

Canada's Fetal-Egg Use Policy, The Royal Commission's Report on New Reproductive Technologies, and Bill C-47

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I. INTRODUCTION: FETAL-EGG USE AS A NEW REPRODUCTIVE TECHNOLOGY

A GREAT DEAL HAS ALREADY BEEN WRITTEN about the growing popularity of the New Reproductive Technologies (NRTs). Their recent arrival has prompted debates that are both fashionable and profitable at the moment. In Canada, the 1994 *Royal Commission Report On New Reproductive Technologies* (hereinafter the *Report*)¹ attracted widespread interest in both academic and public circles. Most recently, the public debate has focused primarily on "new-age" techniques such as cloning mammals² and possibilities of patenting human genetic material.³ Perhaps less glamorously, but in many ways much more importantly, the NRTs are lending themselves increasingly to ongoing discussions of day-to-day issues related to infertility, prenatal screening, and judicial intervention in pregnancy.

One area that has received comparatively scant attention in the legal and medical literature on NRTs is the potential use(s) of fetal eggs. A fetus is a "developing entity from eight weeks after fertilization until birth."⁴ Fetal eggs are, quite simply, eggs retrieved from female human fetuses, most commonly from

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¹ Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) (Chair: P.A. Baird) [hereinafter *Report*]. See also P. Baird, "Proceed with Care: New Reproductive Technologies and the Need for Boundaries" (1995) 12:8 *J. Assist. Reprod. Genet.* 491.

² See "Hello Dolly" (1 March 1997) *The Economist* 17 and "Whatever Next?" (1 March 1997) *The Economist* 79.

³ See, for example, B.C. Cunningham, "Impact of the Human Genome Project at the Interface Between Patent and FDA Laws" (1996) 7 *Risk: Health Safety & Env't* 253.

⁴ *Report*, *supra* note 1 at 1156.

therapeutic or spontaneous abortions. They may potentially be used both for reproduction (fertilisation and implantation)⁵ and for research purposes.⁶ Indeed, their two primary advantages in both regards are their large supply and high quality.

The actual science involved in extracting fetal eggs is, in itself, not very complicated. More contentious are the ethical, societal, and legal implications of using and manipulating eggs taken from “unborn” fetuses. Such issues further complicate the abortion debate, which has been left unresolved and is probably unresolvable. But abortion issues have in some respects inappropriately overtaken and clouded the more significant problems surrounding the use of fetal eggs. Abortion controversies certainly do arise in this area, and they are relevant to a certain degree; but other equally important issues have been overlooked or, at the very least, framed misleadingly around the existing pro-life/pro-choice abortion construct, thereby hindering a complete understanding of all the issues at play.

Canada’s vision of the present and future prospects for NRTs has been noticeably neglectful of the potential ramifications of using (or not using) fetal eggs. Underlying the silence is an unspoken assumption that fetal-egg harvesting could never actually become a reality, let alone become commonplace, in this country. The Royal Commission’s *Report* dismisses the possibility altogether, stating simply that any use(s) of fetal eggs should be criminally impermissible. Similarly, Bill C-47⁷ (the federal government’s sole legislative response to the *Report* to date) also proposes to criminalise all or nearly all uses of fetal eggs. Both documents devote considerably more space to discussing the permissible uses of non-reproductive fetal tissue than they do the banned uses of fetal eggs and fetal ovarian tissue, without explaining why the latter are prohibited outright while the former are not.

⁵ Dr. Roger Gosden, of Leeds University, has already succeeded in grafting ovarian tissue in mice. See “They Are the Egg Men” (3 September 1994) *The Economist* 79. See also R. G. Gosden, “Transplantation of Fetal Germ Cells” (1992) 9:2 *J. Assist. Reprod. Genet.* 118. Similar operations in humans cannot be far behind.

⁶ Fetal tissue has been used in research as a source of human cell lines since the 1930s, and was instrumental in the preparation of the polio vaccine, among others. See H.T. Greely *et al.*, “Special Report: The Ethical Use of Human Fetal Tissue in Medicine” (1989) 320:16 *N. Eng. J. Med.* 1093 at 1093. Today, non-reproductive fetal tissue is used for a variety of therapeutic purposes; see *infra* notes 61–63.

⁷ Bill C-47, *Human Reproductive and Genetic Technologies Act*, 2d Sess., 35th Parl., 1996 (2d reading 5 November 1996) [hereinafter Bill C-47].

As a follow-up to the Royal Commission's *Report* and Bill C-47, the federal government developed a position paper on the future of NRTs in Canada.⁸ This document introduces the "third phase" in the government's plan to deal with NRTs, namely, the regulatory phase. While the paper refers to fetal-tissue use, it does not specifically address fetal-egg use at all. Rather, it reiterates the guiding principles behind Canada's developing policy for NRTs more generally, and proposes that a second bill be introduced to Parliament containing the regulatory component of Canada's management regime for NRTs. This second bill would amend the legislation introduced in June 1996 (Bill C-47), thereby creating a single comprehensive piece of legislation containing both prohibitions and regulatory controls. The proposed regulatory structure would include the creation of an agency operating separately from Health Canada, which would report to the Minister of Health. Among other things, the management regime would require the development of national standards and the issuance of licenses for "acceptable" NRT practices in Canada, as well as measures for enforcing compliance with these regulations. It would also allow for a collaboration of federal, provincial, and territorial legislation, as well as non-legislative initiatives.

At the moment, Bill C-47 remains the government's only existing legislative response to the Royal Commission's *Report*. Bill C-47 had passed its second reading in the House of Commons but died on the order paper in April 1997, before it could be passed into legislation, when the federal Liberal government called an election. The government had been anxious to pass Bill C-47 before the election was called. The Liberals were subsequently re-elected in June, and it is widely expected that the Bill will be resurrected in some form and reintroduced in early 1998. How Parliament reacts to it in its upcoming session will have severe ramifications for the future development of NRTs in Canada.

Canada's complete rejection of any uses of fetal eggs is strange given the prevalence of infertility in this country and the accompanying market demand for useable, "good-quality" eggs. Its "say nothing, do little" approach is also perplexingly oblivious to experiences elsewhere, and particularly in the United States, where there exists a greater awareness—in the legal and medical literatures at least—of the NRTs' ability to manipulate fetal eggs and fetal ovarian tissue. Perhaps ultimately the greater discussion in the U.S. between lobbyists from both camps can be explained simply as a reaction to a greater push from the scientific and medical communities in that country for legitimisation and public funding.

Whether banning the use of fetal eggs is right for Canada or not, the topic certainly merits fuller consideration than it has received so far. This article will

⁸ Canada, Minister of Health, *New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health* (Ottawa: Minister of Supply and Services Canada, June 1996) (Minister of Health: David Dingwall) [hereinafter *Setting Boundaries*].

seek to fill some of the empty silences on the subject, add something to the debate, and hopefully stimulate more discussion on the subject—all the while focusing on the Canadian experience. First and foremost, it will critique Canada's thus far unexplained ban of the use of fetal eggs and fetal ovarian tissue; in doing so, it will seek to expose the seriousness and complexity of the issues at play. Given the absence of available information on-point in Canada, this article will seek to assess through other means whether Canada reached the right decision in banning the use of fetal eggs. For example, is the decision consistent with the rest of the *Report's* recommendations and the Commission's specific mandate?

Ultimately, I will argue for the legalisation of fetal-egg use, both in reproduction and in research, and make recommendations accordingly. I will demonstrate that the Canadian Government's proposed ban on fetal-egg use is unjustifiable in light of the high infertility rate in this country. In this article, I will pay particularly close scrutiny to the *Report* and Bill C-47. It will also be necessary at times to draw analogies with other NRTs. Some of the most relevant ones include: non-reproductive fetal-tissue transplants, using eggs from cadavers, assisted means of reproduction such as *in vitro* fertilisation, assisted insemination, and embryology.

I am not an expert in medical science. Rather, my perspective on the issue of using fetal eggs is twofold: first, I am interested in exploring the legal ramifications of either banning or permitting the use of fetal eggs, and the reasoning used to arrive at either conclusion; secondly, and on a different level, I will offer my response to the *Report* and Bill C-47 as one of the "individual Canadians"⁹ about and for whom the *Report* purports to speak. Before we can even begin to talk about law, we must iron out how we feel as a society about the use of fetal eggs, and be able to articulate both our logical ("ethical") and emotional ("moral") responses to the problem—only then can we justify our legal responses.

II. WHY USE FETAL EGGS?

POSING THE ISSUE IN TERMS of why we "use" fetal eggs immediately raises a definitional problem. How we describe this particular NRT affects how we perceive what we are doing, and how we set about justifying it. Are we simply "using" the fetal eggs? If so, are we using them as means towards some justifiable end(s)? The term "use" itself can carry several different connotations. Here, would it be more accurate to say instead that we are *manipulating* fetal eggs when we retrieve them for fertilisation or research purposes, perhaps even *profiting from* them? Or rather, are we merely *resorting to* fetal eggs as second-best alternatives

⁹ *Report*, *supra* note 1 at xxxv.

in order to satisfy our reproductive and research needs?¹⁰ I employ all these terms throughout this article as a reminder that even our most basic perceptions and descriptions of our actions are loaded with multiple meanings which vary depending on one's personal point of view and stated (or hidden) objectives.

The two main reasons for wanting to use fetal eggs, particularly as a treatment for infertility but also in research, are supply and quality. Simply put, fetal eggs are plentiful and, arguably, possess highly desirable features. In the following sections, I will elaborate on these features and explain how they support arguments in favour of using fetal eggs. As this article is intended to focus primarily on the reproductive uses of fetal eggs, most of the arguments will be offered in this context; they apply equally, however, to the potential uses of fetal eggs in research.

A. Supply

According to a recent report in a medical journal, "[b]y the fifth month of gestation the average female fetus will have approximately 7 000 000 eggs, 400 000 of which will remain at puberty with less than 500 of these being ovulated."¹¹ Thus, one unborn fetus alone can yield potentially up to seven million eggs.¹²

The abundant supply of fetal eggs is particularly significant in light of the high rate of infertility in couples in Canada. According to the Royal Commission's *Report*, approximately 250 000 couples¹³ in Canada are infertile.¹⁴ Conse-

¹⁰ Defining what we "need" is, of course, similarly problematic. Moreover, I wish to stress that fetal-egg use cannot be justified on a purely needs-based argument. While a supply-and-demand construct forms an important part of my analysis of potential fetal-egg uses in this essay, I in no way intend to suggest that our needs alone can serve to rationalise the development of this NRT. I recognise that there are serious risks associated with allowing fetal-egg use, such as potentially coerced abortions and lack of proper consent to fetal-egg donations. As with all other technologies, this NRT raises the potential for abuse, which must be carefully monitored and guarded against.

¹¹ J.M. Berkowitz, "Mummy Was a Fetus: Motherhood and Fetal Ovarian Transplantation" (1995) 21 *J. Med. Ethics* 298 at 299.

¹² Other documents place the number at five million. See E. Mathes, "Which Came First: The Egg or the Right To It?" (1994) 27:4 *LAW/Technology* 1.

¹³ *Report*, *supra* note 1 at 188.

¹⁴ The *Report* defined infertility as "the absence of pregnancy in a [heterosexual] couple who have been cohabiting for at least the past two years and who have not used contraception during that period." The figures would change if the definition were different and included, for example, failure to carry a pregnancy to term, or failure to give birth to a healthy child. See *Report*, *supra* note 1 at 181–186.

quently, many women look to assisted means of reproduction to become pregnant, such as assisted insemination and *in vitro* fertilisation (IVF).¹⁵

The prevalence of IVF techniques is especially relevant to a discussion of fetal-egg use. In IVF, a mature egg is taken from a woman's ovary (usually after hormonal treatment to stimulate egg production), fertilised outside the body with sperm, and then implanted in the uterus of the same woman or the uterus of another woman; the latter is accomplished through "egg donation." Regardless of the ultimate recipient of the egg, a shortage of eggs means that this type of assisted reproduction is inaccessible to a large portion of the population. For example, being poor, uneducated, unmarried, or otherwise single, gay or lesbian, or disabled have all been cited as possible reasons for being screened out as inappropriate (or undeserving) candidates for IVF.¹⁶

Undoubtedly, to some degree these screening-out criteria reflect deep-rooted discrimination against certain groups in society. But they also simply reflect an actual shortage in supply. A woman seeking IVF treatment must wait until the end of each egg-retrieval cycle, and usually an additional number of months,¹⁷ before knowing whether or not the procedure has been successful.¹⁸ A woman's finite supply of eggs, combined with her limited number of childbearing years, severely minimises her chances of success through IVF. In addition, the likelihood of obtaining eggs through organ-donation mechanisms is small; ovaries and eggs are not "popularly recognized organs for transplantation." Thus, family members of accident victims are not likely to donate their loved ones' reproductive materials in the same way that they donate other organs.¹⁹

In light of the above factors, the need for some other source of healthy eggs is obvious. On the supply side, the possibility of using fetal eggs appears as a heaven-sent solution to the limited availability of eggs. Fetal eggs can potentially be used for transplant, or fertilisation and implantation, in both infertile women and in women who experience early menopause. Put bluntly, the supply of fetal eggs meets the demand for eggs.

¹⁵ Adoption is, of course, another alternative. Because of the high demand for adoptable children, however, the adoption process in many cases may take longer than medically assisted reproduction, and may be as costly if not more so. See K.J. Daly & M.P. Sobol, *Adoption in Canada—Final Report* (National Adoption Study) (Guelph, Ontario: University of Guelph, 1993).

¹⁶ See *Report*, *supra* note 1 at 506–507, 551–554.

¹⁷ *Report*, *supra* note 1 at 537.

¹⁸ "Success rates" of IVF are debatable and confusing. See D.J. Jones, "Brief of the Law Reform Commission of Canada to the Royal Commission on New Reproductive Technologies" (1992) 13:1 *Health L. Can.* 119 at 120.

¹⁹ J. Hersey, "Enigma of the Unborn Mother: Legal and Ethical Considerations of Aborted Fetal Ovarian Tissue and Ova Transplantations" (1995) 43 *U.C.L.A. L. Rev.* 159 at 189.

One might object to this discussion entirely on the grounds that it is crass to discuss any treatment of body-parts in terms of supply and demand. Intuitively, this objection may be well-founded. The suggestion that market forces may help to define the limits of our bodily integrity may be repugnant to us; it is perhaps even more repugnant to think that we may be using materials taken from unborn fetuses.

On the other hand, the reality of the matter is that a supply-and-demand construct for bodily materials is already very much with us. We do not find blood donations repugnant; on the contrary, the increasing demand for blood compels blood banks to campaign actively for donations. Similarly, we treat organ donations as laudable and necessary. And, to make a comparison with other reproductive material, we accept that sperm banks exist in many cities across the country, ready and willing to accept "donations" from qualifying men. One might argue that the analogy to blood and organ donations is misleading—that blood and organ donations *save* lives, whereas fetal-egg donations would only *enable* life. Such an argument, however, depends on how highly we value our procreative capacity and whether we believe in any "right" to bear children.²⁰ If we value these things as highly as life itself, then the line between *saving* life and *enabling* life becomes blurred.

The idea of a "market" for fetal eggs raises questions about who, if anyone, may or should be receiving money in the exchange. Perhaps most controversially, it raises the possibility of women deliberately becoming pregnant in order to sell fetal eggs.²¹ One author even envisages a future in which infertile women or couples seeking to buy fetal eggs openly take on the role of "customers" shopping at an abortion clinic.²² Questions about payment or compensation for bodily materials taken from fetuses have arisen in the case of non-reproductive fetal tissue transplantation, such as fetal pancreatic tissue for treating diabetes and fetal brain tissue for treating Parkinson's disease.²³ In those cases, the general consensus seems to be in favour of prohibiting any monetary payment to the woman who had carried the fetus, thereby reducing her incentives to abort,

²⁰ I recognise that strong arguments "for" and "against" this point may be made. On the one hand, it seems cruel and inhumane to deny an infertile couple every possible chance to conceive. On the other hand, a perceived global overpopulation "crisis" might lead us to justify denying them such opportunities.

²¹ Mathes, *supra* note 12 at 11.

²² Mathes, *supra* note 12 at 1.

²³ See K.J. Ryan, "Tissue Transplantation From Aborted Fetuses, Organ Transplantation From Anencephalic Infants and Keeping Brain-Dead Pregnant Women Alive Until Fetal Viability" (1991) 65 S. Calif. L. Rev. 683 at 685–686.

or even to conceive to abort.²⁴ Whether the same reasoning applies in the case of fetal-egg transplants is debatable and will be addressed later in this article.

B. Quality

A technical debate is currently emerging within the medical community about whether fetal eggs are biologically preferable to eggs within a living woman's body. The general consensus at the moment seems to be that fetal eggs possess certain specific valuable advantages. Highlighting some of the salient arguments on both sides will be relevant to my analysis of fetal-egg manipulation later on in this article.²⁵

Detractors of fetal-egg use argue that fetal eggs are inferior because they have experienced little environmental exposure: while fetal eggs are not completely free of "environmental pressure," they experience a comparatively low amount of it.²⁶ Advocates of fetal-egg use, however, point to a lack of evidence that fetal eggs are, in fact, genetically inferior.²⁷ Moreover, they argue that minimal environmental exposure is in fact beneficial to the egg: it is accompanied by less environmental damage, since fetal eggs "have had less exposure to environmental toxins, which are known to cause chromosomal aberrations."²⁸ Along the same line of reasoning, fetal eggs are preferable because they avoid the detrimental effects of ageing, namely, the "established association between advanced material age and increased risk of congenital malformation."²⁹

Secondly, detractors argue that spontaneously aborted fetuses have "a high incidence of chromosomal defect."³⁰ Advocates of the fetal-egg NRT respond

²⁴ See, for example, J.F. Sedlak, "Fetal Tissue Transplantation: Regulating the Medical Hope for the Future" (1990) 4 J.L. & Health 57; J.A. Robertson, "Abortion to Obtain Fetal Tissue For Transplant" (1993) 27 Suffolk U.L. Rev. 1359 at 1373; N.E. Field, "Evolving Conceptualizations of Property: A Proposal to Decommmercialize the Value of Fetal Tissue" (1989) 99 Yale L.J. 169; Greely *et al.*, *supra* note 6 at 1094. For a debate on the sale of fetal tissue and live organs generally, see Proceeding, "Defining the Limits of Organ and Tissue Research and Transplantation" (1993) 27 Suffolk U.L. Rev. 1457.

²⁵ For a description of the benefits and risks associated with using and transplanting reproductive fetal tissue, see H.J. Meeker, "Issues of Property, Ethics and Consent in the Transplantation of Fetal Reproductive Tissue" (1994) 9 High Tech. L.J. 185 at 188-191.

²⁶ The concern is that without experiencing "normal" environmental pressures, "fetal eggs may harbour genetic anomalies not eliminated through natural selection." See Berkowitz, *supra* note 11 at 299.

²⁷ Berkowitz, *supra* note 11 at 299.

²⁸ Berkowitz, *supra* note 11 at 298.

²⁹ Berkowitz, *supra* note 11 at 299.

³⁰ Uncertainty about the time of fetal cell death before a spontaneous abortion is also a problem. See Hersey, *supra* note 19 at 190.

that while this is true, the problem can easily be avoided through physicians screening potential donor eggs for such defects or limiting the fetal-egg harvesting to elective abortions, where the eggs carry a lower risk of chromosomal abnormality.³¹ Furthermore, they say, a risk of chromosomal abnormalities inheres in all conceptions, whether natural or medically assisted, and medical science cannot be expected to foresee them all.³²

Finally, fetal tissue is generally also preferable to cadaver tissue (another potential source of donor eggs). Cadaver tissue is likely to be diseased or too mature to be effectively transplanted and received by a recipient's body. More specifically, fetal eggs are much less likely to be rejected during a transplant by the host body, because they contain very few antigens.³³

C. Using Fetal Eggs in Research

At the moment, the main use contemplated for fetal eggs lies in the area of assisted reproduction, which is the primary focus of this article. Fetal eggs may, however, also be used for research, and medicinal and purposes. Fetal eggs could be used for research into egg-freezing, much in the same way that mature eggs are used for freezing research.³⁴ Additionally, new and not yet contemplated research possibilities for fetal eggs may emerge in the near or distant future.

Perhaps most significantly in terms of existing NRT capabilities, fetal eggs can be fertilised *ex utero* and used in embryo research. Indeed, embryo research is already considered to be an accepted form of research. Some embryo-research purposes include: learning more about human infertility and how to diagnose it, improving existing infertility treatments and developing new technologies, detecting and preventing genetic and chromosomal anomalies, finding new methods of contraception, and gaining more knowledge about human development and its disorders.³⁵

The legal state of affairs on embryo research in Canada is currently ambiguous. According to the *Report*, embryo research is currently being done "without

³¹ Berkowitz, *supra* note 11 at 299.

³² Berkowitz, *supra* note 11 at 299–300.

³³ Hersey, *supra* note 19 at 18; Ryan, *supra* note 23 at 684.

³⁴ *Report*, *supra* note 1 at 509.

³⁵ *Report*, *supra* note 1 at 613. For an American perspective on embryology, see A. Alpers & B. Lo, "Commodification and Commercialization in Human Embryo Research" (1995) 6 *Stan. L. & Pol'y Rev.* 39; J. Coleman, "Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures" (1996) 27 *Pac. L.J.* 1331. See also N.P. Terry, "Alas! Poor Yorick, I Knew Him Ex Utero: The Regulation of Embryo and Fetal Experimentation and Disposal in England and the United States" (1986) 39 *Vand. L. Rev.* 419.

a clear legal and public policy context.”³⁶ Yet, the *Report* does not purport to outlaw the practice, stating that embryo research “can provide important health benefits.”³⁷ Instead, the *Report* sets out to develop mechanisms for making embryo research consistent across the country.

In its investigation of possible regulatory schemes for embryology, the Royal Commission completely ignored the possibility of using fetal eggs for such research; the *Report* does not even raise it as an idea. It does, however, firmly oppose any and all uses of fetal eggs for reproductive purposes, namely, transplantation, fertilisation, and implantation.³⁸ One can only assume, given its adamant stance in this regard, that the *Report* would also forbid using fetal eggs for research purposes. Why embryo research should be permissible using women’s eggs but not using fetal eggs is unclear and contradictory, as I will explain in more detail in the section on the Royal Commission’s *Report*.

III. THE STATUS OF FETAL EGGS IN OTHER COUNTRIES

IT WILL BE USEFUL TO EXAMINE briefly how other countries have dealt with the new-found ability to extract fetal eggs and use them in reproduction and research. The experiences of the United Kingdom and the United States are perhaps most relevant to the discussion of fetal-egg use in Canada: first, because their legal systems are similar to that of Canada; and secondly, because the law reform process is already well underway in these two countries to deal with fetal eggs. In general, the medical and legal literature on fetal-egg use in the United Kingdom and the United States reveals a greater awareness of this NRT in these countries than that existing in Canada.

A. United Kingdom

In April 1994, the British House of Commons passed a bill criminalising the use of fetal ovarian tissue for fertility treatment.³⁹ The law was effected through the *Criminal Justice and Public Order Bill*, in which a clause read: “No person shall, for the purpose of providing fertility services for any woman, use female germ cells taken or derived from an embryo or fetus or use embryos created by using such cells.”⁴⁰ The House of Commons passed the Bill in the middle of the night, after a brief debate and without taking a formal vote; in so doing, it overrode a public consultation process that had been set up to investigate the matter.

³⁶ *Report*, *supra* note 1 at 608.

³⁷ *Report*, *supra* note 1 at 626.

³⁸ *Report*, *supra* note 1 at 594.

³⁹ See J. Warden, “Britain Outlaws Fetal Egg Transplants” (1994) 308 *Brit. Med. J.* 1062.

⁴⁰ *Ibid.* at 1062.

B. United States

In the United States, the discussion on fetal-egg use has been subsumed under that country's heated debate over non-reproductive fetal-tissue transplantation. The legality of these transplants, and especially whether they should receive public funding, has been highly politicised over the last two decades. Most recently, in 1993, the Clinton administration lifted the ban on federal funding for human fetal-tissue transplantation research. In so doing, it reversed the moratorium on federal funding, initiated by the Reagan administration and upheld by the Bush administration.⁴¹ The status of public funding is nevertheless fragile, as the government of the day could reinstate the moratorium at any time.⁴²

In contrast to the debate over non-reproductive fetal-tissue transplants, the American literature has little to say about fetal-egg uses.⁴³ The existing American laws do not expressly permit or forbid fetal-egg use. Fetal-tissue research and donation in general are regulated under a patchwork of federal and state laws.⁴⁴ Presumably, fetal eggs donations could be regulated under the Uniform Anatomical Gift Act (UAGA), which defines a "decedent" as a "deceased individual and includes a stillborn infant or fetus," and perhaps also under the National Organ Transplant Act (NOTA).⁴⁵

Clearly, the British approach to fetal-egg use is conservative, while the American approach is more liberal, at least in the sense that it has not yet banned the practice altogether. So far, the Canadian response to fetal-egg use has echoed that of the U.K. Both the Royal Commission's *Report* on NRTs and Bill C-47 seek to ban most, if not all, uses of fetal eggs in both reproduction and research, as I will discuss below.⁴⁶

⁴¹ N.M. Constantine Bell, "Regulating Transfer and Use of Fetal Tissue in Transplantation Procedures: The Ethical Dimensions" (1994) 20 *Am. J.L. & Med.* 277 at 278–281; Meeker, *supra* note 25 at 192–193. See also H.M. Maroney, "Bioethical Catch-22: The Moratorium on Federal Funding of Fetal Tissue Transplantation Research and the NIH Revitalization Amendments" (1993) 9 *J. Contemp. Health L. & Pol'y* 485.

⁴² K.J. Lafferty & J.J. Furer, "Legal and Medical Implications of Fetal Tissue Transplantation" (1993) 27 *Suffolk U.L. Rev.* 1237 at 1245.

⁴³ Interestingly, most of the existing literature on fetal-egg use in the U.S. has been written by third-year or recently graduated law students. See 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; Hersey, *supra* note 19; Meeker, *supra* note 25.

⁴⁴ See Maroney, *supra* note 41.

⁴⁵ See Hersey, *supra* note 19 at 167.

⁴⁶ The federal government's position paper on NRTs, *Setting Boundaries*, *supra* note 8, does not refer to fetal-egg use *per se*.

IV. ABORTION

AS MENTIONED IN THE INTRODUCTION, the controversy over whether fetal eggs and other fetal tissue should be utilised has been consistently framed around the existing abortion construct. In one sense, the abortion debate has hijacked the fetal-tissue debate: no one has yet discussed fetal tissue without entering into an elaborate reconfiguration of the pro-choice/pro-life dilemma. For example, one author has commented that “[t]he arguments against fetal tissue transplant research are a subset of the arguments against abortions and the questions of whether ethical concerns about abortion can be divorced from the use to which the tissue will be put.”⁴⁷ I disagree with this viewpoint. In my opinion, it is misleading to describe fetal-tissue and fetal-egg use as a subset of abortion issues. Doing so does not clarify the issues; rather, it merely serves to mystify them.

Many authors have already examined the fetal-tissue dilemma through the abortion lens.⁴⁸ I will not repeat all their arguments here, but will summarise the arguments’ more salient points in order to show how abortion has clouded the issues. In our mostly pro-choice society, where abortion is neither illegal nor unobtainable, the question of abortion is relevant to fetal-egg use, but not central.

The first main argument put forward by detractors is that allowing any fetal-egg use will lead to an increase in abortion. Women will begin to abort deliberately, they say, in order to “produce” fetal tissue; worse, women will deliberately conceive to abort, for the same purpose. Fetal tissue retrieved from fetuses that were aborted “electively” is much more desirable than that obtained from miscarriage or terminated ectopic pregnancies. Women will therefore either feel coerced into aborting, or will be significantly more likely to opt to abort on their own.

Underlying these arguments is the belief that once people know that fetuses can be used beneficially in medicine or research, they will create a “market” for them. Such reasoning is fallacious and unsupported by history. The discovery that tissues and organs taken from cadavers could be transplanted or used in research has not created a widespread commercial “market” for cadavers.⁴⁹

⁴⁷ Ryan, *supra* note 23 at 693.

⁴⁸ See, for example, Robertson, *supra* note 24; Bregman, *supra* note 43; Mathes, *supra* note 12; Greely *et al.*, *supra* note 6; Ryan, *supra* note 23; Constantine Bell, *supra* note 41; A.M. Skerrett, “Fetal Tissue Research and Abortion: Do They Have A Future Together?” (1990) 13 *Campbell L. Rev.* 81; C.B. Sarkos, “The Fetal Tissue Transplant Debate in the United States: Where Is King Solomon When You Need Him?” (1991) 7 *J. L. & Pol.* 379.

⁴⁹ Constantine Bell, *supra* note 41 at 281. One cannot and must not, however, discount suggestions that such markets for human cadavers *do* exist in some places—witness, for example, recent reports of criminals being executed in China for the purpose of providing human organs for donation. These reports are horrifying and point to a very real risk of abuse arising

Why, then, would the ability to use fetal eggs cause a market for fetuses to emerge?

Curiously, those who fear an increase in elective abortions have not explored the fact that any supposed increase would be an increase in aborted *female fetuses* only. Clearly, this is a very significant point, and it is surprising that it has been overlooked. If people fear an imagined "fetus factory," why do they not also fear the implications of deliberately conceiving *female fetuses* specifically, and then deliberately aborting them? Again, I do not believe that allowing fetal-egg use would lead to an increase in abortion. But for those who do, the question of aborting female fetuses has been kept disturbingly quiet.

The second main issue that has been raised under the rubric of abortion is who, if anyone, could or should consent to fetal-egg use following an abortion, and whether true consent could be achieved. Clearly, a fetus is incapable of consenting to its own use, so any consent that is given must derive from elsewhere. Some people have framed this problem as a question of who "speaks for the fetus."⁵⁰ I would argue that it is inappropriate to phrase the question in this way, because doing so implicitly assumes that the fetus is a person; such an assumption is problematic in law, if not in abstract ethical theory. We will never solve the problem of whether or not a fetus is a person, just as we will never find an absolute legal resolution to the abortion quagmire.⁵¹

Instead, I would argue that it is more feasible, and entirely appropriate, simply to require the aborting woman's consent. In this case, the woman would not be acting as a "proxy" for the fetus, but rather, she would be consenting in her own right. Once the woman has made her decision to abort, issues of whether the fetus is a person or not become moot. The fetus no longer has any chance of becoming a person. It would therefore be more accurate to see the fetus as an extension of the woman's body. Accordingly, the woman's consent to any uses of the fetus's tissue or eggs should be legitimate and final.

The next major question flowing from the consent paradigm described above is whether an aborting woman could ever truly consent to fetal-tissue donations. Choosing whether to abort is a deeply personal and emotionally taxing decision. While a woman is making that decision, she should not be pressured by someone else coercing her into donating eggs (or any other tissue) from the fetus. Several authors have suggested that one way to get around this problem is to separate the woman's decision to abort from her decision to donate fetal

ing alongside the ability to use any human tissue. My point is that a "market" for fetal eggs should not emerge as long as we guard against the possibility by properly ensuring a woman's consent in every fetal-egg donation.

⁵⁰ See Mathes, *supra* note 12 at 7.

⁵¹ It is clear under Canadian case law, however, that a fetus is not a person under certain circumstances. See *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *R. v. Sullivan*, [1991] 1 S.C.R. 489.

material.⁵² This would be achieved by keeping her expressions of consent to the two procedures completely distinct in time and in place. Thus, the woman would not even be presented with the possibility of donating the fetal eggs or tissue until *after* her abortion. This mechanism is intended to ensure that she has freely consented to the abortion.

In my opinion, this consent mechanism would work well in theory, but not in practice. It might safeguard a woman's consent the first time she has an abortion, but the validity of her consent to subsequent abortions would be questionable. Moreover, it would only be a matter of time before this two-step consent procedure became common knowledge. At that point, the "separation of consents" would be merely formal, rather than truly meaningful, and the validity of such a system would therefore be spurious.

At the same time, however, the problem of identifying a woman's valid consent should not in itself cause us to ban fetal-egg use altogether. Obtaining true consent has always been a problem in medical contexts. In all medical emergencies, for example, a fear always exists that true consent has been jeopardized by the stress or trauma of the moment. Yet, we still allow doctors to provide treatment, even when this entails highly invasive surgery. Similarly, in the context of fetal-egg donations, we must accept that in a small number of cases, the woman's consent may not be valid. By taking precautionary measures such as the two-step consent mechanism, however, we can ensure that the chance of this happening will be no higher than it already is.⁵³

Similarly, precautionary measures must be taken in situations where a woman may wish to designate the recipient(s) of her fetal eggs. Most authors argue against allowing a woman to choose the recipient(s) of all fetal tissue generally, for fear that allowing this would compound the possibility that a woman may be coerced into aborting.⁵⁴ In my opinion, in fetal-egg use such fears can be

⁵² See, for example, Ryan, *supra* note 23 at 687; Robertson, *supra* note 24 at 1367; T.M. Hess-Mahan, "Human Fetal Tissue Transplantation Research: Entering a Brave New World" (1989) 23 *Suffolk U.L. Rev.* 789 at 818; B.R. Burlingame, "Commercialization in Fetal-Tissue Transplantation: Steering Medical Progress to Ethical Cures" (1989) 68 *Tex. L. Rev.* 213 at 237.

⁵³ Another way of safeguarding the woman's consent would be for the doctor (or another authority figure) to reject the fetal-egg donation if he or she fears that the woman was coerced into consenting. See Robertson, *supra* note 24 at 1372.

For a pathological example of how a woman's consent (or lack thereof) to donating her eggs may be abused, witness the recent case at the University of California-Irvine fertility clinic, where three physicians were accused of stealing women's eggs and embryos and implanting them in other patients or using them in research. See S.J. Paine *et al.*, "Ethical Dilemmas in Reproductive Medicine" (1996) 18 *Whittier L. Rev.* 51.

⁵⁴ See, for example, Robertson, *supra* note 24 at 1359-1361. For a discussion of fetal-tissue designation in the United States, see M.W. Danis, "Fetal Tissue Transplants: Restricting Recipient Designation" (1988) 39 *Hastings L.J.* 1079; see also S.C. Hicks, "The Regulation

assuaged by requiring mandatory counselling for both the donating woman and her designated recipient, who may be a family member, a friend or a complete stranger. Admittedly, mandatory counselling requirements may seem patronising, because they presuppose that the persons receiving counselling do not know always what is in their own best interest. Here, however, mandatory counselling would be useful not only as a safeguard against coercion, but also as a valuable source of information for both parties. While the counselling itself would be mandatory, ultimately the decision to designate a recipient or not would still be that of the woman.

Fetal-egg designation is not as outrageous as it may appear at first glance. Indeed, today one finds a near-parallel situation with open adoption, where a birth mother may in some cases choose her child's adoptive parents.⁵⁵ Similarly, in fetal-egg donation, a woman may select the mother or couple who will raise the child conceived from her fetus's egg.

Finally, one cannot ignore the commercial issues that may arise in allowing women to consent to fetal-egg donations. We can easily envisage situations where people may offer a woman money in exchange for her consent to donate fetal eggs. Such scenarios are admittedly problematic, given our general consensus that the commercialisation of bodily materials is inherently offensive and unethical. Moreover, banning the commercialisation of fetal eggs will not necessarily prevent it entirely. Surrogacy contracts are unenforceable in law, and yet they are often concluded and the obligations thereunder fulfilled without any state intervention. In a similar vein, we could never achieve complete control over the commercialisation of fetal-egg use. Nevertheless, fears of possible commercial exploitation of women should not serve as a justification for ban-

of Fetal Tissue Transplantation: Different Legislative Models for Different Purposes" (1993) 27 *Suffolk U.L. Rev.* 1613 at 1623–1629; and T.M. Hess-Mahan, *supra* note 52 at 819–823.

⁵⁵ Open adoptions may take many forms and may be understood to include varying degrees of "openness." The main principle underlying open adoption is the sense that each child should have as much information as possible about his or her own identity and history. Thus, an open adoption may consist of simply "opening" previously confidential adoption records; in its most "open" form, it may involve ongoing contact among the birth parent(s), the child and the adoptive parents. For one example of an open adoption, see L. Caplan, "A Reporter At Large: An Open Adoption—Part I" (21 May 1990) *The New Yorker* 40; and L. Caplan, "A Reporter At Large: An Open Adoption—Part II" (28 May 1990) *The New Yorker* 73.

Open adoptions are increasingly gaining recognition and have been legally approved in several jurisdictions, including Scotland, Kansas, Alabama, New Zealand, and New South Wales. British Columbia has so far been the only province in Canada to enact progressive open adoption legislation. It passed its comprehensive *Adoption Act*, S.B.C. 1995, c. 48 (formerly Bill 51) in July 1995. The Act came into force on 4 November 1996, as per B.C. Reg. 93/96. See also S.K. Senoff, "Open Adoptions in Ontario and the Need for Legislative Reform" (1998) 15:1 *Can. J. Fam. L.* [forthcoming].

ning fetal-egg use. Such fears also exist in many other contexts, such as surrogacy, adoption, and organ donation, to name a few. We do not allow these fears to paralyse our actions in those contexts. Nothing supports taking a different approach in the case of fetal-egg use.

Abortion issues are certainly relevant to fetal-egg use; fetal-egg use is at least coincident with abortion, if not a direct consequence of it. But abortion is not the main interest at stake in using fetal eggs. Rather, the real issue is infertility, since infertility is the driving force behind the desire to use fetal eggs in reproduction in the first place. In the following section, I will discuss (among other things) the contradiction between the Royal Commission's emphasis on the prevalence of infertility in Canada on the one hand, and its ban on the use of fetal eggs in reproduction on the other.

V. THE REPORT⁵⁶

AS PREVIOUSLY STATED, the Royal Commission's *Report* pays very little attention to the possibility of using fetal eggs. It emphatically rejects any suggestion of using them for reproduction purposes, and does not even address whether they could be used in research. Shockingly, the *Report* dismisses the question quite peremptorily in two sentences. The entire paragraph, under the heading "Potential Use of Eggs from Fetuses," reads as follows:

We would object strongly to fertilization of eggs obtained from female fetuses, even if it becomes technically feasible to retrieve and mature them. We find this suggestion deeply offensive to all notions of human dignity and have recommended that it be among the activities prohibited outright in the *Criminal Code of Canada*.⁵⁷

The first striking thing about the above passage is its brevity, especially when it is contrasted with the rest of the *Report* (nearly thirteen hundred pages). Surely a report as voluminous and costly as this one could have expanded more fully on this admittedly controversial NRT, regardless of its ultimate conclusion in the matter.

The Commission's mandate was "to inquire into and report on current and potential medical and scientific developments related to new reproductive technologies."⁵⁸ Part of its mandate was also to examine "the causes, treatment and prevention of male and female infertility ... embryo transfers ... embryo experimentation and fetal tissue transplants ... [and] the commercial marketing of ova, sperm, and embryos."⁵⁹ According to this mandate, the *Report* could and

⁵⁶ *Supra* note 1.

⁵⁷ *Report*, *supra* note 1 at 594.

⁵⁸ *Report*, *supra* note 1 at 1175.

⁵⁹ *Report*, *supra* note 1 at 1175.

should have devoted more space to fetal-egg use, since the new-found ability to extract eggs from fetuses relates in some way to all the above-listed issues.

Secondly, the *Report's* brevity on the subject of fetal eggs is particularly striking in light of the *Report's* overall emphasis on infertility in Canada. The *Report* indicates that infertility "touches the daily lives of many thousands of individual Canadians."⁶⁰ Additionally, it instructs that "a responsible and caring society should seek ways to recognize and support the desire of individuals and couples to have children."⁶¹ One would assume that such statements were not intended to be merely rhetorical. Moreover, current *in vitro* fertilisation (IVF) practices are extremely invasive to women, and the possible adverse effects of fertility-drug use are unknown.⁶² Part of supporting "the desire of individuals and couples to have children" should therefore involve exploring all other possible avenues of assisted reproduction. As mentioned in the discussion above on supply and demand, the conceivably abundant supply of viable fetal eggs cannot be overlooked or cast aside too quickly. Even if the Royal Commission ultimately still concluded that resorting to fetal eggs is an inappropriate means of treating infertility, it should at least have done justice to the prospect by discussing it more seriously in its "comprehensive" *Report*.

Thirdly, the *Report* is disappointing because it does not engage in any debate whatsoever over *why* using fetal eggs is "deeply offensive to all notions of human dignity." Such a sweeping statement would be more convincing if it were supported by facts or ethical inquiries into the matter. For example, how does a fetal egg differ from fetal tissue? Is the difference qualitative or quantitative? In other words, does a fetal egg's ability to become a person lie at the basis for the distinction? Or is the fact that a single fetus could potentially yield millions of eggs offensive by virtue of the sheer number of eggs involved? Alternatively, was it the indirect link between fetal eggs and abortion that caused the Commission to shy away? If so, is this link less relevant when transplants of non-reproductive fetal tissue are at issue? Finally, why is this procedure any more offensive to human dignity than invasively retrieving eggs from a living woman during IVF? The *Report* leaves no clues about whether it raised these questions, and if so, how it answered them.

By contrast, the *Report* devotes an entire chapter to the uses of non-reproductive fetal tissue.⁶³ In particular, it focuses on existing and future benefits that may be derived from fetal-tissue transplantation. For example, fetal-tissue transplants may be used therapeutically to treat, and perhaps one day

⁶⁰ *Report*, *supra* note 1 at 163.

⁶¹ *Report*, *supra* note 1 at 163–164.

⁶² *Report*, *supra* note 1 at 375–376.

⁶³ *Report*, *supra* note 1 at 967–1015.

cure, a number of diseases including, among others: Parkinson's disease, Alzheimer's disease, and diabetes.⁶⁴ Additionally, other sources indicate that experimental fetal-tissue transplants in animals have offered hope for potentially treating Huntington's chorea, spinal cord injuries, leukemia, Down's syndrome, Tay-Sachs disease, hemophilia, epilepsy, cancer, brain damage caused by accident or stroke,⁶⁵ and even AIDS.⁶⁶

Fetal-tissue transplantation is not well-known among Canadians.⁶⁷ In fact, according to the *Report*, the majority of Canadians surveyed were not aware of the fact that fetal-tissue transplants could be done at all. Nevertheless, the *Report* indicates that "many survey respondents viewed [fetal-tissue transplantation] as a positive development that could be of benefit to society because it might result in treatments or cures for debilitating diseases."⁶⁸ Accordingly, Canadians seem generally open to the idea of using fetal tissue in disease treatment, and medical research, but not for commercial purposes.⁶⁹ As part of its *modus operandi* throughout the *Report*, the Commission prefaced its discussion of most topics with a presentation of "The Views of Canadians" on the NRT in question. One is left wondering why the Commission did not at least consult Canadians for their opinions on fetal-egg use.

A. The Constitutionality of Criminalising Fetal-Egg Use

Finally, the *Report's* dismissal of all NRTs involving fetal eggs is puzzling for its invocation of the Criminal Code. Its recommendation that fetal-egg use "be among the activities prohibited outright in the Criminal Code of Canada" is made almost *en passant*, while referring the reader to Chapter 5 of the *Report*, entitled "Achieving Responsible Regulation." Chapter 5 describes the Commission's framework for addressing the NRTs. The Commission's vision of "responsible regulation" entails combining "social control" (criminal and penal law)⁷⁰ with "monitoring" (regulatory law).⁷¹ Generally speaking, it seeks to regulate

⁶⁴ *Report*, *supra* note 1 at 967. See also "Something New in Mind" (22 March 1997) *The Economist* 99, on fetal-brain-cell transplants in treating Parkinson's disease.

⁶⁵ See Constantine Bell, *supra* note 41 at 278.

⁶⁶ See Lafferty & Furer, *supra* note 42 at 1237.

⁶⁷ For a recent exploration of Canadian policy on this issue, see D.K. Martin, "Foetal Tissue Transplantation Research: A Canadian Policy Analysis" (1992) 13:1 *Health L. Can.* 132.

⁶⁸ *Report*, *supra* note 1 at 969.

⁶⁹ *Report*, *supra* note 1 at 970.

⁷⁰ *Report*, *supra* note 1 at 108.

⁷¹ *Report*, *supra* note 1 at 109.

those practices it deems permissible and to criminalise those that have earned its disapproval—including fetal-egg use.

A questionable discrepancy exists between the reproductive techniques that the *Report* deems permissible and those it would criminalise. All up-and-coming NRTs are controversial to some extent, and yet the *Report* purports to criminalise only some. These can be paraphrased as follows:

- (i) For-profit activities related to the creation, exchange, and use of human reproductive materials;
- (ii) For-profit activities (by anyone except the birth mother) related to preconception arrangements;
- (iii) Research involving human zygotes or embryos for developing ectogenesis, cloning, creating human/animal hybrids, and reproductive uses of fetal eggs; and
- (iv) Unwanted medical treatment and other interferences with the physical autonomy of pregnant women.⁷²

One author reviewing the *Report* has commented that “it is not clear why or how the [*Report*’s] ethic of care led to these more extreme recommendations with respect to these, and only these, specific issues.”⁷³ Similarly, another author has noted that “criminal or penal prohibitions are blunt instruments that are often antithetical to anything that might be called the ethic of care.”⁷⁴ Both comments reflect at least a certain confusion about this apparent inconsistency in the *Report*, if not a questioning of the Commission’s motives in seeking to criminalise these NRTs specifically.

Since criminal sanctions are “the most stringent form of control available”⁷⁵ in Canada, one would expect a detailed discussion of their relevance and application to fetal-egg use, both in terms of their underlying social policy and their constitutionality. Instead, the *Report* offers a rather simplistic federalist argument for why Parliament has the authority to legislate in the area of NRTs gen-

⁷² *Report*, *supra* note 1 at 108–109.

⁷³ D. Majury, “Is Care Enough? *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*” (1994) 17 Dal. L.J. 279 at 287. The controversial “ethic of care” served as the focalising centrepiece of the *Report*, as did the accompanying eight guiding principles (individual autonomy; equality; respect for human life and dignity; protection of the vulnerable; non-commercialisation of reproduction; appropriate use of resources; accountability; and balancing individual and collective interests). See the *Report*, *supra* note 1 at 49–67. Compare with W. Kymlicka, “Approaches to the Ethical Issues Raised by the Royal Commission’s Mandate” (October 1991) [paper commissioned by the Royal Commission]. See also R. Ariss, “The Ethic of Care in the Final Report of the Royal Commission on New Reproductive Technologies” (1996) 22 Queen’s L.J. 1.

⁷⁴ P. Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995) 40 McGill L.J. 905 at 914.

⁷⁵ *Report*, *supra* note 1 at 108.

erally. It seeks to bring federal control over NRTs under Parliament's peace, order, and good government (POGG) power as well as under its criminal power, saying: "[i]n our view, these legislative prohibitions fall squarely within the federal government's constitutional mandate to protect public health, public security, and the public interest, and to promote constitutional values of human dignity and equality."⁷⁶ Both the legality and effectiveness of such legislative prohibitions, however, are doubtful.

First, it is debatable whether the advent of NRTs qualifies for federal jurisdiction under POGG without undermining the division of powers in the Constitution.⁷⁷ Depending on the circumstances, health could fall under either federal or provincial jurisdiction, hence the "double aspect" to health law in Canada. Generally speaking, however, health is considered a provincial matter under s. 92(16). Parliament would therefore ordinarily be overstepping its jurisdiction and infringing upon the exclusive powers of provincial legislatures under s. 92 of the Constitution if it legislated in this area.

Parliament may assert its POGG power if one of three conditions are satisfied: if a matter is "residual," i.e., one not enumerated in the division of powers; if Canada is faced with a matter of national concern; or if an emergency arises. According to Canada's leading constitutional law expert, health matters could conceivably fall under POGG if they had a national dimension or if an emergency was involved.⁷⁸ The provinces have exclusive jurisdiction over health matters that are "local or private,"⁷⁹ under s. 92(16) of the Constitution; thus, Parliament cannot claim federal authority over health by virtue of its residual power under s. 91. The jurisprudence demonstrates that what constitutes a matter of national concern is subjective to a large degree.⁸⁰ Because it is not "beyond the powers of the provinces" to legislate in the area of NRTs, however, NRTs would probably not be considered a matter of national concern.⁸¹ One would also need to search long and hard to find a real "emergency" related to NRTs. Finally, one might wish to question whether NRTs are, in fact, primarily a health matter at all. One could reasonably argue that they would be more

⁷⁶ *Report, supra* note 1 at 109.

⁷⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

⁷⁸ P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 476.

⁷⁹ See also *Schneider v. The Queen*, [1982] 2 S.C.R. 112, which upholds the provinces' jurisdiction in this regard.

⁸⁰ See *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663; and *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

⁸¹ See Hogg, *supra* note 78 at 447. Moreover, in my opinion it could be dangerous to admit NRTs as a matter of national concern. How could we distinguish them from all other health matters that are provincial?

properly characterised as a family-law issue. In that case, NRTs would clearly fall under provincial jurisdiction as a "local or private" matter, under s. 92(16) of the Constitution.

Secondly, experts in Canadian criminal law have questioned the rationale for invoking the criminal law in the area of NRTs.⁸² Whether one characterises an activity or a behaviour as criminal in nature is largely a question of principles. In essence, criminal law aims to protect society from harm and to uphold its fundamental values. But criminal sanctions may not, in all cases, be necessary to achieve these goals; worse, they may not even be effective. Although they carry a strong message to the public not to engage in the prohibited activities, criminal sanctions may not achieve their desired deterrent effect. Instead, they may simply force the prohibited activities underground and out of the public eye. For example, prohibition did nothing to quell the consumption of alcohol in the 1920's, and the criminalisation of "recreational drugs" has arguably been ineffective; likewise, anti-abortion laws did not stop women from obtaining the procedure. In the same vein, criminal provisions against the implementation of certain NRTs may be difficult or impossible to enforce. All of these elements might lead one to conclude that in the area of NRTs, a regulatory scheme might be more effective than the criminal law.⁸³

All of these considerations are doubly important at the moment because the Commission's recommendations set the stage for Bill C-47, which was drafted largely as a response to the Royal Commission's *Report*. As my discussion in the following section will reveal, the Bill's contents are as controversial, if not more so, than the *Report*'s.

VI. BILL C-47⁸⁴

In 1996, PARLIAMENT PROPOSED the *Human Reproductive and Genetic Technologies Act* (Bill C-47). To date, this Bill has been the only legislative response to the Royal Commission's *Report*. By April 1997, it had passed second reading in the House of Commons and was referred to the Committee on Health, which heard many submissions on the Bill by various concerned parties and interest groups. Parliament had clearly been intent on passing the reproductive legislation before the next federal election, especially given its alarm at the recent sheep-cloning event in Scotland.⁸⁵ But in April, the federal government called an election for June, and consequently the Bill died on the order paper without

⁸² See, for example, Healy, *supra* note 74 at 920.

⁸³ For a fuller discussion of these issues, see Healy, *supra* note 74 at 944-946.

⁸⁴ *Supra* note 7.

⁸⁵ See *supra* note 2.

being passed into legislation. Now that the Liberal government has been re-elected, it is generally expected that it will resurrect Bill C-47 and endeavour to enact it in the upcoming Parliamentary session.

Bill C-47 is predominantly prohibitive in nature with two main parts. First, it sets out thirteen prohibited activities and uses of new reproductive and genetic technologies. Secondly, it delineates the maximum punishments applicable to the offences it would create.⁸⁶ The prohibited activities are primarily those that commercialise reproduction or offend the health, human dignity, or security of Canadians. In effect, the Bill's Preamble highlights these objectives as being paramount to the proposed legislation. Most notably, however, the Preamble fails to highlight issues of procreative choice and procreative liberty—issues that one might reasonably expect to be at the forefront of any legislation affecting our legal reproductive capacities.

The provisions relevant to fetal-egg use are reproduced below:

4. (1) No person shall knowingly:
 - (f) retrieve an ovum or sperm from a foetus or cadaver with the intention
 - (i) that the ovum mature outside the human body, be fertilized or be implanted in a woman, or
 - (ii) that the sperm be used to fertilize an ovum;
 - (g) cause an ovum or sperm retrieved from a foetus or cadaver to mature outside the human body, or
 - (i) cause the fertilization of such an ovum, or fertilization of an ovum by such sperm, or
 - (ii) implant in a woman such an ovum, or an ovum fertilised by such sperm;
 - (k) cause the fertilization of an ovum outside the human body for purposes of research.
4. (2) No person shall offer to carry out any procedure prohibited by subsection (1).
4. (3) No person shall offer consideration to any person for carrying out any procedure prohibited by subsection (1).
7. (1) No person shall use any ovum for the purpose of research, donation, maturation, fertilization or implantation in a woman unless the donor of the ovum has consented to its use for that purpose.

Each of these provisions requires careful scrutiny, given their potential ramifications if they are eventually passed into law.

Section 4 of the Bill contains most of the provisions dealing with fetal eggs. Its effect is to prohibit all possible reproductive uses of fetal eggs. Whether it also prohibits all uses of fetal eggs in research is debatable, as I will explain. The language in s. 4 is often problematic and calls for careful consideration of all its possible interpretations.

⁸⁶ These are: up to \$250 000 or four years' imprisonment on summary conviction; and up to \$500 000 or ten years' imprisonment on indictment (s. 8).

The first challenge posed by s. 4(1)(f) is its use of the phrase “with the intention.” As a legal matter, the phrase was probably included to reflect the requisite *mens rea* of the offence. As a practical matter, however, one might question how “with the intention” could be interpreted. The criminal burden of proof (beyond a reasonable doubt) could be difficult to meet. Also, how could one prove that a person retrieved an egg from a fetus *with the intention* that it be matured outside the human body, fertilised, or implanted in a woman, if he or she did not initially plan for these procedures, but retrieved the egg for some other purpose? Or, what if the fetal tissue were stored for some time, and subsequently matured, fertilised, or implanted by someone other than the person who retrieved it? These examples might seem overly imaginative, but given the unknown bounds of NRTs, such technical distinctions must be addressed.

Secondly, it is unclear who could be charged under s. 4(1)(g), since the word “cause” could be interpreted in several different ways. One would normally expect that a physician or researcher “causes” an egg to be retrieved from a fetus. But what about the woman who consents to the retrieval? She, too, “causes” the egg to be removed, and in more than an esoteric sense. Similarly, she “causes” the fertilisation of the egg if she consents to the procedure. It seems, then, that even if one were in agreement with the spirit of the provisions, one would have difficulty interpreting and applying them.

Section 4(1)(k) poses a different set of interpretative problems. It provides that no person shall “cause the fertilization of an ovum outside the human body for purposes of research.” Although it does not specifically mention fetal eggs, this prohibition would presumably capture both fetal- and non-fetal eggs. Interestingly, however, it only bans uses of eggs (and fetal eggs) in research involving fertilisation. *A contrario*, then, *other* uses of fetal eggs in research, namely, fetal-egg research that does not involve fertilisation, would be permissible. Such an interpretation may sound precious, but it is perfectly valid since the very text of the Bill supports it.

Sections 4(2) and 4(3) prohibit offering to carry out any procedure prohibited by subsection (1) and offering consideration to any person for carrying out these procedures. Both are problematic in that they could criminally implicate a woman whose fetus was aborted or miscarried. Under s. 4(2), a woman could be found liable for allowing (“offering”) eggs to be retrieved from her aborted or miscarried fetus. And under s. 4(3) she could, in some instances, be implicated for having received “consideration” (monetary or otherwise) for allowing fetal-egg research, although she herself could not be held liable.

Finally, s. 7 of the Bill, which prohibits the use of human eggs without consent, is ambiguously drafted. It speaks to the problem of who, if anyone, could or should consent to the use of human eggs, both for reproductive and for research purposes. Section 7 provides that “[n]o person shall use any ovum ... unless the donor of the ovum has consented to its use for that purpose.” The provision is relatively unproblematic in the context of eggs retrieved from a

woman. It is generally accepted that every mentally capable woman has legal control over her own body and over her own reproductive capacity. Thus, as an "ovum donor," she would be required to consent to any uses of the egg.

Section 7 becomes problematic, however, if the egg in question is a fetal egg. In that case, who must consent to its use? It is doubtful whether s. 7 even anticipated this question, given its prohibitions against using fetal eggs in s. 4. Nevertheless, at least textually, one could argue that s. 7 incorporates the question of who consents to the use of fetal eggs. As indicated earlier, s. 4 does not clearly prohibit *all* uses of fetal eggs in research; it merely prohibits those uses pertaining to reproductive research. Thus, using fetal eggs in non-reproductive research could be permissible under the Bill. In that case, how are we to interpret s. 7? I would argue (as I did in the section on abortion, *supra*) that the "ovum donor" would still be the woman who previously carried the fetus, and not the fetus itself.

According to the Interpretation section of Bill C-47, "donor" means "the person who produces the ova or sperm, whether or not for purposes of donation." The *person* who *produces* fetal eggs, legally speaking, would necessarily have to be the woman, since a fetus is not a "person" under Canadian law;⁸⁷ and, in any case, a fetus is incapable of giving consent. In addition, arguments that the "ovum donor" could also be the man who helped conceive the fetus, thereby "producing" the fetal egg, would be weak; the link between these men and the fetal eggs, both legally and physically, would be tenuous at best. Hence, interpreting s. 7 as requiring the woman's consent for the use of fetal eggs in research leads to the most reasonable result. Most importantly, this interpretation safeguards the interests of women who might otherwise be coerced into aborting.

Clearly, the Royal Commission's *Report* served as the impetus behind many, if not all, the prohibitions in Bill C-47. Specifically, the prohibitions in the Bill respond well to the *Report's* recommendations that NRTs involving fetal eggs be banned. Like the *Report*, however, the Bill fails to explain how fetal-egg use is incompatible with its underlying objectives of protecting "the health and safety of Canadians" and "the dignity of all persons, in particular children and women, in relation to uses of human reproductive materials" (s. 3). The proposed legislation is remarkably brief and unsophisticated, given the importance of the issues. With its emphasis on criminalising a large number of NRTs, it is also ultimately unresponsive to the real problem. As seen in the previous section, criminalising certain unwanted behaviours or practices will not always—or even usually—curb them. And, as discussed above, it is not at all clear in the Bill why some practices are deemed undesirable while others are entirely permissible.

⁸⁷ See *R. v. Morgentaler*, *Tremblay v. Daigle*, and *R. v. Sullivan*, *supra* note 51.

VII. HOW WOULD FETAL-EGG USE AFFECT EXISTING NOTIONS OF THE FAMILY?

A COMPREHENSIVE DISCUSSION of the broader implications of the NRTs on our notions of the family are best left to another article. The possibility of fetal-egg use in assisted reproduction, however, raises two particular issues that I will address here, namely, our evolving views of motherhood and our fears about the psychological stability of children born out of fetal-egg conceptions.

First, fetal-egg use raises specific issues about how our views of motherhood may change if the practice becomes accepted. One of the main underlying reasons for banning fetal-egg use is society's revulsion at the prospect of bringing into the world children whose "mothers" never really existed.⁸⁸ Allowing the conception of "fetal-egg babies" would permanently reverse the million-year-old trend in which all children "could be certain they had a mother who was once a living person."⁸⁹ Perhaps most shockingly of all, in a fetal-egg conception a woman could give birth to her own granddaughter, without her "daughter" ever having lived.

A fetal-egg conception would not be the first event to challenge our understanding of motherhood, by any stretch. Many new reproductive technologies (which are perhaps not so "new" anymore) have reconfigured our traditional image of the mother as the woman who conceives, carries, gives birth to, and subsequently acts as the primary care-giver to her own biological children. Procedures such as IVF⁹⁰ and assisted insemination have permanently altered our expectation that women would become pregnant through "natural" conceptions.⁹¹ Even Caesarean sections may be seen to have called into question the ideal that women would give birth through "natural" labour.⁹² Clearly, surrogacy

⁸⁸ Warden, *supra* note 39 at 1062.

⁸⁹ Berkowitz, *supra* note 11 at 298.

⁹⁰ One author has proposed draft legislation that would recognise two legal mothers in IVF. See L.I. Palmer, "Who Are the Parents of Biotechnological Children?" (1994) 35 *Jurimetrics J.* 17; D.S. Strouse, "Egg Donation, Motherhood and State Law Reform: A Commentary on Professor Palmer's Proposals" (1994) 35 *Jurimetrics J.* 31; and L.I. Palmer, "Rejoinder" (1994) 35 *Jurimetrics J.* 51.

⁹¹ Current feminist literature also reflects this change. For example, in an oblique reference to NRTs, Catharine MacKinnon has commented that sexual intercourse is "still the most common cause of pregnancy," meaning, of course, that it is no longer the only "cause." See C. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 94.

⁹² Shakespeare's Macduff was "from his mother's womb untimely ripp'd," and this factor ultimately led to Macbeth's downfall in the famous play. That C-sections should be depicted in a sinister manner in the literature is not insignificant. The emphasis on Macduff's "unnatural" birth suggests that C-sections were once seen as aberrational, and perhaps ominous. See W. Shakespeare, *Macbeth* (Toronto: Oxford University Press, 1960) Act V, Scene VII.

contracts present motherhood as something that can be bought and sold—or at least negotiated.⁹³ Finally, adoption has shown us that adoptive motherhood is as legitimate as biological motherhood.

Thus, the idea that we may stray from our traditional representations of motherhood is no longer new or surprising. Assisted reproduction through fetal-egg use is conceptually no different from all the other examples listed in the preceding paragraph. In fact, it is only one step away from, or beyond, IVF (where donated eggs are used) and surrogacy. In both these procedures, and in reproduction through fetal-egg use, a woman is implanted with an egg that did not originate from her ovaries. It seems rather disingenuous to advocate IVF and surrogacy on the one hand, but to deem fetal-egg use unacceptable on the other hand, on the ground that it offends our accepted notions of motherhood.

The argument that “fetal-egg babies” would not have a “real mother” is equally false and misleading. They *would* have a mother—the woman who carried them, and who raised them. To argue otherwise is to undermine that woman’s maternal legitimacy and authority and to impute our own societal prejudices onto the child in question.

Secondly, and following from this last point, some people worry that children born from fetal-egg conceptions would suffer deleterious psychological consequences directly flowing from their status as “fetal-egg children.”⁹⁴ They contend that these children will experience debilitating identity crises over not knowing who their “real” mother was. Such arguments are completely unfounded. A “fetal-egg baby” would have no greater difficulty (and perhaps less) coming to terms with his or her identity than would, for example, an adopted child.

Interestingly, criticisms of fetal-egg conceptions raise exactly the same arguments that were once raised about adopted children, namely, that they are somehow less emotionally and psychologically secure than children raised by their biological parents.⁹⁵ These adoption myths are not grounded in fact.

⁹³ One author has proposed a new legal framework that would more accurately reflect the rights and obligations at play in surrogacy, departing from the traditional conception of motherhood as purely biological, and favouring instead the “psychological dimensions” of reproduction and parenting. See A.E. Stumpf, “Redefining Mother: A Legal Matrix for New Reproductive Technologies” (1986) 96 Yale L.J. 187.

⁹⁴ See Mathes, *supra* note 12 at 13.

⁹⁵ Different medical and sociological experts have attested to a prevalence of various disorders in adopted children, ranging from mild problems of insecurity and self-esteem, to more severe disorders such as attention-deficit disorder, to a propensity for violent behaviour. These professionals have even invented institutionalised terms for these supposed disorders, such as “adopted-child syndrome” and “genealogical bewilderment.” Unfortunately, many people fail to recognise that these studies are themselves inaccurate and statistically meaningless. They are done mostly in mental-health clinics and “reflect the mental states of

Rather, they merely reflect how society discriminates against children who do not fit into the traditional mould of the nuclear family.⁹⁶ All the arguments against adopted children have proven to be untrue. And, in the same way that people are beginning to realise that adoption myths are unfounded, they will also eventually accept "fetal-egg children" as being just as legitimate and as valuable as "naturally" conceived children.

VIII. RECOMMENDATIONS

IN LIGHT OF ALL the foregoing considerations, I recommend the following changes to Canada's policy on fetal-egg use. These recommendations are policy-oriented rather than legal. As I have argued that NRTs fall under provincial jurisdiction, I recommend that each province adopt these policy initiatives and incorporate them into its body of law. Each province may do this either by amending its existing health and/or family law legislation, or by enacting new legislation on NRTs. As NRTs' capabilities are constantly changing, I would recommend the former option over the latter, at least for the time being and until the area of NRTs becomes more settled.

1. Canada Should Reverse its Current Policy Against Fetal-Egg Use

In light of the preponderance of infertility in Canada, and the high value we place on Canadians' right to form a family, fetal-egg use should be a legally permissible means of assisted reproduction, to be used alone or in conjunction with other NRTs such as *in vitro* fertilisation.

Accordingly, Parliament must not pass Bill C-47, which would criminalise fetal-egg use in reproduction and in reproductive research. While it is impossible to "repeal" the Royal Commission's *Report*, the Canadian Government should consider taking measures to declare formally that the policy set out in the *Report*, at least as it pertains to fetal eggs, is no longer of any force or effect.

2. Anyone Retrieving Fetal Eggs, or Using Them in Assisted Reproduction or for Research Purposes, Should be Licensed to Do So and Should Follow Provincially Authorised Guidelines

Legal experts tell us that regulatory mechanisms would be much more effective and enforceable in the area of NRTs than criminal ones. While fetal-egg use should not be banned, it should be regulated in order to ensure that this NRT is

groups in clinics rather than those in the wider population." See Caplan, *supra* note 55 at 73–74. See also Senoff, *supra* note 55.

⁹⁶ A member of Britain's Human Fertilisation and Embryology Authority has apparently commented that "we don't know the effects on a child produced through foetal tissue. They [sic] could be regarded as some sort of leper by others." See Mathes, *supra* note 12 at 12–13.

not abused. Licensing requirements would serve to protect both the health of the individual women donating the eggs and the interests of all Canadians. Accurate record-keeping would ensure, for example, that the limit of fertilising one egg per fetus (see below) is not surpassed. Similarly, accurate record-keeping would allow “fetal-egg children” to learn as much as possible about their genetic heritage.

In order to fulfil these requirements, both the licensed practitioners and licensors should report to a public body (perhaps the National Regulatory Commission suggested by the *Report*) on a regular basis.

Legally, the authority to legislate over NRTs, which may be considered either a health matter or a family law matter (or both), falls under provincial jurisdiction. Any criminal attempts to legislate in this area run the risk of being unconstitutional.

3. Only Women Who Undergo Elective Abortions, or Who Miscarry, May Consent to Donating Fetal Eggs for Reproductive or Research Purposes

I have argued in this article that the aborted fetus should be viewed as an extension of the aborting woman’s body; the fetal eggs should therefore be viewed as though they were taken from the woman’s own ovaries. The woman’s consent, and hers alone, is necessary in any and all fetal-egg use.

4. The Abortng Woman’s Consent to Donate Fetal Eggs Must Be Obtained Separately From, and at a Later Time Than, Her Decision to Abort

Although this two-step consent mechanism, which I describe in more detail earlier in this article, may in some cases be more formal than substantive, it is still a necessary measure to ensure that the woman’s consent is given as freely as possible.

5. The Number of Fetal Eggs Used in Assisted Reproduction Should Be Limited to One Per Fetus

While each fetus can potentially supply millions of viable eggs, it could be very hazardous to utilise a large number of eggs from the same fetus to impregnate different women. The demand for fetal eggs does not justify using *all* of the viable eggs that a single fetus may yield. Rather, diversity and health concerns dictate that for reproductive purposes, fetal eggs from a single fetus should be used in moderation.

I am recommending that the number be limited to one egg per fetus. Practitioners may fertilise more than one egg *ex utero*, but ultimately only one egg or fertilised egg derived from a single fetus may be implanted in a woman’s uterus. This number may be increased slightly if it can be shown that no genetic harm would result. An alternative approach would be to set the limit at twelve, which is also the maximum amount of sperm donations allowed per male donor.

6. *The Number of Fetal Eggs Used for Research Purposes May Be Unlimited*

The reasons for limiting the number of eggs per fetus in reproduction do not apply when the eggs are used in research. Allowing a large number of eggs from a single fetus to be used in research may lead to more information and possible cures for infertility, as well as other illnesses and diseases.

7. *Women Who Have Undergone Abortions May, In Some Cases, Be Allowed To Designate Recipients for Fetal Eggs*

Just as birth mothers may select adoptive parents for their children in open adoption, so too may aborting women donate fetal eggs to their designated recipients, if they so desire.

While mandatory counselling for both the donating woman and the recipient would safeguard against the possibility that a woman may be coerced into aborting, the decision to designate a recipient would ultimately be that of the woman.

IX. CONCLUSION

IN THIS ARTICLE, I strongly recommend that Canada legalise the use of fetal eggs in both reproduction and research. To date, very little has been written in this area. Both the Royal Commission's *Report* and Bill C-47 recommend banning the use of fetal eggs for all reproduction purposes, and for most research purposes. Both documents do so without providing any underlying rationale for their recommended prohibitions. As an ordinary "individual Canadian," for whom these documents purport to speak, I find their silence in this regard deeply unsatisfying.

Hence, one of my primary goals in this article has been to consider possible arguments for banning fetal-egg use. Ultimately, I conclude that none of them justify banning fetal-egg use. On the contrary, a number of factors, and especially Canada's high infertility rate, point to a real need for fetal eggs in both reproduction and research.

I have therefore recommended several policy initiatives which would enable all Canadian provinces to allow and regulate fetal-egg use. We will never be able to harness the powers of science; indeed, the NRTs continue to show us that science's capabilities are limitless. Researchers will continue to make new discoveries and to apply them in ways that affect our lives, whether we sanction these activities publicly or not. In the long run, it is much more preferable to permit this research to be done in the open, rather than to drive it underground by criminalising it. By enacting regulatory requirements, such as licensing, the provincial governments can ensure that the research is done properly and in a manner that is accountable to the Canadian public. Doing so will also ensure that all possible benefits resulting from the research are reaped by Canadians as soon as possible.

The discussion of fetal-egg use in this article demonstrates that the phrase “New Reproductive Technologies” is in many ways a misnomer. It gives the impression that the technologies should be the focal point of our attention, when in fact it is everything else about them that is controversial, namely, ethics, economics, family values, policy, regulation, and finally—once everything else has been ironed out—law. When all is said and done, the technologies themselves are relatively simple. What is much more complicated, and will be for years to come, is *how we choose to use them*.