purpose."<sup>114</sup> By thus limiting the scope of the proposed offence to purposeful conduct, the Commission acknowledged that any offence in this matter would be difficult and controversial.

While few perhaps would deny that pregnant women have a moral obligation to avoid reckless or negligent conduct affecting their foetuses, we hesitate to bring in criminal law at this point. In the first place, because of the unique relationship between mother and foetus, use here of criminal law would — unfairly in our view — impose special burdens on her over and above those falling on all other parties. Second, criminal law enforcement would involve intolerable restrictions, on the mother's own autonomy, e.g., monitoring the way she eats, drinks, smokes and so on. Third, such monitoring and restrictions could well cause marital and familial disruption. Finally, at a time when pregnant women's civil liability for foetal injuries is far from resolved, it would be premature to impose on them the still more onerous burden of criminal liability.<sup>115</sup>

These caveats with respect to the proposed offence are so clearly stated that they amount, in effect, to a powerful rebuttal of the recommendation.

It might be noted here that the Commission, in Recommendation 273, unlike the Law Reform Commission, does not address the liability of a pregnant woman for failure to obtain assistance in child-birth.<sup>116</sup> This matter is currently addressed under section 242 of the *Criminal Code*. Prosecutions have been rare but the principle espoused by the Commission would entail repeal of section 242.

Apart from specific offences concerned with the conduct of pregnant women, the Commission evidently contemplates in Recommendation 273(b) any case in which an incidental aspect of criminal prosecution would be confinement or imprisonment of a woman in the interests of her fetus. For practical purposes, the only issues of criminal law raised here are whether the interests of the fetus are relevant to denying interim release after arrest or to sentencing. There is no sufficient body of decisions in which judges have ordered continued detention or a custodial sentence in the interests of the fetus over the liberty of the pregnant woman.<sup>117</sup> The best explanation for this is probably that it would be transparently and self-evidently wrong for a judge to confine or detain a woman solely in the interests of the fetus because those interests are strictly irrelevant in relation to bail or in relation to punishment. It can be argued that only one case will suffice to make a case for legislative prohibition of such decisions, but it is

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<sup>113</sup> According to Martin, *supra* note 26 at 120, the Commission received submissions that advocated the enactment of offences that would sanction conduct by a pregnant woman that causes harm to the fetus she carries.

<sup>114</sup> *Crimes Against the Foetus*, *supra* note 112 at 52.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Report*, *supra* note 1 at 964.

<sup>117</sup> See generally MacKenzie, *supra* note 37.

submitted that an equally effective remedy would lie in the appellate courts. Without denying or impugning the principle upon which it is based, Recommendation 273 does not now warrant any legislative action with respect to the criminal law.<sup>118</sup> Any statutory prohibition intended to sanction a pregnant woman's conduct on the basis of harm or danger to the fetus is guaranteed to raise a powerful challenge to its validity under section 7 of the *Charter*. The exact extent of a woman's right of personal security under that section remains unclear after *R. v. Morgentaler*,<sup>119</sup> but there is no doubt that the right of personal security has sufficient force to put any such prohibitions in doubt.

In short, then, it would seem that the weight of the argument lies *in principle* with the conclusion of the Commission in Recommendation 273. But it does not follow that the Government of Canada should act on this recommendation because there is now no demonstrable need to modify the criminal law so as to correct a problem that does not presently exist. It is undesirable to use the force of the criminal law to make strictly symbolic declarations of fundamental values. The obligation or duty of care owed by a pregnant woman to her fetus should properly be seen instead as a moral obligation that is beyond the reach of the law, civil or criminal.<sup>120</sup>

*d. Unwanted Medical Intervention and Criminal Assault*

Another recommendation in Chapter 30, "Judicial Intervention in Pregnancy and Birth," concerns the legal definition of liability for medical intervention that is unwanted by the pregnant woman.

274. Unwanted medical treatment and other interferences, or threatened interferences, with the physical autonomy of pregnant women be recognized explicitly under the *Criminal Code* as criminal assault.<sup>121</sup>

As with Recommendation 273, the value that this proposal seeks to preserve is the personal autonomy of pregnant women. It might be asked here too whether the ethic of care necessarily compels a restatement of liability for assault in the manner proposed in Recommendation 274.

Recommendation 274 proposes that the personal autonomy of pregnant women be given enhanced protection by including within the notion of criminal assault instances of unwanted medical treatment and other actual or threatened interferences with the physical autonomy of pregnant women, especially by way of caesarean section.<sup>122</sup> This recommendation is redundant to the extent that its substance is covered by the general law of assault, which is defined in section 265 of the *Criminal Code*. Moreover, there

<sup>118</sup> See the dissenting opinion in the *Report*, *supra* note 1 at 1134.

<sup>119</sup> *Morgentaler* (1988), *supra* note 72.

<sup>120</sup> See R. Bessner, "State Intervention and the Pregnant Women" in Basen, Eichler & Lippman, *supra* note 2, vol. 2, 170 at 175.

<sup>121</sup> *Report*, *supra* note 1 at 965.

<sup>122</sup> See I. Grant, "Forced Obstetrical Intervention: A Charter Analysis" (1989) 39 U.T.L.J. 217; Hanigsberg, *supra* note 107.

is scope for civil liability for assault by private action or by way of complaint before professional disciplinary boards. It might well be argued that section 265 of the *Code* is not used effectively to prosecute assault, but that is not equivalent to arguing that the net of liability is cast in such a way as to allow persons guilty of assault to escape conviction. There is no discernible body of jurisprudence to suggest that accused persons easily mount successful defences to assault charges that are laid and brought to court. There are two other factors that militate against the implementation of this proposal. First, the recommendation might be inconsistent with other provisions of the *Criminal Code* that impose a duty on persons who undertake to provide medical assistance to take all reasonable care. Second, as has been stated previously, it is imprudent to use the force of the criminal law for hortatory purposes (*i.e.*, a statutory declaration of the personal autonomy of specifically identified members of society) in circumstances where principles of general application adequately address the interests of personal autonomy. In sum, it might be said that the principle of restraint in the use of criminal sanctions provides the dominant and compelling reason to refrain from implementing Recommendation 274.<sup>123</sup>

*e. Other Possible Prohibitions*

It was noted above that the Commission liberally recommends prohibition as a means of enforcing its conclusions of policy but fails to make plain whether prohibitions should be statutory or otherwise, and whether statutory prohibitions should be criminal or otherwise. It will be recalled that a single statutory scheme could include criminal sanctions, regulatory prohibitions, and administrative prohibitions and thus it might be appropriate to identify some of the especially ambiguous recommendations in the *Report*.

There are several recommendations that could be included among penal sanctions by virtue of their subject matter and the rationales that support them. No attempt will be made here to survey these recommendations thoroughly, but some examples will suffice. Recommendation 287 states the following:

287. The prohibition of the commercial exchange of fetuses and fetal tissue extend to tissue imported from other countries, so that no fetuses or fetal tissues are used in Canada for which women have received payment, or where a profit has been made by an intermediary.

This proposal follows a recommendation that provincial legislation be amended to prohibit the sale of fetal tissue. However, it is not clear whether the form of federal prohibition contemplated by Recommendation 287 is criminal or regulatory. The principle behind this proposal is the abhorrence of the commodification of human reproduction, and it is for this same reason that the Commission recommended that participation in commercial surrogacy arrangements be prohibited "under threat of criminal sanction" on the terms stated in Recommendation 199. The *Report* also refers

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<sup>123</sup> One commissioner, Dr. Suzanne Rozell Scorsone, dissented from Recommendations 273 and 274 (*Report*, *supra* note 1 at 1053-1146).

obliquely to the Commission's view that "the commercial exchange of fetuses and fetal tissue be prohibited under threat of criminal sanction,"<sup>124</sup> although there is no recommendation in precisely these terms. However, it should be noted that in the "Overview of Recommendations", the Commission lists Recommendation 287 among its proposals for use of the criminal law.

The foregoing example is perhaps best regarded simply as a lack of terminological precision, yet others suffer from substantive difficulties. For instance, there are many recommendations relating to genetic alteration but the precise terms of these recommendations are not clear. Recommendation 192, it will be recalled, identified various forms of research that should be condemned under threat of criminal sanction. In Chapter 26, "Prenatal Diagnosis for Congenital Anomalies and Genetic Disease", the Commission also recommends statutory guidelines to prevent genetics centres from acquiring licences to permit genetic alteration of a human zygote or embryo.<sup>125</sup> It is entirely plausible, given the rationale for this recommendation, that the objective could and should be sought by means of criminal prohibition.

There are also several proposed prohibitions that clearly contemplate a criminal offence, in that offenders could be charged by information and brought before the courts. They have a similar form:

86. Collecting, storing and distributing, or using sperm in providing assisted insemination services without a licence issued by the National Reproductive Technologies Commission, or without complying with the National Commission's licensing requirements, as outlined below, constitute an offence subject to prosecution.<sup>126</sup>

These proposals would sanction non-compliance with the conditions of a regulatory scheme. That, of course, does not by itself settle whether the offences should be criminal or regulatory in nature, but it will also be seen that the type of behaviour contemplated in these recommendations could as easily be the object of outright criminal prohibition.

### B. Options

It is important to emphasize, again, that criminal sanctions and regulatory controls over reproductive technologies are not mutually exclusive. Indeed, the norm throughout the Commonwealth would now appear to be legislation that is primarily regulatory in nature, but enforced by prohibitions. These prohibitions typically concern breach of the requirement for a licence or non-compliance with licensing conditions. Only a few offences can be described as direct criminal prohibitions, but even those few are incorporated within the same statute.

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<sup>124</sup> *Ibid.* at 1002.

<sup>125</sup> Recommendation 241, *supra* note 36.

<sup>126</sup> *Ibid.* at 475; see also, *e.g.*, Recommendation 131, *supra* note 34; Recommendation 196, *supra* note 34; Recommendation 234, *supra* note 34; Recommendation 291, *supra* note 34.

On this last point it is useful to consider various options with respect to the form of possible legislative responses at the federal level. Criminal sanctions could, of course, be introduced in the *Criminal Code*.<sup>127</sup> This would be especially appropriate for discrete, easily defined forms of behaviour. Criminal prohibitions could also be included in other federal statutes — either an existing statute or a new statute created specifically to address issues relating to reproductive technologies. It might also be noted that criminal sanctions could be introduced in one, two, or all of these legislative instruments. The statutory source of an offence does not affect its definition or quality as a criminal offence, and thus there is little significance to be drawn from the source alone. If the Government of Canada should decide not to embark upon any form of regulation of reproductive technologies, and yet to criminalize certain types of behaviour, there is perhaps a stronger argument that a criminal offence should be introduced by amendment of the *Criminal Code*. Conversely, if the Government should decide to regulate the matter of reproductive technologies, alone or with the cooperation of the provinces, a distinct statute for this purpose is a more flexible and coherent option. It would allow the Government to declare its policy in a single statement and to adapt it by amendment and further regulation in response to new developments. This latter option of a distinct statute is useful whether or not it incorporates criminal sanctions.

There are three broad areas in which criminal sanctions could be imposed: genetic research; assisted conception; and interference with the personal autonomy of pregnant women. It is beyond doubt that Parliament can create criminal offences in relation to each of these three matters. The reason for doing so can be summarized in general terms as the protection of society from harm by the reinforcement of fundamental values and by the deterrence of harmful behaviour. The enactment of criminal offences would no doubt send a strong message to the public and to the professional communities that have special interests in reproductive technologies. This is perhaps especially true with respect to certain types of genetic research and surrogacy arrangements, because they pose a degree of novelty that causes moral and ethical anxiety; but the symbolic value of a strong message can also be challenged by a substantial array of objections to the enactment of criminal sanctions.

The most important question is whether the enactment of criminal prohibitions is necessary to protect fundamental values and to achieve an effective measure of deterrence of undesirable behaviour. This question has two dimensions. The first relates to the principle of restraint in the use of the criminal law. Is it clear that no other means of control can effectively achieve the desired protection of fundamental values and the deterrence of harmful conduct? At the moment, the answer to this question is negative because Parliament and the provincial legislatures have not attempted alternative measures. The second aspect is more problematic and consists essentially of the reasons why responsible decision-makers could seek the introduction of criminal sanctions. Even if criminal sanctions are considered appropriate measures, is it clear that there is a consensus on the values that demand protection by the criminal law and the

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<sup>127</sup> An example might be the prohibition of participation in paid surrogacy arrangements.

manner in which offences should be defined? Is it similarly clear that the enactment of criminal sanctions would actually have a demonstrable deterrent effect?

The research of the Commission, despite its claims, suggests that there is a substantial measure of ambiguity and ambivalence in public opinion. It cannot be claimed that there is overwhelming empirical support for the criminal prohibitions recommended by the Commission. It is perhaps clear that there is much anxiety among the public about aspects of reproductive technologies, but the evidence compiled by the Commission does not lead ineluctably to the conclusion that criminal sanctions are warranted. Moreover, it might plausibly be argued that the ethic of care entirely supports the option *not* to enact criminal sanctions but to control the development of reproductive technologies by regulation in a manner that protects, but also promotes, the public interest. If some of the activities that the Commission proposes to criminalize could actually promote the public interest and enhance the ethic of care, it might be considered an error of judgment to allow the threat of criminal sanction to foreclose the development of helpful knowledge and experience. In other words, there might be a significant social harm in criminalizing behaviour in the manner proposed by the Commission.

## Conclusion

These are intractable questions of principle, and arguments can be made on this basis for and against the use of criminal sanctions. There are also objections of a more pragmatic nature.

The introduction of criminal sanctions by Parliament could have the effect of excluding regulatory or penal control, by Parliament or the provinces, over matters covered by the definition of criminal offences. By enacting criminal offences, Parliament would adopt an option for controlling reproductive technologies that is inflexible and resistant to change.

The principle of legality is a concept in criminal law that demands sufficient definition of the terms of criminal liability. The public is entitled to be informed with adequate clarity of the limits of lawful behaviour. The enactment of criminal offences relating to reproductive technologies, and particularly offences relating to scientific processes and biological entities, would require exceptional precision. Offences drawn in the terms used in Recommendations 184 and 192 are not good enough. Parliament would likely have to create offences by reference to a schedule of prohibitions or by reference to subordinate legislation that particularizes unlawful conduct. Once again, however, it must be asked whether these recommendations might not as effectively be enacted in a regulatory scheme.

Assuming nonetheless that criminal sanctions were introduced, the enforcement of such offences would be exceptionally problematic.

A preliminary problem would be investigation and the acquisition of evidence. The creation of criminal sanctions implies that alleged offences would be investigated according to the ordinary procedures of the criminal law. This would mean, in practical terms, that police officers would conduct investigations, principally by means of oral information and search and seizure. With respect to the latter, section 8 of the *Charter* has been interpreted so as to require prior authorization before a search or seizure can be executed. No doubt a special statute dealing with reproductive technologies could provide specific rules relating to search, seizure, and more generally the acquisition of information, as is the case in the *Food and Drugs Act* and the *Narcotic Control Act*,<sup>128</sup> but these special provisions cannot replace a strictly regulatory model of investigation for the enforcement of criminal offences.

A smaller, but not insignificant, point is the authority to prosecute any proposed offences. Offences in the *Criminal Code* are typically prosecuted by the Attorney General of the province, whereas offences in other federal enactments are typically prosecuted by the Attorney General of Canada. If criminal offences were introduced in the *Criminal Code* and in other federal statutes, there might be a possibility of inconsistency or even of conflict. If offences were enacted in legislation other than the *Criminal Code*, the law should specifically provide for the Attorney General of the province to prosecute after giving personal consent to the preferment of charges and after having consulted with the Attorney General of Canada. Alternatively, authority to prosecute could be given to the Attorney General of Canada on the same conditions.

With respect to genetic research, the possibility of successful prosecution would be diminished in two senses by the corporate nature of such work. One is the specific notion that corporations might be liable for particular offences, in which case the prosecutor would have to satisfy the complex and difficult tasks of proving the acts of some natural person or persons, so as to engage the liability of the corporation. Apart from corporate liability in this narrow sense, there is also the problem that genetic research is often corporate in the sense that it involves large numbers of people who contribute to a single enterprise. For purposes of prosecution, therefore, this would raise problems in identifying the participants in criminal activity.

Another significant obstacle to effective prosecution might be the heightened standard of proof (*i.e.* beyond a reasonable doubt) required for conviction of a criminal offence. This would apply to all offences prosecuted in the ordinary courts, as opposed to infractions that occur under a regulatory scheme administered by an agency.

For these reasons, and for others given above, the case for criminal prohibitions without a broader regulatory scheme is unpersuasive.

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<sup>128</sup> R.S.C. 1985, c. N-1.