Osgoode Hall Law Journal

Volume 32, Number 4 (Winter 1994) Article 1

10-1-1994

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Citation Information

Trebilcock, Michael J.; Martin, Melody; Lawson, Anne; and Lewis, Penney. "Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services." *Osgoode Hall Law Journal* 32.4 (1994) : 613-701.
DOI: https://doi.org/10.60082/2817-5069.1660
https://digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss4/1

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Abstract

This article examines the cases for and against commercializing, or "commodifying," reproductive materials and services. Using a supply/demand third-party framework, three basic scenarios in which commercial-exchange relationships may be possible-exchange of gametes and zygotes, exchange of gestational services, and exchange of fetal material-and the major parties of interest, or stakeholders, are identified. The study sketches the liberal, essentialist, and radical contingency theories that shape the debate over the commercialization of reproductive materials and services. The article then attempts to derive some basic governing principles that reflect as much common ground as possible amongst these various normative perspectives, while recognizing that complete reconciliation is impossible. Taken together, these principles are designed to reflect a strategy of "constrained commodification," where commercialization or commodification, that is, financial remuneration, plays a relatively neutral role in the utilization of reproductive materials and services. In light of these principles, the article concludes by sketching legal and regulatory regimes with respect to the exchange of gametes and zygotes, gestational services, and fetal tissue.

Keywords

Human reproductive technology industry--Law and legislation

TESTING THE LIMITS OF FREEDOM OF CONTRACT: THE COMMERCIALIZATION OF REPRODUCTIVE MATERIALS AND SERVICES©

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This article examines the cases for and against commercializing, or "commodifying," reproductive materials and services. Using a supply/demand third-party framework, three basic scenarios in which commercial-exchange relationships may be possible—exchange of gametes and zygotes, exchange of gestational services, and exchange of fetal material—and the major parties of interest, or stakeholders, are identified. The study sketches the liberal, essentialist, and radical contingency theories that shape the debate over the commercialization of reproductive materials and services. The article then attempts to derive some basic governing principles that reflect as much common ground as possible amongst these various normative perspectives, while recognizing that complete reconciliation is impossible. Taken together, these principles are designed to reflect a strategy of "constrained commodification," where commercialization or commodification, that is, financial remuneration, plays a relatively neutral role in the utilization of reproductive materials and services. In light of these principles, the article concludes by sketching legal and regulatory regimes with respect to the exchange of gametes and zygotes, gestational services, and fetal tissue.

Cet article examine les arguments pour et contre la commercialisation (ou la commodification) des services et des matériaux de reproduction. Tout en prenant conscience d'une structure basée sur l'offre et la demande et une troisième partie, on peut identifier trois scénarios de base dans lesquels les relations d'échange commercial seraient possibles—l'échange des gamètes et des zygotes, l'échange des services de gestation, et l'échange du tissu fœtal. Aussi, on peut identifier les parties majeures intéressées—ceux pour qui beaucoup est en jeu. Cette étude esquisse les théories libérale, essentialiste, et radicale de contingence, qui façonnent la discussion sur la commercialisation des services et des matériaux de réproduction. Ensuite, l'article essaie de dériver des principes de base gouvernants qui refléteraient un point de rapprochement parmi ces perspectives normatives variées—tout en se rendant compte qu'une réconciliation totale est impossible. Vus ensemble, ces principes tiennent à refléter une stratégie de "la commodification contrainte," où la commercialisation ou la commodification, ce qui veut dire la rémunération financière, joue un rôle plutôt neutre dans l'emploi des services et des matériaux de réproduction. Vus ces principes, l'article conclut par esquisser des régimes légaux et régulatoires qui gouverneraient l'échange des gamètes et des zygotes, des services de gestation, et du tissu fœtal.

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** Graduates of the University of Toronto Law School. This paper is derived from a larger study undertaken by the authors for the Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies*, vol. 3 (Ottawa: Minister of Supply and Services, 1993). We are grateful to Roxanne Mykitiuk of the Commission for extensive and helpful comments on an earlier draft of the larger study. We are also grateful to workshop participants at the University of Virginia Law School and Vanderbilt Law School for comments on an earlier draft of this paper.

I. COMMODIFICATION

The recent emergence of a wide range of technologies[1] for the manipulation of reproductive materials has sparked massive ethical controversies.[2] Many of these technologies in their present or future forms challenge traditional conceptions of the family by making possible the radical transformation of parental, familial, and social relationships. One key question, which engages sharply divergent views, is whether the new reproductive technologies perpetuate and reinforce negative gender stereotypes about the role of women in contemporary society—viewed from the perspectives of women using these technologies to address problems of infertility, and of women who provide reproductive materials or services to those requiring them to facilitate reproduction. The use of new technologies for non-reproductive purposes, for example, the use of fetal material for the treatment of degenerative

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[1] This term includes, among others, artificial insemination by husband (insemination with the sperm of a male partner); donor insemination (insemination with the sperm of a man who is not anticipating becoming the social father of the resulting child); ovum donation (stimulation of increased production of ova, and removal of ova from one woman for use by another woman); gamete intra-fallopian transfer (injection of sperm directly into the fallopian tube, where fertilization takes place); *in vitro* fertilization (extracorporeal fertilization of ova, producing a conceptus for subsequent transfer into the female body); zygote intra-fallopian transfer (transfer of the conceptus into the fallopian tube); and zygote donation (donation of a zygote to persons who do not provide genetic material to create the zygote). Zygote gestation and transfer and what we term pre-conception agreements are variations on what is known as "surrogacy." These will be discussed further below. Techniques for the medical application of fetal tissues and organs for therapeutic purposes will also be included under the rubric of "technologies," although, while fetal material is a "reproductive material," it is not used for reproductive purposes in this context. It is also important to note that the current state of technology is such that sperm can be cryopreserved ("frozen") but ova cannot. However, for the purposes of our analysis, we will hypothesize that a method for the preservation of ova will be devised. For extensive descriptions of these technologies, see *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993) at c. 18-23 [hereinafter *Royal Commission*].

[2] For an overview of these controversies, see *Royal Commission*, *ibid.* at c. 2 and 3.

diseases such as Alzheimer's and Parkinson's diseases,[3] and for genetic research, also invokes a range of competing viewpoints, as does the use of technologies for the purposes of genetic research, gender selection, and genetic manipulation.

As if these controversies were not intense enough, an additional level of controversy is introduced when the focus is narrowed from the desirability of the technologies *per se* to the issue of commodification of reproductive materials. The issue of commodification requires consideration of the possible range of mechanisms that could be adopted to induce the supply of reproductive materials,[4] on the one hand, and to allocate the materials, with their associated technologies, to recipients, on the other hand. The threshold question of whether there should be a role for market or exchange processes on either the supply or demand side of these technologies implicates broader and long-standing debates over what resources or attributes should be "commodified." In other words, what is the legitimate domain of the market?

Margaret Jane Radin, in a widely noted article,[5] identifies a spectrum of views on this issue. This spectrum ranges from scholars such as Karl Marx, who favoured universal non-commodification, to many classical liberals and neo-classical economists, who view all resources and attributes as, in principle, commodifiable (universal commodification). Between these two extremes are a wide and rich variety of viewpoints that would permit some resources and attributes to be commodified, but would prohibit the commodification of other resources or attributes altogether. Yet another range of views would identify some set of resources or attributes with respect to which only partial commodification should be permitted, such that market exchanges would only be permitted subject to substantial legal

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[3] The issue of commodifying fetal material raises questions as to whether there is, or may in future be, a shortage of this material. Some commentators cite the number of elective abortions currently performed and the growing use of laboratory methods to replicate fetal cells as an indication that demand will not outstrip supply. See, for example, B.R. Burlingame, "Commercialization in Fetal-Tissue Transplantation: Steering Medical Progress to Ethical Cures" (1989) 68 Tex. L. Rev. 213 at 239. On the other hand, others argue that the huge number of potential medical and research applications for fetal tissue indicate that demand may soon exceed the current supply, resulting in a shortage of fetal tissue similar to the shortage of organs available for donation. See, for example, M.W. Danis, "Fetal Tissue Transplants: Restricting Recipient Designation" (1988) 39 Hastings L.J. 1079 at 1106; J.S. Bregman, "Conceiving to Abort and Donate Fetal Tissue: New Ethical Strains in the Transplantation Field—A Survey of Existing Law and a Proposal for Change" (1989) 36 U.C.L.A. L. Rev. 1167 at 1187; and J.M. Hillebrecht, "Regulating the Clinical Uses of Fetal Tissue: A Proposal for Legislation" (1989) 10 J. Legal Med. 269 at 290.

[4] For our purposes, "reproductive materials" include gametes, zygotes, and fetal tissue.

[5] "Market Inalienability" (1987) 100 Harv. L. Rev. 1849.

constraints. In some cases, lines must be drawn between market and non-market domains, but in other cases, the central question is the appropriate choice of legal and related constraints to confine, structure, and channel private exchange activities so as to realize whatever advantages markets hold in particular contexts, while minimizing their most dysfunctional or objectionable features.

This paper will address the commodification dimension of controversies over the new reproductive technologies and technologies for the use of fetal material; accordingly, it is important to begin with a clear definition of "commodification." In its simplest form, this term implies the exchange of a good or service for money or similar benefit. It does not *a priori* imply any pejorative or other connotation. Those persons who believe that the mere alienation of reproductive material or services, whether for remuneration or not, is objectionable in its own right, will find commodification *a fortiori* objectionable. Indeed, this is the position taken in some of the theoretical perspectives described in Section II below. However, if commodification is equated with alienability more generally, we would be required to evaluate the desirability of the new reproductive technologies *per se*, which is not the primary focus of this paper. In order to focus on the special or *sui generis* moral problems introduced by commercialization of relevant relationships or interactions, we are largely required to assume the existence, and possibility of non-commercial utilization, of the underlying technologies. Accordingly, for present purposes, we will adopt the narrower definition of commodification, equating the term "commodification" with commercialization, which will largely confine our study to an examination of exchanges in which remuneration is involved.

It is important to keep in mind the different inducement effects that may be associated with payment for reproductive and fetal material:

1. The prospect of financial remuneration could induce the *creation* of material that would not otherwise have been created. In this case, individuals desiring remuneration will accept *de novo* medical and psychological risks (for example, a woman who participates as a "surrogate mother," or "provides gestational services,"[6] or a woman who conceives a fetus with the intention

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[6] A long and intense debate has been provoked by the question of what it is that the "surrogate" mother is providing. Elizabeth Anderson suggests that it is fallacious to speak of buying a woman's gestational "services" in the same manner as it is incorrect to speak of buying a baker's bread-baking "services." Clearly in the latter case one buys the *bread* as a piece of property: "Is Women's Labour a Commodity?" (1990) 19 Phil. & Pub. Aff. 71 at 78. Many object to gestational service sales agreements on these grounds, claiming that they are "baby-selling" arrangements and,

of aborting it and selling the fetal material).

2. Offers of financial remuneration could induce individuals to part with material that was already created for other purposes[7] (for example, a fetus from a natural pregnancy or "spare" gametes or zygotes from an IVF procedure (*in vitro* fertilization). The risks involved in *creating* the material would already have been assumed for other reasons. Two sub-categories of situations should be identified here:
   (a) The supplier could have already intended to part with the material and have no other use for it (for example, a woman who was planning an abortion, or a couple who was planning to donate "spare" zygotes). Here, the additional risks involved in *parting* with the material would be taken in any event.
   (b) The supplier did not intend to part with the material before being confronted with the prospect of financial remuneration (for example, a woman who was planning to sustain the pregnancy, or was planning to keep the spare zygotes and try to implant them in a later cycle). In this situation, the supplier will have been induced to bear the risks of *parting* with the material and to forego the risks and benefits of continuing with the original use that she had in mind for the material (for example, the risks of sustaining the pregnancy to term, or the risks associated with the implantation of zygotes, and the benefits of potentially producing a child).

For the purposes of this paper, three basic exchange scenarios are identified by reference to the type of material or service that is being exchanged: (1) the exchange of gametes and zygotes; (2) the sale of gestational services; and (3) the sale of fetal tissue. These groupings are

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consequently, ought to be prohibited by law. Even if gestational service agreements *are* held to involve the sale of babies, however, this conclusion is not determinative for some proponents of such arrangements who have advocated the merits of a legal system *authorizing* the sale of babies. See, for example, K. Selick, "The Case for Baby Buying" (February 1991) Can. Law. 44; and E.M. Landes & R.A. Posner, "The Economics of the Baby Shortage" (1978) 7 J. Legal Stud. 323. Other than "baby-selling" and "surrogacy" arrangements, gestational service agreements have sometimes been referred to as "womb rental" agreements (see K.M. Sly, "Baby-Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' for a Fee" (1983) 18 Gonz. L. Rev. 539), as agreements to transfer "parental rights" (see *Baby M* appeal, *infra* note 8 at 46), or, in the extreme, as "slavery" (see L. Stone, "Neoslavery—'Surrogate' Motherhood Contracts v. The Thirteenth Amendment" (1988) 6 Law & Ineq. J. 63; and A.L. Allen, "Surrogacy, Slavery, and the Ownership of Life" (1990) 13 Harv. J.L & Pub. Pol'y 139).

[7] This example would not apply to "surrogacy" cases because in these cases the agreement is made before conception, and the risks associated with conception and pregnancy are incurred as a result of the agreement.

based on the type of material or service being commodified rather than on the particular technology employed to procure or create the material: certain technologies may be employed in more than one type of exchange. In the gestational services context, use of different techniques makes it possible for a woman providing gestational services to gestate either her own ova (fertilized by the commissioning man's sperm), or another woman's ova (supplied, for example, by a female commissioner, and fertilized by sperm from her partner or a male "donor"/supplier). We term the first example a "Pre-Conception Agreement," and the second a "Zygote Gestation and Transfer Agreement."[8]

The above discussion addresses exchanges between persons or interests who could be termed "parties" to the exchange, acting as suppliers or demanders. But there is also another category of interests which we characterize as "third parties," who fall outside the supplier/demander dichotomy yet are strongly affected by commercial exchanges of reproductive materials and services. Situated within this category are, first, "family interests." This group would include the partners (homosexual or heterosexual) and other children of donors and recipients. Friends and members of the extended family would also be included. A second group would include the fetus or child resulting from the use of the technology in question. The topic of fetal "interests" is highly controversial, but it would seem that, at a minimum, a fetus is entitled to some measure of respect by virtue of its having had the potential to become a human being. It is clear that other parties must take the fetus's or child's interests into consideration since the fetus or child is the subject of, rather than a participant in, an exchange transaction. Future sexual partners of children created using donor gametes, *i.e.*, partners who might possibly have been created by gametes

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[8] To date, what we have termed pre-conception agreements have predominated. These have received the greatest public attention, particularly in the controversial case *Re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. 1987) [hereinafter *Baby M* trial]; 537 A.2d. 1227 (N.J. 1988) [hereinafter *Baby M* appeal]). However, zygote gestation and transfer agreements may be becoming more common: see C. Lawson, "Couples' Own Embryos Used In Birth Surrogacy" *The New York Times* (12 August 1990) 1. This type of arrangement was exemplified in the recent case of *Johnson* v. *Calvert*, 851 P.2d 776 (Cal. 1993). Some feminists would argue that, for the purposes of a discussion of commodification, differentiation between the two situations is unnecessary and artificial. These theorists argue that a woman's body behaves no differently if the implanted conceptus is genetically unrelated to herself and that to impose a genetically-centred notion of motherhood is to impose upon women the male experience of fatherhood, where paternity is argued to be substantially derived from genetic ties. See, for example, B.K. Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton, 1989) [hereinafter *Recreating Motherhood*]. See also, W. Chavkin, B.K. Rothman & R. Rapp, "Alternative Modes of Reproduction: Other Views and Questions" in S. Cohen & N. Taub, eds., *Reproductive Laws for the 1990s* (Clifton, N.J.: Humana Press, 1989) 405.

from the same donor, would also fall into this category. A third group would comprise those responsible for selecting, manipulating, and storing reproductive material. This group, which might be called "facilitating parties," includes the doctors of the supplier and demander (who are responsible for the health and best interests of the parties), and medical personnel who arrange for production of the reproductive or fetal material. Technicians and operators of facilities that transport and store reproductive and fetal material would also be included in this category, as would for-profit fetal tissue processing companies. A fourth group is comprised of what might be called "moral interests." Its membership would include individuals and associations (such as women's groups and religious organizations) that have beliefs about how reproductive material and fetal material ought to be used in our society. Some technologies will concern a greater number of interests than will others, although all commercial exchanges will affect parties in all four groups.

A final background issue is the controversial topic of infertility. The question of whether supply of and demand for reproductive materials and services ought to be promoted in this context implicates current understandings of the nature, prevalence, treatment, and possible social responses to infertility. Some aspects of the controversy are scientific, in that there appears to be no clear medical consensus on the precise incidence, causes, and in some cases cures for infertility. While the number of people visiting fertility clinics in the United States has tripled over the last twenty years, and each year approximately 2.4 million couples seek medical help for infertility,[9] the scientific evidence does not seem to support the widely-held perception that the incidence of infertility is increasing.[10] In Canada, three recent surveys found that the infertility rate for couples who had cohabited without using contraception for a one year period was approximately 8.5 per cent (some 300,000 couples), while the infertility rate after two years was approximately 7 per cent (about 250,000 couples).[11] While sexually transmitted diseases are a significant cause of infertility, many other causes of infertility remain unknown.[12]

However, it bears noting that the definition of infertility, which in medical contexts is often defined as inability to conceive naturally

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[9] See K. Banks, "Baby Chase" (May/June 1991) 57 Equinox 76 at 78.

[10] *Royal Commission*, *supra* note 1 at 192.

[11] *Ibid.* at 180.

[12] *Ibid.* at 175-77.

over a one-year period, is somewhat arbitrary due to the fact that some couples are able to conceive naturally given a time period longer than one year.[13] Moreover, it can reasonably be argued that the concept of infertility, like other so-called disabilities, is not, and should not be, exclusively a medical issue; the extent to which particular physical limitations should be regarded as disabilities requiring or justifying medical responses is to some extent a matter of social construction. In other words, a society collectively may acknowledge that some causes of infertility can be prevented and some can be cured, and must determine whether or not some should be responded to through new reproductive technologies, or whether some perhaps should, or must, be lived with. The question of the appropriate allocation of social resources to the prevention and treatment of the causes of infertility, and the potential use of new reproductive technologies as a substitute for or complement to physiological "cures" for infertility is clearly an important underlying issue in the commodification debate.[14]

The organizational structure of this paper is as follows. In Section II, we sketch a range of major normative perspectives that appear to drive debates over the appropriate scope and role for commercialization of reproductive materials procured or created using the new reproductive technologies. Three of these perspectives are individualistically-oriented liberal theories unified by a common commitment to individual conceptions of the "good life": these are autonomy, utilitarian-efficiency, and distributive justice theories. These perspectives are contrasted with theories that are loosely grouped under the rubric of "essentialism," which implies that human nature or community values possess an essence or core with which individual choices about use of reproductive materials and technologies must be reconciled. In turn, liberal and essentialist theories are both contrasted with a set of radical contingency theories, which hold that the contingencies of history, culture, society, politics, and economics have combined to generate systemic inequalities (particularly for women), which, in our current social order, could potentially be exacerbated by the use of reproductive materials, services, and technologies. As these theories are addressed, the nature of their salience in the context of the three exchange scenarios (gametes and zygotes, gestational services, and fetal tissue) will be explored. Certain strengths and weaknesses within

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[13] For this reason, the Royal Commission recommends that infertility be assessed on the basis of a two-year period: *ibid.* at 188.

[14] For a discussion of this issue from a feminist perspective, see, for example, *Recreating Motherhood, supra* note 8 at 140ff.; and *Royal Commission, ibid.* at 170-75.

each theory and major points of convergence and divergence among them will be noted, although clearly anything approaching complete reconciliation of these perspectives is impossible. Various aspects of these normative perspectives will be drawn upon in Section III, where four general principles—the Principle of Uniqueness, the Principle of Enablement (not Inducement), the Principle of Constrained Choice, and the Principle of Fair Access—will be developed and explained. These principles reflect our best efforts at a coherent synthesis of the more compelling aspects of these perspectives. In Section IV, these governing principles will be brought to bear on the three categories of potential exchange activities identified in Section I, and possible legal and regulatory frameworks that seem to be implied by these principles will be briefly explored.

II. NORMATIVE PERSPECTIVES

A. *Introduction*

In clarifying the nature of the normative conflicts over the commercialization of reproductive materials and services, we think that it is useful to develop a basic taxonomy of these perspectives, even at the risk of oversimplification, to illuminate the general orientation of these perspectives towards the phenomena of concern to us. Apart from the risk of oversimplification, we also recognize that there is a risk that some perspectives or viewpoints do not fit neatly into the categories that we present below, but reflect instead a more nuanced combination of more than one perspective. For example, the Royal Commission on New Reproductive Technologies chose to adopt a perspective termed "the ethic of care," which includes eight principles: individual autonomy, equality, respect for human life and dignity, protection of the vulnerable, non-commercialization of reproduction, appropriate use of resources, accountability, and balancing of individual and collective interests.[15] In an area as controversial as the new reproductive technologies, it is particularly important to preface a detailed analysis of the possible policy options with some basic normative reference points. Failure to do so would entail the even greater risk of disappearing into a moral swamp where an appreciation of reasoned alternative positions becomes

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[15] *Royal Commission*, *ibid.* at 52-53 and c. 3.

impossible and where debates are reduced to voices shouting incomprehensibly at each other across unfathomable moral voids.

B. *Liberal Theories*

1. Classical autonomy theories

For classical liberals, individuals are conceptualized as having preceded the existence of civil society, but in a state of nature these individuals are thought to have run the risk of mutually destructive forms of anarchy. Hobbes, Locke, and later liberals postulated the emergence of civil society as a form of social contract, where individuals actually, tacitly, or hypothetically consented to surrender some measure of individual autonomy to the state in return for guarantees of the protection of physical integrity and justly acquired forms of private property, and the ability to enter into consensual relations with other members of the society with respect to these property rights. Just as the overarching social contract was conceived of as a form of "government with the consent of the governed," whence it derived its legitimacy, individual actual contracts were seen as a manifestation of government with the consent of the governed. A central tenet of classical liberalism has always been that the state should remain neutral amongst competing conceptions of the good life, which individuals should be free to choose for themselves in charting out their own lives and their relations with others, and that the right and responsibility of individual moral choice has overriding moral force in itself. In this conception of the limited state, a strong distinction is drawn between public and private spheres, and a central role is assigned to private property rights and private ordering through freedom of contract.[16] In the reproductive exchange context, this perspective implies that individuals on the supply and demand sides should be assured of as many choices as possible with regard to uses of the technologies and possible exchange relationships from which to choose their own conception of the good life, and these choices should be considered a private matter between parties to the transaction—not a matter for state intervention.[17]

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[16] See J. Gray, *Liberalism* (Milton Keynes: Open University Press, 1986).

[17] See, for example, L.B. Andrews, "My Body, My Property" (October 1986) 16 Hastings Center Rep. 28; and J. Robertson, "Minimize Government Regulation" in G.E. McCuen, ed., *Hi-Tech Babies: Alternative Reproductive Technologies* (Hudson, Wisc.: Gary E. McCuen Publications, 1990) 127.

A number of difficulties with classical autonomy theories that are directly relevant to the new reproductive technologies context must be noted briefly at this point. First, does the conception of private property rights extend to an individual's own body or parts or aspects thereof? Can individuals be said to "own" reproductive materials,[18] such that they should be free to buy or sell them like any other type of property? Most autonomy theorists would answer in the affirmative. For Locke, private property rights start with one's own body. These rights are then projected into the external world through just acquisition of property rights in external objects. However, even John Stuart Mill, a celebrated proponent of classical liberal values, doubted whether people should be permitted to sell themselves into slavery. According to Mill, a person is not free to agree not to be free.[19] Nevertheless, most classical liberal autonomy theorists would not consider participation in an exchange of reproductive materials or services as analogous to selling oneself into slavery.[20]

Second, there are serious difficulties with autonomy theories in determining whether the initial acquisition of property rights was just, and if not, what rectifications are required to redress initial unjust acquisitions.[21] In a contemporary setting, this translates into a concern about the implications of gross inequalities in endowments that individuals bring to their interactions with each other.[22] In a reproductive exchange context, an example of this concern might be that potential providers of gestational services are persons who are disadvantaged in our society relative to "brokers" and demanders of such services.[23]

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18 For a discussion of three concepts of the embryo—the person, property, and "special respect" views—see C. Perry & L.K. Schneider, "Cryopreserved Embryos: Who Shall Decide Their Fate?" 13 J. Legal Med. 463 at 477-88.

19 *On Liberty* (Harmondsworth: Penguin, 1984) at 172-75.

20 R. Posner defends the practice of "surrogacy" against claims that it is analogous to slavery in *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992) at 413 and c. 15.

21 See, for example, R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 174-82.

22 This issue will be discussed in more detail in section II(B)(3), "Distributive Justice," below.

23 Feminist Susan Sherwin argues that gestational service agreements in practice amount to the exploitation of poor, under-educated, and emotionally unstable women: "Feminist Ethics and New Reproductive Technologies" in C. Overall, ed., *The Future of Human Reproduction* (Toronto: Women's Press, 1989) 259 at 266. See also, C. Overall, "Surrogate Motherhood" in M. Hanen & K. Nielson, eds., *Science, Morality & Feminist Theory—Canadian Journal of Philosophy Supp. 13* (Calgary: University of Calgary Press, 1987) 285 at 299. In the *Baby M* appeal, *supra* note 8 at 1249, Wilentz C.J., speaking for the court, noted that "the Sterns are not rich and the Whiteheads not

Third, there is a problem of determining whether all preferences have equal validity. Autonomy theories essentially take preferences as given and do not inquire whether some preferences are more genuine or more worthy than others. Indeed, where preferences come from, how they are shaped and reshaped over time, and the legitimacy of the sources that shape and reshape them are of little or no concern to classical autonomy theorists. Thus, in the reproductive exchange context, many autonomy theorists would argue that if a person manifests a desire to enter into an exchange of reproductive materials or services, no inquiry into the social or historical conditions which may have shaped this preference is necessary.[24]

Fourth, with respect to the central role played by freedom of alienation or contract in these theories, autonomy theorists themselves recognize that certain conditions must be met in order to regard a decision to alienate property rights by contract or donation as autonomous. The first condition is that the decision be voluntary, *i.e.*, uncoerced. A very large body of complex and controversial philosophical literature has developed around the issue of coercion.[25] Despite these ambiguities, in practice autonomy theorists tend to adopt a rather stringent definition of coercion. In the reproductive exchange context, many autonomy theorists would not consider an agreement to, for example, undergo an abortion in order to sell the fetal tissue "coerced" unless the woman involved was physically forced to agree to the exchange. Paucity of alternative choices for income enhancement,[26]

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poor. Nevertheless, it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent."

[24] Deborah Poff argues, in the different but related context of *in vitro* fertilization, that "[t]he fact that their choice may be conditioned by a created want does not *prima facie* make it an unacceptable choice": "Reproductive Technology and Social Policy in Canada" in Overall, *ibid.*, 216 at 223. Others argue that even if the desire to reproduce is fostered by "unhealthy" societal and historical influences, the state should not be permitted to prohibit choices in this area by fertile or infertile individuals. See, for example, J.A. Robertson, "Procreative Liberty, Embryos, and Collaborative Reproduction: A Legal Perspective" (1988) 13 Wom. & Health 179 at 190, 192; M. Balboni, "The Right of Procreative Choice" in McCuen, *supra* note 17 at 106; and L.B. Andrews, "Policy and Procreation: The Case of Surrogate Motherhood" (Feminism and Law Workshop Series, University of Toronto, Faculty of Law) (27 March 1992) at 12-14.

[25] See A. Wertheimer, *Coercion* (Princeton, N.J.: Princeton University Press, 1987) and M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) c. 4.

[26] Autonomists argue that a choice need not be seen as morally unacceptable simply because it is constrained. In the context of gestational service exchanges, see P. Schuck, "Some Reflections on the *Baby M* Case" (1988) 76 Geo. L.J. 1793; R. Arneson, "Commodification and Commercial Surrogacy" (1992) 21 Phil. & Pub. Aff. 132 at 158; and A. Wertheimer, "Two Questions About Surrogacy and Exploitation" (1992) 21 Phil. & Pub. Aff. 211 at 224-27.

such as the financial constraints faced by a low-income single mother who possesses few marketable skills other than her ability to provide ova, gestational services, or fetal tissue, or moral pressures, such as pressure on a pregnant woman from a family member in need of fetal tissue for therapeutic purposes, would be unlikely to constitute "coercion" sufficient to invalidate the agreement.[27]

A second condition for an autonomous choice to enter into contracts or other relationships with other parties is that the decision be adequately informed. Again, however, while some cases are easy, many others are highly problematic. Very few individuals enter into contracts with perfect information about the current or future state of affairs as these may bear on the value of the contract or interaction to the contracting parties. One can, of course, argue that the decision to forego the opportunity of acquiring further information is itself an autonomous decision, but if the condition of informed consent is to retain any salience, there will be a wide range of other cases where an individual choice may reasonably be regarded as defective (non-autonomous), because it was made in the presence of misinformation or in the absence of highly material information.[28] Autonomy theorists may accept that persons entering into agreements for the exchange of reproductive materials and services should be provided with all relevant information about physical (and possibly also psychological) risks. It is unclear whether information failure resulting from circumstances which are, by their very nature, unforeseeable (such as the bonding process experienced by some suppliers of gestational services as the pregnancy progresses) would be sufficient to invalidate the exchange on this ground.[29] The inability of young gamete suppliers in straitened financial

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[27] For a discussion of a variety of arguments in favour of according women the right to provide fetal tissue, see A. Fine, "The Ethics of Fetal Tissue Transplants" (1988) 18 Hastings Center Rep. 5 at 7; and J.A. Robertson, "Fetal Tissue Transplants" (1988) 66 Wash. U. L.Q. 443 at 463-72. For a discussion of some of the potential sources and types of coercion to which a woman could be subjected, see Burlingame, *supra* note 3; B. Lafave, "Who's In Control? Eggs Embryos and Fetal Tissue" (Fall 1988) Healthsharing 29 at 31; and Danis, *supra* note 3.

[28] See Trebilcock, *supra* note 25 at c. 5.

[29] See, for example, Posner, *supra* note 20 at 423-24, 426-27, and c. 15. Posner argues that gestational services agreements, which he terms "contracts of surrogate motherhood" and "the sale of parental rights," should be specifically enforceable despite various concerns with regard to the unpredictability of the mother-child bond. Posner argues that to require the "surrogate" mother to participate in counselling, or to question her ability to enter into a contract of this type, is "patronizing." See also R.A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" (1989) 5 J. Contemp. Health L. & Pol'y 21. Conversely, Michael Trebilcock and Rosemin Keshvani, among others, argue from a liberal perspective that special provision must be made, in the form of a legislated "opt-out" right for the birth mother, in

circumstances to foresee how the realization of their possible genetic paternity or maternity will affect them in later life[30] would also be an ambiguous (and even less likely) ground for the invalidation of this type of exchange. It could be argued that provision of information about such risks *ex ante* (that is, before the commencement of the exchange) is sufficient to enable potential suppliers to determine whether they are willing to accept the possibility of this risk materializing *ex post*[31] (after the exchange has been consummated).

A third condition that must be met in order for contractual arrangements to promote autonomy values pertains to third-party effects: even if the immediate parties to contractual arrangements are acting voluntarily and with full information, the transaction may have a negative impact on one or more third parties, thus violating their autonomy. This is often referred to as the "harm" principle, which was first enunciated in these terms by John Stuart Mill.[32] Mill appears to have assumed that determining whether actions by A alone, or by A and B in association with each other, harm third parties was a matter of relatively mechanistic determination. However, again, an extremely complex body of philosophical literature has developed around the harm principle, which is now widely understood to be an unavoidably moral

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recognition of the unpredictability of the mother-child bond: "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41 U.T.L.J. 533 at 584-85. For studies on the empirical question of "bonding" between mother and baby, see L. Millen & S. Roll, "Solomon's Mothers: A Special Case of Pathological Bereavement" (1985) 55 Am. J. Orthopsych. 411 at 412, in which it was found that birth mothers who give a child up for adoption experience anguish as much as twenty years later. In V.C. Jackson, "*Baby M* and the Question of Surrogate Parenthood" (1988) 76 Geo. L.J. 1811 at note 19, the author cites numerous studies establishing that many birth mothers severely underestimate the emotional trauma resulting from giving up the child. See also, E. Kane, *Birth Mother: The Story of America's First Legal Surrogate Mother* (New York: Harcourt Brace Jovanovich, 1988); and M.M. Suh, "Surrogate Motherhood: An Argument for Denial of Specific Performance" (1989) 22 Colum. J.L. & Soc. Probs. 357 at 362-72. At 379, Suh writes that "[b]ecause of the nature of the bonding process ... a birth mother cannot make a 'knowing' or 'informed' waiver of her parental ties prior to birth." Some argue that consensus on the question of mother-child bonding has by no means been established: D. MacPhee & K. Forest, "Surrogacy: Programme Comparison and Policy Implications" (1990) 4 Int'l. J. L. & Fam. 308 at 315.

30 This possibility is suggested in J. Glover *et al.*, *Ethics of New Reproductive Technologies: The Glover Report to the European Commission* (DeKalb, Ill.: Northern Illinois University Press, 1989) at 32-38 [hereinafter *Glover Report*].

31 Posner, *supra* note 20 at 426, argues that "contracts always are made before rather than after they are performed;" parties must accept the risk that the situation *ex post* will not be as favourable as was anticipated *ex ante*. Schuck, *supra* note 26 at 1799, also argues that "[t]he risk of subsequent regret is the price we pay for our commitment to personal autonomy and responsibility in the face of uncertainty."

32 *Supra* note 19 at 68-69.

question.[33] That is to say, one could give the harm principle so expansive an interpretation that the private ordering regime would largely come to an end, simply because somebody out there in society happens to take offence at the activities of A alone or A in association with B. On the other hand, to define harm to third parties as entailing only direct forms of physical infliction of injury is to adopt an arbitrary and unprincipled definition of harm that assigns special significance to physical impacts on bodily integrity or private property, without explaining why these impacts should be viewed as more serious than any of a number of less tangible impacts.

Yet despite these ambiguities, autonomy theorists are unlikely to consider exchanges of reproductive materials and services invalid solely on the grounds that they cause intangible harm to what were described above as "moral interests." Harm to the fetus in the case of fetal tissue exchange, or harm to the gamete or zygote in these types of exchanges, would not be considered sufficient to invalidate the agreement, because to recognize fetuses, gametes, or zygotes as "persons" could bring about a situation in which the interests of suppliers and demanders might be in conflict with the "interests" of the reproductive material.[34] Autonomy theorists would be reluctant to assign "interests" to gametes, zygotes, and fetuses, when these interests could constrain the autonomy of existing persons and bring into question the concept that reproductive materials are the property of the person whose body produces them. These theorists would argue that persons who are offended by the thought of harm to fetuses, or the thought that exchanges of gametes, zygotes, or gestational services are taking place, are free not to take part

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[33] See Trebilcock, *supra* note 25 at c. 3.

[34] See J.A. Robertson, "Procreative Liberty, Embryos, and Collaborative Reproduction: A Legal Perspective" in E.H. Baruch, A.F. D'Adamo, Jr. & J. Seager, eds., *Embryos, Ethics and Women's Rights: Exploring the New Reproductive Technologies* (New York: Haworth, 1988) 179 at 182-83. In the fetal tissue context, an argument is made that "the fetus lacks the status of a child and, after death, has no protectable interests of its own": G.J. Annas & S. Elias, "The Politics of Transplantation of Human Fetal Tissue" (1989) 320 New Eng. J. Med. 1079 at 1080 and *passim*. Conversely, most autonomy theorists do not argue that the child in a gestational service agreement has no interest in the exchange: see, for example, Trebilcock & Keshvani, *supra* note 29 at 582-83. Some argue that the child's interests (autonomy) are advanced by the mere fact of its having been born at all: Robertson, *supra* note 24 at 186. The argument is also made that since these children are so clearly desired at birth, they might end up feeling especially loved and wanted: L. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements" (1988) 16 Law, Med. & Health Care 7 at 9.

in such exchanges, but should not be permitted to forbid the participation of others who do not share these views.[35]

It will be obvious to readers that autonomy theories and their limitations are likely to be central to debates over commercialization of the new reproductive technologies. On the one hand, it can be argued that consensual transactions for the sale and purchase of reproductive material reflect individual autonomous choices and are a private matter, implicating the parties to the agreement and not any state or public interest. On the other hand, it can reasonably be argued that many of the general difficulties presented by autonomy theories are acutely salient in the present context. A broader interpretation of coercion, information failure, and harm to third parties would arguably permit Mill's slavery concern to be extrapolated to the sale of reproductive materials and services.

Despite the complexities of arguments for and against autonomy values in the reproductive context, some contemporary analysts strongly subscribe to assigning a central role to such values in this context. For example, John Robertson argues that the state has no right to constrain private arrangements between individuals with respect to the exchange of genetic material, or even the use of medical procedures to screen reproductive material for gender, genetic, or other characteristics.[36] Some liberal feminists take a similar view.[37] Indeed, more broadly, feminist movements have invoked autonomy values to strongly attack state restrictions on contraception and to advance the claim for

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[35] John Robertson writes, "[u]nless sale is connected with tangible harm to other persons, the moral or symbolic offense that some people might find in such transactions is not a sound basis for restricting procreative liberty by banning sale of embryos": *ibid.* at 188. See also M.A. Warren, "Is IVF Research a Threat to Women's Autonomy?" in P. Singer *et al.*, eds., *Embryo Experimentation* (Cambridge: Cambridge University Press, 1990) 125. Warren writes, at 135, that

> [c]omplete reproductive freedom is a utopian ideal; but partial reproductive freedom is better than none. The long-term value to women of IVF and other new reproductive technologies remains to be seen. For that very reason, it is vital that individual women's decisions about the use of IVF be respected. Neither physicians nor legislators have the wisdom to override women's own informed judgements about matters so central to their reproductive lives.

[36] "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth" (1983) 69 Va. L. Rev. 405; "Embryos, Families, and Procreative Liberty: The Legal Structures of the New Reproduction" (1986) 59 S. Cal. L. Rev. 942; *supra* note 24 at 186. See also J. Heller, "Should Genetic Engineering be Permitted?" in Law and Economics Working Paper Series, vol. 24 (Toronto: Canadian Law and Economics Association, 1994) at 43-44.

[37] See, for example, L.B. Andrews, "Alternative Modes of Reproduction," in Cohen & Taub, *supra* note 8 at 361; and "Control and Compensation: Laws Governing Extracorporeal Generative Materials" (1989) 14 J. Med. & Phil. 540 at 549-51.

unconstrained access to abortion, where epithets like "pro-choice" or "hands off my body" have evoked classical liberal values. In the reproductive exchange context, liberal feminists argue that to be consistent with positions that they have taken on the centrality of the right of individual choice in contexts such as contraception and abortion, they should similarly defend the right of individuals, including women, to make whatever private decisions they find appropriate with respect to their bodies and to the use of these technologies.[38] If individual choice is to be respected in the case of abortion, where another life or potential life is being terminated, then individual choice should be at least as strongly respected with regard to participation in new reproductive technologies, where another life is being created. In addition, the argument is sometimes made that these technologies, particularly in their application to sperm and zygote exchanges, provide the potential for liberating women from subordination by men by permitting the possibility of childbirth and childrearing by, for example, single or lesbian women, without requiring relationships with men.[39] Moreover, it is argued that to prohibit women from demanding payment for reproductive services or materials is to sanctify traditional and oppressive notions of women as limited to roles as altruistic childrearers and caregivers, which is considered by some to be tantamount to "moralized slavery."[40]

2. Utilitarian-efficiency theories

Unlike the limited role assigned to the state in most autonomy theories, utilitarian theories contemplate a larger role for the state in constraining, shaping, or directing the activities of individual members, if only to solve coordination or collective action problems that individual actors may confront. Unlike deontological theories of autonomy,

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[38] See C. Shalev, *Birth Power: The Case for Surrogacy* (New Haven, Conn.: Yale University Press, 1989); and L.B. Andrews, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 Law, Med. & Health L. 72 at 73-78.

[39] See W. Kymlicka, "Rethinking the Family" (1991) 20 Phil. & Pub. Aff. 77; and R. Rowland, "Motherhood, Patriarchal Power, Alienation and the Issue of 'Choice' in Sex Preselection," in G. Corea *et al.*, eds., *Man-Made Women: How New Reproductive Technologies Affect Women* (Bloomington: Indiana University Press, 1987) 74 at 84-86.

[40] Shalev, *supra* note 38 at 164. For a Marxist argument to similar effect, see J. Ollenburger & J. Hamlin, "'All Birthing Should be Paid Labor'—A Marxist Analysis of the Commodification of Motherhood" in H. Richardson, ed., *On the Problem of Surrogate Parenthood: Analyzing the Baby M Case* (Lewiston, N.Y.: Edwin Mellen, 1987).

utilitarian theories are end-state or consequentialist in nature. According to early utilitarians, such as Jeremy Bentham, the state is justified in adopting collective policies that increase the total or at least average utility of members of the society in question. Here, utility is conceived of in subjective terms—pleasures or pains felt by individuals. The state is entitled to engage in a maximizing calculus with regard to policy choices if such policies would result in a *net* increase in average utility in society—even though the distribution of utility associated with these policies may be quite uneven, and for some individuals, negative. In other words, in contrast to autonomy theories, the state is entitled to sacrifice the welfare of some if this would more than proportionately increase the welfare of others.[41] Thus, if it could be determined that the commercialization of reproductive materials and services had more adverse than positive effects, measured by an aggregate of individuals' utility functions, then the state would be justified in curtailing these activities, despite the preferences of those individuals who wished to make use of them.[42]

As with autonomy theories, a number of standard difficulties present themselves. Some of these difficulties are conceptual, whereas others are methodological or operational. At a conceptual level, the principal objection to utilitarianism is that, while it counts every individual's utilities and treats them as equally valid, it permits some individuals to be used as a means to the ends of others and hence violates the conception of equal moral agency that underlies classical liberal theories. For example, a sexist, racist, or homophobic society might be able to justify policies that impose these values on particular minorities if these policies could plausibly be regarded as increasing average utility. Conversely, however, to the extent that a minority of members of society were sexist, racist, or homophobic in their private interactions, and the majority of members of society were opposed to these values, a utilitarian calculus might well justify the imposition of legal constraints on the minority that espouses these values.

At a methodological or operational level, utilitarianism, in many contexts, presents almost insuperable problems of indeterminacy. For example, in the reproductive technology context, all the utilities and

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41 See W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press, 1990) c. 2.

42 A brief example of the factors involved in a utilitarian calculus in the reproductive-technologies context is provided in the *Glover Report*, *supra* note 30 at 27-29, and in M. Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Oxford: Basil Blackwell, 1985) at ix-xvi.

disutilities of every member of society who is directly or indirectly affected by these activities would have to be weighed. Affected parties would include infertile couples and their families on the demand side, providers of reproductive material and their families on the supply side, the children created by these exchanges, medical and research interests, and third parties generally who may have widely divergent views as to the appropriateness of these activities.[43] How all of these utility effects can, in practice, be uncovered, measured, and compared is far from obvious; the only possibility would seem to be a retreat to a kind of majoritarianism whereby these issues would simply be resolved by popular citizen vote or a free majority vote of representatives in the relevant legislature.[44] However, the likelihood of such a vote accurately revealing underlying utility functions and intensity of preferences seems remote. Indeed, much of the indeterminacy in debates over the new reproductive technologies would seem to derive from the fact that any number of more or less plausible scenarios as to the possible impact of these technologies on a wide range of groups in society can be advanced, with little or no prospect of empirical validation of the claimed impacts.

At this juncture it is important to note two economic derivatives of utilitarian theories, both of which involve a particular conception of efficiency.[45] The narrower and more stringent derivative is Pareto

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[43] Ruth Macklin, in "Ethics and Human Values in Family Planning: Perspectives of Different Cultural and Religious Settings" in Z. Bankowski, J. Barzelatto & A. Capron, eds., *Ethics and Human Values in Family Planning* (Geneva: Council for International Organizations of Medical Sciences (CIOMS), 1989) 68 at 71, provides an indication of what this calculation might involve in the context of gestational services arrangements:

> A number of factors must be taken into account: the benefits to infertile couples, and the happiness resulting from having a child that they could not otherwise have; the unhappiness of surrogate mothers who regret having made such an arrangement and seek to get their babies back (a minority of those who have served as surrogates); the feeling of satisfaction in helping others, on the part of the women who serve as surrogate mothers and have no regrets; the unknown effects on a surrogate mother's other children—the children of her marriage, who are half-siblings of the child concerned; the uncertain consequences for the children born of surrogacy arrangements—whether they will find it an emotional burden; and other consequences, positive and negative, for the families involved in such arrangements and for others. How can these multiple and varied effects be determined? And even if the relevant empirical facts can be ascertained, how should the good and bad consequences be balanced?

[44] The *Glover Report* recognizes that the interests included in a utilitarian calculation and the amount of credence given to the claims of each seem inevitably to fall prey to a host of unavoidably subjective judgments by the decision maker purporting to perform the analysis: *supra*, note 30 at 25-27.

[45] These concepts are developed more fully in M.J. Trebilcock, "Economic Analysis of Law," in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 103.

efficiency. This entails asking of any particular transaction or policy option whether it is likely to make somebody better off and nobody worse off, using the parties' current state of affairs as the baseline. The ethical intuition behind this concept is that no reasonable person could object to a transaction or policy that meets this test, except for unworthy reasons such as envy. The conventional economic argument is that one would not expect to observe two parties entering into a private exchange unless they both believed themselves likely to be made better off by it. As these transactions generalize across the economy, and as markets develop, the price mechanism serves two allocative functions: on the demand side, resources are allocated to their highest-valued uses (as reflected in willingness to pay); and on the supply side, resources are drawn into activities where prices that demanders are willing to pay exceed the cost of meeting these demands. On this view, social welfare in general is enhanced by providing a broad domain for private ordering. Most neoclassical economists' commitment to the private ordering process is largely due to their attraction to the Pareto principle. It will be obvious that most collective decisions by government cannot meet the Pareto test: that is, they almost invariably make some members of the community better off while making others worse off.

However, just as autonomy theories presented some difficulties, here too certain conditions must be met in order for this inference of joint welfare enhancement to be justified. Obviously, an exchange coerced at gunpoint—for example, the mugger's proposition "your money (or, in the reproductive exchange context, your gametes) or your life"—is not a transaction that meets the Pareto principle, because the mugger is made better off by the transaction but the passer-by is made worse off. Beyond cases of physical force such as this, it is far from clear what degree of voluntariness is required in order for the Pareto criterion to be met.[46] Similarly, decisions made with imperfect information may lead an individual to regret a transaction and to feel that she or he has been made worse off by it. An example might be that of a woman who is not told that the tissue from her abortus is to be used for transplant therapy rather than research, and later regrets the transaction because she is uncomfortable with the thought that the material was used for this purpose.[47] In what circumstances does the absence of complete information warrant rebutting the inference of joint welfare enhancement?

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[46] Trebilcock, *supra* note 25 at c. 4.

[47] See J.F. Childress, "Ethics, Public Policy, and Human Fetal Tissue Transplantation Research" (June 1991) Kennedy Inst. Eth. J. 93.

Additionally, while it may be obvious that most collective decisions cannot meet the Pareto principle, it is in fact arguable that most private transactions also cannot meet it once third party effects are taken into account. If even one member of society is offended or otherwise aggrieved by a transaction entered into between A and B, such that her or his utility is diminished, even though the transaction between A and B is fully voluntary and informed, it is arguable that the transaction does not meet the Pareto principle.[48] In the reproductive exchange context, the number of third parties in the moral interests category who may be offended by transactions involving reproductive material or services is such that no exchange of this type could be Pareto-superior.

Finally, the Pareto principle is insensitive to the justice or injustice of the distribution of prior endowments that parties bring to an exchange, and simply takes the existing distribution as a given. Thus, transactions entered into by disadvantaged women, with nothing else to sell but their reproductive services or material, may well meet the Pareto criterion in that such exchanges may improve their welfare over the *status quo ante*. On a related point, one might also note that the Pareto principle is not concerned with the division or equality of gains from exchange, however disproportionate the gains to each party, as long as each party gains something. For example, an exchange between a couple that is paid nominally more than their costs in producing a zygote, which is then used to produce a child, could meet the Pareto test despite the fact that the demander may have gained much more from the exchange than did the suppliers.

Despite these difficulties, a Pareto-efficiency perspective does draw our attention to the fact that certain exchanges fall further short of the Pareto principle than do others: exchanges involving the *de novo* production of gametes, zygotes, or fetal material are more likely to render the supplier "worse off" as a result of the exchange (in that the supplier has incurred physical and psychological risks that she would not otherwise have assumed), whereas exchanges involving "spare" gametes, zygotes, or fetal material are less likely to render the supplier "worse off" because the material would have been produced, and disposed of, whether or not the possibility for exchange existed. Also, a utilitarian perspective more generally draws our attention to the fact that different types of exchanges are likely to implicate different kinds and numbers of third parties: exchange of fetal material from spontaneous abortions

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[48] See G. Calabresi, "The Pointlessness of Pareto: Carrying Coase Further" (1991) 100 Yale L.J. 1211.

(miscarriages) would offend fewer moral interests than would the exchange of material from elective abortions;[49] exchange of gametes would offend fewer interests than would the exchange of zygotes (which are viewed by some as the moral equivalent of living children,[50] and which raise issues that are much more difficult to resolve between parties in the event of, for example, divorce or disagreement as to disposition).

Situations frequently arise in which the state must make decisions on behalf of the collective even though the Pareto principle cannot be satisfied. Economists have, accordingly, been compelled to recognize a somewhat more complex concept of efficiency, which is often referred to as Kaldor-Hicks efficiency. With this form of efficiency, the question to be posed with regard to a collective decision or legal rule is, "do the gainers gain sufficiently from it such that they could *hypothetically* fully compensate the losers, so as to render the latter indifferent to the decision or rule, while still preserving some gains for themselves?" This concept of efficiency is also referred to as "potential Pareto efficiency," which reflects the fact that both sets of parties are not in fact made better off because the losers do not in fact have to be compensated. In effect, Kaldor-Hicks efficiency entails a cost-benefit analysis, but unlike utilitarianism it only recognizes preferences that are supported by willingness to pay, which is in part a function of ability to pay. The wealth maximization value embedded in Kaldor-Hicks efficiency has been defended by theorists such as Richard Posner on the grounds that individuals who can support their preferences with dollars are, in most cases, only able to do so because they have provided goods and services that are valued by other members of the community, while

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[49] However, it must be noted that it is very difficult to procure tissue from miscarriages, or from therapeutic (as opposed to elective) abortions, because in many of these cases the likelihood of anomaly or defect may render the material unsuitable for transplantation. In addition, since miscarriages generally occur outside of a clinical setting, tissue retrieval is difficult, if not impossible. See M.B. Mahowald, "Neural Fetal Tissue Transplantation: Should We Do What We Can Do?" (1989) 7 Neurologic Clinics 745 at 750-51; and B.M. Dickens, "Fetal Tissue Transplantation" (6 July 1989) Transp. Imp. Tod. 33.

[50] See, for example, the official position of the Catholic church, as expressed by the Congregation for the Doctrine of the Faith, "Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day" in R.T. Hull, ed., *Ethical Issues in the New Reproductive Technologies* (Belmont, CA: Wadsworth, 1990) 21. The Congregation writes, at 22, that "the fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality." While the Catholic church does not view gametes as the moral equivalent of living children, it must be noted that the church opposes the use of donor gametes, among other applications of the new reproductive technologies.

individuals who cannot support their preferences with dollars have presumably been less valuable members of the community.[51] This attempt at an ethical justification of Kaldor-Hicks efficiency has been widely criticized and discredited, largely because willingness and ability to pay often do not reflect any defensible concept of desert, but rather reflect the luck of the genetic lottery or of early family circumstance, and provide no basis for disregarding preferences unsupported by wealth.[52]

A more pragmatic justification for the Kaldor-Hicks efficiency principle is that it is more operational than the utilitarian principle, because costs and benefits associated with any proposed policy choice are more easily measured and compared in dollar metrics than in abstract "units" of utility. This justification is also highly contestable. In many policy settings, it will be impossible to secure an accurate revelation of preferences in terms of what people are prepared to pay to see a particular policy option adopted or rejected. Even if accurate preference revelation could be obtained, which is inherently difficult in the absence of voluntary transactions reflecting actual resource allocation decisions, comparing gains and losses entails making highly controversial assumptions about commensurability of utility functions. For example, does a one dollar gain to a wealthy person count the same as a one dollar loss to a poor person? And in the reproductive exchange context, how are we to place a price on materials or services which result in the creation of a child who is "priceless"?[53]

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[51] R.A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981) at c. 4.

[52] See the symposia *Efficiency as a Legal Concern* in (1980) 8 Hofstra L. Rev. 485 and *Change in the Common Law: Legal and Economic Perspectives* in (1980) 9 J. Legal Stud.

[53] Peter Schuck has suggested that the sum that adoptive parents are prepared to pay to secure a newborn through private or independent adoption agencies might provide a starting figure for estimating the value of gestational services. However, Schuck notes that commissioning individuals might be prepared to pay more than this to obtain a child who is, at least in part, genetically related to themselves: "The Social Utility of Surrogacy" (1990) 13 Harv. J.L. & Pub. Pol'y 132. But Eric Mack, in "Dominos and the Fear of Commodification" in J.W. Chapman & J.R. Pennock, eds., *Markets and Justice* (New York: New York University Press, 1989) 198, has argued, at 217, that despite any "price" the market may assign, a core of internally valued activities remains which persistently escapes the market's pricing mechanisms:

> [t]ypically, one can know the price of something yet not identify the value of that something with its monetary price because the two somethings are not identical. ... What is paid for when one "buys" a child is the opportunity to become a parent to that child (the child it will become through one's parentage of it); one does not buy that developing child and one's relation to it. The costs incurred for such an opportunity can hardly be identified with the value (even the discounted value!) one enjoys in the child.

In more conventional economic terms, commissioning parents are likely to realize a substantial "consumer surplus" beyond the fees paid.

Despite these formidable difficulties with both utilitarianism in general and the two efficiency derivatives of it, it must be acknowledged that many decisions that individuals, families, and communities must make often necessarily reflect a crude or intuitive utilitarian calculus. Moreover, the framework has several helpful aspects, such as drawing attention to the full array of options that may be deployed to address a particular resource allocation decision, for example, how to address the problem of infertility in terms of relative emphasis on prevention, cure, or other reproductive options; identifying the opportunity costs associated with each option; and permitting some intuitive comparison between the net costs or benefits associated with particular options and those associated with other options, for example, in determining an appropriate allocation of reproductive materials to various proposed research projects.

3. Distributive justice theories

Classical autonomy theories entail a negative concept of liberty that rejects the legitimacy of external constraints on individual action and would perceive forms of wealth redistribution as "coerced," at least if one were able to assume that the initial acquisition of property rights was just. At most, these theorists would advocate a once-and-for-all rectification of past injustices in acquisition. While utilitarian theories contemplate state action in a wider range of circumstances, the objective of maximizing total or average utility has no direct, concrete implications for how utility should be distributed. However, another strand of liberal theory—sometimes referred to as "revisionist liberalism"[54]—focusses on justice in the distribution of resources and opportunities. This entails a positive theory of liberty. According to Hegel and his followers, individual freedom in the full sense involves having an opportunity for self-realization. If certain resources, powers, or abilities are needed for self-realization to be effectively achievable, then having these resources must be considered part of freedom itself. As Dyzenhaus explains, all individuals should have the circumstances that make it possible to lead autonomous lives. This preference will require that liberals attempt to eradicate social practices that impose preferences on others, such as the preference for the patriarchal life.[55] This view is much less concerned than classical autonomy theories with necessarily elusive normative and

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[54] See Gray, *supra* note 16.

[55] D. Dyzenhaus, "Liberalism, Autonomy and Neutrality" (1992) 42 U.T.L.J. 354 at 375.

historical questions as to the justice of initial acquisitions, but rather starts with the *status quo*.[56] In common with utilitarianism, and in contrast to classical autonomy theories, it shares an end-state or consequentialist orientation.

A basic difficulty with theories of positive liberty is that it is not clear what self-realization entails for different individuals, and therefore what resources are required. Moreover, advocates of positive liberty, even if satisfied with the justice of the initial acquisition of property rights, often invoke an expansive conception of positive liberty to justify continual state involvement in the distribution of resources in order to maintain a just distribution over time, arguably entailing state interference in (wealthier) individuals' ability to pursue their own life plans as they please.[57]

The most ambitious and best known contemporary articulation of a theory of distributive justice that attempts to address some of these problems is that provided by John Rawls.[58] Rawls's theory builds on the earlier social contract liberal tradition by constructing a social contract behind a "veil of ignorance," which prevents individuals from knowing their place in society and their natural endowments. Of particular salience to the reproductive exchange context, individuals would not know whether they were wealthier demanders or poorer suppliers, men or women, or possessors of particularly desirable attributes. Rawls argues that individuals in this state (the "original position") would agree to the following principles of justice:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
2. Social and economic inequalities are to be arranged so that they are: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. Inequalities of opportunity are only acceptable if they enhance the welfare of the least advantaged.

This approach has advantages over utilitarianism in that it confers on individuals in the original position a veto against policies which would maximize general welfare while invading the liberty and damaging the interests of some. While the "maximin" or "difference" principle gives priority to the poorest in society by condemning as unjust

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[56] Gray, *supra* note 16 at 57-58.

[57] Nozick, *supra* note 21; and I. Berlin, "Two Concepts of Liberty" in I. Berlin, ed., *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

[58] *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

any inequalities that do not benefit them, the greatest equal liberty principle prohibits the unjust distributions of unfreedom that utilitarianism would permit. Rawls contemplates that his principles of justice would be effectuated through basic background institutions in society, such as the tax and transfer system, while minimizing encroachments on the autonomy of individuals to pursue on their own, or through association with others, their own particular conceptions of the good life.

In the reproductive exchange context, distributive justice issues arise on both the demand and supply sides. On the demand side, in an unconstrained market, access to these technologies will, to a significant extent, be a function of wealth. To the extent that one believes that the general distribution of wealth in our current society comports with a defensible concept of distributive justice, one might not object to resources being rationed on the basis of willingness to pay. However, we have little reason to be confident that this proposition holds generally true. Distributive justice theorists would argue that activities that have a disproportionate negative impact on the disadvantaged are unjust. Accordingly, a system of unconstrained commodification which benefitted wealthier demanders while excluding many less wealthy demanders from participation in the activity, or discriminated against historically disadvantaged groups, such as lesbian or single women, or imposed a greater proportion of the "costs" of an activity on the poor, would not be considered distributively just.[59] A system that allowed demanders to pay for materials or services on a sliding scale, with poorer demanders more heavily subsidized by the state, and which forbade discrimination on grounds unrelated to parenting ability (such as sexual

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[59] This is also a concern for feminists writing from a distributive justice perspective. See, for example, H. Bryant, *The Infertility Dilemma: Reproductive Technologies and Prevention* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); Macklin, *supra* note 43; and G. Corea, *The Mother Machine* (New York: Harper & Row, 1985). A related concern is that research interests, which are also wealthy and powerful relative to the least advantaged individuals in society, will make discoveries and advance scientific knowledge to the advantage of everyone but at a disproportionate expense to poorer people, in that the poor (who may be disproportionately attracted by the financial rewards offered) will bear the physical and psychological risks involved in providing materials for research. This concern is in keeping with a key bioethical principle adopted in the *Belmont Report*, that research subjects not be drawn disproportionately from disadvantaged groups in the population, and that the resultant discoveries not be of *de facto* benefit to only the more advantaged groups in society. The principle in question is the "justice" principle, discussed in the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington: 1978) at 9-10.

orientation and marital status), would be considered a more morally attractive alternative.[60]

A distributive justice perspective also draws our attention to the fact that in Canada, as in many other countries, the provision of health care has been generally viewed as a basic good that should be available independently of the resources of those who require care. If one views infertility as an illness or physical disability similar to many other disabilities, the treatment of which should be covered by public health care, then it would follow that medical technologies which seek to address the consequences of infertility should be rationed on some basis other than willingness to pay, such as some definition of need, or merit on medical grounds (*i.e.*, amenability to treatment), or queuing, or some combination of these.[61] The provision of fetal tissue for therapeutic purposes would also require similar treatment, because fetal tissue is a potentially life-, health-, and dignity-saving resource[62] analogous to organs or bone marrow which are currently rationed according to criteria such as the above.

On the supply side, classical autonomy theories would be largely insensitive to economic pressures that might drive individuals to supply reproductive materials or services and, indeed, would view this option as one that increases what may admittedly be a very meagre opportunity set. Utilitarianism might also regard the opportunity to increase one's welfare in this way as contributing to average social utility. However, distributive justice theorists are likely to view pressing economic circumstances as symptomatic of inequalities in the distribution of background endowments, although their response would ideally be to rectify these inequalities through society's basic institutions, without necessarily constraining the opportunities of individuals to enter into

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60 Several writers make the argument that if gestational-service arrangements and the use of reproductive materials and technologies are to be permitted, there is a role for the state in allocating these services regardless of whether there is a free market on the supply side. Susan Sherwin makes this argument regarding reproductive technologies in general, in "Feminist Ethics and New Reproductive Technologies," *supra* note 23 at 259. D. Poff, *supra* note 24, *passim*, makes the same argument in the context of donor insemination and *in vitro* fertilization.

61 For a useful discussion of this issue and other matters of concern to distributive justice theorists in the context of the new reproductive technologies, see R. Dresser, "Social Justice in New Reproductive Techniques" in A. Milunsky & G.J. Annas, eds., *National Symposium on Genetics and the Law III* (New York: Plenum Press, 1985) 159. See also, *Royal Commission*, *supra* note 1 at c. 4.

62 For a discussion of the important issues that are at stake for the fetal tissue transplant recipient, see G.L. Morgan, "Is There a Right to Fetal Tissue Transplantation" (1991) 10 U. Tasmania L. Rev. 129.

these arrangements if they so wish. To impose such constraints may offend Rawls's first principle.

Nevertheless, in a society where these inequalities have not been remedied, to permit a system of unconstrained commodification—which would involve financial inducements for suppliers that would disproportionately induce the poor to participate—may offend Rawls's second principle.[63] The subject of financial inducements will be discussed in more detail in Sections III and IV below, but at this juncture it is necessary to note the potential for suppliers to be drawn disproportionately from the ranks of the economically disadvantaged, who are able to provide reproductive materials and services at a lower opportunity cost than wealthier persons.[64] This is analogous to the concern discussed by Calabresi and Bobbit in *Tragic Choices*[65] over the likelihood that, in an American context, voluntary recruitment of a regular army to serve in a limited (foreign) war may entail over-representation of, and disproportionate sacrifices by, low-income blacks. In the gestational services context, the concern is that economically disadvantaged women, women of colour, and Third-World women could be disproportionately induced to provide gestational services, governed by embryo gestation and transfer agreements (in which the commissioning individual[s] provide the zygote), because their opportunity costs may be significantly lower than those of other women.[66]

An additional issue of concern to distributive justice theorists is that of "differential pricing." This term refers to the likelihood that an unconstrained market would result in the offering of higher prices to suppliers of materials and services with highly-demanded characteristics: gametes, zygotes, and gestational services involving the use of the supplier's own ova by way of pre-conception agreements, offered, for example, by white, blonde, blue-eyed suppliers, could well be purchased at a higher price than material from persons with less-demanded

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63 An opposing argument, made by Richard Posner, among others, is that unconstrained commodification has a *favourable* impact on the poor because it increases their already meagre opportunity set. This argument will be discussed below, in Section III.

64 See Maholwald, *supra* note 49 at 755; and *Royal Commission*, *supra* note 1 at 670-74.

65 G. Calabresi & P. Bobbit, *Tragic Choices* (New York: W.W. Norton, 1978).

66 See, for example, Corea, *supra* note 59, especially c. 11: "Surrogate Motherhood: Happy Breeder Woman;" "Human Slavery," in McCuen, *supra* note 17 at c. 11; and *Infertility: Women Speak Out* (London: Pandora Press, 1989).

characteristics.[67] Suppliers from historically disadvantaged groups might face discrimination in such a market. Economically disadvantaged demanders would also be unable to obtain materials with the more-demanded characteristics. In the fetal tissue context, if histo-compatibility were to become a factor in fetal tissue transplants, economically disadvantaged demanders with rare tissue types might be unable to secure a supply of this important resource.[68]

A more general critique of social contractarianism from a feminist perspective is offered by Carole Pateman.[69] Pateman argues that the social contract tradition, even in modern Rawlsian form, involves one of two equally unacceptable sets of implications for women. First, as full individuals in their own right, women can now argue for full equality with men, which entails demanding that they be treated "just like men." But in societies like ours, with a long patriarchal tradition of subordination of women, demanding to be treated just like men involves acquiescence in social structures that many women feel are inherently unjust. In the reproductive exchange context, this could entail acceptance of male-oriented concepts of private property rights, freedom of contract, and a genetic notion of parenthood as applied to reproductive materials and services.[70] Second, in Rawls's original position, where natural endowments are not known, the de-gendered individuals are so abstracted from real-life human beings that it is not clear what set of social structures would be agreed on to regulate their reproductive processes. Additionally, to the extent that these structures reflect androgyny rather than patriarchy, arguably important differences in the way men and women view their role in these processes will become lost.

Either of these two sets of implications is uncongenial to many women, in both reproductive exchange and other contexts, because these implications fail to recognize, for example, the uniqueness of women's

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67 Sperm banks purporting to produce children with "superior" characteristics are already in existence. See Note, "Eugenic Artificial Insemination: A Cure for Mediocrity?" (1981) 94 Harv. L. Rev. 1850.

68 See, generally, A.L. Caplan, "Blood, Sweat, Tears, and Profits: The Ethics of the Sale and Use of Patient Derived Materials in Biomedicine" (1985) 33 Clinical Res. 448. See also R. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (New York: Pantheon Books, 1971).

69 *The Sexual Contract* (Stanford: Stanford University Press, 1988).

70 To many feminists, viewing children as objects of a parental "right to reproduce" or as property to be possessed, reflects offensive, patriarchal notions of the family centred around rights and ownership: M. Ryan, "The Argument for Unlimited Procreative Liberty: A Feminist Critique" (July/August 1990) 20 Hastings Center Rep. 6 at 9-10; and K.T. Bartlatt, "Re-Expressing Parenthood" (1988) 98 Yale L.J. 293 at 339.

role in gestation and childbirth, and other issues central to the autonomy of women, such as the just allocation of responsibility for child care, care of the elderly, and domestic labour more generally.[71]

We now proceed to review a set of theories that in one respect or another challenge in important ways the individualistic underpinnings of all three liberal theories reviewed above. The first set of such theories, while sharply different from one another in various respects, are placed under the general rubric of "essentialist" theories, because they share the claim that there is some essence to human nature or some core of community values that unconstrained individual choices in the reproductive context may be inconsistent with and may indeed violate.

C. *Essentialist Theories*[72]

1. Religious perspectives

Members of some religions take the view that the nature of the procreative function has been divinely decreed and that worldly laws or practices at variance with this conception contravene God's will. For example, the Catholic church officially takes the view that sex outside of marriage is immoral, that sex within marriage should not be separated from the act of procreation, and that marriage is a sacred union for life that the parties should not be free to terminate. Life is also thought to begin at conception, requiring that the conceptus be treated with the same respect and concern that is accorded to a living child. These views lead to opposition to pre-marital sex, contraception, abortion, and

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[71] On the other hand, Susan Moller Okin has recently defended Rawls's theory against these criticisms: "Reason and Feeling in Thinking About Justice" in C. Sunstein, ed., *Feminism and Political Theory* (Chicago: University of Chicago Press, 1990) 15. She contends that the original position requires political actors to be empathetic and to take the standpoint of the disadvantaged. Choosers are not required to think as if they were "disembodied nobodies" (at 34), but are instead required to "think from the position of *everybody*, in the sense of *each in turn*" (at 30). On this view, the original position is by no means an abstraction from difference, but is instead rooted in "an appreciation and concern for social and other human differences" (at 31). See also L. McClain, "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence" (1992) 65 S. Cal. L. Rev. 1171. See also Kymlicka, *supra* note 39, who shares some of Okin's views, but also offers a critique of her defence of Rawls. Kymlicka argues, at 93, that Okin does not address the issue of what forms of family life *would* be endorsed by people in Rawls's original position.

[72] It is important to note that the writings of some theorists—particularly feminists within the "essentialist" category—could also be grouped within the "contingency feminist" category. That is to say, some writers offer arguments from both perspectives to develop their objections to exchanges of reproductive materials and services. Accordingly, the citation of a writer within the "essentialist" category does not imply that the writer's views are necessarily so restricted.

divorce, and they also lead to strong opposition to most of the new reproductive technologies where reproductive functions can occur outside of the marital and sexual relationship of husband and wife.[73] This perspective leads to opposition to the new reproductive technologies *per se*, rather than to the commercialization of reproductive materials and services itself.

However compelling these views may be to adherents of the religion in question, given the separation of church and state that is fundamental to most liberal democracies, it is not at all clear why the state should feel obligated to act on these views and require obedience to these dictates by members of society who do not subscribe to them. This is without questioning, of course, the right of individuals who hold these views to act upon them in their own lives. Also, many feminists view these religious positions as sanctifying traditional conceptions of the family, which have often entailed the subjugation and oppression of women.

2. Natural law theories

Natural law or natural rights theories, which have come in many different forms over the ages, trace back to Aristotle, who posited that "man's" correct nature or *telos* could be determined through rational reflection on the essential nature of the person. Aristotle supported this moral theory with a metaphysical biology that depends, in the last resort, on a mystical conception of nature as a system tending to perfection. According to contemporary natural rights theorists, such rights embody the conditions necessary for the flourishing of "man" as the distinctive creature that "he" is: we discern the content of these rights by considering the distinguishing marks of the human species and the circumstances in which these characteristics or powers might best be realized.[74] However, as John Gray points out, there is an arbitrariness in the moral judgments that go into any selection of these distinguishing marks of "man." Gray suggests that these difficulties in natural law doctrine can be illustrated by a thought experiment:

> Let us suppose we are in a position (one we may well occupy in the middle future, given the possibilities of genetic engineering) to alter the content of man's nature or essence: how could the natural law ethic of realizing man's distinctive power help us here? We might refuse to alter human nature, and be wise to do so; but the reason can hardly be

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[73] See Congregation for the Doctrine of the Faith, *supra* note 50 at 31-35.

[74] See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

> that human nature as it is embodies moral perfection. If it does not—and few would dare claim that it does—then we must choose which human powers to foster and which to repress or remould. No ethic which appeals solely to an idea of realizing the distinctive human powers can help us with the radical choice as to, "Which essence shall man have?"[75]

The nature of these difficulties is readily demonstrated by a review of different natural law theories as they pertain to reproductive relationships. For example, Aristotle himself defended slavery and the natural inferiority of women. Locke, and other early social contractarians, assumed either as a matter of divine will or biology that

> marriage and the family exist in the natural state ... that the attributes of individuals are sexually differentiated ... [that] men naturally have the characteristics of free and equal beings [and that] [w]omen are naturally subordinate to men, and [that] the order of nature is reflected in the structure of conjugal relations.[76]

This natural law perspective could also be used to argue that the use of the new reproductive technologies and commodification of reproductive materials and services is "unnatural," because these modes of reproduction are contrary to the nature of sexual procreation within the marital relationship. Natural law objections to the exchange of fetal tissue would also reflect concerns about moral complicity in, and encouragement and legitimization of, abortion and the use of the fetus as a means to another's ends.[77]

In the last century, and occasionally today, social Darwinists and eugenicists have propounded theories of the natural genetic inferiority of non-white races.[78] Currently, many sociobiologists claim that the desire to reproduce reflects an inherent genetic trait, observable in most animal species, to maximize individual reproductive success and perpetuate genetic lineages.[79] Unlike other natural law theories, this

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[75] Gray, *supra* note 16 at 48.

[76] Pateman, *supra* note 69 at 53.

[77] See, for example, J.T. Burtchaell, "University Policy on Experimental Use of Aborted Fetal Tissue" (1988) 4 IRB: Rev. Human Subjects Res. 7; "The Use of Aborted Fetal Tissue in Research: A Rebuttal" (1989) 2 IRB: Rev. Human Subjects Res. 9; A.R. Bauer, "Bioethical and Legal Issues in Fetal Organ and Tissue Transplantation" (1989) 26 Hous. L. Rev. 955; and Robertson, *supra* note 27, in which some natural law arguments are canvassed, although Robertson is opposed to them.

[78] D. J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Berkeley: University of California Press, 1986).

[79] See, for example, M. Daly & M. Wilson, *Sex, Evolution, and Behaviour*, 2d ed. (Belmont, Ca.: Wadsworth, 1983); R.D. Alexander, *The Biology of Moral Systems* (New York: Aldine De Gruyter, 1987); C. Crawford, M. Smith & D. Krebs, eds., *Sociobiology and Psychology* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1987); and P.W. Strahlendorf, *Evolutionary Jurisprudence: Darwinian Theories in Judicial Science* (S.J.D. Thesis, University of Toronto Law School, 1991).

perspective has been invoked to justify unconstrained commodification of gametes, zygotes, and gestational services, because it is argued that reproduction and, in particular, the perpetuation of a genetic tie, is a pressing and inherent human need.

Many modern feminists would reject all of the foregoing essentialist theories of the nature of the reproductive function. They would see them as barely disguised efforts to rationalize the subordination of women by confining women to conjugal relationships in which their principal function is that of childbearer and rearer, and excluding them from equal participation in civil society. However, some modern feminists themselves propose a very different theory of the reproductive process that could be described as "essentialist" in orientation. For example, Margaret Jane Radin[80] argues that permitting the commodification of many human attributes, such as sexual or reproductive functions, is inconsistent with essential conceptions of human personhood or human flourishing.

This position was also strongly espoused by the Royal Commission:

> Commissioners believe it is fundamentally wrong for decisions about human reproduction to be determined by a profit motive .... Commodifying human beings and their bodies for commercial gain is unacceptable because this instrumentalization is injurious to human dignity and ultimately dehumanizing. We therefore consider commercialization of reproductive materials and reproductive services to be inappropriate.[81]

Pursuant to this view, the Commission recommended that selling, purchasing, or charging fees for serving as a "broker" in connection with the creation, exchange, and use of human reproductive materials, including sperm, ova, zygotes, and fetal materials should be prohibited.[82] Further, the Commission asserted that "commercial preconception [surrogacy] arrangements commodify women's reproductive functions and place women in the situation of alienating aspects of themselves that should be inherently inalienable."[83] Even non-commercial arrangements were held to be objectionable because "the arrangement still results in the commodification of a child and the reproductive process" and is "offensive to the human dignity of the child."[84]

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[80] Radin, *supra* note 5.

[81] *Royal Commission*, *supra* note 1 at 55-56.

[82] *Ibid.* at 108.

[83] *Ibid.* at 683. See also Recommendations 199-205 and c. 23.

[84] *Ibid.* at 689.

Some writers go further and object to both commodification of reproductive materials and services, and to the use of the new reproductive technologies *per se*. Some feminist writers argue that these technologies fragment the childbearing and childrearing process, medicalize motherhood, and imply a loss of control by women of their bodies and the birthing process.[85] They reject what they perceive to be a patriarchal view of reproduction as exclusively biological in nature, and emphasize what they perceive to be the essentially *relational* nature of childbearing and childrearing.[86] This view leads to a much more holistic conception of reproduction, which at base rests on some essentialist conception of "natural" motherhood.

The motherhood that is being celebrated on this latter view is not the motherhood sanctified by earlier natural law theories that entail the subjugation of women in traditional conjugal relationships, but the caring and relational values that some feminists believe are distinctively associated with the nature of womanhood. While this position converges ironically with many of the other natural law views of the reproductive function in opposing many aspects of the new reproductive technologies, feminists who take this view are rightly concerned to stress that their opposition focusses on the potential impact of these technologies on the status and welfare of women, rather than on the status and welfare of the fetus, on preserving traditional family structures, or on perpetuating genetically-driven notions of parenthood.[87] This view recognizes that the new reproductive technologies *per se* and the commodification of reproductive materials and services do have some positive, as well as negative, effects on women. Positive aspects include the potential to subvert traditional family structures by enabling, for example, single and lesbian women to have children without a male partner, and the potential to enable women who wish to pursue careers or other goals to cryopreserve (freeze) zygotes during their youth for implantation later in their lives. But it is also argued that the risks of reinforcing the traditional view, that having children is a social or biological imperative for women, outweigh many of the seeming benefits of commodification

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[85] See, for example, Rothman, *supra* note 8; B.K. Rothman, "Reproductive Technology and the Commodification of Life" (1987) 13 Wom. & Health 95 [hereinafter "Commodification of Life"]; Ryan, *supra* note 70; and K.P. Morgan, "Of Women Born? How Old Fashioned! New Reproductive Technologies and Woman's Oppression," in Overall, *supra* note 23, 60.

[86] See Ryan, *ibid.* at 10.

[87] See, for example, J.G. Raymond, "Fetalists and Feminists: They are Not the Same," in P. Spallone & D.L. Steinberg, eds., *Made to Order: The Myth of Reproductive and Genetic Progress* (Oxford: Pergamon Press, 1987) 58.

and the technologies *per se*.[88] Reinforcing the power of the medical profession in the medicalization of pregnancy is also a concern. As Gena Corea writes, "[i]ncreasingly, it is the contents of the container that matter, not the container herself. Accordingly, obstetricians are coming to view themselves as 'physicians to the fetus'."[89]

Just as this view reflects concerns that the new reproductive technologies may devalue womanhood by viewing women as merely containers or mother machines, there is a collateral concern that babies will increasingly come to be seen as products that parents can in effect "order," with desired characteristics, through control of genetic inputs.[90] Sperm banks purporting to offer genetically superior sperm, with particular attributes, are already in existence.[91] The "commodification" of children, like that entailed in treating women as breeding machines, is equally subversive of the relational—rather than genetic—values that many women regard as being the essence of womanhood and motherhood.[92] Thus, a rich notion of embodied identity is threatened by the fragmentation of reproductive processes entailed in commodification and many of the new reproductive technologies.[93] The provision of

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[88] *Royal Commission*, *supra* note 1 at 37.

[89] *Supra* note 59 at 299.

[90] See, for example, G.J. Annas & S. Elias, "Social Policy Considerations in Noncoital Reproduction" in Milunsky & Annas, *supra* note 61, 147 at 156. These concerns are also shared by many feminists within the "contingency" perspective.

[91] *Ibid.* at 152; and Note, *supra* note 67.

[92] Robert H. Blank, *Regulating Reproduction* (New York: Columbia University Press, 1990) at 90, though not writing from a feminist perspective, states the point well:

> The emphasis on technological "perfection" raises questions concerning the purpose of children in this generation. It is not surprising that terms such as "quality control" over the reproductive process and children as "products" of particular techniques are commonplace. With the increased availability of sex and characteristic selection techniques, motivations for their application must be examined closely. There is a clear danger of viewing children as commodities.

[93] An interesting critique of this perspective is provided by Scott Altman in his article "(Com)modifying Experience" (November 1991) 65 S. Cal. L. Rev. 293. Altman assembles arguments against what he terms the "modified-experience" claim—the idea that commodification and the new reproductive technologies will harmfully alter sensibilities and attitudes such that persons are products or objects to be produced, priced, purchased, used, and discarded. Altman asserts that traditional humanistic values are not fragile, but rather tend to persist over time, even in the face of potentially commodifying and dehumanizing practices of the present, such as paid adoption, prostitution, and labour markets. He argues, at 333, that these "precedents" for the reproductive technologies and commodification of reproductive materials and services demonstrate that "[p]eople need not stop pricing to preserve the ability to think in terms other than price." In short, Altman believes that fears about radical societal and relational disruption and harm to non-economic humanistic and interpersonal values are largely alarmist and unfounded, and that the

gestational services, which some feminists term "baby selling," is perhaps the most widely-claimed example of the devaluation of the gestational experience and fragmenting of the relationship between mother and child. This type of exchange is said to be premised on a male model of parenthood and contract, in which genetic ties are paramount, the best interests of the birth mother[94] and child are irrelevant in the face of a contractual agreement, and babies are considered suitable commodities to be priced, contracted for, and sold.[95]

At the limit, one can conjure up scenarios of "genetic bazaars" in the future—not unlike Aldous Huxley's *Brave New World*[96]—where all or most reproduction is reduced to individuals buying or selling genetic inputs into the reproductive process, maybe through specialized mail-order houses or laboratories, incubating embryos in artificial wombs, and contracting out the childrearing process to modern-day equivalents of wet-nurses, childcare workers, and day-care centres, where relations such as those between mother and child, siblings and father, and parents and extended family become non-existent in some cases and transitory or highly attenuated in others. Pateman refers to this scenario as "universal prostitution."[97]

This brief review of various essentialist theories that bear on the reproductive process underscores Gray's doubts that the question "Which essence shall man have?" is capable of yielding any determinate answer. Gray argues that because various components of human flourishing may often be in intractable conflict with one another, this is decisive against any prospect of reviving a natural law ethics.[98] While there have been recent ambitious efforts to do so,[99] they tend, as in the past, to entail either relatively arbitrary assertions of the essence of human nature, or claims about this essence at such a high level of abstraction that they are essentially devoid of meaningful content. The pluralism of views with regard to the meanings of parenthood, and issues

"modified-experience" claim, at least in its broad and simplistic form, should not be heavily relied upon in policy formulation. See also Arneson, *supra* note 26 at 142-44.

94 The term "birth mother" refers to the woman who gestates and gives birth to the child, regardless of genetic contribution.

95 "Commodification of Life," *supra* note 85 at 99, in which it is argued that women who participate in gestational service agreements "have accepted the alienation of the worker from the product of her labor: the baby like any other commodity does not belong to the producer but to the purchaser." See also, *Royal Commission*, *supra* note 1 at 683.

96 (New York: Harper & Row, 1932).

97 *Supra* note 69 at 193.

98 *Supra* note 16 at 49.

99 See, for example, Finnis, *supra* note 74.

surrounding the possible existence, or specification, of essential differences between women and men (potentially attributable to biological, or social, or a combination of factors), makes determination of policies based on such premises a difficult, if not intractable, problem.

3. Conservative communitarian theories

Communitarian theories, while exhibiting diversity similar to that of liberal theories and essentialist theories, typically reject the "atomistic," "impoverished" pre-social individualism that is said to characterize liberal theory, and the moral absolutism that is said to characterize many essentialist theories. In our present context, two major strands of communitarianism can be identified: one relatively conservative in its implications, emphasizing the importance of preserving traditional community values; the other much more radical, viewing inherited social structures as often oppressive and looking to imagine and realize future possibilities of alternative and more benign social structures. We discuss the first in this section, and the second in the next.

The first strand of communitarianism holds that while moral norms may not be immutable or divinely ordained, and are instead relative to given societies or particular periods of history, a substantial or dramatic transformation of these norms may nevertheless lead to the disintegration or destabilization of society; and society is entitled collectively to adopt measures designed to protect its own moral cohesion and to prevent the erosion of its essential common values. This position was made famous by Lord Devlin in his reaction to the British Wolfenden Committee which recommended, in 1957, that homosexuality between consenting adults be decriminalized.[100] Devlin argued that the overwhelming majority of members of British society at that time held the view that homosexuality was inconsistent with core communal values, and that society was entitled to take collective action to protect those values. In the reproductive exchange context, this perspective could imply that a rapid transition to the use of new reproductive technologies, and commodification of reproductive materials and services, would undermine the institution of the family on which society is based, and that the state would accordingly be entitled

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[100] Lord Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

to prohibit the use of the technologies and commodification of reproductive materials and services.[101]

H.L.A. Hart, in his famous critique of Devlin,[102] argued that Devlin's position reduced all issues of morality to a question of whether particular conduct makes the person on the Clapham omnibus feel sick. Devlin's views, are, of course, strongly antithetical to classical liberal views,[103] although they do share something in common with utilitarian theories, in that the latter also emphasize maximizing the "good of the many" even if this is at the cost of overriding the preferences of the few. It is clear that moral majoritarianism is the animating force behind the views of many moral conservatives in North America today on issues like abortion, homosexuality, pornography, and the new reproductive technologies, and can claim legitimacy from a political system that is premised on majority rule. Nevertheless, the moral premises of conservative communitarianism are antithetical to many feminists, who see them as a rationalization for oppressive traditional family structures and gender inequalities.[104]

A rather more sophisticated line of communitarian reasoning has recently been developed by scholars such as Michael Sandel,[105] Alasdair MacIntyre,[106] Charles Taylor,[107] and others.[108] Taylor's recent book, *The Malaise of Modernity*, usefully exemplifies the orientation of this line of thinking. Taylor identifies three overarching concerns about the

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[101] For an example of a conservative communitarian perspective on the use of donor materials, see G.R. Dunstan, "Moral and Social Issues Arising from A.I.D." (Symposium on Legal and Other Aspects of Artificial Insemination by Donor (AID) and Embryo Transfer, 1 December 1971) in *Law and Ethics of A.I.D. and Embryo Transfer* (Ciba Foundation Symposium 17 (new series)) (Amsterdam: Associated Scientific Publishers, 1973) 47.

[102] *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963).

[103] However, conservative communitarians might argue tendentiously in reply that liberalism itself is an ideology which is imposed upon all communitarians who disagree with it.

[104] See M. Friedman, "Feminism and Modern Friendship: Dislocating the Community," in Sunstein, *supra* note 71, 143.

[105] *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982).

[106] *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1981).

[107] *Philosophy and the Human Science: Philosophical Papers 2* (New York: Cambridge University Press, 1985), especially "Atomism" at 187; *Sources of the Self* (Cambridge, Mass.: Harvard University Press, 1989); and *The Malaise of Modernity* (Toronto: Anansi, 1991).

[108] M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); A. Etzioni, *The Moral Dimension* (New York: Free Press, 1988); R.N. Bellah *et al.*, *Habits of the Heart* (Berkeley: University of California Press, 1985); and R.N. Bellah *et al.*, *The Good Society* (New York: Alfred A. Knopf, 1991).

quality of moral life and moral decision making in modern societies: first, a preoccupation with possessive individualism (to use C.B. Macpherson's phrase);[109] second, a preoccupation with narrowly instrumental reasoning; and third, a detachment or disengagement by individuals from active participation in the political life of their community. For Taylor, the radical individualism sanctified by classical-liberal theory leads to a facile form of soft relativism or moral subjectivism, where "doing your own thing," or individual choice, becomes the dominant moral value in its own right. According to Taylor, this leads to an individualism of anomie, where moral reasoning or moral criticism becomes impossible in the absence of the acceptance of some self-transcending values. In the absence of acceptance of such values, whether they derive from God, nature, history, or from collective participation in a process of self-definition, we are left with social atomism and a culture of narcissism. According to Taylor, narrowly instrumental reasoning leads to a preoccupation with individual self-interest and a devaluation of the impacts of one's actions and uses of technologies on relationships with others, and indeed on nature itself. By Taylor's line of reasoning, one could argue that use of the new reproductive technologies and commodification of reproductive materials and services entail an undue focus on the desires of particular individuals, without according adequate consideration to the impact of individual decisions on the families and children affected, or their impact on the values of the larger community.

The detachment of individuals from active participation in the political life of their community undermines any ability to forge a consensus on common public projects, endeavours, or goals, which in the reproductive exchange context could be offered as a partial explanation for the policy paralysis engendered by the vast diversity of individual viewpoints on this subject. This concept of communitarianism is not necessarily either conservative or radical, although the appeal to self-transcendent values tends to emphasize "essential" human values and the importance of preserving continuity and stability in social structures.

Even accepting this more nuanced understanding of human beings as social creatures situated in and shaped by social relationships and contexts, the core problem presented by Devlin's moral majoritarianism still remains: to what extent should a community, whatever the degree of public or political participation by its citizens, be entitled to adopt a uniform and monolithic conception of the good life and impose it on individual members of that community who do not

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[109] *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962).

share that conception? This dilemma is easily illustrated in the new reproductive technology context. While many individuals today may be offended by, and reject, Lord Devlin's proposition that a homophobic society is entitled to impose its views on individual members who do not share these views, is it any more appropriate for a community, a majority of whose members are opposed to all or many forms of the new reproductive technologies or commodification of reproductive materials and services for whatever reasons, to impose its views on individual members of the community who do not share them?

D. *Radical Contingency Theories*

1. General

A much more radical strand of communitarianism would reject out-of-hand the classical liberal assumption that individual identities and preferences exist in a pre-social state, and would instead view all or most preferences as reflecting the contingencies of history, social structures, economic organization, and politics.[110] On this view, preferences are treated as endogenous, not exogenous, to the social structures in which individuals find themselves situated. Thus, rather than asking the question, "how can society's institutions best establish the conditions for the satisfaction of existing individual preferences?" (as all liberal theories would ask), one would ask the very different question, "what kinds of social structures and institutions do we collectively feel are most appropriate to enable 'true' preferences to be realized?"[111] In other words, the second question implies that the causality between individual preferences and social institutions is reversed.

In discounting the validity of manifest, or apparent, individual preferences, which are viewed as adaptive, endogenous, or socially constructed, radical contingency theories encounter some serious difficulties. For example, if individual preferences can be viewed as lacking independence and validity for these reasons, why would we not

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[110] For a review of theories of adaptive or endogenous preferences, see C. Sunstein, "Legal Interference with Private Preferences" (1986) 53 U. Chic. L. Rev. 1129 [hereinafter "Legal Interference"]; and "Preferences and Politics" (1991) 20 Phil. & Pub. Aff. 3.

[111] Debra Satz, in "Markets in Women's Reproductive Labour" (1992) 21 Phil. & Pub. Aff. 107 at 131, asks a similar question: "[w]e have to ask: [w]hat kinds of work and family relations and environments best promote the development of the deliberative capacities needed to support democratic institutions?"

suppose that the preferences of legislators, bureaucrats, regulators, and judges would not be subject to the same infirmities? Why is this not a quintessential case of the socially constructed blind leading the blind, unless we make the precarious assumption that when we aggregate preferences in collective decision making, all the sundry flaws and biases in individual preferences get neutralized in one "genuine" collective preference? As Eric Mack puts the point (perhaps too strongly), "if the problem is that people are such knaves or fools that they cannot recognize or will not choose these components of human flourishing, then who is to be entrusted to design and enforce limitations of the market that will grant genuine personhood and community?"[112]

Nevertheless, it should be noted that the concept of a *liberal* democracy also rests on the assumption that a group of decision makers (*i.e.*, the legislature, subject to Constitutional constraints and entitlements) can collectively determine laws to govern a heterogeneous society. Law necessarily, and almost by definition, constrains the variety of "life choices" open to individuals in the interest of preserving harmony amongst groups and individual members of society. Disagreements between radical contingency and liberal autonomy theorists would seem to centre around the question of how to ascertain (and liberate) "true" preferences, rather than the question of whether to impose majority preferences on those who disagree with them (which is the autonomist's critique of conservative communitarian theories).

There is a further and in some ways more fundamental circularity problem with theories of endogenous preferences: presumably, *any* form of social, economic, political, or legal organization will be vulnerable to the same claim, so that the validity of individual preferences will be open to challenge *ad infinitum* by those holding decision-making authority or other members of the community with different views. One might, of course, argue in Aristotelian fashion that participation in non-hierarchical, dialogic, processes of collective self-definition confer a special validity on preferences arrived at in this manner, although it seems unlikely, given the kind of secular and pluralistic society in which we live, that consensus could be reached on anything approaching a complete conception of the conditions necessary to facilitate true human flourishing. Nevertheless, it may be possible to identify or devise incremental mechanisms that would enable individuals and communities to consider and evaluate current or traditional

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[112] Mack, *supra* note 53 at 223.

preferences in the light of new information, options, and experiences.[113] For example, further increases in workplace options available to women, with the concomitant potential for securing an independent source of income, may, as they have over the past thirty years, offer some women the opportunity to re-examine their former "preferences" to remain in uncongenial relationships, to be the sole provider of domestic services in the home, or to act as gestational service providers.

We now turn to a particular version of social contingency theory, radical—or more accurately "transformative"—feminist theories, which have particular implications for the reproductive exchange context.

2. Contingency feminist theories

As noted above, many feminists view the new reproductive technologies as threatening women by reinforcing historical gender stereotypes that see women principally as breeding machines.[114] However, some feminists are cautious about accepting essentialist claims about the nature of womanhood or motherhood.[115] These essentialist views largely rest on the notion of inherent differences between men and women—in the present context, differences in the value that women place on relationships, care giving, and nurture. These values have been given much prominence in work by scholars such as Carol Gilligan[116] who, in her research on the developmental patterns of young boys and girls, found that girls valorize notions of care giving and altruism in relationships while boys emphasize an ethic of justice and rights. However, it is not clear that Gilligan claims that these are essential or inherent differences, as opposed to differences engendered by environmental influences. While Gilligan's work has led some feminists to claim that women have an inherently different form of moral development, other feminists such as Catharine MacKinnon argue differently:

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[113] Monitoring, evaluating, and responding to new technologies as they emerge is one of the functions of the Royal Commission's proposed National New Reproductive Technologies Commission: *supra*, note 1 at c. 5.

[114] Corea, *supra* note 59.

[115] See S. Sherwin, "No Longer Patient: Feminism and Medical Ethics" (Feminism and Law Workshop, University of Toronto Law School, 7 February 1992); and J.G. Raymond, "Reproductive Gifts and Gift Giving: The Altruistic Woman" (Hastings Center Report November/December 1990).

[116] *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982).

> For women to affirm difference, when difference means dominance as it does with gender, means to affirm the qualities and characteristics of powerlessness ... . So I am critical of affirming what we have been, which necessarily is what we have been permitted ... . Women value care because men have valued us according to the care we give them.[117]

In a similar vein, the question of women's altruism as a motivation for participation in reproductive exchange relationships must be addressed. Richard Titmuss, in his well-known book *The Gift Relationship: From Human Blood to Social Policy*,[118] argues that important non-economic values such as a sense of altruism, reciprocity, and community, are fostered by a donation rather than a commercial system of blood supply. He argues that Britain, which traditionally depended on a system of voluntary blood donations for transfusion purposes, outperformed the United States, which traditionally relied more on commercial payment for blood, with respect to the quantity and quality of blood supplied, the avoidance of severe shortages and surpluses, and the overall fostering of the non-economic values noted above. Janice Raymond, however, argues that the distinction between commercial and altruistic arrangements in the reproductive exchange context is suspect[119] because women's participation may simply be a reflection of a long history of subjugation and socialization, whereby women have been induced or compelled to value themselves in accordance with their reproductive abilities and to see themselves as under an obligation to be caregivers, childbearers, or nurturers if this is what serves men's needs.[120] The Royal Commission also took this view in recommending that even non-commercial surrogacy arrangements not be sanctioned or encouraged.[121] Thus, to the extent that patriarchal family and social structures have induced women to accept, over time, that their most appropriate role in life is as childbearers and childrearers, we should not take these preferences as given, but rather see them as a result of a long history of oppressive and biased socialization processes (a position strikingly similar to that taken by John Stuart Mill in his essay, *The Subjection of Women*).[122] On this view,

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117 *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1989) at 39. See also McClain, *supra* note 71.

118 Titmuss, *supra* note 68. For a rejoinder, see K. Arrow, "Gifts and Exchanges" (1972) 1 Phil. & Pub. Aff. 342.

119 *Supra* note 115.

120 See, for example, Rowland, *supra* note 39; and Raymond, *ibid.*

121 *Royal Commission*, *supra* note 1 at 689.

122 (London: Longmans, 1869).

many feminists would contend that encouraging the development and use of new reproductive technologies in many contexts, whether on a commercial or non-commercial basis, carries serious threats to the status of women, unless the contingencies of culture, society, economics, and politics, which have conspired to subordinate women over history, have first been addressed.[123]

More specifically, it is argued that narrow conceptions of consent or coercion typically espoused by classical liberal theory and neo-classical economics, which ask whether a particular proposal is a threat or an offer, or whether the recipient is made better or worse off relative to her starting point,[124] simply fail to recognize the social and economic inequalities that leave women, in many contexts, with highly constrained choices. In other words, a much more contextual conception of coercion is required. If adopting this more contextual conception of coercion leads to the view that most women are only prepared to contemplate entering into exchange relationships, such as the supply of ova or gestational services, because other avenues of self-fulfilment have been systematically foreclosed to them, then these exchange relationships should be prohibited.

It is also argued that disability, including infertility, is, in part, a social rather than a purely medical or scientific construct.[125] Medicalizing infertility by defining it as an "illness" or "defect" trades on the fact that, historically, women have been induced to believe that childbearing and rearing is their primary role in life, and that if they cannot perform this function they are a failure.[126] The perception of infertility as a tragic deficiency that can only be remedied by obtaining

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[123] See Pateman, *supra* note 69; *Recreating Motherhood, supra* note 8; L.R. Woliver, "New Reproductive Technologies: Challenges to Women's Control of Gestation and Birth," in R.H. Blank & M.K. Mills, eds., *Biomedical Technology and Public Policy* (Westport, Connecticut: Greenwood Press, 1990) 43; and Satz, *supra* note 110.

[124] See Trebilcock, *supra* note 25 at c. 4.

[125] *Recreating Motherhood, supra* note 8 at 140-52; and C. Overall, *Ethics and Human Reproduction* (Boston: Unwin Hyman, 1987) at 139.

[126] See Poff, *supra* note 24; and Corea, *supra* note 59 at 100-34. Robert Lee Hotz, in his book *Designs on Life* (Toronto: Pocket Books, 1991), documents the "stories" of couples who have made use of new reproductive technologies. Although Hotz is not writing from a feminist perspective, many of the situations that he describes give support to feminist fears about the effect of new reproductive technologies on women. For example, one woman confides:

> I am dependant on the technology, and that is very scary. ... If it were not for that, I would be a barren woman. In an earlier time, King Henry would have divorced me, I'd have my head cut off. Everything I am doing is experimental. I have to trust in a doctor. The one thing my husband can give me now is emotional support—that and good sperm.

one's "own" child in some other way also detracts from the exploration of other options open to women (and men) who wish to nurture, guide, assist, and share themselves with others: these options include volunteer and paid work with children in the community, spending time with the children of friends and family, foster parenting, and even work with other groups, such as teenagers or elderly persons. To the extent that the new reproductive technologies carry the potential for reinforcing and perpetuating the view that women are not fulfilled unless they are able to conceive, bear, and raise children, the technologies are antithetical to women's interests.

Also, it is argued both by some feminists and many non-feminists that the role that technology has assumed in most modern societies should not be taken as a given. For example, it is argued more generally that the technological imperative induces us to see everything in the world, including nature and the environment, as simply a resource to be exploited, and that prescriptive (as opposed to holistic) technologies generate a culture of compliance.[127] Specifically, in the context of the new reproductive technologies, it is argued that the technological imperative encourages society to see the reproductive faculties of women as simply another resource to be exploited or "plundered."[128] Diversion of social resources to technologies designed to produce babies not only objectifies and devalues both women and children, but also draws resources away from pressing women's concerns such as pay equity in the workforce, adequate social assistance benefits for disadvantaged women (such as women whose child care commitments preclude them from workforce participation, and elderly and disabled

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127 See U. Franklin, *The Real World of Technology* (Montreal: C.B.C. Enterprises, 1990); Taylor, *supra* note 107; M. Adas, *Machines as the Measure of Men* (Ithaca: Cornell University Press, 1989); and J. Ellul, *The Technological Society* (New York: Vintage Books, 1964).

128 See M. McNeil, "Reproductive Technologies: A New Terrain for the Sociology of Technology" in M. McNeil, I. Varcoe & S. Yearley, eds., *The New Reproductive Technologies* (London: Macmillan, 1990) 1; and J. Murphy, "Egg Farming and Women's Future" in R. Arditti, R.D. Klein & S. Minden, eds., *Test-Tube Women: What Future For Motherhood?* (Boston: Pandora Press, 1984) 68. Janice Raymond, in "Of Eggs, Embryos and Altruism" (1988) 1 Reprod. & Gen. Eng. 281 at 283, argues in the fetal tissue context that

> [f]etal tissue is becoming increasingly important to all sorts of high-tech medical research to what I call "Rambo" medicine. Rambo medicine is based on male heroic technical prowess that requires more high tech, more high drama, more high publicity, more high funding, and more high risk for more women, with little immediate success—but of course, the *promise* of it. Rambo medicine, like messianic religion, is always promising a future that is yet unrealized. Rambo medicine is a medical eschatology of things to come.

women), and day care.[129] The tendency to focus medical and technological attention on women's bodies is exacerbated in the present context by the fact that the medical profession is male-dominated, and so combines in a single mind-set both the narrowly instrumental view of the role of technology and a patriarchal view of the role of women in society.[130]

It is argued further that capitalist institutions, historically and currently still dominated by men, conceive of all interactions and relationships as dominated by concepts of private property rights and freedom of contract, where anything can be bought or sold, if there is a willing buyer and seller, without regard to how the commodification of human faculties, or resulting children, may dramatically transform, in a broader systemic sense, social relationships over time. Finally, a straightforward political argument might be made for constraining the new reproductive technologies, at least in the short run: to the extent that these threaten the dominant role historically played by women in the childbearing and rearing process, whatever the rights and wrongs of this role, women should not give up this political "card"—perhaps their major card—until equality has been secured in other significant domains.

On this view, it is impossible to determine what role should be assigned to the new reproductive technologies without first attending to the surrounding contingencies of history, culture, society, economics, and politics, which cumulatively account for the subordinate status of women. As MacKinnon states in the conclusion to a recent book, "[a] feminist theory of the state has barely been imagined; systematically, it has never been tried."[131] According to Pateman, "new anti-patriarchal roads must be mapped out to lead to democracy, socialism, and freedom."[132] However, these goals can scarcely be claimed to constitute a concrete agenda for action, given the deep ambiguities surrounding each of these concepts. Nevertheless, if the contingencies that account for present gender inequalities were to be more effectively addressed, some contingency feminists might be more agnostic than feminist proponents of "natural" motherhood as to the role that should then be

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[129] See Woliver, *supra* note 123 at 50-52; and R.D. Klein, "What's 'New' about the 'New' Reproductive Technologies?" in Corea *et al.*, *supra* note 39, 64 at 68-69.

[130] *Royal Commission*, *supra* note 1 at 32-34.

[131] *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) at 249.

[132] *Supra* note 69 at 233.

assigned to both commodification and the new reproductive technologies *per se*.[133] It is possible that in this more ideal world, contingency feminists, who of course strongly emphasize the right of all women (including historically disadvantaged women such as members of ethnocultural minorities, Third-World women, and lesbian and single women) to make choices about the control of their own bodies, would find substantial convergence with strong autonomy proponents, including liberal feminists, who argue that these decisions should be the personal prerogative of individual women.

However, the immediate dilemma faced by contingency feminists is the "double-bind" problem that is entailed in the transition from the non-ideal world to a more ideal world. According to Radin,[134] in moving to a world where truly autonomous individual choices are possible, it is often difficult to decide whether society should, in the interim, adopt a set of policies that heavily constrain the ability of women (and men) to utilize or participate in potentially harmful activities on the grounds that, for the time being, fully autonomous choices (reflective of true preferences) are not possible. Some autonomy theorists might argue that this risks a new form of authoritarianism or paternalism (parentalism) not sharply dissimilar from that entailed in the position that Lord Devlin took on homosexuality. Moreover, it is possible that stringent constraints on participation in exchange relationships relating to the new reproductive technologies might risk, in the short run, implying that women are incapable of making choices about their lives, thereby perhaps reinforcing rather than undermining gender stereotypes about the capacities or incapacities of women to participate fully as equal moral agents in all aspects of social life. Yet the second horn of the dilemma is that if potentially harmful activities such as the commercial exchange of reproductive materials and services, and indeed the proliferation of reproductive technologies more generally, are not constrained in the short term, we may risk further exacerbating the disadvantages that women face in contemporary society.

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[133] See Satz, *supra* note 111; and Rowland, *supra* note 39. Robin Rowland writes, at 80, that "[i]f these technologies were in the hands of women whose bodies they most intimately affect, we may be able to utilize them to free women and give them new choices. But past experience teaches us that the control of women's bodies is a continual battleground of the sexes."

[134] *Supra* note 5.

E. *Conclusions*

Between the extremes of the atomistic individualism and narcissism arguably entailed by classical liberalism, the moral absolutism arguably associated with many forms of essentialism, and the indeterminacies arguably entailed by many contingency theories, where are we left at the end of the day in terms of identifying some normative signposts that might guide us in decisions regarding the regulation of the new reproductive technologies? This question is rendered particularly intractable not only because different members and groups in the community will have different and strongly held views as to which of these perspectives represents the most appropriate normative framework within which to evaluate the new technologies, but also because many individuals will feel simultaneously attracted to the values which are represented in many of the normative perspectives reviewed. That is to say, not only do policymakers face the not unfamiliar problem of different groups in the community taking different positions on the issues at stake, but many individuals themselves may also feel internally torn and anguished over the value conflicts that the issues in this context present. This suggests the exercise of some prudence in policy formation: marginal or incremental change that permits both reversibility or further change in the light of accumulating experience, rather than quantum leaps into the unknown, seems a sensible policy orientation.[135]

However, in determining public policies towards these new technologies, it seems crucial to bear in mind, in a non-dogmatic, non-rigid way, the difference between state action and individual and group action. That is to say, the mere fact that the state has chosen not to act to constrain private activity in a given context does not *necessarily* imply that it endorses, sanctifies, or legitimates private decisions taken in these domains. Rather, it leaves open a different kind of political discourse—not a discourse directed at the state designed to induce or foreclose state action, but a political discourse amongst each other, as individuals and groups, whereby we can seek to persuade each other, through moral argument, of the rightfulness or wrongfulness of individual choices. Apart from the politics of state action, women's groups, for example, can engage in political discourse with other groups in persuading individual members to reconceive their public and private roles. Similarly, women and men, as individuals and groups, can debate

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[135] See C.E. Lindblom, "The Science of 'Muddling Through'" (1959) 19 Pub. Admin. Rev. 79.

amongst each other about how gender relationships can be more constructively conceived. In other words, to view the politics surrounding the new reproductive technologies as centred exclusively, or even perhaps predominantly, on state action reflects an impoverished view of the nature of political discourse.

This said, however, we are not so naïve as to suppose that the state can remain entirely neutral on the issues posed by the new reproductive technologies. It is already, and will remain, heavily implicated in the level and objectives of funding for medical research in the area, in the provision of subsidized health care services, and in the choice and administration of a legal framework that, to a greater or lesser extent, facilitates or constrains these technologies. Also, differences in endowments, including power differentials, which individuals bring to exchange transactions, cannot be addressed solely by market mechanisms and are unlikely to be redressed if the state remains neutral in this area. Thus, any idealized liberal notion of complete state neutrality on these issues is utopian. The state has no option but to make a range of collective decisions that will clearly, one way or another, significantly shape the scope and form that the new reproductive technologies, and exchange relationships relating to them, will take in the future.

Finally, despite the indeterminacies entailed in contingency-feminist positions as to what role the new reproductive technologies and exchange relationships might play if a more ideal, gender-equal world were to be attained, their central point can scarcely be denied. That is, to the extent that all the surrounding inequalities are left unaddressed, to attempt to formulate normatively coherent and defensible responses to the issues raised by the new reproductive technologies in abstraction from the context in which these issues now confront us is a daunting and perhaps impossible task. This is not an argument for paralysis—we have already acknowledged that the state is not now, and cannot in the future be, neutral over these issues—but it is an argument for viewing the formulation of policy responses to issues raised by the new reproductive technologies in a broader policy context, and for simultaneously promoting a much more broadly conceived policy agenda that situates the new reproductive technologies and exchange relationships in this larger context.

III. PROPOSED GUIDING PRINCIPLES

A. *Introduction*

Both as individuals and as a community, we do not operate within a one-value view of the world. Most of us simultaneously espouse autonomy, efficiency, distributive justice, relational, and probably other values. The task that we confront, as individuals and as citizens, is how to reconcile, or weigh, these values in particular contexts. While we do not pretend to be able to offer a meta-theory that weighs these values in some general social welfare function, in the particular context of the commercialization of reproductive materials and services we believe that there are elements in each of the major normative perspectives reviewed above that justify recognition, in a normatively defensible and coherent legal framework, for regulating this class of activity. This is not to claim that these perspectives can be reconciled in all major respects, or that a compromise among them can best be justified as a necessary evil in order to secure some minimum necessary level of political consensus to support some set of public policies. While it may be true that a compromise will secure the necessary political consensus, we claim that on normative grounds a number of the critical values represented in these perspectives will properly inform the choice of public policies in this context. We make no apologies for this form of "moral pluralism": it is not unprincipled to optimize across a set of values, all of which, to a greater or lesser extent, legitimately evoke our allegiance.

In the guiding principles we develop below, as our attempt at a coherent synthesis of certain elements in the major normative perspectives that drive debates over the new reproductive technologies, four critical issues stand out amongst others as requiring resolution: (1) the role to be assigned to financial compensation for the supply of reproductive materials and services; (2) the extent to which suppliers or demanders should be able to stipulate genetic characteristics in parties with whom they enter into exchange relationships pertaining to reproductive materials and services; (3) whether suppliers or demanders should have a right to "opt-out" of any exchange relationship that they have previously entered into; (4) the extent to which, if at all, access to reproductive materials and services should be subsidized by the state.

We should frankly acknowledge at this juncture that the central question of the scale of payments for reproductive materials and services, and the extent to which these payments should be contractually determined, is an issue that continues to cause some tension in

viewpoints amongst the co-authors. Perhaps predictably, the male, and highly predictably, the co-author most committed to a law and economics perspective, is less convinced than his co-authors of the need for as stringent a set of constraints as the latter feel are warranted.[136] However, the arguments on both sides of this issue are fully canvassed, and readers will have to form their own judgments.

B. *The Four Principles*

1. The principle of uniqueness

a) *Blood and kidneys*

The first principle is that reproductive material and services are unique and must be regulated in a manner different from that which may be appropriate for other bodily materials, regenerative (such as blood) or non-regenerative (such as organs).[137] The lack of analogies becomes apparent when one considers the difference between peoples' attitudes to blood and organ donation and their feelings about donation of reproductive material. For example, it is common for blood donors to sport a sticker in the shape of a drop of blood on their lapels after making a donation; but one has difficulty imagining men wearing a sperm sticker, or couples wearing matching zygote stickers, following donation of reproductive material. Currently, sperm suppliers seem quite secretive; it is not a matter discussed in the workplace as is blood donation. Organ donations are also different. While a large percentage of citizens are willing to sign organ donation cards so that their organs may be used after their death, many would feel differently about their ovaries being extracted and their ova used for the creation of twenty or thirty children. Spouses and other family members might also feel disturbed at the thought of their partner's reproductive material being used to create children related to that partner but unrelated to

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136 See Trebilcock & Keshvani, *supra* note 29.

137 The *Glover Report*, *supra* note 30 at 32, explicitly recognizes the uniqueness of gametes and the implications for suppliers:

> [s]emen donation is not just like blood donation. By donating semen for these new techniques, a man is partly responsible for bringing a new person into the world. The potential donor needs time to consider his motives, and possible future regrets. Perhaps a donation made by a young unmarried man is something he will later find difficult to talk

themselves. These feelings would not be evoked by the donation of, for example, kidneys.

b) *The personal aspect*

The traditional connection of reproductive material with sexuality, usually thought of as a private and personal matter, is another factor in peoples' reluctance to treat reproductive material as they would organs or blood. Sociobiologists argue that humans, like other animals, desire to bring offspring into the world to perpetuate their particular genetic material,[138] but the current shortage of sperm, ova, and zygotes calls this argument into question: the very reason that we might consider introducing commercialization is to induce individuals to overcome their observed reluctance to part with their reproductive material. The reason that few individuals currently volunteer to donate, even when donation is painless and consumes a minimal amount of time (such as sperm donation, which is less painful and time-consuming than blood donation) and even when the material is already in existence (such as "spare" zygote donation) can only be that people have strong personal feelings and moral beliefs about their own genetic material. Decisions about whether to assist in creating a unique new human being reflect a combination of emotions and strongly held intellectual, spiritual, and moral convictions.

Gestational services and fetal material have personal and unique aspects also. Gestational services are unlike other physical labour, in that the fetus is developing within—and, importantly, in connection with—the woman's own body. The desire to experience pregnancy, and to know that they have nourished the fetus and given birth to the child, may be reasons why some female demanders prefer to make use of supplied gametes and zygotes rather than adopt. The presence of strong personal and moral convictions in the fetal tissue context are amply demonstrated by the powerful emotions and variety of opinions evoked by the abortion debate. Yet despite the range of disagreement on the subject of abortion, we believe that there is a thread of commonality, in that most individuals would agree that the fetus—and, in some contexts, the zygote or embryo—is worthy of a degree of respect by virtue of its biological status as a genetically-unique potential human life.

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138 See *supra* note 79.

c) *"Need" and demand for reproductive material and services*

It is also clear that there are very real physiological and medical distinctions to be drawn between the "need" for reproductive material and services and the need for blood and organ donation. Demanders of blood and organs often will die without them, but demanders of reproductive material and services are, typically, physically sound and are, in the case of reproductive material, more likely to continue to be healthy if they do *not* receive the material they demand, *i.e.*, to use materials demanders must assume medical risks.[139] While the psychological pain of some childless individuals may be significant, it is unlikely to be life-threatening, and some potential substitutes for a genetically- or gestationally-related child are available.[140] This distinction between urgent physiological and medical need for blood and organs and perceived psychological need for children requires that demand for reproductive materials be evaluated on its own merits, and not analogized to demand for other bodily materials. By contrast, the demand for fetal material *is* analogous to the demand for blood and organs, because fetal material may be necessary for the continuance of an existing human being's life.

2. The principle of enablement (not inducement)

a) *Arguments for and against emphasizing distributive concerns*

Given the deeply personal and controversial nature of reproductive material and services, our second principle—premised on the fact that commercialization is likely to have powerful incentive effects that may disproportionately induce the disadvantaged to participate as suppliers—becomes especially important. Monetary

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[139] In the words of R. Snowden and G.D. Mitchell, *The Artificial Family: A Consideration of Artificial Insemination by Donor* (London: George Allen & Unwin, 1981) at 71:

> [t]he donor is *not* giving semen to help other people in the same way that many of us donate blood. Semen is being given for the purpose of *creating a new human being* whereas blood is given to assist those who are already in existence and who need help. The issues of personal and social responsibility surrounding the care of people who already exist are very different from those surrounding the planned creation of a new

[140] Adoption, foster parenting, and volunteer or paid work in childcare are among the options available to those who wish to share their lives with children.

inducements directed at overcoming strong convictions of a personal and moral nature are inappropriate, and become more so when it is the poor who will be disproportionately induced to participate. For example, Cass Sunstein argues that laws should properly reflect the majority's "preferences about preferences," or second-order preferences at the expense of first-order preferences.[141] This phenomenon—voluntary foreclosure of certain choices—is the political analogue of Ulysses and the Sirens.[142] Such measures may be regarded as an effort by citizens to protect themselves against their own transitory and perhaps misguided choices: this is a kind of pre-commitment policy.

The counter-argument, made strongly by Richard Posner—that the supply of reproductive material, gestational services, and fetal material would be only one more of many undesirable jobs filled by society's poor—is unconvincing.[143] It underestimates the unique nature of this activity, and it could also be used to justify the opposite conclusion—not imposing another undesirable burden on the already-disadvantaged poor. Posner also argues that paying the poor to perform undesirable jobs *is* distributively just and non-exploitative because it improves their lot in life by making them financially better-off relative to their admittedly meagre alternatives.[144] However, this argument fails to take into account the unique nature of the activity in question: it is admirable to improve the financial circumstances of the poor, but at what personal and moral cost to these persons? Other distasteful jobs which one might take on for financial motivations, such as providing janitorial services or garbage collection, are qualitatively different from the provision of genetic or fetal material or gestational services. It is distasteful to many to imagine a society where poorer persons seeking to improve their lot in life are presented with a strong financial inducement to sell their reproductive material or services to wealthier persons. It would obviously be preferable to at least attempt to extend to poorer persons a small part of the range of choices (including education, job

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141 See "Legal Interference" and "Preferences and Politics," *supra* note 110 at 1169 and 12, respectively.

142 See J. Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1979).

143 "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" (1989) 5 J. Contemp. Health L. & Pol'y 21 at 26.

144 *Ibid.* at 25-26. See also Posner, *supra* note 20. In the latter, Posner states, at 425, "[m]y conclusion is that the technological revolution in reproduction has increased and will continue to increase the full income of women relative to men." For further arguments that surrogacy contracts are not exploitative of women with few other opportunities, see Wertheimer, *supra* note 26 at 224-27; and Arneson, *supra* note 26 at 158-59.

skills training, employment opportunities, daycare, *etc.*) that are available to wealthier persons. If one were to adopt Posner's position, one could quite readily justify postponing the adoption of progressive social policies, such as the extension of the choices and opportunities outlined above, until the poor had exhausted all income opportunities from their other natural endowments (including their reproductive materials and capacities for gestational services).

Another argument made, ironically, by some feminists, is similar to the Posnerian argument, differing only in the conviction that it would be best, in an ideal world, if no one were to become a supplier: this line of argument holds that since the supply of reproductive material and services is a morally repugnant activity which ideally no one should need to participate in, anyone who does so should be paid very well.[145] The paradox of this argument is apparent: large payments will induce more people to enter an activity which is already perceived to be undesirable. There is also a short-sighted quality to this argument: paying a subset of poor people to participate in undesirable activities may increase their income but diverts attention from systemic inequalities in society and the labour market—factors which cause people to become and stay poor.

Turning to primarily demand-side issues, Posner's argument that in a system of unconstrained commercialization more suppliers would enter the market, and that the ensuing competition would drive the price of services down to (opportunity) cost, thereby making materials and services more financially accessible to poorer demanders, is also highly problematic. The market would generate differential pricing (such that materials and services produced by persons of different racial backgrounds and attributes would be priced differently), which could potentially alter the way that we as a society perceive and value our constituent members. Children produced from materials sold in such a market might also come to see themselves as more or less valuable than other children with different racial backgrounds and attributes. This type of market would also offer a disproportionate share of the increased selection of materials and services to wealthier demanders who could afford to pay for the more highly demanded (and accordingly more expensive) materials and services. Finally, a subset of poorer demanders would be excluded from participation because they lack the resources to pay market prices, even when these prices are close to cost. The benefits that the less advantaged would derive from a system whereby wealthier demanders exchange money for reproductive

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145 This type of argument is discussed in M.A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Mass.: Harvard University Press, 1990) at 26; and Shalev, *supra* note 38.

materials from poorer suppliers, who risk physical and psychological harm (and may be paid at a rate marginally above cost, particularly if they do not possess highly demanded characteristics), while some poorer demanders are unable to obtain materials at all, are unclear at best.

Faced with such difficulties, some might argue that an unconstrained market on the supply side and state allocation or subsidization on the demand side is a possible alternative. But a supply-side market would still generate differential pricing, and paying prices to suppliers sufficient to clear queues of subsidized demanders could place a serious strain on health care budgets, such that the financial feasibility of state involvement in this area could well be called into question. Thus, if some suppliers were well paid, it would not only be at the risk of inducing them to overcome their moral convictions, but might also be to the detriment of poorer demanders, who might lose state support if this area of involvement becomes too expensive. Importantly, if state involvement were to continue in this type of market, it would be to the detriment of those individuals who would be deprived of other (perhaps even life-saving) medical resources, due to the diversion of health care resources to applications of the new reproductive technologies.

It is clear that monetary inducements will always disproportionately affect the poor: even small sums may induce the indigent to participate as suppliers, and it would be next to impossible to offer enough money on a consistent basis to systematically induce the wealthy. It is also apparent that the tax and transfer system (the mode of income redistribution favoured by Rawls) is unlikely to remedy large wealth differentials among potential demanders, or remedy the poverty of many potential suppliers, so as to make access to a relatively unconstrained market distributively just (at least in the foreseeable future). In so far as we are particularly concerned about distributive consequences when the subject matter in question has strong personal and moral implications, it follows that unconstrained commodification of reproductive material is unacceptable. However, banning the use of supplied reproductive materials and services and fetal material also seems a drastic measure. We would prefer to permit the exchange of these materials and services, while attempting to anticipate and constrain many of the possible negative effects. Accordingly, we are in favour of what we have called "constrained commodification."

b) *Enabling altruism*

If the supply of materials and services is to be increased, measures that do not involve monetary inducements (which may induce the poor to bear a disproportionate share of the physical, psychological, and moral costs entailed) must be considered. Appeals to altruism, unlike financial incentives, would draw a relatively equal response from all socioeconomic groups in society. However, while the wealthy can afford to be altruistic (that is, they can afford transportation costs, foregone wages, babysitting expenses, *etc.*), the less well-off (who are also motivated by altruism) can ill-afford these basic expenses. Therefore, it would seem appropriate to offer compensatory payments—reimbursement for travel costs, out-of-pocket expenses, and some basic time costs—in order to enable all persons who wish to participate to do so. It is essential that these payments be "enabling" only: they must be compensatory without having an inducement effect. Compensation for a supplier's time is problematic, since we recognize that, generally speaking, payments equal to an individual's opportunity costs (the money that the individual would otherwise earn) may make the individual indifferent between participating in the activity and continuing in her or his normal employment, and payments in excess of opportunity costs function as an inducement to participate in the activity. We would suggest that compensation for a supplier's time be set slightly below the minimum wage, with special provisions made for those on social assistance and those not employed in the labour market. This would achieve our goal of facilitating altruism by offering compensation without causing inducement effects for the poor.

c) *The research subject and adoption analogies*

Our position with regard to compensation rather than inducement receives support from the ethical recommendations of the Medical Research Council of Canada (MRC)[146] and the Office of Research Administration at the University of Toronto in their guidelines with regard to use of human subjects for research.[147] Research subjects

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[146] *Guidelines on Research Involving Human Subjects 1987* (Ottawa: Minister of Supply and Services Canada, 1987) [hereinafter *MRC Guidelines*].

[147] B.M. Dickens, ed., *Guidelines on the Use of Human Subjects* (Toronto: Office of Research Administration, 1979) [hereinafter *University of Toronto Guidelines*]. This study also contemplates that special provisions will apply in case of a "significant" risk: it recommends, at 37, that in such a

are in a position similar to that of *de novo* gamete, zygote, and fetal tissue suppliers and of women providing gestational services: they are incurring risks and expenses to participate in a medical procedure that is not of direct therapeutic benefit to themselves. Since subjects do experience some discomfort and inconvenience, and reap no direct medical benefits from the procedures, it would seem unjust not to offer compensation. However, the MRC and the Office of Research Administration are concerned that when money is introduced, less well-off persons will be disproportionately attracted as subjects.[148] The solution reached is to offer compensation for out-of-pocket expenses and to pay for time at a rate no higher than the minimum wage—in effect, to enable altruism by offering reimbursement for certain legitimate expenses but not to offer inducements.[149] Both the concerns and the solution are clearly very similar to our second principle.

Another analogy that is highly apposite is provided by the laws in most jurisdictions that permit private adoption services. Here it is common for adoption laws to restrict payments that can be made by adoptive parents or agencies acting on their behalf to biological mothers contemplating the possibility of giving up their unborn children for adoption, to basic medical and living expenses.[150] Presumably, these laws are designed to ensure that women who might otherwise have decided to keep their children are not unduly induced to give them up by the prospect of large financial payments.

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case "no one should be compensated financially for undergoing a significant risk. ... The risk to the subject in such a case should be outweighed by a related, non-pecuniary benefit to the subject. Any medical risk, for example, should be outweighed by both the probability and degree of a therapeutic advantage."

[148] MRC *Guidelines*, *supra* note 146 at 24-25; and *University of Toronto Guidelines*, *ibid.* at 30-33 and 36-37.

[149] The *University of Toronto Guidelines*, *ibid.* at 37, conclude that "compensation must not be so great that it is an excessive inducement. As a general rule, pro-rated compensation should never exceed the hourly minimum wage. ... Moreover, it is noteworthy that even a small compensation may be an unfair inducement to a person in financial distress;" see also the discussion at 36-37. The MRC *Guidelines*, *ibid.*, are based on the same principles—compensation for expenses and payment at a level that does not induce persons to participate—but the Council, at 24, allows for compensation for "reasonably assessed ... loss of wages;" see also the discussion at 24-25. This would presumably result in paying poorer research subjects less money than wealthier research subjects, which seems somewhat problematic. Both the *University of Toronto Guidelines*, at 37, and the MRC *Guidelines*, at 25, state that if subjects choose to withdraw before the project is completed, compensation should still be given for the participation given.

[150] See Posner, *supra* note 20 at 409. Posner, however, is critical of these financial ceilings.

d) *Justifiable "discrimination"*

i) Supply side

An altruistic supplier of materials or services may be more likely than a paid supplier to be truthful about the presence of genetically-linked diseases in her or his family's history, and about her current state of health,[151] but even an honest supplier may not be aware that she or he has a sexually-transmitted disease. We would therefore require all prospective suppliers to undergo blood tests and other necessary medical tests.[152] Psychological screening, designed to discover whether the prospective supplier is able to understand the implications of supplying materials or services and is consenting to the procedure, may also be important.[153]

In the context of reproductive materials and services, it would also seem reasonable to take account of concerns that the number of children genetically related to one individual supplier not become large enough that the children could unknowingly meet and have children of their own together. This concern could be met by establishing a limit on the number of children that one supplier could parent (including the children that the supplier has produced for herself or himself).

Some studies have suggested that a central record-keeping agency[154] be established to record information regarding the number of

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151 This argument is made by Richard M. Titmuss, *supra* note 68 at 151 and *passim*. The *Reid Report*, prepared by the combined ethics committee of two Canadian medical societies, suggests that suppliers be informed that should a recipient bear a child that is handicapped because of the supplier's deliberate deception about family genetic history or personal medical history, the supplier will be liable to support the child. If the supplier were honest, and yet a handicapped child was born, the supplier would not be liable. This requirement would give suppliers a significant incentive to reveal all that they know about their medical and genetic history: The Combined Ethics Committee of the Canadian Fertility and Andrology Society and the Society of Obstetricians and Gynaecologists of Canada, *Ethical Considerations of the New Reproductive Technologies* (Toronto: Ribosome Communications, September 1990) (Chair: R.L. Reid) at 32 [hereinafter the *Reid Report*]. However, the level of payment that we recommend is non-inducing, such that those who choose to participate would not have an incentive to lie about their history.

152 For a discussion of precautionary screening in the context of sperm donation, see *Royal Commission*, *supra* note 1 at 448-50 and Recommendations 83-103.

153 Those incapable of consenting, such as mentally handicapped persons, would not be permitted to participate. For a discussion of the importance and content of counselling in the context of the new reproductive technologies, see, for example, *Royal Commission*, *ibid.* at 460-65, 487-89, and Recommendation 99(e).

154 The *Royal Commission*, *ibid.* at 118-19, proposes that this is one of the functions that would be performed by its proposed National Reproductive Technologies Commission.

children that a given supplier has parented, and to inform recipients if genetically-linked diseases develop in the supplier after the child has been born.[155] The supplier would also be informed if the child developed genetically-linked diseases. This information could be relayed through a central agency, without revealing names or other identifying information. A central agency could also be used for the initial matching of prospective suppliers and demanders, and for the facilitation of continuing contact between the parties where this is desired. We discuss this possibility in more detail below.

ii) Demand side

We would require prospective recipients of reproductive materials and services, like prospective suppliers, to meet certain minimum medical and psychological criteria. Some would argue that the state ought not to set any requirements for demanders since the state does not purport to restrict anyone from having children naturally. Others might argue that use of supplied materials is more similar to adoption than to natural reproduction, and that standards are routinely set to screen adoptive parents. Regardless of whether natural parenting or adoption is the better analogy, it is clear that the state does set minimum standards for all parents once a child is born: the state may assume custody of a child if its parents are subjecting it to abuse or neglect. It would not seem unreasonable to require prospective recipients to meet minimum conditions necessary for the safety of the child. Those who would pose a threat to the child's safety might include, for example, untreated hard drug addicts, sexual offenders, *etc.*

One could also imagine purely medical restrictions on access to reproductive materials and technologies, and the therapeutic use of fetal material: persons with a very low probability of conceiving or sustaining the pregnancy, or benefitting from the transplant, might not be permitted to participate (at least where the services are being subsidized by the state). This would not be unlike the current practice of allocating expensive medical resources such as organs for transplant, and use of dialysis machines, only to those who have some probability of significantly benefitting from them.

While some grounds for restricting access to reproductive materials and services are legitimate, others are unjustifiably

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155 See, for example, the *Reid Report*, *supra* note 151 at 33-35, with regard to the release of non-identifying medical and genetic information.

"discriminatory" in that they do not have a bearing on the demander's ability to parent a child. We would argue (as does the Royal Commission) that racial or ethnic background, socioeconomic status, sexual orientation, and marital status of demanders ought to be included among the grounds for discrimination that are considered unjustifiable.[156] That is to say, we would not, *a priori*, exclude demanders from participation in exchanges on the basis of these characteristics; the question of whether suppliers and demanders should be permitted to "discriminate" by specifying which characteristics they would require in an exchange partner will be discussed below.

iii) Spousal consent for reproductive materials and services

Another issue that arises is whether the consent of spouses or partners ought to be obtained before suppliers or recipients are permitted to participate in the exchange of reproductive material or services. We are reluctant to require the spouse or partner's consent, since this would significantly impair the autonomy of the supplier or recipient. On the supply side, in situations where the materials in question, such as gametes, involve the body of only one partner and the material produced will be transferred to the demander, we would not require spousal consent. It would seem reasonable to require the consent of both partners in the case of zygote supply, because both partners have contributed to the creation of the material.

The situation on the demand side is more complex, because a child who will require financial support and emotional nurturance will potentially be produced. It would seem severe to require the spouse or partner of the recipient to provide support for the resulting child if he or she was not aware of, or did not consent to, the use of supplied materials or services; but, conversely, it would be highly unjust to permit a spouse or partner to develop a relationship with the resulting child while refusing to support it. The *Reid Report* responded to this problem by recommending that a recipient be able to receive materials without her spouse's consent; however, the doctor should tell the recipient that her spouse will be informed of the proceeding, so that he can decide whether to accept the responsibility of supporting the prospective child.[157] We

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[156] *Royal Commission*, *supra* note 1 at Recommendation 121.

[157] The *Reid Report*, *supra* note 151 at 31, recommends that "[i]f the husband does not consent a notation should be made on the wife's consent form and on the records. The husband should not be named as father on the child's birth registration and no support obligations will be created." The

would also suggest that relief from support obligations be available only if the couple's relationship is terminated prior to the child's birth.[158] Thereafter, current family law provisions may hold a person who is in a parental relationship with a child responsible for supporting or contributing to the child's support, regardless of a genetic or a gestational relationship, and regardless of consent to conception.[159]

3. The principle of constrained choice

a) *Information and licensing*

The third principle we propose is that a significant range of choices be available to both suppliers and demanders. Autonomy considerations would dictate that suppliers and demanders be given as much discretion as possible to determine their own arrangements. In order to make these choices, suppliers and demanders must be provided with all relevant information about risks, costs, benefits, alternatives, *etc.* We recognize that information "counselling" may be most effective when it is administered by individuals who are sensitive to the particular situation and concerns of the persons they are serving. We would therefore recommend that the state establish minimum standards and guidelines (establishing, for example, what information must be provided and what screening criteria are to be applied), and grant licences for individually- and group-operated clinics.[160] In the context of reproductive materials and services, one could imagine, for example, religious or cultural groups, disabled persons, gay and lesbian

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Ontario Law Reform Commission took a different approach, recommending that the husband or partner be "presumed as a matter of law" to be the father of the artificially-conceived child, subject to rebuttal, with the onus of proof on the person who would seek to rebut the presumption: *Report on Human Artificial Reproduction and Related Matters* (Toronto: Ministry of the Attorney General, 1985), vol. 2 at 176-78 [hereinafter *Ontario LRC Report*].

158 It might also be necessary to rebut a legal presumption of paternity. For the conditions under which a person is presumed to be the biological father of a child, see Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. 12, s. 8.

159 See, for example, Ontario's *Family Law Act*, R.S.O. 1990, c. F-3, ss. 1(1) and 31(1). Section 1(1) includes within the definition of parent "a person who has demonstrated a settled intention to treat a child as a child of his or her family." However, it must be understood that when an order for support of a child is made, the Court "should ... recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent" as one factor in determining the amount of child support that each party is required to pay: s. 33(7)(b).

160 The Royal Commission, *supra* note 1 at 116-18, would assign such a function to its proposed National Reproductive Technologies Commission.

organizations, feminist groups, and persons from minority ethnic groups meeting licensing standards and administering their own clinics. This system would ensure that consistent standards are maintained, but that suppliers and demanders from different backgrounds can ask questions, share experiences, and participate in an environment that is comfortable for them.

b) *Entitlements and contracting*

Another important role for the state is the establishment of background entitlements and the designation of which entitlements can be waived or contracted around. We are in favour of background entitlements because they ensure a degree of certainty and predictability, but we would permit contracting around certain entitlements so as to provide individuals with as many choices as possible. One entitlement would be a presumption of anonymity: suppliers and demanders would be entitled to participate in exchanges without contact with each other. This would protect the interests of both parties in maintaining privacy and avoiding unwanted interference. However, suppliers and demanders would be free to contract around this entitlement and decide to meet and become acquainted, if they so choose, before participating in the exchange of gestational services, gametes or zygotes, or even fetal material. This proposal draws support from recent developments in adoption practices: in some jurisdictions (such as California, New Zealand, and Ontario), adoption agencies can facilitate contact between birth parents and adoptive parents before and after children are adopted. In some cases, birth parents and their families maintain contact with adopted children and adoptive families on a regular and long-term basis.[161] In Ontario, birth parents are not accorded such entitlements by law; rather, arrangements for contact between the birth family and the adoptive family are instances of "contracting around" entitlements to confidentiality and privacy on the part of both parties.

In our scheme, when allowing for the possibility of contracting around entitlements, it is important to distinguish between agreements that are reached *ex ante* and those that are reached *ex post* (that is, agreements made before, rather than after, the materials are used or the service commenced). It is important to strike a balance between

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[161] These practices were reported in J. Dineen, "Adoption Without the Secrets" *The Toronto Star* (9 January 1993) G1 and G5.

allowing parties as much freedom as possible to make (and change) arrangements to fit their particular needs, and recognizing the need for parties to know what to expect of each other and to be able to predict the consequences of their choices. For instance, it would seem reasonable to allow all parties to an exchange of sperm to agree, *ex ante*, that the genetic father would receive pictures of the child but would not visit, and it would also seem reasonable to hold the genetic father to that agreement *ex post*, rather than to permit him to attempt to renegotiate the agreement via the central agency, or attempt to contact the demanders directly. If parties were not held to their agreements *ex post*, one could imagine that the central agency might be overwhelmed with requests to renegotiate: suppliers and demanders might continue to contact the agency repeatedly over long periods of time, and the costs of administering a renegotiation process (in financial, bureaucratic, and emotional terms) could be substantial. While these restrictions on renegotiation may seem strict, it is important to recognize that they apply only to situations in which the parties have chosen, *ex ante*, not to exchange full names and addresses for the purpose of *ex post* renegotiations. In other words, parties are still free to agree *ex ante* to leave open the possibility of *ex post* renegotiations, and to conduct these negotiations among themselves rather than through the central agency.

Yet, while we believe that *ex ante* agreements ought to be consistently enforced *ex post*, we would add one significant qualification: we would include in every *ex ante* agreement a non-waivable background entitlement allowing suppliers a period in which they could choose to "opt out" of the agreement.[162] We would not allow parties to contract around this entitlement because we believe that the entitlement is an important way to safeguard the voluntariness of the agreement and to recognize the possibility of subsequent regret. We draw again upon the adoption analogy. Almost every jurisdiction in the Western world prohibits birth mothers from consenting to an adoption within a prescribed period after birth and permits consent given thereafter to be revoked within a further prescribed period. Our position also gains support from recent empirical literature in psychology and economics which finds that people systematically place a higher cost on the

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[162] This is similar to the situation of research participants. It seems reasonable to permit an opt-out since participation in the project is theoretically driven by altruism—if the subject changes her mind about exercising her altruistic sentiments, she ought to be permitted to withdraw: *MRC Guidelines*, *supra* note 146 at 25; and *University of Toronto Guidelines*, *supra* note 147 at 27.

reduction of existing endowments than foregone future benefits.[163] The opt-out period would need to be sufficient to allow the supplier time for second thoughts (*i.e.*, time for the supplier to rest and take steps to recover herself emotionally after the birth, abortion, or gamete-procuring procedure). However, the period should not be so long that undue hardship is caused to the demander (who must endure correlative uncertainty). The number of days or weeks chosen for each type of exchange should reflect a balance between respect for a legitimate process of reconsideration or change of circumstance, and the need of all involved for resolution and certainty. With regard to the exchange of gestational services, it is relevant to note that in the context of adoptions in Ontario the period is four weeks.[164]

We would not permit an opt-out period for demanders because the opt-out is premised upon the need to reconsider in light of physical and psychological experiences occurring during the course of procuring or creating the material; demanders do not share these experiences, and it seems unreasonable for the supplier to undergo the risks involved in producing the material (or, in the gestational services context, the baby) only to have the demander opt out arbitrarily (perhaps, in the gestational services context, because the baby was not exactly as expected). But while demanders would not be permitted to opt out, we would permit them to return unused reproductive materials or, in the gestational services context, place the baby up for (subsequent) adoption. The latter is a right which other parents already have, should unforeseen circumstances, such as marital breakup, affect their ability or desire to produce and rear the resulting child.

Should suppliers decide to opt out of the agreement, we would, by analogy to rules applying to research subjects, allow suppliers to keep payments earned up to the point of opt-out.[165] Withholding compensatory payments from suppliers makes it difficult for them to

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[163] See, for example, D. Kahneman, J.L. Knetsch & R.H. Thaler, "The Endowment Effect, Loss Aversion, and Status Quo Bias" (1991) 5 J. Econ. Persp. 193; "Experimental Tests of the Endowment Effect and the Coase Theorem" (1990) 98 J. Pol. Econ. 1325; and J.L. Knetsch, "The Endowment Effect and Evidence of Nonreversible Indifference Curves" (1989) 79 Am. Econ. Rev. 1277.

[164] The birth mother is prohibited from giving consent to an adoption until seven days after the baby's birth, and she is then permitted three weeks within which time she can change her mind: *Child and Family Services Act*, S.O. 1984, c. 55, ss. 131(3), (8).

[165] In the words of the Medical Research Council of Canada, "[s]ubjects should not be offered such rewards for participation as will constrict their freedom to leave a study. Reimbursement should therefore be as expenses are incurred": MRC *Guidelines*, *supra* note 146 at 25; see also the *University of Toronto Guidelines*, *supra* note 147 at 37.

terminate their participation because they have invested time, effort, and out-of-pocket expenses in the exchange, in which they have been participating on an altruistic basis, (*i.e.*, they were participating with the intent of providing materials or services for the benefit of demanders). But if suppliers decide to opt out after the material (or, in the gestational services context, the baby) has been produced and to retain the material (or baby) for their own use, they should be required to reimburse the expenses incurred in producing the material (or baby), because suppliers in these circumstances have become demanders (using materials for the production of their own children) rather than suppliers (providing materials or services for others). This provision would guard against opportunism on the part of persons who might otherwise have an incentive to purport to be suppliers, then deliberately opt out in order to produce materials (or babies) for themselves at the state's (and the demanders') expense.

c) *Information entitlement for resulting children*

We would also permit children who have been involved in exchanges of materials or services—whether born from supplied materials or gestational services, or perhaps as recipients of fetal material—to access their medical and administrative records at the central agency, once they have reached the age of majority. We would not, however, permit the child to have access to the supplier's name or other identifying information without the supplier's consent. It would, nevertheless, seem advisable for provisions governing children produced as a result of the new reproductive technologies to be harmonized, in this regard, with provisions governing children adopted following natural pregnancies.

d) *Specification of characteristics*

A key issue—particularly for autonomy theorists and some feminists—is the question of which characteristics suppliers and demanders can specify about each other. Autonomy theorists might agree with us that it would be inappropriate to exclude persons from participating in the market on the basis of racial or ethnic background, socioeconomic status, sexual orientation, or marital status,[166] but might

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[166] See Section III(B)(2)(d)(ii),"Demand Side," above.

add nevertheless that suppliers and demanders ought to be able to specify their preferences in this regard and be matched accordingly. We agree that suppliers may well be concerned about the person or persons who will parent their genetically-related child, and demanders may well be interested in the characteristics of the person or persons who will contribute the genetic material for the child they will raise. But to permit suppliers and demanders to specify race, sexual orientation, marital status, or other attributes (such as height, eye colour, potential abilities, or IQ), or demanders to specify whether they want a male or female child, raises concerns about the reinforcement of negative stereotypes and discriminatory attitudes, as well as promoting the prospects of positive eugenics.[167]

A brief explanation of our opposition to the specification of genetic characteristics is in order. Our own proposals are limited to the issue of genetic "selection," which involves selecting suppliers who have certain desired characteristics with a view to producing children who may have those characteristics, but because genetic "selection" and the future possibilities for manipulating the genetic material itself raise several similar concerns, we will briefly address the latter practice also.[168]

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[167] A distinction is often drawn between "negative" eugenics, which involves the removal or alteration of a defective gene, *i.e.*, a gene that causes a particular disease or other medical condition, and "positive" eugenics, which involves the alteration of otherwise "normal" genes for the purpose of "enhancing" the genetic makeup. The positive/negative distinction is clearly problematic in so far as it posits a "normal" or neutral baseline from which categorization of manipulation as "positive" or "negative" can be made. This baseline would appear to be, to some extent, dependent upon moral determinations about what constitutes a "defect," thereby placing the manipulation in the "negative" category. Although there is a broad consensus that conditions such as *spina bifida* and sickle cell anemia are "defects," it is highly questionable whether a particular eye colour, racial type, sex, or any number of other attributes of a physical or mental nature could be termed "defects." See, for example, G. Coleman, "Genetic Engineering: Should Parents Be Allowed to Design Their Children?" 34 How. L.J. 152; R.F. Chadwick, "The Perfect Baby: Introduction" in Chadwick, ed., *Ethics, Reproduction and Genetic Control* (London: Croom Helm, 1987) 93; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Splicing Life* (Washington, D.C.: U.S. Government Printing Office, November 1982) (Chair: M.B. Abram); and J. Heller, *supra* note 36. A further distinction is sometimes drawn between somatic gene cell manipulation (alteration of genes that are not transmitted by the subject to offspring) and germ cell manipulation (alteration of genes that are transmitted). A thorough discussion of the merits of somatic cell therapy versus germ cell therapy and a discussion of the merits of the negative/positive distinction are beyond the scope of this paper. Indeed, a thorough discussion of the subject of eugenics *per se* is beyond the scope of this paper. We would merely note that it is possible to identify a small range of cases, such as serious medical conditions, that could be termed "defects," the correction of which could be designated an exercise of "negative" eugenics.

[168] The hypothetical nature of this discussion should be noted. It is not possible, at present, to manipulate genetic material so as to increase intelligence, athletic ability, *etc.* The genetic coding for these traits is unknown, and indeed the difficulties involved in defining the concept and

Some authors, notably Posner, argue that although the prospect of positive eugenics (achieved either through selection of materials produced by individuals with certain desired characteristics, or through manipulation of genetic material) evokes images of the Nazi regime and the breeding of "supermen" ("the Final Solution"), the contemporary and future practice of it need not be cause for concern.[169] Posner suggests that improvements in the attributes of human beings are generally desirable and contends that the manipulation of genetic material, or practices such as "screening" sperm suppliers on the basis of physical or intellectual attributes, are unlikely to result in dramatic changes in the "gene pool" or in the composition or values of society. Posner bases these assertions, in part, on the assumption that the practice of genetic manipulation is unlikely to become widespread because most people will want their children to resemble themselves (and will accordingly not want a "superbaby"), and because few fertile persons will want to make use of methods of genetic alteration or selection. Further, if the ability to conduct genetic selection and alteration remains in the control of individuals (rather than the state), the danger that a large, powerful, homogeneous new generation—or army—of "supermen" will be produced, is minimal. Posner also asserts that since the long-term consequences of genetic manipulation and genetic selection are not currently known, it is better not to constrain individuals' choices in this regard at present.

The validity of Posner's twin assumptions—that few people would want to give their children attributes that they themselves do not possess, and that the practice of genetic manipulation or selection is unlikely to expand beyond a small number of individuals—is questionable. From an autonomy perspective, the imposition of demanders' preferences (for example, intellectual or physical attributes) may compromise the autonomy of the resulting child: the demanders' decision to "select" for or against certain characteristics could constrain the child's autonomy by restricting the range of choices available to him or her. Should a demander's autonomy, exercised by choosing the characteristics of "his" child, be permitted to constrain the exercise of the child's autonomy in pursuing her own conception of "the good life"? Of course, it is also possible to argue that genetic selection will actually increase the range of choices available to the resulting child, thereby enhancing the child's autonomy. It is impossible to know what the child herself would prefer. The choice is that of the demander, and the effects

attributes of "intelligence" demonstrate that the idea of simply identifying a discrete set of "intelligence genes" may well be somewhat fanciful.

[169] *Supra* note 20 at 413-14 and 429-32.

of that choice, for better or for worse, will be felt by the child, who is the subject of, rather than a party to, the decision. Genetic manipulation, unlike other techniques for "improving" or "altering" children's attributes or abilities (such as formal lessons in athletic, artistic, or intellectual subjects, or socialization in particular religious, cultural, community, or family environments), is irreversible and leaves no scope for the child's own choices.[170]

From a utilitarian perspective (and assuming that genetic manipulation or selection is not confined to a very small number of individuals), the prospect of permitting demanders to impose their genetic preferences on the next generation of children raises the issue of how the characteristics which are most likely to maximize aggregate utility should be determined. Would the state be justified in setting guidelines, or even imposing rules or quotas, to govern the number of persons to be endowed with particular attributes, on the ground that aggregate social utility will be maximized by a particular range or distribution of various attributes? However, it is far from clear how a particular range or distribution of attributes would maximize aggregate social utility. Even if decisions about genetic selection or manipulation were left entirely to individuals (rather than the state), could we be confident that individual demanders' utility-maximizing decisions, if genetic selection or manipulation were widely practised, would necessarily maximize social utility or remain free from state intervention? Given the irreversibility of the consequences, standard assumptions of risk aversion at the individual level might reasonably translate into a strategy of "minimax regret" (minimizing the possibility of the most catastrophic consequences) at the collective level. In the words of the Commissioners of the Royal Commission, "[s]ociety does not have to be driven by technological change; we have choices about how to control technologies to ensure that, if they are used, it is in beneficial ways and in ways that avoid or minimize their adverse consequences."[171]

Permitting demanders to specify genetic characteristics also poses several other problems. For example, by directing attention to the possession of specific attributes, it might detract from a holistic view of personality and human potential. It must also be recognized that medical science has not established that characteristics or attributes such

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[170] An autonomy analysis would likely conclude that the child's autonomy would be enhanced by certain applications of "negative" genetic engineering: for example, a child's autonomy would doubtless be enhanced if she were to be born without sickle-cell anemia.

[171] *Supra* note 1 at 47.

as sexual orientation or musical or athletic ability are heritable, or that manipulation of genetic material in order to remove or promote such characteristics is—or ever will be—possible. Attempts to "select" for certain characteristics on the basis of the supplier's attributes may prove futile, particularly when a myriad of environmental circumstances, the complex interaction of the supplier's genetic material with that of the demander, and the interaction of various dominant and recessive genetic traits, are taken into account. Finally, because (in our scheme) the state is administering the matching of suppliers and demanders, it might appear to be sanctioning or granting a measure of legitimacy to differentiation or discrimination on the basis of such characteristics.

In addressing these concerns, we would recommend denying suppliers and demanders the opportunity to specify characteristics. We would, however, make an exception with regard to race.[172] Our reasons for this exception are twofold. First, it would seem to be in keeping with respect for the continuity of culture and tradition to allow suppliers and demanders to specify race (for example, one could imagine a Native supplier requesting that the material be provided only to a Native demander or a Native demander requesting a Native supplier). Second, in our current social climate, accustomed as we are to natural conception, it is generally expected that a child who is born to a couple will resemble its parents with regard to racial characteristics. If demanders were not permitted to specify the supplier's race, one could imagine a situation in which, for example, an Asian couple who has told no one about their use of supplied materials gives birth to a non-Asian child. The social reaction in such a case could cause the parents and the child embarrassment and distress.

While the aforementioned constraints on supplier and recipient designation may seem stringent to some, we re-emphasize the point that such constraints pertain only to the information that may be formally recorded. Parties who strongly desire to know more about each other would have the option of mutually declining anonymity and choosing to meet prior to supplying or receiving materials.[173] The availability of this

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[172] We also make an exception for gender selection when this is done on medical grounds, such as when sex-linked genetic disorders are a strong possibility. We would also make exceptions for the most clear-cut examples of "negative" eugenics, such as serious medical disorders.

[173] An argument might be made that the issue of race could be dealt with by suppliers and demanders choosing to meet prior to supplying or receiving materials. However, this would compromise suppliers' and demanders' opportunities to choose anonymity, and could introduce delay and transaction costs. Since we are convinced that specification of race should be viewed as a legitimate option for suppliers and demanders, and is a subject which will be of importance to many potential participants, we would prefer to allow participants the option of specifying race while

option, coupled with the parties' freedom to decline to participate in the exchange after meeting each other, effectively enables interested parties to "screen" each other in accordance with a variety of unique subjective factors. We acknowledge that the availability of this option has the potential for reintroducing discrimination by the back door; however, it could enable the parties to establish a rapport that might provide the foundation for a relationship between the various "parents," which could be beneficial for the resulting child. We believe that this option is a necessary concession to the autonomy interests of suppliers and demanders (particularly, perhaps, in the gestational services context). Moreover, suppliers and demanders would be free to retain the presumption of anonymity and decline the opportunity to meet.

e) *Fetal tissue and specification*

We would permit suppliers of fetal material, like suppliers of other materials, to designate whether the material is to be used for research or therapeutic purposes.[174] While it is likely that most suppliers and demanders of fetal material would be less concerned with the specification of characteristics and attributes than would parties to agreements involving the production of children, one could imagine particular requests in rare situations (for example, one could imagine a "pro-life" demander requesting tissue produced from a spontaneous abortion, *i.e.*, miscarriage). Another example might be a request by the supplier to be informed of the demander's medical condition following the transplant. While the vast majority of exchanges are likely to be anonymous, some parties might want to make other arrangements. We would retain a presumption of anonymity, but would permit alternate arrangements to be made.

f) *Exchanges within the family*

It is also important to address the question of suppliers designating recipients with whom they are already in contact, whether as friends, acquaintances, colleagues, or family members. There is a concern that demanders might use their relationship with potential suppliers to pressure the latter into providing reproductive materials. In

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retaining anonymity. The option of specifying race *and declining* anonymity would also remain available.

[174] This is the position taken in the *Reid Report*, *supra* note 151 at 29.

the fetal tissue context, where a friend or family member's life may be at stake, potential suppliers could face considerable pressure to conceive in order to abort the fetus and provide the material to the demander.[175] Concerns about such pressures are well-known in the context of organ and bone marrow donation, but in those circumstances potential suppliers may well have the protection of a medical practitioner who, at the supplier's request, could inform the family that the potential supplier was not a good match. Because no "match" is currently considered necessary for fetal transplants, potential suppliers of fetal material would not have this protection. Moreover, we are of the view that a fetus is not directly analogous to an organ, in that it is a potential human being and, as such, is worthy of a measure of respect. To conceive a fetus for the express purpose of aborting it seems much more morally problematic than to provide one's own organs or bone marrow.

However, to suggest (as the Royal Commission does)[176] that suppliers of fetal material not be permitted to designate the recipient of the material is a difficult position to maintain. We are concerned that women not become pregnant in order to abort the fetus for transplant purposes, but there is no way of knowing whether that was indeed the case. It is not possible to divine women's motivations for conception or abortion, and were it possible, it would seem to be an undesirable intrusion on a woman's right to make her own reproductive decisions. And while families and friends have the potential to exert undue pressure on potential suppliers, their plight may also elicit genuine altruism. It would seem anomalous to suggest that suppliers be permitted to provide fetal material to strangers, but not to their own family members or friends. In the context of other reproductive materials, it would also seem odd to allow (as would the Royal Commission) a woman to donate a spare ovum to a stranger, but not to her own sister.[177] While we are sensitive to the concern expressed by Janice Raymond that "altruism" may be suspect[178] in a society where

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[175] *Supra* note 1 at 999-1000. Some might be prompted to wonder whether exchanges of fetal material within the family might occur, given the current availability of fetal material from unintentional pregnancies that ended in abortion. We would hypothesize that if the "abortion pill" (RU 486; mifepristone) were to become available in Canada, the availability of fetal material could decline significantly. If treatments using fetal material become more widespread, demand would rise. If these eventualities materialize before fetal-tissue-culture practices develop to the point where substantial amounts of tissue can be produced and sustained, it would seem reasonable to anticipate a shortage of fetal material.

[176] *Ibid.* at 1000.

[177] *Ibid.* at 592-93 and c. 21.

[178] *Supra* note 114.

there are many pressures on women to subordinate their own desires to the needs of others, be it family, friends, or children, we must also respect women's right to have abortions, or participate in the supply of reproductive materials or gestational services, for their own reasons. The task of deciding on an appropriate response to this tension has presented us with acute difficulties, as we have found both feminist and autonomy concerns—as well as concerns about respect for the fetus—compelling.

Permitting recipient designation, while establishing certain safeguards (to be discussed in more detail in Part IV, below) to increase the likelihood that suppliers' choices are as informed, voluntary, and reflective of suppliers' true preferences as is possible in our current society, would seem to us to be a reasonable compromise. While a thorough exploration of the meaning of "informed consent" would take us beyond the scope of this paper, we would suggest that, at a minimum, suppliers and demanders be provided with information about the potential *psychological* consequences of the exchange. We would also make non-directive counselling, designed to facilitate discussion and thorough exploration of the consequences and implications of participation in the exchange, mandatory rather than optional. The non-waivable right to an "opt-out" period as discussed above is yet another safeguard.

g) *Computer matching*

The process of pairing suppliers with demanders—according to race, if requested, or by preferences for anonymity or for prior or continuing contact—could be accomplished by establishing a computer matching system. Such a system could be administered by the central agency mentioned above. Individual clinics could counsel and assist potential suppliers and demanders in providing information, and the data could be entered into a central computer system. It is likely that a clinic serving a particular ethnic or cultural group in the population would serve many people who are eventually matched. However, in some cases, particularly when the supplier and demander want to remain anonymous, a match could be obtained from a distant location and the materials could be transported. If queues develop, individuals could decide whether to wait, to explore other options, or to change their declared preferences.

4. The principle of fair access

On the demand side, some state subsidization of the use of reproductive technologies, supplied materials, storage facilities, and drugs is essential to ensure access by demanders of all socioeconomic groups. But in line with our first principle (of uniqueness), we do not recommend that use of the new reproductive technologies be funded in the same manner as health care services under the state health care plan. We justify subjecting users of the new reproductive technologies, materials, and services to special financial arrangements, because the production of children by artificial means differs significantly from (and is not "necessary" or therapeutic in the same sense as) the health- and life-sustaining procedures traditionally and currently covered by the state health care plan.[179] We suggest that demanders be asked to pay on a sliding scale for their use of the technologies *per se*, materials, drugs (which should be included since these are a major expense), and storage facilities, and the costs of pregnancy in the gestational services context. The state would heavily subsidize the use of materials, technologies, *etc.*, by poorer persons, while well-off persons would be required to pay the full cost. Persons whose use of the technologies is self-regarding, *i.e.*, persons who require no materials to be supplied, would also be required to pay on a sliding scale and to comply with limits on the number of times that materials and technologies may be used.

The use of fetal material would be an exception to the sliding scale: we would recommend that the state health care plan cover the full cost of fetal tissue procurement and transplant medications and procedures, since fetal tissue transplants (like organ transplants and blood transfusions) may be medically necessary to preserve the demander's own life. With regard to the supply of fetal material, we would recommend that publicly-funded abortions be available to all women. This would remove the concern that women who could not

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179 The Royal Commission came to a different conclusion on this issue. The Commission recommended the inclusion of the new reproductive technologies within the state health care plan, subject to qualifications with regard to evidence of the medical effectiveness (and, in some cases, cost-effectiveness) of particular technologies and services. The Commission, *supra* note 1 at 716, took the position that "[t]he ability to have children is not a luxury or a frill, so that effective assisted conception services for people who are infertile are as or more important than many other services already provided in the health care system." Not to extend full coverage to these services would, in the Commission's opinion, create a "two-tier system, in which access to services depends on ability to pay." The Commission does not seem to have considered the possibility of using a sliding scale: see c. 20, 24, and *passim*.

afford an abortion might be induced to supply fetal material for research or therapeutic purposes by the prospect of receiving a free abortion.

Expense is an important concern, even with partial contributions in the gamete, zygote, and gestational services contexts by better-off individuals. It is important that the state determine what proportion of health care resources ought to be devoted to the technologies and which of the technologies are cost-effective.[180] Limits could be set on the number of times a demander could make use of the technologies, or on the number of children produced. Medical factors, such as a very low probability of success, could also be used to limit the number of demanders. These limits should also be applied to persons whose use of the technologies is self-regarding. The state would also need to determine what proportion of medical research resources ought to be devoted to the technologies.

One example of an institutional mechanism for establishing such priorities and balancing the relevant societal, group, and individual interests has been proposed by the Royal Commission.[181] The Commission advocates a "National Reproductive Technologies Commission," independent of government and composed of professionals from a variety of disciplines and lay members representing the community, which would establish comprehensive policies and practices in this field. The proposed Commission would set national licensing standards for infertility treatment services and research; gather, analyze, and store information on technologies, services, and outcomes; assist and enable co-operation between the provinces and levels of government; keep pace with emerging technologies, techniques, and services; and promote data collection, analysis, public education, and research into the causes and prevention of infertility.

A key way to reduce the number of demanders, and to ensure that those who are involved are aware of the implications of their participation, is to provide prospective demanders with comprehensive information. From an autonomy perspective, it is preferable to give individuals information to facilitate their own preferences than to impose external constraints. An important topic would be the alternatives to having one's "own" (genetically-related) child. While trying to decide whether to use the technologies, or while waiting, prospective parents could explore alternatives and decide whether they are certain that they want to participate.

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[180] *Ibid.* at c. 4.

[181] *Ibid.* at Recommendation 1 and c. 5, "Executive Summary and Overview of Recommendations."

IV. APPLICATIONS

In this section, we propose what we believe should be the central elements of any regulatory regime governing exchanges involving gametes and zygotes, gestational services, or fetal tissue. Our task here is to apply the four governing principles developed in Section III.

A. *Gametes And Zygotes*

In accordance with our fourth principle (fair access), the cost of gamete and zygote use would not be borne entirely by the state health care system, but would rather be supplemented by payments from demanders on the basis of a sliding scale. On the supply side, in accordance with our second principle (enablement, not inducement), donors would be reimbursed both for their expenses and their time; the latter at a rate below minimum wage, such as $5 per hour. Payment by the hour is, in this context, preferable to lump-sum payments because it is more adequately tailored to the actual amount of time contributed. Also, a lump sum may have an inducement effect on suppliers who may excessively discount the time commitment due to an unfamiliarity with the technologies, medical testing, and administrative procedures. Only *de novo* suppliers ought to be paid for time and expenses involved in procuring the material: money payments are to enable altruistic donors to donate by compensating them for expenses which they would not otherwise have incurred, not to compensate suppliers of spares who would have incurred these costs in any event. Nevertheless, both suppliers of spares and *de novo* suppliers would be reimbursed for costs directly associated with the administrative organization of the donation and medical screening procedures.

We recommend that both women and men be allowed to donate materials and receive compensation according to the aforementioned non-inducing rate of payment. It seems anomalous to suggest, as does the Royal Commission on New Reproductive Technologies, that women should not be permitted to donate ova *de novo*.[182] The Commissioners assert that it is not "ethical" to "permit" an "invasive surgical procedure, with its attendant risks, on an otherwise healthy woman for the benefit of someone else, particularly in the absence of information about the

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[182] *Ibid.* at Recommendation 166 and c. 21.

long-term effects of these procedures."[183] But these arguments could also be applied to organ donation and even some research studies—procedures which women are "permitted" to undergo. Also, if information about the long-term medical consequences of ova retrieval is absent, why are women permitted to undergo ova retrieval at all? Should not self-regarding situations also be prohibited? And, if ova retrieval is permitted, surely its invasiveness and accompanying risks are concerns best remedied by requiring participants to be adequately informed, not by banning *de novo* donation absolutely. As regards sperm donors, the Royal Commission would provide them with all relevant information and compensate them at a non-inducing rate for their "time and inconvenience;"[184] male donors would be permitted to make their own choices. We therefore argue that, although the procedure and risks for *de novo* ova donors are significantly different from those involved in sperm donation, women should also be entitled to make their own choices.

Suppliers and demanders would both need to be provided with full information about the relevant physical and psychological risks entailed in the activities. Both should be screened to ensure that they meet appropriate medical and psychological standards. With regard to ova donation (and also the provision of gestational services), instead of paying women to accept *ex ante* risks, such as developing ovarian cancer, infection, *etc.*, we would hold the state strictly liable for harm caused by the drugs or procedures involved, *i.e.*, the state would be liable on proof of causation rather than negligence. This would ensure that of all the ova donors and gestational service providers who incur the risk of subsequent harm, only those for whom the risk materializes would be compensated, and they would be compensated fully.

Suppliers and demanders would be matched through a central computer system in keeping with their preferences for anonymity or meeting *ex ante* or *ex post*, among other factors. Also, again in keeping with our desire to avoid inducement effects and the concomitant risks of differentiation or discrimination on the basis of racial characteristics, we would forbid differential pricing: public appeals for donors from certain groups might be permissible if supply shortages were acute, but all donors who volunteer and meet the standard criteria should be accepted and compensated for their expenses at the same rate.

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[183] *Ibid.* at 591-92.

[184] *Ibid.* at 448. See also Recommendation 88(k) and c. 19.

The autonomy of suppliers would be respected by the establishment of an "opt-out" period during which they could change their minds about the provision or disposition of the supplied materials. Up until the point when the materials are used, suppliers could require a change in the disposition of the materials, *i.e.*, they could require that the materials be used for research rather than procreation, or that the materials be destroyed. This "opt-out" period is of even greater importance in the gestational services context.

Storage issues must also be addressed. We propose that individuals or couples sign a form setting out their wishes should any of a set of eventualities, such as divorce, death, *etc.*, occur. It would seem appropriate to establish a set of background rules on these issues (for example, in the event of divorce, the materials are to be donated rather than used by one of the former spouses), which individuals and couples could contract around. We also recommend that there be limits on the number of gametes and zygotes that any individual can store; this is designed to guard against concerns about the social costs of overuse of the technologies. Also, the possibilities for "stockpiling" genetic material, bequeathing gametes and zygotes in wills, and bringing into the world children whose genetic parents died many years previously, lead us to suggest a time limitation on storage of materials after which the materials would be disposed of according to the wishes expressed in the initial form. Donation to another individual for immediate use, destruction, or donation for research purposes would be the three available alternatives. The Royal Commission recommends that decisions about the disposition of materials be made before gametes are obtained or zygotes created, and recommends that zygotes not be stored for a period in excess of five years or after the death of one of the gamete suppliers.[185]

Imposing a limitation period would also likely bring about an increase in the supply of materials, since some persons would presumably choose to donate, rather than destroy, their materials at the end of the limitation period. However, any materials that are donated would still have to be used in keeping with the rule limiting the number of children that can be genetically parented by one person.

With regard to reproductive materials not subject to long-term storage issues, since the state would have authority over the receipt, storage, allocation, and distribution of materials for reproductive purposes, it would also seem reasonable to entrust the state with the

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[185] *Ibid.* at Recommendations 170, 171, and c. 21.

allocation of gametes and zygotes for research purposes. It would be important to establish a mode of allocation to ensure that the demands of individuals and those of research interests are both met. It is unlikely that research interests would have difficulty acquiring a sufficient supply of materials, since some donors are likely to prefer that their genetic material be used for research rather than the creation of children for others. Also, research interests do not ordinarily require gametes or zygotes from donors of, for example, a particular race, and some researchers can make use of donated materials that are damaged, chromosomally abnormal, *etc.*

B. *Gestational Services*

It is clear to us that in this context certain background legal entitlements must be firmly secured. This is particularly important on the supply side, where concerns are widely held about the potential for women's exploitation as gestational service suppliers. In accordance with many of these concerns, we advocate two important safeguards for these women. The first is that the birth mother ought to be legally presumed to be the child's mother.[186] The second is that the birth mother have an absolute right to "opt out" of the gestational service arrangement after the child's birth within a given time period, in which case she would retain full custody of the child.[187] The birth mother's right to be presumed the child's mother would terminate at the end of the opt-out period, if the woman does not choose to opt out of the agreement within this period.

These two absolute entitlements respect many of the concerns identified in the various normative frameworks above. Distributive justice concerns, for example, identify the dangers of women of colour or of the Third World being exploited as gestational carriers of others' genetic material, without the same rights as those held by women who give birth following natural pregnancies. Ensuring that these women are legally held to be the mothers of the children they gestate will provide them with a minimum safeguard against such racial exploitation, by ensuring that they are presumptively held to be the mothers of the

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[186] This would mean that the providers of the genetic material (the commissioning individuals) would *not* be legally presumed to be the parents of the child until the expiry of the opt-out period.

[187] This would be subject, of course, to the standard unfitness *caveat* of social welfare legislation: see *infra* note 189 and accompanying text.

children they bear (regardless of their lack of genetic contribution), with all of the rights and obligations that natural maternity entails. Women are less likely to be objectified and treated as mere "breeders" if they possess full control over the disposition of the child to whom they give birth. And with this protection, some conception of a unified "motherhood" will be retained, in line with some feminist concerns.

Birth mothers may tend to underestimate the bonding process that takes place during gestation—a process which may render them unprepared to give the child to others after its birth. Allowing these women the right to opt out of the agreement once the baby is born means that these mothers will be able to reassess their judgment of the arrangement's implications for them in the light of their evolving feelings and information. While an opt-out right creates additional risks for commissioning individuals, it strengthens incentives for more careful screening of prospective birth mothers to ensure that they are informed about the nature of the agreement, and are emotionally stable and psychologically prepared to undertake the commitment of providing gestational services.

Martha Field, among others, has proposed an approach to this issue which is appealing to us.[188] Field would establish a presumption that the birth mother be entitled to keep the child, should she so elect, on the basis that at the date of birth the mother and baby will be bonded much more closely than father and baby.[189] By analogy with adoption rules, Field would provide a short period after birth for the birth mother to repudiate the gestational service agreement (subject to an unfitness *caveat* as defined in current child welfare laws, which applies to all parents). Current Ontario adoption law prohibits a birth mother from giving consent to an adoption until seven days after the baby's birth; three weeks are then provided within which the birth mother can change her mind.[190] We suggest that this four-week period is an appropriate one to apply in the context of gestational service agreements. Establishing these presumptions would not only respect the autonomy of the birth mother to make her own decision in light of changing emotions and information, but would also avoid the uncertainty and psychological

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[188] *Supra* note 145.

[189] Once the birth mother's custody is assured in this manner, the question of paternal visitation rights would need to be addressed. Our position is that these visitation rights should not be recognized once a birth mother has opted out of the gestational service arrangement. Anything less would defeat the very purpose of the opt-out clause, and would also create the potential for future litigation that may be harmful to the child.

[190] See, for example, the *Child and Family Services Act*, R.S.O. 1990, c. 11, s. 137(8).

trauma for all parties to the agreement of custody litigation, and particularly the damaging publicity and uncertainty that may impair the future well-being of the child—a real "cost" of gestational service agreements that ought to be avoided in the interests of the children involved.[191]

Once the child is born, however, and the opt-out period has elapsed, we recommend that the gestational service agreement be fully enforceable—that is to say, that the transfer of custody be enforced and maintained. By this point, the birth mother will have decided that she is prepared to give up the child, and the child's life with its new parents must be free to begin. The contact which might then ensue between the child and its birth mother would be up to the birth mother and the commissioning individuals to determine together. This determination would have to take place at the time of the original agreement, and would be subject to modification at a later date if both parties had agreed *ex ante* to leave this option open by, for example, exchanging identifying information.

As was the case with gamete and zygote exchanges, we propose that a central registry of potential participants be established; perhaps the same registry could be used in conjunction with all reproductive technologies. Potential suppliers and demanders[192] would participate in the screening procedures[193] outlined above, and be provided with comprehensive information about the gestational service scheme. This would include information about all costs and risks associated with the process, and the gestational mother's right to opt out of the scheme. Once both demanders and suppliers had made their desires known to a licensed agency, the central registry of interested parties could be used to "match" suppliers with corresponding demanders in accordance with their declared preferences.

A number of further substantive questions must also be addressed. First, ought a gestating mother be free to undergo an

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191 We concede that this "cost" could also be avoided by a strict parental presumption in favour of the father. For the reasons we have outlined, however, we believe that it is in the child's interest for custody to be presumptively granted to its mother.

192 We would require that all demanders of gestational services be medically incapable of gestation. We are uncomfortable with the thought of men and women using a gestational service arrangement purely for convenience, because they themselves do not want to take the time and effort to conceive and gestate a child.

193 Examples of the kind of questions that would need to be addressed in counselling, for both the gestational mother *and* the commissioning individuals, are provided in M. Harrison, "Psychological Ramifications of 'Surrogate Motherhood'" in N.L. Stotland, ed., *Psychiatric Aspects of Reproductive Technology* (Washington, D.C.: American Psychiatric Press, 1990) 97.

abortion without the consent of the commissioning individuals? Since natural mothers in other relationships now have such a right independent of their partners,[194] we believe that the position should be no different in the case of women choosing to gestate for others.[195] This conclusion is entirely consistent with the autonomy of birth mothers and also with many feminist concerns that pregnancy is a particularly woman-centred process, and that the fetus ought consequently not to be seen as the "property" of the commissioning individuals. Commissioning individuals would also have to accept the risk of a gestational mother miscarrying the fetus. Since the birth mother would not be profiting financially from the termination of the pregnancy, there would be no cause for commissioning individuals to complain of undue enrichment on her part.

The autonomy principle in this context would also seem to dictate that a birth mother should be allowed to control decisions made in regard to her body and the fetus during her pregnancy; that is to say that she ought not to be forced against her will to undergo any medical tests or treatments.[196] A more difficult issue is the extent to which her drug-taking, drinking, smoking, or eating habits might be controlled during the pregnancy. Certain commissioning individuals will undoubtedly seek to impose restrictions on these forms of behaviour by the gestational mother during the pregnancy. While women might be encouraged to abide by some of these restrictions, we believe strongly that a pregnant woman ought never to be compelled to conduct her life in a certain way. To attempt to legally compel a pregnant woman to, for example, refrain from drinking alcohol or smoking cigarettes during her pregnancy would not only run contrary to the traditional refusal of courts to compel specific performance in personal service contracts, but would also conjure up visions of extreme scenarios in which the commissioning individuals hire detectives to spy on the gestational mother and attempt to confiscate alcohol and cigarettes in her possession. We would hold any promises with regard to refraining from activities such as smoking or drinking to be legally unenforceable, and a breach thereof as providing no grounds for repudiation of the agreement.

If the commissioning individuals should change their minds about the arrangement during pregnancy or before transfer of the child,

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[194] *Daigle* v. *Tremblay*, [1989] 2 S.C.R. 530.

[195] Sorkow J. took this position in the *Baby M* trial, *supra* note 8 at 1159.

[196] See Andrews, *supra* note 37 at 365-66.

for example, because the wife of an adoptive couple has become pregnant unexpectedly, or the adoptive parents have separated, or the child is born disabled, or is in some other way unacceptable to the commissioning individuals, they will not be free to renounce the child. It would be extremely harsh to leave the child "parentless." The commissioning individuals, like natural parents, must accept the risks of conceiving or helping to conceive a child in circumstances different from those previously intended or desired. Like any other parents, they would then have the option to put that child up for (subsequent) adoption if they felt unable to adequately care for it.

Another important issue is that of payment to suppliers. It is over this question that the most emotional and divisive debate has taken place on the subject of gestational service arrangements. As we have described above, our proposed regime of "constrained" commodification would prohibit women from being induced to provide their gestational services for financial reward. Any calculation of a compensation payment will be controversial. In the case of gestational service sale, the women most vulnerable to financial inducement are likely to be those of lower or middle incomes who are at home looking after their children, because these women are the ones most likely to have the time and flexibility to provide gestational service at low opportunity costs. In order to be faithful to our guiding principles, it is crucial that our payment scheme not induce these women to become gestational-service providers. Beyond compensation for basic out-of-pocket costs (for example, medical and transportation expenses), we propose the payment of a modest lump sum figure set at a level slightly below minimum wage opportunity costs, which might be approximately $5,000 (adjusted annually for inflation). Payment is suggested as a lump sum, despite the concerns noted in Section III, above, because per-hour estimates are difficult to calculate in the gestational services context due to the fact that a woman is "working" twenty-four hours per day to gestate the child, but she is also free during much of that time to perform other tasks. This is not the case in the gamete, zygote, and fetal tissue donation context, where we suggest that suppliers be paid on an hourly basis.

With respect to demand-side payment for gestational services, our fourth principle (fair access) dictates that the cost of this service be paid for on a sliding scale, depending on the means of demanders.

We anticipate that under our system conditions will be similar to those obtaining currently, in that there will be more demanders for gestational services than suppliers. The anticipated disparity between the number of suppliers relative to demanders will undoubtedly lead to

some queuing by demanders, and strict efforts must be made to ensure fair and equal access. To this end, the number of times any one commissioning individual should be able to engage the services of a gestational mother should probably be limited to one birth.[197]

C. *Fetal Tissue*

To discuss the specifics of our proposed regulatory regime, we will look at the supply and demand sides separately. On the supply side, the issue of payment is of greatest importance, since we are concerned not to offer women financial inducements to overcome their moral convictions with regard to the disposition of their fetuses or the sustaining of a pregnancy.

Fetal tissue could be produced in three different scenarios: a woman could intentionally become pregnant in order to abort the fetus and provide fetal tissue, or she could decide to abort a fetus that she had formerly intended to keep, or she could have been intending to have an abortion for personal reasons and subsequently decide to supply the tissue. Given the substantial number of elective abortions currently performed, the last scenario seems likely to be the most common source of fetal tissue. In practice, distinguishing between these three scenarios is difficult, because it requires an inquiry into the woman's motives which is neither practicable nor desirable.[198] This difficulty is exacerbated by the fact that each of the three possible scenarios would seem to require a different level of compensation, in keeping with the principle that suppliers should be compensated for opportunity costs and incidental expenses connected with the supply of materials (for example, women who became pregnant in order to supply the tissue would need to be compensated from the inception of the pregnancy, while women whose decision to abort was independent of the possibility of tissue donation would only need to be compensated for time spent in administrative procedures with regard to the donation). In keeping with our guiding principles and in the interests of avoiding a motive-based

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[197] We would suggest that gestational mothers who are contributing their genetic material be governed by the same provisions that govern in the context of gamete and zygote supply: namely, that they be limited to the production of ten genetically-related children, including children that they produce for themselves.

[198] In addition, a governmental scheme which requires an inquiry as to intent at the time of conception or abortion might constitute an unconstitutional invasion of the privacy of the woman involved. See J.M. Hillebrecht, "Regulating the Clinical Use of Fetal Tissue" (1989) 10 J. Legal Med. 269 at 285.

scheme, we would provide compensatory payment to all suppliers at the level of the lowest-paying scenario: namely, the donation of tissue produced from an abortion that would have taken place in any event (this is analogous to the situation with regard to "spare" zygotes, outlined earlier). This payment would be nominal. It would not cover the cost of the abortion (which presumably would have taken place regardless of the decision to supply tissue and would be covered under the state health care system), but would cover the administrative costs surrounding the supply of the tissue (including incidental costs of, for example, child care during the administrative procedures).

The timing of consent to donation is important. Women should be asked whether they are willing to supply the fetal tissue after they have decided to abort, but prior to the abortion itself.[199] There are a number of reasons why consent must be obtained before the abortion occurs. These include the need to transport and utilize the tissue soon after the abortion;[200] the possibility that post-abortion consent could be affected by anaesthesia used during the abortion;[201] and the possibility that the emotional effects of the abortion itself might influence consent given after the abortion.[202]

The provision of information regarding the possibility of donation, and the obtaining of consent, would take place after the decision to abort is made, unless the woman requests such information earlier.[203] Adequate time to make both independent decisions (the decision to abort and the decision to supply the fetal tissue) should be allowed. There would be separate consent forms for the abortion and fetal disposition.[204]

The potential supplier would need to be provided with all relevant information concerning the tissue "donation," and the need for information would be especially acute when suppliers are asked to undergo more dangerous abortion techniques, or to postpone the abortion in order to obtain more useable tissue. Suppliers would be

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[199] See also G.J. Annas & S. Elias, "The Politics of Transplantation of Human Fetal Tissue" (1989) 320 New Eng. J. Med. 1079 at 1082.

[200] J.F. Childress, "Ethics, Public Policy, and Human Fetal Tissue Transplantation Research" (June 1991) Kennedy Inst. Ethics J. 93 at 114.

[201] U.K., H.C., "Review of the Guidance on the Research Use of Fetuses and Fetal Material" Cmnd 762 in *Sessional Papers* (1989) at 6.5.

[202] Robertson, *supra* note 27 at 469, note 80.

[203] Childress, *supra* note 200 at 115.

[204] See *Royal Commission*, *supra* note 1 at 997-98, for similar recommendations.

screened in accordance with medical and psychological criteria tailored to the fetal tissue donation context. And while the vast majority of fetal tissue exchanges are likely to be anonymous, matching may occur where, for example, parties would like to meet *ex ante* or *ex post* or where the supplier would like to be advised of the demander's condition *ex post*.

Suppliers would be entitled to determine whether the tissue is to be used for research or therapeutic purposes. They would also be permitted to opt out of the donation until such time as the tissue is actually used (or so long as the usefulness of the material is not compromised).[205] However, such a right may become illusory if the time between donation and processing (at which point the identifiability of the tissue may be compromised) is medically required to be short. If medically feasible, we would be in favour of a regime which allowed for a period of a few days subsequent to donation during which time the supplier would be able to opt out and ask that her tissue be destroyed or used for another purpose (such as research rather than therapeutic application).

On the demand side, adequate information must be provided to potential recipients before the decision to undergo a fetal tissue transplant is made. Information regarding specific risks and the difficulty of quantifying the risks associated with such an experimental procedure must be made available.[206] As noted previously, the source of the tissue, which is almost always elective abortions, must be disclosed to potential recipients, who may find abortion morally abhorrent.[207] Additionally, all demanders would be screened in accordance with medical and psychological criteria to assess their physiological amenability to the transplant and their psychological perspective on the subject. Since fetal tissue is a potentially life-saving resource, it should be allocated on the basis of medical need and utility, and these decisions can only be made by qualified medical personnel.

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[205] An opportunity to withdraw consent after the abortion has taken place is recommended by Annas and Elias, *supra* note 198 at 1082.

[206] Morgan, *supra* note 62 at 144 and 149. The first fetal tissue transplant in Canada was performed in December 1991 at Victoria General Hospital in Halifax. It is estimated that only 3 to 4 per cent of persons suffering from Parkinson's disease would be eligible candidates for the transplant procedures, although it is hoped that techniques and scientific knowledge will be enhanced to a point at which many more patients can be helped: D. Jones, "Halifax Hospital First in Canada to Proceed with Controversial Fetal Tissue Transplant" (1992) 146:3 Can. Med. A.J. 389 at 389-90.

[207] J.F. Sedlak, "Fetal Tissue Transplantation: Regulating the Medical Hope for the Future" (1989) 4 J.L. & Health at 80.

With regard to payment on the demand side, since the transplantation of fetal tissue is therapeutic in nature, the cost of the transplant should be borne by the state health care system. Due to the cost of the accompanying technologies and the time and resources required to make use of them—doctors, nurses, medical personnel, equipment, *etc.*—careful decisions will need to be made with regard to the appropriate proportion of the health care budget to be devoted to this type of therapeutic intervention.

The procedural aspects of the donation, and the transplantation and research applications of fetal tissue, would be regulated according to the following scheme. The collection of fetal tissue from abortion clinics and hospitals would be performed by retrieval agencies. At some point in the future, the presence of for-profit tissue processing companies in Canada may become a factor.[208] These companies could be paid a fee to process and proliferate the fetal tissue obtained from the non-profit retrieval agencies. The tissue would then be allocated to hospitals using a national allocation computer database, which would contain information on all potential recipients of fetal tissue and their medical needs. Tissue would also be allocated for research purposes.

V. CONCLUSION

Given strongly held and opposing views as to which normative perspective represents the most appropriate framework for evaluating the new reproductive technologies, given the possibilities for the commercialization of reproductive materials and services that these technologies entail, and given that many individuals are likely to feel simultaneously attracted to the values inherent in several of these perspectives and to feel internally torn over the value conflicts which they present, we have attempted to sympathetically engage various perspectives in proposing a set of guiding principles that seem to reflect basic and cogent moral intuitions on the central issues that the subject presents. In this context, where the effects of alternative policies are currently so much a matter of empirical conjecture, it seems appropriate

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208 A fetal tissue processing company isolates the required cells from the fetal tissue obtained from non-profit retrieval agencies and causes the cells to proliferate so that small amounts of fetal tissue can be used for many patients: Burlingame, *supra* note 3 at 221. In addition, the company processes the fetal tissue in order to decrease the possibility of rejection of the tissue by the recipient-host. "[B]ecause fetal tissue is genetically simple and immunologically undeveloped, laboratory processes can eliminate the few structures that could trigger immune responses in recipients": *ibid.*

to proceed with considerable caution; in other words, to adopt a strategy of "minimax regret." This means that policies should be designed to foreclose the more catastrophic or socially destructive possibilities that can plausibly be envisaged. Accordingly, we have attempted to strike a balance between individual choice and (we hope) avoidance of the more extreme and possibly negative consequences of unconstrained market activity, by leaving open the possibility of participation in exchange relationships with regard to use of the new reproductive technologies under a constrained set of conditions. We believe that such a strategic policy orientation reflects a perfectly sensible recognition of the kind of risk aversion that influences most individuals in making their own life plans. Our choice of regulatory principles with regard to the appropriate role for commercialization of reproductive materials and services, and the applications of these principles in the three exchange scenarios reviewed, are heavily influenced by this general strategic orientation. In this respect, and in the context of the new reproductive technologies, we reject the largely unconstrained role for markets espoused by Richard Posner, who is of the view that although the prospect of positive eugenics is "ominous" (more so than negative eugenics), "its macrosocial effects lie many decades, perhaps centuries, in the future, and since we do not know whether those effects are likely to be on balance good or bad, it seems idle to worry about them now."[209] This view seems to ignore the virtues of marginal change in venturing forth into new and uncharted social domains and of preserving maximum capacity for policy reversibility or modification in the light of accumulating experience.

There seems to be little doubt that the new reproductive technologies, and some of their more extreme implications, such as genetic engineering and selective insemination and implantation of genetic material, will pose some of the most morally anguishing and potentially socially divisive issues that we are likely to face as a community in the decades ahead. We are under no illusions that in this paper we have been able to offer any simple normative talisman or correlative legal rules that can guide us to the light on the distant shore. As H.L. Mencken once remarked, for every complex problem there is a solution that is neat, plausible, and wrong. Our proposals in this paper have attempted to take seriously this cautionary wisdom.

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[209] Posner, *supra* note 20 at 432.