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Legislating Respect: A Pro-choice Feminist Legal Analysis of Embryo Research
Restrictions in Canada

Maneesha Deckha

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LEGISLATING RESPECT: A PRO-CHOICE FEMINIST ANALYSIS OF EMBRYO RESEARCH RESTRICTIONS IN CANADA

*Maneesha Deckha**

This article investigates the impact of legislating respect and dignity for the embryo in vitro on the legal and cultural status of the embryo in utero. It evaluates the restrictions on embryo research in Canada's *Assisted Human Reproduction Act (AHRA)* to consider whether they should receive pro-choice feminist support. Specifically, the article explores whether it is possible for feminists to accord respect to the in vitro embryo, as the *AHRA* attempts to do, without jeopardizing support for abortion. The article canvasses the theoretical possibilities of this position by comparing the compatibility of feminist articulations of a right to abortion (bodily integrity and equality) with feminist arguments against the expansive use of embryos in research (commodification and exploitation). The article argues that it is logically compatible for feminists to promote "respect" and "dignity" for in vitro embryos while maintaining a pro-choice position on abortion. The article nevertheless cautions against feminist support for *AHRA* as it currently stands given that, on a practical basis, a feminist understanding of the *AHRA*'s restricted embryo research regime is difficult to achieve in the public sphere. The article explains why the more likely result for the public sphere will be an unqualified discourse of respect and dignity for embryos in general, which could then problematically revive the abortion debate and destabilize the non-personhood status of the in utero embryo. As a remedy, the article provides recommendations for how *AHRA* should be amended so as to better ensure that legislative restrictions on embryo research signal a legislative intent that respects women's reproductive autonomy.

Cet article étudie l'impact de légiférer sur la question du respect et de la dignité d'un embryon in vitro et sur les statuts juridique et culturel de l'embryon dans l'utérus. Il évalue les restrictions aux recherches sur les embryons prévues au Canada dans la *Loi sur la procréation assistée (LPA)* pour déterminer si elles doivent recevoir un soutien des pro-choix féministes. Plus précisément, l'article examine s'il est possible pour les féministes de respecter l'embryon in vitro, ce que tente de faire la *LPA*, sans mettre en péril le soutien à l'avortement. L'article examine les possibilités théoriques de cette position en comparant la compatibilité des articulations féministes d'un droit à l'avortement (intégrité corporelle et égalité) avec des arguments féministes contre l'utilisation large des embryons dans la recherche (marchandisation et exploitation). L'article soutient qu'il est logiquement compatible pour les féministes de promouvoir à la foi « respect » et « dignité » pour les embryons in vitro tout en conservant une position pro-choix en matière d'avortement. L'article met néanmoins en garde contre le soutien féministe pour la *LPA* sous sa forme actuelle étant donné que, sur le plan pratique, une compréhension féministe des restrictions sur les recherches sur les embryons prévues dans la *LPA* est difficile à réaliser dans la sphère publique. Cet article explique pourquoi le résultat le plus probable pour la sphère publique sera un discours sans réserve de respect et de dignité pour les embryons en général, ce qui pourrait alors s'avérer problématique en relançant le débat sur l'avortement et en déstabilisant le statut de non-personnalité de l'embryon dans l'utérus. Pour y remédier, l'article fournit des recommandations sur la façon dont la *LPA* doit être modifiée afin de mieux garantir que les restrictions législatives sur la recherche sur l'embryon reflètent une intention du législateur qui respecte l'autonomie reproductive des femmes.

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Introduction

Canada is one of the few countries worldwide without a specific piece of legislation directly regulating abortion.¹ When positioned along a global spectrum, Canada may be said to occupy an “extreme” position in its (dis)regard for the in utero embryo or fetus, and its (high) value for the integrity of women’s bodies and their reproductive lives.² But the abortion debate is not the only venue where questions and arguments regarding the moral status of the human embryo circulate. Embryonic stem cell research and the miracles it portends have caught the imagination of scientists, politicians, and the public alike, for reasons not the least of which involves the fate of in vitro embryos, which are vital to this form of stem cell research. Although this area is not as ubiquitously regulated as abortion, a substantial number of countries have passed legislation specifying the scope of embryonic stem cell research that they find acceptable. Canada is among these countries and, interestingly, as discussed below, has adopted a middle position when compared to its peers, generally permitting research on existing embryos under certain conditions, but not the creation of new ones.

While Canada’s tempered position in the debate may appear to be a sensible compromise, further query gives reason for pause. If the rationale for the midway position is indeed a desire to afford human embryo life some respect and dignity, it is a striking one since Canadian law has (1) held that the fetus and thus, presumably, the embryo, which is even further removed from the moment of birth, is not a person and therefore is denied the rights and ethical significance that that legal status entails;³ and (2) not acknowledged that embryos, while not persons, are nonetheless to be respected.⁴ A restrictive stem cell regime is understandable in jurisdictions where restrictive abortion regimes also exist, or where, if not personhood, there is at least some explicit legal recognition of the value of human embryonic life. It seems discordant in a country where pro-life dis-

¹ See Maneesha Deckha, “The Gendered Politics of Embryonic Stem Cell Research in the USA and Canada: An American Overlap and Canadian Disconnect” (2008) 16:1 Med L Rev 52 at 74, n 136.

² In making this observation about Canada’s position on the legality of abortion, I am mindful that serious impediments to accessing abortion, notwithstanding the permissive legal landscape, still exist. See Jocelyn Downie & Carla Nassar, “Barriers to Access to Abortion Through A Legal Lens” (2007) 15 Health LJ 143.

³ See *Winnipeg Child and Family Services (Northwest Area) v DFG*, 3 SCR 925, 152 DLR (4th) 193.

⁴ France is an example of the position that, although embryos are not persons, they deserve respect. See Stephanie Henneute-Vaucher, “Words Count: How Interest in Stem Cells Has Made the Embryo Available—A Look at the French Law of Bioethics” (2009) 17:1 Med L Rev 52 at 53-54.

course is not predominant in public discourse and the criminalization or even targeted regulation of abortion is not a live political issue.⁵

The main goal of this article is to investigate the extent and impact of such a discourse of respect and dignity for the embryo in the stem cell debate on the legal and cultural discourse surrounding the embryo when abortion and women's bodies are in issue. The paper is thus aimed at evaluating the current restrictions on embryo research in the *Assisted Human Reproduction Act*⁶ and whether they should receive pro-choice feminist support. Of course, whether the *AHRA* fortifies a pro-life position is but just one measure by which to calibrate the benefits of assistive reproductive technologies and embryo research in general. There are other reasons for pro-choice feminists to withhold or apply support that do not focus on the human embryo's moral status and that should be considered in any exhaustive feminist inquiry into the ethics of embryo research.⁷ I have narrowed my focus by considering whether pro-choice feminists in

⁵ See Bruce Campion-Smith, "Abortion Will Never Be Eliminated, Tory MP Says", *The Star* (26 April 2012), online: The Star <<http://www.thestar.com>>; Rachael Johnstone, "Framing Reproductive Rights: The Politics of Abortion Access and Citizenship in a Post-Morgentaler Era" (2010), online: Canadian Political Science Association <<http://www.cpsa-acsp.ca/papers-2010/Johnstone.pdf>> at 2-4.

⁶ SC 2004, c 2 [*AHRA*].

⁷ For example, some feminists have objected to the nature of the discourse surrounding reproductive technologies as focusing on the concerns of first-world citizens while, for the majority of the world's women, such technologies have been used to address concerns about population control. As Navsharan Singh puts it, "Whereas, in the West, dominant discourse around new reproductive technologies focused on the enhancement of women's choice, in the Third World, new reproductive technologies were clearly aimed at placing the fight against fertility 'on a war footing'" ("Of Victim Women and Surplus Peoples: Reproductive Technologies and the Representation of 'Third World' Women" (1997) 52 *Studies in Political Economy* 155 at 156). Other feminists have analyzed the way reproductive technologies reflect and reinforce heteronormative ideals of the nuclear family (see e.g. Angela Cameron, "Regulating the Queer Family: The *Assisted Human Reproduction Act*" (2008) 24:1 *Can J Fam L* 101), while others have critically questioned the fact that such technologies are accessible to, and used almost exclusively by, white people (see e.g. Dorothy E Roberts, "Race and the New Reproduction" (1996) 47:4 *Hastings LJ* 935). Others have impugned these technologies for their pathologization of disability (see e.g. Shelley Tremain, "Biopower, Styles of Reasoning, and What's Still Missing from the Stem Cell Debates" (2010) 25:3 *Hypatia* 577). Still others have objected to the exploitation of animals in the genesis and practice of embryo research (see e.g. Maneesha Deckha & Yunwei Xie, "The Stem Cell Debate: Why Should It Matter to Animal Advocates?" (2008) 1 *Stan J Animal L & Pol'y* 69). Finally, some feminists worry about government deference to scientific and medical authorities in these debates (see e.g. Marie Fox, "The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins" (2009) 17 *Fem Legal Stud* 333 at 341 [Fox, "Embryology Act"]). In the end, as Fox emphasizes, whether regulation is permissive or prohibitive of a certain form of research or assistive reproductive technology, feminist input should be at the foreground in deliberations (*ibid* at 342).

Canada, who *are* generally cautious about reproductive technologies due to the perceived threats these technologies pose to women's bodies, should welcome the embryo research restrictions the *AHRA* now provides. Given the strong feminist involvement at the early stages of lobbying for regulation of new reproductive technologies,⁸ should feminists view the current legislation as a victory in feminist advocacy on this issue? Or, instead, should these feminists be cautious about the *AHRA* restrictions on embryo research due to *AHRA*'s cohesion with pro-life views regarding the value and meaning of the human embryo?

Part I sketches the disconnect animating this query and provides some background on the debate surrounding embryonic stem cell research. Part II, drawing from government and media discourse, briefly sets out the various rationales for the restrictions on the embryo provisions and the shifting influence of feminist interpretations of a restricted embryo research regime.

This background being laid out, Part III begins to take up the main query of the article to explore whether it is possible for pro-choice feminists to accord respect to the in vitro embryo. This part canvasses the theoretical possibilities of this position by comparing the compatibility of feminist articulations of a right to abortion (bodily integrity, equality, etc.) with possible feminist arguments against the expansive use of embryos in research (commodification, exploitation, and the scientific instrumentalization of life in general). Part III then moves into a consideration of whether the level of "respect" and "dignity" for embryos ascertained earlier in Part II is logically compatible with liberal abortion regimes, such as the Canadian regime, and argues that it is.

With the theoretical possibilities charted of how feminist views on abortion may coexist with respect and dignity for the in vitro embryo, Part IV proceeds to explore the viability of a *feminist* understanding of a restricted embryo research regime permeating public consciousness, even though this understanding is theoretically possible. This part explains why the more likely result for the public sphere will be an *unqualified* discourse of respect and dignity for embryos in general, which could then problematically seep into abortion politics. Part IV revisits the discourse analysis in Part II to distill how public commentary about the *AHRA* fails to draw a sharp boundary between the in vitro and in utero embryos to assist the public in seeing the issues as distinct (such that giving respect to one would not entail giving respect to the other). The conclusion in Part IV is that pro-choice feminists need to be concerned with the embryocen-

⁸ Mavis Jones & Brian Salter, "Proceeding Carefully: Assisted Human Reproduction Policy in Canada" (2010) 19:4 *Public Understanding of Science* 420 at 421.

tric discourse generated by the public commentary about the *AHRA*'s embryo research restrictions and need to revisit their theoretical support for the statute in its current form in light of this contrary public reading. Part V concludes with recommendations of how the *AHRA* should be revised to align with a pro-choice feminist position and ensure that restrictions on embryo research are interpreted in a manner supportive of a woman's right to choose.

I. The Disconnect

Stem cells are cells that have the ability to regenerate and turn into, upon the correct signal, virtually every type of tissue and organ within the body.⁹ Scientists hope to use stem cells to cultivate stem cell lines that would generate an abundance of healthy and genetically compatible tissue to replace diseased or damaged tissue characterizing an array of human disorders. They also hope such research will enhance knowledge of these disorders and human development in general.¹⁰ *Embryonic* stem cells, as opposed to adult stem cells, are credited with having more research potential due to their unique capacities to turn into many types of tissue.¹¹

Embryonic stem cell research, however, is especially controversial because of the importance of the human embryo—a symbol caught in cultural politics over the origins and meaning of life, gender roles, and what it is to be human—which is destroyed in this research.¹² The debate over embryonic stem cell research thus involves deeply contested ethical claims, many animated by religious values that human embryos are legal and moral persons and thus should not be treated instrumentally, let alone destroyed.¹³ Religious voices have prominently opposed such re-

⁹ See Nancy E Snow, ed, *Stem Cell Research: New Frontiers in Science and Ethics* (Notre Dame: University of Notre Dame Press, 2003) at 198.

¹⁰ See Nancy E Snow, "Introduction: Stem Cell Research; New Frontiers in Science and Ethics" in *ibid.*, 1 at 4; Angela Campbell, "Ethos and Economics: Examining the Rationale Underlying Stem Cell and Cloning Research Policies in the United States, Germany, and Japan" (2005) 31:1 *Am J L & Med* 47 at 49; National Bioethics Advisory Committee, *Ethical Issues in Human Stem Cell Research*, vol 1 (Rockville: National Bioethics Advisory Commission, 1999) at 1-2; Kenneth J Ryan, "The Politics and Ethics of Human Embryo and Stem Cell Research" (2000) 10:3 *Women's Health Issues* 105.

¹¹ For an articulation of both views on the relative benefits of stem cells from embryos versus those from adults, see David Cameron, "Life, Death, and Stem Cells", *Paradigm* (Fall 2004) 14 at 18.

¹² See Janet L Dolgin, "Embryonic Discourse: Abortion, Stem Cells and Cloning" (2004) 19:3 *Issues L & Med* 203.

¹³ New research on mice embryos indicates the possibility, described by some at this stage as "speculative", of conducting embryonic stem cell research without destroying the human embryo (Nicholas Wade, "Scientists Devise New Stem Cell Methods to Ease

search while scientists, those interested in biotechnological enterprises, and some persons with disabilities have vocally supported it.¹⁴ An intermediate position between complete prohibition and complete support of all embryo research is to favour embryonic research carried out on *existing* embryos only, that is, those “left over” from in vitro fertilization procedures, since these embryos would very likely be discarded anyway.¹⁵ The religious and pro-life imprint of the debate is perhaps best elucidated by the American federal position under President George W. Bush, who blocked federal funds to create new embryos but allowed continuing work with existing ones because, for these, “a life and death decision has already been made.”¹⁶ The complexity of the issue materializes, however, when one realizes that many religious and pro-life Republicans support embryonic stem cell research.¹⁷

Canada’s legislated response to this difficult ethical debate came in March 2004 through the enactment of the *AHRA*, which is generally intended to facilitate responsible reproduction by promoting human health, safety, and dignity.¹⁸ The *AHRA* governs a wide range of practices and procedures, prohibiting things like animal-human chimeras and hybrids, commercial surrogacy, and sex selection, while regulating other assisted

Concerns”, *The New York Times* (16 October 2005), online: The New York Times <<http://www.nytimes.com>>).

¹⁴ See generally Brent Waters & Ronald Cole-Turner, eds, *God and the Embryo: Religious Voices on Stem Cells and Cloning* (Washington, DC: Georgetown University Press, 2003); Jean Reith Schroedel, *Is the Fetus a Person? A Comparison of Policies Across the Fifty States* (Ithaca: Cornell University Press, 2000); John Cloud, “Bush’s No-Win Choice: Why the President’s Stem-Cell Decision Could Define His Term” *Time* 158:3 (23 July 2001) 22.

¹⁵ See Arthur L Caplan & Pasquale Patrizio, “The Art of Medicine: The Beginning of the End of the Embryo Wars”, *The Lancet* 373:9669 (28 March 2009) 1074 at 1075.

¹⁶ Dolgin, *supra* note 12 at 243.

¹⁷ See *ibid* at 250-51.

¹⁸ *AHRA*, *supra* note 6, s 2. Guidelines from Canada’s main funding agencies (Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, *Tri-council Policy Statement: Ethical Conduct for Research Involving Humans*, 2d ed, December 2010, online: Panel on Research Ethics <<http://www.pre.ethics.gc.ca>> [*TCPS*]) also have an impact on federally funded embryo research; they predated the legislation and continue today. Françoise Baylis and Matthew Herder explain the interrelation between the *TCPS* and the *AHRA*: “Where the *TCPS* and the *AHR Act* overlap, the *AHR Act* takes precedence; where the *AHR Act* is silent, the *TCPS* sets the standard for federally-funded research—that is, all research conducted by individuals or in institutions that receive funding from one or more of the federal research Agencies” (“Policy Design for Human Embryo Research in Canada: A History (Part 1 of 2)” (2009) 6:1 *Bioethical Inquiry* 109 at 110).

human reproductive practices used in fertility clinics and beyond.¹⁹ With respect to stem cell research, the *AHRA* permits research on *existing* embryos, but only where the research occurs during the first fourteen days of the embryo's life, and performed with the written consent of the gamete donor.²⁰ The deliberate creation of embryos for purposes not related to reproduction is prohibited.²¹ An overall assessment indicates that Canada has adopted an intermediate position by permitting research on *existing* embryos, but not the *creation* of embryos purely for research.²² That only

¹⁹ *AHRA*, *supra* note 6, ss 5-9. Certain provisions were successfully challenged in 2010 on federalism grounds in a reference to the Supreme Court of Canada brought by the Quebec government (*Reference Re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 [*Re AHRA*]). Quebec had objected to the jurisdiction of the federal government to regulate in what should properly be seen as health-related regulation (provincial) rather than a criminal law area (federal). The provisions invalidated through the reference do not affect the discussion here.

²⁰ *AHRA*, *supra* note 6, ss 5(1)(b), 5(1)(d), 8. Currently, the provisions impacting embryo research in section 5 read:

5. (1) No person shall knowingly ...

(b) create an *in vitro* embryo for any purpose other than creating a human being or improving or providing instruction in assisted reproduction procedures;

(c) for the purpose of creating a human being, create an embryo from a cell or part of a cell taken from an embryo or foetus or transplant an embryo so created into a human being;

(d) maintain an embryo outside the body of a female person after the fourteenth day of its development following fertilization or creation, excluding any time during which its development has been suspended ...

²¹ See *ibid*, s 10.

²² The nature of legislation around the world governing embryonic research is complex. Three general positions exist, however, regarding the use of embryonic stem cells for research purposes: permissive, restrictive, and prohibitive. Nations that adopt a "permissive" position, such as Australia (*Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth), amending *Prohibition of Human Cloning Act 2002* (Cth), *Research Involving Human Embryos Act 2002* (Cth)), the United Kingdom (*Human Fertilisation and Embryology Act 1990* (UK), c 37; *Human Fertilisation and Embryology (Research Purposes) Regulations 2001* (UK), SI 2001/188), Belgium (*Loi relative à la recherche sur les embryons in vitro* (Belg) of 11 May 2003, MB, 28 May 2003, online: <http://www.staatsblad.be>), South Korea (*Bioethics and Safety Act* (S Kor), Act No 9100, 6 December 2008), Spain (*Ley 14/2007, de 3 de julio, de Investigación biomédica* [Law 14/2007, of 3 July 2004, on Biomedical Research] (Spain), (BOE 2007, 159)), Sweden (*Lag om genetisk integritet* [Law on Genetic Integrity] (Swed), SFS 2006:351), India (Department of Biotechnology & Indian Council of Medical Research, *Guidelines for Stem Cell Research and Therapy* (New Delhi: Director General, Indian Council of Medical Research, 2007)), and Israel (*Prohibition of Genetic Intervention Law* (Isr), 5759-1999, SH No 1697, 47 as amended by *Prohibition of Genetic Intervention (Human Cloning and Genetic Change in Multiplying Cells) (2nd Amendment) Law* (Isr), 5770-2009, SH No 2212, 232), allow the use of existing embryos

carefully circumscribed uses may be made of these perceived “surplus” embryos (i.e., those discarded after in vitro fertilization) is suggestive of the *AHRA*’s acceptance of the principle that the human embryo is due some form of respect and retains a level of dignity and moral status.²³ The next part uncovers the reasons behind this legislative stance.

for research, hESC lines derived from supernumerary IVF embryos, and the creation of human embryos for research use, by methods such as “therapeutic cloning” by somatic-cell nuclear transfer. Many other countries adopt a prohibitive position by severely restricting or outright banning the use of human embryos for research, such as Germany (*Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen* [*Stammzellgesetz*] [*StZG*] [*Stem Cell Act*] (Ger), 28 June 2002, BGBl I, online: Gesetz im Internet <<http://www.gesetze-im-internet.de>>), and Italy (*Legge 19 febbraio 2004, n 40* (It), in GU 24 February 2004, n 45 (*Norme in materia di procreazione medicalmente assistita* [Rules on Medically Assisted Procreation])). Further, several European countries signed the *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine* (4 April 1997, Eur TS 164), prohibiting the creation of human embryos for research purposes and for procurement of human embryonic stem cells. An intermediate position of the two allows for the utilization of human embryonic stem cell lines derived from supernumerary IVF embryos for research, but expressly prohibits the creation of embryos specifically for research purposes. The regulations in Canada, Brazil (*Lei No 11.105, de 24 de Março de 2005* [Law No 11.105, of 24 March 2005] (Braz), DOU de 28.3.2005), Denmark (*Lov nr 274 af 4.9.2011 om kunstig befrugtning i forbindelse med lægelig behandling, diagnostic og forskning m.v.* [Law No 274 of 4 September 2011 of Medically Assisted Procreation] (Denmark), as amended by *Lov nr 593 af 14.6.2011 om videnskabetisk behandling af sundhedsvidenskabelige forskningsprojekter* (Denmark)), and France (*Loi n° 2011-814 du 7 juillet 2011 relative à la bioéthique*, JO, 8 July 2011, 11826), Netherlands (Stb 2002, 359 (Neth) (*Embryouet* [The Embryo Act])), Norway (*Lov om humanmedisinsk bruk av bioteknologi m.m.* [Biotechnology Act] (Norway), 5 December 2003, No 100, as amended by *Lov om endringer i bioteknologiloven (preimplantasjonsdiagnostikk og forskning på overtallige befruktete egg)* (Norway), 15 June 2007, No 31), Switzerland (SR 101, AS 947 (2005), 15 February 2005 (Switz) (*Bundesgesetz über die Forschung an embryonalen Stammzellen* [*Stammzellenforschungsgesetz*] [*StFG*] [The Stem Cell Research Act]), Iran (*Ethical Guidelines for Research on Gametes and Embryos* of 2005), Algeria (Ministry of Health, Directive No 300 of 12 May 2001), and Morocco (Decree No 2.01.1643 of 2 January 2003) are examples of this position. See Rosario M Isasi & Bartha M Knoppers, “Mind the Gap: Policy Approaches to Embryonic Stem Cell and Cloning Research in 50 Countries” (2006) 13:1 *Eur J Health L* 9; DG Jones & CR Towns, “Navigating the Quagmire: The Regulation of Human Embryonic Stem Cell Research” (2006) 21:5 *Human Reproduction* 1113; A Elstner et al, “The Changing Landscape of European and International Regulation on Embryonic Stem Cell Research” (2009) 2 *Stem Cell Research* 101; Campbell, *supra* note 10. For visual representations, see The Hinxtion Group, *World Stem Cell Policies*, online: The Hinxtion Group: An International Consortium on Stem Cells, Ethics & Law <<http://www.hinxtongroup.org>>; UK Stem Cell Initiative, “Global Positions in Stem Cell Research”, online: Department of Health <<http://www.advisorybodies.doh.gov.uk/uksci/global/index.htm>>; Australian Stem Cell Centre, “Global Regulation of Human Embryonic Stem Cell Research”, online: Australian Stem Cell Centre <<http://www.stemcellcentre.edu.au>>.

²³ See Deckha, *supra* note 1 at 72.

II. Embryonic Stem Cell Research Rationales—A Discourse of Respect and/or Dignity or Something Else?

An examination of the long legislative history preceding the enactment of Canada's assisted human reproduction legislation identifies more than one possible source of support for the restrictions on the embryo research provisions found in the *AHRA*. The *AHRA*'s early history reveals the prominence of feminist arguments and critiques, which were focused on the implications of new reproductive technologies for women's health.²⁴ Feminists drew particular attention to the many risks faced by women who underwent in vitro fertilization (IVF) procedures.²⁵ Feminists demanded that the government, not just the medical and research communities, take control of the regulation of these procedures in order to ensure women's safety.²⁶ On the subject of human embryo research, many feminists articulated a concern that, as the need for embryos (and, by implication, women's eggs) with which to conduct research increased, exploitation of women's bodies would follow.²⁷

²⁴ See generally Diana Backhouse & Maneesha Deckha, "Shifting Rationales: The Waning Influence of Feminism on Canada's Embryo Research Restrictions" (2009) 21:2 *CJWL* 229 at 234-37.

²⁵ For an in-depth discussion of the risks to women's health posed by in vitro fertilization procedures, see Kay Lazar, "Medical Miracle Turns Nightmare: Wonder Drug for Men Alleged to Cause Harm in Women", *Boston Herald* (22 August 1999) 1; Judy Norsigian, "Egg Donation for IVF and Stem Cell Research: Time to Weigh the Risks to Women's Health", *DifferenTakes*, Issue Paper No 33, (Spring 2005), online: Pop Dev <<http://popdev.hampshire.edu>>; US, *Human Cloning and Embryonic Stem Cell Research After Seoul: Examination Exploitation, Fraud and Ethical Problems in the Research: Hearing Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform*, 109th Cong (Washington, DC: United States Government Printing Office, 2006) at 84 ff. (Dr Diane Beeson) [*Human Cloning Hearing*]; Renate Klein, "Dangers of Harvesting Human Eggs Clouded in Cloning Debate", *The Canberra Times* (8 November 2006); "IVF Treatment Killed my Daughter", *BBC News* (30 June 2005), online: BBC News <<http://news.bbc.co.uk/>>; Letter from Suzanne Parisian (February 2005) in *Human Cloning Hearing*, *supra* note 25 at 100 ff.

²⁶ See Éric Montpetit, Francesca Scala & Isabelle Fortier, "The Paradox of Deliberative Democracy: The National Action Committee on the Status of Women and Canada's Policy on Reproductive Technology" (2004) 37:2 *Policy Sciences* 137 at 144.

²⁷ See e.g. Penni Mitchell, "Keep your Hands Off Our Ovaries!" *Herizons* (Fall 2006) 10 (discussing the dangers of allowing fresh, as opposed to frozen, human embryos to be used for research purposes). Summing up the position of Professor Abby Lippman, a feminist expert on reproductive technology, Mitchell notes that allowing research on fresh embryos is "a move not envisioned when Canada's Assisted Human Reproduction Act was passed in 2004," and that "the relaxing of Canada's scientific rules on human embryo research may mark the beginning of a slippery slope that could put young women's health at risk in order to provide raw materials, including human eggs, for embryonic stem cell research" (*ibid* at 10). See also the project Hands Off Our Ovaries,

Even in the early stages of the assisted human reproduction debate, feminist concern for women's health was not the sole basis of overall opposition to this research. The 1993 report of the Royal Commission on New Reproductive Technologies (Commission), *Proceed with Care*, largely framed the acceptability of human embryo research in terms of the moral status of the embryo and respect for human life.²⁸ This is interesting as the Commission was appointed by the government in response to feminist lobbying, and feminist voices are considered to be influential throughout the Commission's report, often referred to in the literature as the Baird Report after the Commission's (embattled) chair.²⁹ Despite the great deal of attention paid by the Commission to issues of women's reproductive health and freedom, the section entitled "The Ethical Uses of Human Zygotes in Research" ultimately sought to assess what research, if any, would be compatible with the level of respect owed to the embryo by virtue of its connections to the human community.³⁰ *Proceed with Care* emphasized the diversity of Canadians' views on the moral status of the embryo.³¹ It recognized important questions, such as the distinction between in vitro and in utero embryos, and acknowledged that affording a particular status to the in vitro embryo might affect the status of the in utero embryo.³² In the end, the Commission stated its view that "the moral status of the embryo before day 14 after fertilization does not preclude research under certain defined conditions."³³ The fourteenth day reflects the scientific consensus that prior to the fourteenth day individuation has not occurred.³⁴ The Commission defended its view as "a morally acceptable

online: <<http://handsoffourovaries.com/>>. According to Diane Beeson, member of the Board of Directors of Hands Off Our Ovaries, "there have been too many instances of coercion and deception, and violations of informed consent. ... Left uncontrolled, embryonic stem cell (cloning) research demands will place undue burdens on young, poor women" (cited in Mitchell, *supra* note 27).

²⁸ Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol 2 (Ottawa: Communications Group, 1993) at 631-38 (Chair: Patricia Baird) [*Proceed with Care*].

²⁹ See e.g. Annette Burfoot, "In-appropriation: A Critique of *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*" (1995) 18:4 *Women's Studies International Forum* 499; Jones & Salter, *supra* note 8 at 423-24. Jones and Salter also discuss how and why the Commission "was plagued with problems from the outset" and how the presence and personality of the chair, Patricia Baird, contributed to the situation (*ibid* at 424-25).

³⁰ *Proceed with Care*, *supra* note 28 at 636.

³¹ *Ibid* at 631.

³² *Ibid* at 608.

³³ *Ibid* at 632.

³⁴ As Shai Lavi writes, "This regulation is based on the scientific finding that up to that stage of the embryo's development individuation has not yet taken place and the em-

compromise in a pluralistic society.”³⁵ In choosing to ascribe significance to the fourteenth day in the eventual statute, Canada follows several other Western liberal democracies.³⁶ It is critical to note, however, that Canada’s counterparts regulate abortion in ways that Canada does not.³⁷

Despite the Commission’s attention to the “moral status of the embryo” line of reasoning as a basis of support for restricted embryo research regimes, this was by no means the dominant argument made during the early stages of debate in Canada. It was not until the discovery of a technique to isolate and grow stem cells in 1998 by Dr. James Thomson that religious and pro-life arguments in defence of the embryo began to come to the fore.³⁸ Thomson’s discovery initiated the almost immediate takeoff of embryonic stem cell research (ESCR)—research that entails the destruction of the embryo. It was not long before religious and pro-life groups began to outnumber those feminist organizations being invited to speak during government stakeholder consultations on ESCR.³⁹ In De-

bryo may divide into twins” (“From Bioethics to Bio-optics: The Case of the Embryonic Stem Cell” (2008) 4:3 *Law, Culture and the Humanities* 339 at 349.

³⁵ *Proceed with Care*, *supra* note 28 at 635.

³⁶ Although the policies on the use of embryonic stem cells vary between nations, many share the same maximum fourteen-day time limit to their use: Australia, Belgium, the United Kingdom, Denmark, Norway, Sweden, and Canada. For the relevant legislation see *supra* note 22.

³⁷ Under the UK *Abortion Act 1967* (c 87, s 1), the accessibility of an abortion is restricted to before the twenty-fourth week if continuance of the pregnancy involves greater risk than termination. The time limit is lifted if it is “necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman,” and if there is a substantial risk the child will be severely handicapped due to physical or mental abnormalities. Australia shares similar legislation to the United Kingdom, limiting performance to the twenty-fourth week. After the twenty-fourth week, the *Abortion Law Reform Act 2008* ((Cth), s 5(2)) states an abortion will be administered only if the medical practitioner believes it is appropriate in consideration of medical, physical, psychological, and social circumstances. In Belgium, article 350 of the *Code pénal* (as amended by *Loi relative à l’interruption de grossesse, modifiant les articles 348, 350, 351 et 352 du Code pénal et abrogeant l’article 353 du même Code* (Belgium), MB, 3 April 1990, 6379) restricts abortion to the twelfth week if the pregnancy causes a “state of distress” (*ibid* [translated by author]) for the woman. The limit is lifted if continuation poses serious risk to the woman or if the fetus has an extremely serious and incurable disease. Canada currently has no law restricting abortion.

³⁸ See John A Robertson, “Embryo Stem Cell Research: Ten Years of Controversy” (2010) 38:2 *Journal of Law, Medicine and Ethics* 191 at 192.

³⁹ From May to November 2001, the House of Commons Standing Committee on Health conducted forty-seven meetings and consulted with a range of associations and individuals who had been invited to participate in the deliberations on draft assisted human reproduction legislation. The number of religious or pro-life organizations invited to speak during these consultations outnumbered feminist groups. See “Appendix B: List of Witnesses” in House of Commons, Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) at 47

cember 2001, after conducting extensive consultations with Canadians on the subject of assisted human reproduction, the House of Commons Standing Committee on Health issued a report entitled *Building Families*,⁴⁰ which recommended that embryo research “be strictly regulated and limited to using only embryos created but not used for IVF.”⁴¹ Underlying this recommendation was the principle of “respect for human individuality, dignity and integrity”⁴²—an overarching consideration used by the committee to determine that the embryo has “a particular status” and deserves “a measure of respect and protection ... based on its potential for personhood.”⁴³ Interestingly, the committee justified its view that some embryo research *should* be allowed on the basis of its belief that continued embryo research was necessary to ensure the health of the women being treated by fertility techniques.⁴⁴

During the parliamentary debates on the assisted human reproduction legislation, however, the issue of concern for women’s health and safety was all but invisible. These debates revealed an aggressive pro-life political agenda on the part of many Canadian Alliance and Liberal Party members whose voices dominated the debates.⁴⁵ The arguments presented in the House were indistinguishable from those that have been made for decades by the anti-abortion lobby.⁴⁶ This is of particular concern given that the intention of Canada’s Parliament is often discerned, at least in part, by making reference to Hansard debates.⁴⁷ A review of these debates would suggest that any restrictions on human embryo research found in

(Chair: Bonnie Brown), online: Parliament of Canada <<http://cmte.parl.gc.ca/Content/HOC/committee/371/heal/reports/rp1032041/healrp01/07-for-e.htm>> [*Building Families*].

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 15.

⁴² *Ibid.*

⁴³ *Ibid* at 5.

⁴⁴ *Ibid* at 15.

⁴⁵ See generally Backhouse & Deckha, *supra* note 24.

⁴⁶ See *ibid* at 256.

⁴⁷ See e.g. *Rizzo v Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 35, 154 DLR (4th) 193 (where Justice Iacobucci, writing for the Court, stated: “[A]lthough the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation”). Justice Iacobucci referred to *R v Morgentaler* ([1993] 3 SCR 463 at 484, 107 DLR (4th) 537), where Justice Sopinka stated:

[U]ntil recently the courts have balked at admitting evidence of legislative debates and speeches. ... The main criticism of such evidence has been that it cannot represent the “intent” of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

the *AHRA* are the result of a moral concern for the embryo's so-called right to life, no matter what the circumstances and to the subordination of all other interests.⁴⁸

The declining presence of feminist concerns about reproductive technologies in general, compared to the rising visibility of voices expressing anxiety over embryo treatment in the legislative deliberations, was also reflected in the communication strategy of the federal government. Between May 2001 and March 2004, when the *AHRA* became law, Health Canada issued a number of press releases providing justification for the *AHRA*'s provisions. Health Canada consistently appealed to the legislation's two major objectives. First, Health Canada emphasized that the legislation seeks to protect the health and safety of Canadians who use the technologies.⁴⁹

Second, Health Canada asserted that the *AHRA* prohibits those activities deemed ethically "unacceptable" by Canadians and creates a regulatory framework for other assisted human reproduction technologies.⁵⁰ Health Canada was careful to single out embryo research from the array of technologies at stake to declare that the *AHRA* does not promote embryo research but rather "establishes clear boundaries ... as to what constitutes acceptable research."⁵¹ The government did not provide any indication of what grounds make some embryo research ethically "unacceptable", nor did the "moral status of the embryo" argument (or discussion thereof) arise anywhere in these documents. Ultimately, the *AHRA* was justified as a Canadian approach to the issues at stake, and its provisions were said to enjoy widespread support among Canadians.⁵² While there

⁴⁸ See Backhouse & Deckha, *supra* note 24 at 252 ff.

⁴⁹ Health Canada, "Frequently Asked Questions", online: Health Canada <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/faq/index_e.html>; Health Canada, "Health and Safety of Canadians" (2004), online: Health Canada <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/safety-secure_e.html>; Health Canada, "A Chronology of the *Assisted Human Reproduction Act*", online: Health Canada <<http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/general/chronolog-eng.php>>.

⁵⁰ See *ibid.*

⁵¹ Health Canada, "Research Involving the *In Vitro* Embryo, 2004", online: Health Canada <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/research-recherche_e.html>.

⁵² See Françoise Baylis, "The Regulation of Assisted Human Reproductive Technologies and Related Research: A Public Health, Safety and Morality Argument", Expert Report (August 2006) at 12, 32, online: <http://tesla.cc.umanitoba.ca/chrr/images/stories/AHR_expert_Aug_11_2006_FINAL.pdf>; Treasury Board of Canada Secretariat, "2010-11 Main Estimates", online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca>>; Assisted Human Reproduction Canada, "2008 Summer Newsletter", online: Assisted Human Reproduction Canada <<http://www.ahrc-pac.gc.ca>>; Nicole E Kopinski, "Human-Nonhuman Chimeras: A Regulatory Proposal on the Blurring of Species Lines" (2004) 45 BCL Rev 619 at 645-49; Timothy Caulfield & Tania Bubela, "Why a

may well be a consensus among Canadians in terms of the final *outcome* (i.e., a restrictive embryo research regime), the two primary lines of reasoning underlying the support for this outcome are in stark contrast. Unfortunately, the vaguely phrased support for the *AHRA*'s embryo research provisions provided by Health Canada makes it difficult to decipher the true basis for the restrictions.

Despite the government's lack of reference to the moral status of the embryo, the dominant presence of pro-life discourse in the later stages of the assisted human reproduction debate was not lost on the media. Canadian newspapers interpreted the *AHRA*'s provisions as a "compromise" position—meant to appease (as far as possible) Canada's pro-life movement while simultaneously taking care not to alienate the Canadian science and research community.⁵³ A compromise position on this basis is particularly striking, as serious legal and political contemplation of pro-life arguments is widely recognized to be something relegated to Canada's past.⁵⁴ It is perhaps unsurprising, then, that those media reports that made reference to the "human dignity" and "respect for human life" arguments in defence of restricted embryo research did so with skepticism.⁵⁵ These reports were quick to point out the remarkable similarities between these arguments, made in the *in vitro* context, and those that have long appeared legally settled in the *in utero* context.⁵⁶ A series of articles in the *National Post* closely followed, and poked fun at, the most explicit and outrageous anti-abortion arguments levelled in Parliament by a group of particularly vocal pro-life members.⁵⁷ If anything, media reports appeared

Criminal Ban? Analyzing the Arguments Against Somatic Cell Nuclear Transfer in the Canadian Parliamentary Debate" (2007) 7:2 *The American Journal of Bioethics* 51 at 54; *Re AHRA*, *supra* note 19 at para 249, citing *Proceed with Care*, *supra* note 28 at 140.

⁵³ See e.g. Michael Citrome, "Stem Cell Law Restrains Research", *The [Montreal] Gazette* (17 April 2004) J5; "A Careful Advance in Medical Science", *Times-Colonist* (30 October 2003) A10 ["A Careful Advance"]; Kim Lunman, "Senate Passes 'Historic' Bill on Reproductive Technology", *Globe and Mail* (12 March 2004) A7.

⁵⁴ See e.g. Raymond Tatalovich, *The Politics of Abortion in the United States and Canada: A Comparative Study* (Armonk, NY: ME Sharpe, 1997). More recently, there has been concern that Prime Minister Harper's refusal to fund abortions as part of the G8 plan would re-open the abortion debate that has been long settled. See e.g. Mike Blanchfield, "Harper Defends Tories' G8 Abortion Stand, Says Canada Can Fund Other Projects", *CityTV* (28 April 2010), online: CityTV <<http://www.citytv.com>>.

⁵⁵ See Colby Cosh, "The Real Threat to Freedom of Choice", *National Post* (11 June 2004) A1.

⁵⁶ "A Careful Advance", *supra* note 53; Cosh, *supra* note 55; Reginald Stackhouse, "Nothing to Fear but Fear Itself", *The Globe and Mail* (8 September 2003) A15; Diane Irving, "Embryos", Letter to the Editor, *National Post* (1 March 2003) A19; Timothy Caulfield, "Give Stem-Cell Research a Chance", *The Globe and Mail* (20 June 2003) A15.

⁵⁷ Bill Curry, "Vote on Human Cloning Bill Delayed", *National Post* (4 October 2003) A22. That this observation was made in the *National Post*, a paper known for its social con-

to be more sympathetic to the position of scientists who had advocated less stringent research restrictions.⁵⁸

Neither the parliamentary debates nor related media reports addressing the *AHRA* revealed to Canadians that the embryo protections located in Canada's assisted human reproduction legislation are founded on values *apart* from those promoted for decades by the anti-abortion lobby. The principles of "human dignity" and "respect for human life" appear either to retain strong pro-life associations or to remain largely unpacked within Canadian consciousness. While this tenor of the debates and reports preceding the *AHRA*'s enactment is of concern, it is still possible for feminists to embrace the statute on the original, feminist terms that had prompted the Royal Commission on New Reproductive Technologies in the first place. But would such an embrace carry adverse consequences for a pro-choice position? Part III begins to provide an answer. It canvasses the possibility of housing feminist respect for in vitro embryo life under some other feminist principle that does not conflict with the principles of bodily autonomy and equality that matter to pro-choice actors.

III. "Respecting" Embryos and Abortion Rights—Theoretically Possible?

Many feminist arguments in favour of reproductive rights, including abortion, frame these rights in the language of choice based on the principles of equality, liberty, and bodily integrity.⁵⁹ Legal abortion services are positioned as crucial within these arguments for women to experience full and equal individuation, personhood, and citizenship.⁶⁰ Rarely is the legal or moral status, or both, of the embryo or fetus recognized in these argu-

servatism, is telling of the widespread perception that pro-life abortion arguments are outdated in Canada. For more on the conservative slant of the *National Post*, see Robert A Hackett & Scott Uzelman, "Tracing Corporate Influences on Press Content: A Summary of Recent NewsWatch Canada Research" (2003) 4:3 *Journalism Studies* 331

⁵⁸ See e.g. Citrome, *supra* note 53; Stackhouse, *supra* note 56; Irving, *supra* note 56; Caulfield, *supra* note 56.

⁵⁹ See e.g. Melanie Randall, "Pregnant Embodiment and Women's Autonomy Rights in Law: An Analysis of the Language and Politics of *Winnipeg Child and Family Services v. D.F.G.*" (1999) 62:2 *Sask L Rev* 515; Elizabeth Reilly, "The 'Jurisprudence of Doubt': How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty" (1998) 14:4 *JL & Pol* 757; Reva B Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression" (2007) 56:4 *Emory LJ* 815; Reva B Siegel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions" [2007] 3 *U Ill L Rev* 991 [Siegel, "New Politics"]; Dolgin, *supra* note 12.

⁶⁰ See Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (New York: Routledge, 1995) at 33; Elisabeth Porter, "Abortion Ethics: Rights and Responsibilities" (1994) 9:3 *Hypatia* 66 at 78.

ments, with many feminists writing against the rise in visual technologies that encourage the public to view the fetus as a free-floating entity separate from a woman's body.⁶¹

In addition to this type of rights-based feminist pro-choice scholarship, a history also exists of feminist pro-choice arguments that include the embryo or fetus as a separate being due some sort of advertence or regard. While not explicitly framed in the terms of "respect" or "dignity", these pro-choice arguments accord the fetus some significance as an entity whose fate feminists should consider. A classic version of this type of argument is found in Judith Jarvis Thomson's influential essay "A Defense of Abortion", which allows personhood to the fetus at the outset.⁶² Thomson sought to defuse anti-choice arguments that fetuses are persons by conceding this point for the sake of argument and then demonstrating why the value of liberal autonomy still requires the recognition of a woman's right to abort. Newer arguments that acknowledge or permit the beingness of the fetus depart from classic liberal articulations of autonomy to emphasize the fetus's relationality with the mother and thus use relational values to defend a pro-choice position. How these newer arguments arrive at the conclusion that abortion is an ethical outcome and should be legal will be instructive for our purposes in considering how respecting or ascribing dignity to the in vitro embryo does not undermine a pro-choice position.

A. *Feminist Pro-choice Arguments that Ethically Advert to the Embryo*

Stimulated in part by a desire to avoid the stalemate over abortion politics that permeates the United States due to entrenched and dichotomous pro-life and pro-choice positions, some feminists have approached the issue from another angle. This approach is exemplified in arguments that reject the rights-based model and instead focus on the values of care, nurturance, need, and responsibility. Critiques of rights-based approaches are skeptical that justifications for abortion located in the language of property, privacy, and even equality can capture the social nexus of multiple elements—family and work pressures, cultural and religious traditions, class identity, social constructions of sexuality—that impact a woman's decision to become and stay pregnant.⁶³ "Reconceptualizing re-

⁶¹ See e.g. Cornell, *supra* note 60 at 47-49.

⁶² Judith Jarvis Thomson, "A Defense of Abortion" in Joel Feinberg, ed, *The Problem of Abortion*, 2d ed (Belmont, CA: Wadsworth, 1984) 173.

⁶³ See Porter, *supra* note 60 at 78. For a more in-depth discussion of pro-choice feminist arguments that are grounded in relational-social nexus perspectives rather than autonomy-equality ones, see also Janet Farrell Smith, "Rights-Conflict, Pregnancy and Abortion" in Carol Gould, ed, *Beyond Domination: New Perspectives on Women and Philoso-*

productive rights” through this social nexus is meant to avoid the pitfalls of the ideology of the “unencumbered liberal citizen.”⁶⁴

These “social nexus” approaches are moved less by formalistic rights language than by the pursuit of non-oppressive relationships and conditions for women within their particular community contexts. As such, these approaches are better positioned to focus on a full range of reproductive freedoms (not just abortion) and demonstrate a “deep commitment to structural change encompassing imperialism, racism, poverty and sexism” that influences particular ideologies of motherhood.⁶⁵ As racialized feminists have pointed out, for women marginalized by their race, (dis)ability, and class, their reproductive struggles may lie more in avoiding state sterilization programs rather than in accessing abortion services.⁶⁶ Arguments for reproductive choice that rely on the liberal language of “my body is my property” may too easily place the focus on the white, middle-class rights claimant whose primary concern may be the legality of abortion, rather than on non-elite women and the “material conditions of poverty and oppression restricting their choices.”⁶⁷

In addition to better representing the breadth of reproductive concerns, the focus on context, community, and material needs has brought the fetus more to the foreground than standard equality, liberty, and bodily integrity rights articulations. For example, Joan Williams and Shauna Shames make the case for reproductive choice through a child-centred paradigm. They argue that access to abortion allows women to make the best decisions about responsible child rearing, given the economic costs of motherhood and the inability of many single women to support children.⁶⁸ They discuss women’s hopes to be effective mothers, supported by sufficient resources for high quality care and nurturance. Given prevailing socio-economic conditions affecting and marginalizing nonaffluent women

phy (Totowa: Rowman & Allanheld, 1984) 265; Alison Jaggar, “Abortion and a Woman’s Right to Decide” in Carol C Gould & Marx W Wartofsky, eds, *Women and Philosophy: Toward a Theory of Liberation* (New York: GP Putnam’s Sons, 1976) 347; Elizabeth Kingdom, *What’s Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1991); Elisabeth J Porter, *Women and Moral Identity* (North Sydney: Allen & Unwin, 1991).

⁶⁴ Porter, *supra* note 60 at 71.

⁶⁵ Rashmi Luthra, “Toward a Reconceptualization of ‘Choice’: Challenges by Women at the Margins” (1993) 13:1 *Feminist Issues* 41 at 52.

⁶⁶ See *ibid*; Dorothy E Roberts, “Racism and Patriarchy in the Meaning of Motherhood” (1993) 1:1 *Am U J Gender Soc Pol’y & L* 1.

⁶⁷ *Ibid* at 32.

⁶⁸ “Mothers’ Dreams: Abortion and the High Price of Motherhood” (2004) 6:4 *U Pa J Const L* 818 at 818-29.

(“family-hostile workplace”,⁶⁹ lack of health care, poor maternity leave provisions, living wage), supportive conditions are not regularly available. This makes the ability to terminate a pregnancy critical to prevent mothering when adequate supports are lacking.⁷⁰ This line of pro-choice reasoning is clearly contextual and focused on women’s desire to act in the best interests of children.⁷¹ At the same time, this analysis dissociates itself from the adversarial, individualistic, and abstract orientation said to characterize rights-based models in order to consider the relationships that women are striving to create, including those with a current fetus.

These “social nexus” examples indicate that it is possible for feminists to grant ethical consideration to fetuses without abandoning a pro-choice position. It is even possible for this ethical consideration to reach the level of personhood. More to the point, thinking about abortion ethics need not be a conflict of two rights asserted by individualist rights claimants, but instead could be a relational inquiry into the social, political, economic, and cultural conditions that structure women’s decision making around having children and the need to stop the development of the growing embryos and fetuses inside them. I would like to be clear that I am not advocating here that these approaches that give more status to embryos and fetuses are to be preferred to those that do not in defending abortion. The aim of this section has been to reveal the existing feminist arguments that do not deny the beingness of fetuses and embryos or rule out the application of “respect” and “dignity” concepts to them, but yet still reach pro-choice conclusions.

B. Feminist Critiques of Reproductive Technologies that Advert to the Embryo

Given that “respecting” embryos and abortion rights need not be a conceptual impossibility in the abortion context, the same conclusion can be presumed in the embryo research context where women’s bodies are not required to carry and sustain the embryos and fetuses. Indeed, it is in the laboratory context where the interests of embryos and women may seem to be more in alignment. Recall that feminists have long raised concerns about the alienation, exploitation, and commodification of women’s reproductive and genetic labour and material,⁷² which new reproductive technologies would foster, as well as the diminished appreciation and re-

⁶⁹ *Ibid* at 822.

⁷⁰ See *ibid* at 825.

⁷¹ See *ibid* at 829.

⁷² See Carolyn McLeod & Françoise Baylis, “Feminists on the Inalienability of Human Embryos” (2006) 21:1 *Hypatia* 1 at 1.

spect for children commodified as “potential life”.⁷³ Feminists continue to stress that embryo research requires women’s bodies to source the eggs that will become the embryos on which scientists wish to research and which biotech companies wish to mine for lucrative genetic information; although in vitro embryos do not grow inside a uterus, they nonetheless emanate from an egg harvested from a woman’s body.⁷⁴ Feminists have underscored the need for regulation to monitor such processes closely in order to “give women a fair chance of escaping the many potential sources of coercion and exploitation surrounding stem cell research involving the use of eggs, embryos, or fetal tissue.”⁷⁵

More to the point, feminists have also flagged concerns about the embryo involved in reproductive technologies. They have been concerned with embryo commodification and alienability in biotechnological practices and with the ascent of property rights and property discourse in general with respect to human tissue.⁷⁶ As Carolyn McLeod and Françoise Baylis have noted, feminists have articulated multiple arguments against this commodification with respect to the embryo.⁷⁷ Those objecting to

⁷³ Jennifer Nedelsky, “Property in Potential Life? A Relational Approach to Choosing Legal Categories” (1993) 6:2 Can JL & Jur 343 at 350-51.

⁷⁴ See *ibid*; Françoise Baylis, “Animal Eggs for Stem Cell Research: A Path Not Worth Taking” (2008) 8:12 The American Journal of Bioethics 18 at 19, 26-29; Françoise Baylis, “Betwixt and Between Human Stem Cell: Guidelines and Legislation” (2002) 11:1 Health Law Review 44; Dolgin, *supra* note 12; Rebecca Dresser, “Stem Cell Research: The Bigger Picture” (2005) 48:2 Perspectives in Biology and Medicine 18; Samantha King, “Designer Babies, Stem Cells, and the Market for Genetics: The Limits of the Assisted Human Reproduction Act” (2007) 32:3-4 Canadian Journal of Communication 613 at 616-17.

⁷⁵ Françoise Baylis & Carolyn McInnes, “Women at Risk: Embryonic and Fetal Stem Cell Research in Canada” (2007) 1:1 McGill JL & Health 53 at 67. This literature includes those feminists supportive of women being (properly) paid for oocytes and other regenerative tissue rather than serving “altruistically”. See Catherine Waldby & Melinda Cooper, “From Reproductive Work to Regenerative Labour: The Female Body and the Stem Cell Industries” (2010) 11:1 Feminist Theory 3 (where the authors discuss the ways in which the global community is capitalizing on women’s reproductive biology). Waldby and Cooper explore the stem cell and regenerative medicine industries, emphasizing that these industries serve to mobilize female bodily productivity to support biomedical research; yet, the economic value involved in these “transactional relations” (*ibid* at 5) remains largely unacknowledged.

⁷⁶ See Suzanne Holland, “Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues” (2001) 11:3 Kennedy Institute of Ethics Journal 263; McLeod & Baylis, *supra* note 72 at 11 (although noting that an anticommodification view of embryos grounded in their personhood violates feminist commitments to reproductive autonomy and otherwise); Bronwyn Parry & Cathy Gere, “Contested Bodies: Property Models and the Commodification of Human Biological Artefacts” (2006) 15:2 Science as Culture 139.

⁷⁷ *Supra* note 72 at 1.

commodification on the ground that an embryo is a person or otherwise “intimately connected” to or constitutive of personhood or selfhood, McLeod and Baylis classify as incompatible with a pro-choice position and relational feminist understandings of autonomy in general.⁷⁸ Yet, McLeod and Baylis allow that a feminist concern for reproductive and relational autonomy does not rule out ethical regard for the embryo in vitro and specifically state that “commodification of human embryos is a legitimate feminist concern.”⁷⁹

In building their argument, McLeod and Baylis list Cynthia Cohen’s five reasons that human gametes are deserving of a “derivative dignity”: they (1) originate from humans; (2) are “life-giving bodily bits and pieces integral to a function of special import to human beings, reproduction”; (3) exhibit the genetic distinctiveness of their human originators; (4) are “the medium through which unique human beings are created”; and (5) are integral to our relational lives.⁸⁰ McLeod and Baylis note that these features also extend to human embryos.⁸¹ While impugning a conclusion of blanket inalienability based on these features or other considerations,⁸² McLeod and Baylis leave open the idea of ascribing embryos with dignity and respect, especially, it would appear, in situations where women involved in assisted reproductive procedures develop a particular attachment to their embryos.⁸³

Jennifer Nedelsky echoes this sensibility in her arguments against the application of a property discourse or property as a legal category for in vitro embryos. She also worries that selecting property as the legal category to describe human potential life such as gametes, zygotes, and em-

⁷⁸ *Ibid* at 2. The authors also note other problems with the position from a feminist perspective: (1) it is “pronatalist”; (2) it threatens women’s reproductive autonomy; (3) it is unresponsive to various interpretations of “bodily integrity” that women may hold; and (4) it is biologically reductionist in assuming that all body parts are ethically meaningful (*ibid* at 10).

⁷⁹ *Ibid* at 2.

⁸⁰ Cynthia B Cohen, “Selling Bits and Pieces of Humans to Make Babies: *The Gift of the Magi* Revisited” (1999) 24:3 *Journal of Medicine and Philosophy* 288 at 296-98.

⁸¹ *Supra* note 72 at 8.

⁸² See *ibid* at 10-11.

⁸³ *Ibid* at 9. The authors point out, however, that these situations in which women retain a connection to their embryos “at most ... establish that *some persons* ... may perceive their embryos as fully or partially inalienable to them. As arguments, they fail to prove that embryos *are* inalienable to *all persons*, or even to all female persons, given a feminist conception of persons as relational embodied beings” (*ibid* at 10). This position also aligns with feminist literature on pregnancy loss. See e.g. Kate Parsons, “Feminist Reflections on Miscarriage, in Light of Abortion” (2010) 3:1 *The International Journal of Feminist Approaches to Bioethics* 1; Linda L Layne, “Breaking the Silence: An Agenda for a Feminist Discourse of Pregnancy Loss” (1997) 23:2 *Feminist Studies* 289.

bryos would do violence to the sense of attachment that women and men have to the potential life they have created.⁸⁴ Nedelsky believes that these materials of potential life are due a separate legal regard if we are to respect the attachment of persons to them as well as the children ultimately born from them. She also believes that “the common sense flinching at thinking of a fetus as property ... [is] not simply [an] emotional respons[e] that we should discount.”⁸⁵ She is clear, however, that this nonproperty treatment should in no way interfere with a woman’s ability to terminate her pregnancy, which is an essential ingredient of a relational view, according to Nedelsky, of what autonomy requires.⁸⁶

Marie Fox has also allowed the human embryo an ethical status. She wishes to step out of paradigms that query whether the human embryo should be classified as a person or as property, as she finds the embryo’s residence in either category to be inappropriate.⁸⁷ Mindful of the “emerging international consensus on the legal status of the embryo” as “halfway between person and property,” Fox counsels a different, nondualistic, and nonanthropocentric paradigm to imagine the embryo.⁸⁸ She advances the conceptualization of the human embryo as a cyborg entity—part organism and part machine—not only to bypass the polarizing choice of designating it as either property or a person in law, but also to connect it to other marginal beings in law. As Fox writes:

Designating embryo bodies as cyborgs opens up productive new ways of thinking in which we can acknowledge that as a technological life-form they certainly matter, but leave open for debate the question of how *much* they matter ... Situating [the cryo-preserved human embryo] within this complex matrix of biotechnological entities ... forces us to confront the more important question of how much cyro-preserved embryos matter relative to other creatures. Thus we are faced with the question whether they matter more than the women whose eggs produced them or the sentient animals who were subjected to experimentation to bring them into existence.⁸⁹

Fox, much like Nedelsky, and McLeod and Baylis, promotes a relational way of “seeing” embryos by inviting us to consider the broader relations of power that animate their existence and the anxiety over their status.

⁸⁴ Nedelsky, *supra* note 73 at 357-62.

⁸⁵ *Ibid* at 354.

⁸⁶ *Ibid* at 364-65.

⁸⁷ “Pre-persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo” (2000) 8:2 Health Care Analysis 171 [Fox, “Cyborgs”].

⁸⁸ *Ibid* at 181.

⁸⁹ *Ibid* at 182.

C. *Philosophical Compatibility*

In the feminist arguments canvassed, I do not see widespread application of the concepts of “respect and dignity” for embryos, but rather efforts to embed and embody the embryo in relation to women and, in the case of Fox, to nonhuman animals. This renders more understandable the unease with the commodification of embryos and thus the conclusions that embryos merit some type of ethical regard that distinguishes them from property or mere thinghood. If anticommodification concerns formed the rationale for critical scholars to protect human tissue, including embryos and fetuses, by applying the concepts of “respect” and “dignity” to them, then this ethical move would appear compatible with a pro-choice feminist position on abortion.

It appears, then, that it is possible to ascribe an ethical regard to embryos amounting to respect and dignity under feminist positionings without investing in sanctity of life or even (nonhuman-unfriendly) human dignity arguments. But this philosophical compatibility does not address the question we need to ask to evaluate the impact of feminist support for something like the *AHRA*—namely whether, *in practice*, a discourse of respect for in vitro embryos promotes a feminist understanding of the issues at stake to the public or whether it imparts, instead, a pro-life viewpoint. The next part takes up this question.

IV. “Respecting” Embryos and Abortion Rights—Practically Possible?

As Samantha King has noted in discussing the limits of the *AHRA*, feminists reviewing limits on embryo research can “fall into dualistic thinking due to a fear that any perceived concern about embryos will cede territory to anti-choice forces.”⁹⁰ This proclivity to adhere to an absolutist position may prevail despite theoretical agreement (as per one or more arguments above) that respect or dignity for both embryos and women can co-exist. While the dualism is unfortunate, there seems to be real cause for worry, even in Canada, where the influence of anti-choice forces is notable in a statute like the *AHRA*, which does not make any stipulations regarding the in utero embryo, but only the in vitro one. The potential for competing public discourses to occlude feminist explanations for the legislation is thus an important element to consider in deciding whether feminists are able to support the *AHRA* in its current form. This part discusses three reasons to be concerned.

⁹⁰ *Supra* note 74 at 617. See also Fox, “Cyborgs”, *supra* note 87.

A. *Inactive Regulator*

On January 12, 2006, nearly two years after the enactment of *AHRA*, the Assisted Human Reproduction Agency of Canada (the AHRAC) was established.⁹¹ It was immediately responsible under the *AHRA* for overseeing the regulation of assisted human reproduction activities and enforcing prohibitions in the legislation.⁹² Yet, it was not until almost three years after the *AHRA*'s enactment that the federal government, led by Conservative Prime Minister Stephen Harper, announced the appointments of a president, chair, and eight board members to the AHRAC.⁹³ Canadian media sources heavily criticized the makeup of the board as one with strongly conservative social ideals in this area, and even a decidedly anti-abortion agenda.⁹⁴ Since then, it has been observed that the AHRAC has not carried out any discernible substantive regulatory work other than organizing conferences for its staff.⁹⁵ Interestingly, in its March 2012 budget, the federal government announced that the AHRAC would be disbanded by March 2013. The provisions in place requiring the licensing of research facilities would also be disbanded.

Even with the AHRAC scheduled to discontinue in March 2013, someone will need to enforce the regulatory framework developed with respect to the parameters around the use of in vitro embryos for research purposes under section 10 of the *AHRA*. It is difficult to predict the outcome of this process, as Health Canada has not yet developed regulations for this section.⁹⁶ Health Canada has as of now developed regulations only for sec-

⁹¹ See Health Canada, "Assisted Human Reproduction", online: Health Canada <<http://www.hc-sc.gc.ca>>.

⁹² See *ibid.*

⁹³ See Paul C Hébert & Amir Attaran, "A Plea for Transparency in Canada's 'New Government'" (2007) 176:5 *Canadian Medical Association Journal* 601, online: *Canadian Medical Association Journal* <<http://www.cmaj.ca/>>.

⁹⁴ See e.g. "Regulatory Board Lacks Balance", *The [Montreal] Gazette* (8 January 2007); "The Fertility Watchdog's Conservative Weighting", *The Globe and Mail* (29 December 2006) A18; Carolyn Abraham, "Critics Troubled by New Fertility Panel", *The Globe and Mail* (23 December 2006) A1.

⁹⁵ See e.g. Laura Eggertson, "Demands Made for Inquiry into Operations of Reproductive Health Agency" (2011) 183:1 *Canadian Medical Association Journal* E21; Tom Blackwell, "Government Shatters Agency That Oversees Canada's Fertility and Assisted Reproduction Industry", *National Post* (30 March 2012), online: *National Post* <<http://news.nationalpost.com>>; Tom Blackwell, "Bad Press Irks Fertility Industry Regulator: Memo Outlines Plan", *National Post* (15 October 2010) A9.

⁹⁶ According to Health Canada's website, "Health Canada has decided to delay the pre-publication of draft regulations in *Canada Gazette*, Part I, until an opinion is provided by the Supreme Court of Canada on the constitutionality of parts of the *Assisted Human Reproduction Act* (AHR Act). Work continues unabated to develop proposed regulations under the Act" (Health Canada, "Publication of Proposed Assisted Human Re-

tion 8 of the *AHRA*, which requires that the consent of donors be obtained prior to the use of their reproductive material or in vitro embryos.⁹⁷ Given Health Canada's low public profile with respect to this issue so far, it is unlikely that any discourse used to familiarize the public with the scope of section 10 regulations will materialize to include a conscious distinction between protection for in vitro embryos, and protection for embryos generally. The likelihood of this forecast is further supported by the disappointing realization that, to date, neither the AHRAC nor Health Canada has made any attempt to distinguish between in vitro and in utero embryos in order to help Canadians understand that the basis for providing protections for one does not automatically translate into protections for the other. Even if Health Canada were to articulate this distinction to Canadians, it seems unlikely that it would enjoy political support from the current federal cabinet, given the latter's pro-life leanings.

B. Rise of Pro-life Initiatives at the Federal Level

While Canada is a global leader in legalizing abortion and, as mentioned at the onset, one of three countries that do not specifically regulate the practice, arguments about the sanctity of (human) embryonic life have become visible again in Canadian public debate. Evidence of this was found in the more recent consultation and parliamentary debates surrounding embryo research.⁹⁸ This constituency was also behind the Conservative private member's bill seeking to introduce an *Unborn Victims of Crime Act*.⁹⁹ Most recently, this issue has gathered public attention

production Regulations Delayed until Supreme Court Appeal is Decided" (17 February 2009), online: Health Canada <<http://www.hc-sc.gc.ca/>>. On December 22, 2010, the Supreme Court of Canada rendered a deeply divided decision in *Re AHRA* (*supra* note 19), striking down several *AHRA* provisions. Parliament has yet to respond to the Supreme Court's recent pronouncements. Assisted Human Reproduction Canada's (AHRC's) website, however, acknowledges the recent Supreme Court ruling, points out the provisions that "remain constitutional" ("AHRC Board of Directors Strategic Plan, 2011-13", online: Assisted Human Reproduction Canada <<http://www.ahrc-pac.gc.ca/>>) and emphasizes that the AHRC "still maintains its responsibility for the *Act's* prohibitions and for informing Canadians on all matters relating to assisted human reproduction, including the risk factors associated with infertility" ("AHRC Chronology of Events", online: Assisted Human Reproduction Canada <<http://www.ahrc-pac.gc.ca/>>).

⁹⁷ *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137.

⁹⁸ See discussion in Part II, above.

⁹⁹ Bill C-484, *An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offence)*, 2nd Sess, 39th Parl, 2007 (first reading 21 November 2007). This bill was introduced by Ken Epp, Member of Parliament for Edmonton-Sherwood Park, Alberta. See Backhouse & Deckha, *supra* note 24 at 261-64. Following this bill was Bill C-537, *An Act to amend the Criminal Code (protection of conscience rights in the health care profession)*, 2nd Sess, 39th Parl, 2007-2008, cl 1 (which proposed to protect health care practitioners by making it a criminal offence to dismiss

through M-312, a motion introduced by Stephen Woodworth (Kitchener Centre, CPC) calling for a special committee to debate the definition of “human being” in subsection 223(1) of the *Criminal Code*.¹⁰⁰ Pro-life sensibilities have also affected the Government’s international policies: witness its controversial decision to exclude abortion from its G8 health care initiative regarding “maternal and child health.”¹⁰¹ Pro-life elements are even resurfacing and acquiring influence in the more moderate Liberal Party.¹⁰²

Despite these legislative and executive initiatives, and the significant and growing number of MPs that have indicated that they are anti-choice, the majority of Canadian MPs are not. Thus, the likelihood of the Conservative government introducing legislation to regulate abortion and having it enacted is minimal. Yet, with a politically conservative cabinet able to influence the main government messages surrounding embryo research,¹⁰³ it is equally unlikely that articulating a distinction between the moral status of in vitro and in utero embryos will be a government priority. It seems that it will be up to civil society voices to provide a more complicated discourse from which the public can grasp the feminist rationales behind the regulation.

an employee who refused to perform procedures offending the tenets of his or her religion. Particularly earnest is the definition of “human life” as an organism at any stage of development). Similarly, Brent St Denis, Member of Parliament for Algoma-Manitoulin-Kapuskasing, Ontario, introduced Bill C-543, *An Act to amend the Criminal Code (abuse of pregnant women)*, 2nd Sess, 39th Parl, 2008 (first reading 14 May 2008) (which proposed to add pregnancy to the list of aggravating factors for the purpose of sentencing).

¹⁰⁰ RSC 1985, c C-46. Motion M-312 was debated on April 26, 2012, and September 21, 2012. On September 26, 2012, Parliament voted on Motion M-312, and it was defeated 203 to 91. For more information on the motion, including the powers and tasks of the proposed special committee and a list of members’ votes, see House of Commons, *Journals*, 41st Parl, 1st Sess, No 466 (26 September 2012) [House of Commons, *Vote No 466*] (detailed results available online: Parliament of Canada <<http://www.parl.gc.ca/HouseChamberBusiness/ChamberVoteDetail.aspx?Language=E&Mode=1&Parl=40&Ses=3&FltrParl=41&FltrSes=1&Vote=466>>).

¹⁰¹ David Akin & Meagan Fitzpatrick, “Abortion Left Out of Canada’s G8 Maternal Health Plan”, *Global News* (26 April 2010), online: Global News <<http://news.globaltv.com/>>; “Maternal Plan Should Unite Canadians: Harper” (27 April 2010), online: CBC News.ca <<http://www.cbc.ca/>>.

¹⁰² See Joan Bryden, “Liberals Fear Pro-lifers Trying to Take Over Weakened Federal Party”, *The Globe and Mail* (8 February 2012), online: The Globe and Mail <<http://www.theglobeandmail.com/>>; Kim Mackrael, “Fetus-Rights Motion Deepens Tory Rift on Abortion”, *The Globe and Mail* (25 September 2012), online: The Globe and Mail <<http://www.theglobeandmail.com/>>. Of the votes in favour of Motion M-312, four were from members of the Liberal Party: see House of Commons, *Vote No 466*, *supra* note 100.

¹⁰³ See King, *supra* note 74 at 614.

C. Rationales for Embryo Research Restrictions in Mainstream Media

A good source for this public education on feminist concerns would be the mainstream media. It is difficult, however, to find media discussion outlining feminist rationales for respecting the restrictions on embryo research, let alone other prohibitions in the statute. Indeed, it is difficult to find material regarding feminist messaging on reproductive freedom in general or evidence of public scientific and cultural literacy regarding new reproductive technologies. Since the enactment of the *AHRA* in 2004, a wide range of issues affected by the legislation have been debated in mainstream media.¹⁰⁴ While there seems to be much discussion regarding certain issues, such as the *AHRA*'s impact on cloning research or on fertility treatment options, there has been much more limited discourse around the rationales for the embryo research restriction provisions.¹⁰⁵ Perhaps more disconcerting, and as discussed below, this already limited discourse is predominantly framed in terms of a dichotomy between those advocating for values that have traditionally been promoted by the anti-abortion lobby, and scientists working in the field who favour more relaxed restrictions.

In fact, there are only a few media voices articulating any concern for the risk to women and women's health as a reason to support the research restrictions. A review of online databases of mainstream Canadian media since the *AHRA*'s enactment¹⁰⁶ reveals some public discourse in which women's bodies are visible in discussions related to the research restrictions. In particular, while the *AHRA* does not differentiate between the use of "fresh" (i.e., created specifically for research) versus "frozen"

¹⁰⁴ These issues include, for example, the impact of the *AHRA* on those seeking donated egg, sperm, or surrogacy arrangements in order to have children, and related concerns around "fertility tourism" due to sperm and egg shortages. There has also been media discussion of the conservative makeup of the Assisted Human Reproduction Agency of Canada, as well as the impact of the *AHRA* on human cloning research. This media analysis was conducted using three online databases that cover major Canadian newspapers and periodicals: *Canadian Newsstand*, *CBCA Current Events*, and *CPIQ Canadian Periodical Index*. The search terms used, both alone and in combination, are as follows: "Assisted Human Reproduction Act", "*AHRA*", "assisted reproduction", "embryo research", "stem cell research", and "research restrictions"; the search was focused on media produced after the *AHRA*'s enactment in 2004.

¹⁰⁵ For example, using the database *CBCA Current Events* and the search term "Assisted Human Reproduction Act", 194 results were obtained, with the vast majority dealing with fertility treatment options and cloning research. Approximately 12 addressed the research restrictions in some way and 2 made reference to feminist rationales for the restrictions. Similarly, using the database *CPIQ* and the search term "Assisted Human Reproduction Act", 33 results were obtained with 15 dealing with fertility treatment issues, 4 addressing the research restrictions in some way, and 2 articles in a feminist magazine explaining feminist rationales for the restrictions.

¹⁰⁶ See *supra* note 104 for methodology.

embryos, the debate over whether the use of fresh embryos should now be expressly prohibited has addressed the issue of women's health. As Françoise Baylis and her colleagues explain, allowing the use of fresh embryos:

risks harming women because it increase the likelihood they will need to undergo additional IVF cycles to have children. ... [W]omen who have given away their fresh embryos instead of freezing them may have to agree—yet again—to the risky and painful procedures of ovarian stimulation and egg collection surgery.¹⁰⁷

Baylis has also criticized the “unrealistic hopes” fostered by advocates of stem cell research in swaying governments and other funders “to divert or waste intellectual and financial resources, all the while paying little or no attention to the impact all of this has on the women who are expected to provide the scientists with the eggs for their cloning research.”¹⁰⁸ In another commentary, Jeff Nisker and Angela White express similar concerns for the welfare of women if the use of fresh embryos is allowed, and specifically, if physicians are not explicitly prohibited from asking women undergoing fertility treatments to donate fresh embryos for stem cell research. The authors believe that IVF patients may comply with this request because they trust that their physician would act in their best interest, they fear “offending the professional on whom they depend to help them deliver a child,” or they are influenced by the media.¹⁰⁹ Academics Baylis and Nisker are two of the few prominent commentators in Canadian news sources articulating concern for women's health in discussions regarding embryo research.¹¹⁰

Apart from these cases in the fresh embryo debate,¹¹¹ most of the limited discussion on the rationales behind the research restrictions ignores any feminist concerns, instead situating the issue between traditional pro-

¹⁰⁷ Françoise Baylis et al, “Nothing Extreme About Protecting Fresh Embryos”, *The Globe and Mail* (16 January 2007) A17.

¹⁰⁸ Françoise Baylis, “Stem Cell Research Fosters Unrealistic Hopes”, *The Vancouver Sun* (19 September 2005) A7.

¹⁰⁹ “The CMA Code of Ethics and the Donation of Fresh Embryos for Stem Cell Research” (2005) 173:6 *Canadian Medical Association Journal* 621 at 621. See also “Donating Fresh Embryos Should be Stopped: Ethicist”, *Alberni Valley Times* (13 September 2005) 7; Sheryl Ubelacker, “Doctors Should be Stopped from Seeking Fresh Embryos for Research: Ethicist”, *Canadian Press* (12 September 2005).

¹¹⁰ See also Françoise Baylis' comments in Norma Greenaway, “Two Sides Debate Fate of ‘Fresh’ Human Embryos”, *The Ottawa Citizen* (3 January 2007) A3.

¹¹¹ While there is much more nuanced discussion of feminist rationales behind the research restrictions in feminist publications such as *Herizons*, ultimately, such feminist media that explicitly work to present ideas outside of the mainstream perspective are not indicative of the general public's understanding of the reasoning behind the AHRA's restrictions.

life values and the interests of scientists. For example, in one article entitled “Restricting Stem Cell Research Is a Mistake,”¹¹² the author notes: “[T]he most troubling aspects of the legislation ... are the standards set for stem cell research” in relation to the fact that scientists are only permitted to use existing embryos for research purposes.¹¹³ The author believes this restriction “is based on a lack of understanding about the science of stem cell research and what an embryo really is” and goes on to state that using the “moral standards” of stem cell research opponents is “misguided.”¹¹⁴ Significantly, the author attributes the research restrictions entirely to embryocentric “moral” issues and displays no understanding that there may be other reasons to uphold the research restrictions. Indeed, the embryocentric moral basis for the research restrictions is often assumed. In one editorial piece, the author writes, “if it is illegal under the [AHRA] to produce human embryos for research, on what moral basis is it acceptable to conduct research upon embryos created for a different purpose, that of possible insemination? They are the same thing.”¹¹⁵ The writer has not only assumed that the prohibitions in the AHRA against producing embryos purely for research purposes are embryocentric, but has also extended this morally based rationale to explaining why research on existing embryos should be prohibited on the same grounds.

Reports in mainstream media seem to have exclusively associated the research restrictions with traditional anti-abortion values, thereby rendering feminist rationales seeking to protect women’s bodies from exploitation invisible in the discussion.¹¹⁶ In several contributions to mainstream media outlets, prominent bioethicist Margaret Somerville has articulated her concern with the research restrictions in terms of “respect for the transmission of human life,” which she explains is one of the “new kinds of respect for human life.”¹¹⁷ Somerville states, “the prohibition in

¹¹² Steven Martinovich, “Restricting Stem Cell Research Is a Mistake”, *Sudbury Star* (19 March 2004) A11.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ “Using Embryo Stem Cells Crosses an Ethical Line”, Editorial, *The Vancouver Sun* (14 August 2006) A8.

¹¹⁶ See also Dan Sparks, “Stem Cell Research Fine, Method of Supply in Question”, *Kamloops Daily News* (30 November 2004) A6 (in which the author objects to any kind of embryonic stem cell research solely on the grounds that “human life should be respected and protected from conception to natural death”). Not only are feminist concerns about the health and safety of women and the potential exploitation of women absent as reasons to support the research restrictions, but also the issue is framed explicitly in terms of respect for human life and in language reminiscent of the anti-abortion lobby.

¹¹⁷ Margaret Somerville, “Respect for Life”, Letter to the Editor, *The Globe and Mail* (17 January 2007) A18.

the [AHRA] on creating embryos other than for in-vitro fertilization—that is, allowing their creation only if there is a possibility that they will be given a chance at life—helps to establish this kind of respect.”¹¹⁸ In a more disconcerting statement, Somerville states: “[the AHRA] reflects the view that to create embryos other than by sexual reproduction and other than to help people have children is inherently wrong.”¹¹⁹ Not only does this marginalize feminist rationales for prohibiting the creation of embryos for research purposes but it also assumes the embryocentric basis of the prohibition.

It would appear that, as with the statute itself, “with concern about the embryo front and centre, women’s bodies have become all but invisible” in media discussions.¹²⁰ This absence is worrisome given that cultural iconography of the pro-life movement circulates even in Canada.¹²¹ While the “ideological power” of pro-life messages may be much more resonant in the United States and elsewhere, the image of the free-floating “public fetus” made popular by visual media, pro-life “documentaries”, and the routinization of ultrasound technology in obstetrics is also familiar to Canadians.¹²² Despite their urgent need, American feminists have not been

¹¹⁸ *Ibid.*

¹¹⁹ Margaret Somerville, “The Ethics of Stem Cells”, *The National Post* (20 August 2004) A16.

¹²⁰ King, *supra* note 74 at 613.

¹²¹ See e.g. Heather Mallick, “The Role of Media in the Abortion Debate” in *20th Anniversary of Regina v. Morgentaler: Of What Difference? Reflections on the Judgment and Abortion in Canada Today*, Symposium, Toronto, 25 January 2008 (Toronto: National Abortion Federation & Faculty of Law, University of Toronto, 2008) 54, online: Pro Choice <http://prochoice.org/pubs_research/publications/downloads/canada/ofwhatdifference.pdf> (in which Mallick notes, “what happens in the United States matters a great deal as well, largely because they have a lock on our culture and our media. Young people watch American TV shows and American movies; their cultural mores seep in” at 55). She continues, “I think if abortion rights disappear in the U.S., there will be a resultant anti-choice pressure here transmitted via the media” (*ibid* at 56).

¹²² See e.g. “Fetal Development”, online: Abortion in Canada <http://www.abortionincanada.ca/facts/fetal_development.html> (where several such images are displayed). These images and the phenomenon of the fetishized public fetus (first described as such by Rosalind Pollack Petchesky) are critically discussed in Janelle S Taylor, *The Public Life of the Fetal Sonogram: Technology, Consumption, and the Politics of Reproduction* (New Brunswick, NJ: Rutgers University Press, 2008); Valerie Hartouni, “Fetal Exposures: Abortion Politics and the Optics of Allusion” in Paula A Treichler, Lisa Cartwright & Constance Penley, eds, *The Visible Woman: Imaging Technologies, Gender, and Science* (New York: New York University Press, 1998) 198; Carol Stabile, “Shooting the Mother: Fetal Photography and the Politics of Disappearance” in Treichler, Cartwright & Penley, *ibid.*, 171; Rosalind Pollack Petchesky, “Foetal Images: The Power of Visual Culture in the Politics of Reproduction” in Michelle Stanworth, ed, *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: University of Minnesota Press, 1987) 57.

able to counter these messages with their own cultural images.¹²³ Canadian feminists thus do not have ready access to strategies and tactics that can work to entrench respect for pro-choice positions should a rise in resistance to abortion materialize from this media messaging. Pro-choice feminists consequently find themselves in the difficult situation of supporting a statute, in theory, due to feminist reasons that are not transparent or accessible to the larger Canadian public and, in fact, have been displaced by a pro-life reading of the statute.

D. Embodying Embryos in Law

Given this context, it becomes difficult to approve of the *AHRA* in its current wording. Nedelsky's work, in promoting women's autonomy but counselling against property as a legal category for embryos implicated in reproductive technologies, is instructive here. She recognizes the arguments advanced by other feminists as to why a property discourse can be empowering for women if sufficiently contextualized and rehabilitated from property's typical and prevailing exclusive and hierarchical meanings.¹²⁴ Yet, she is still reluctant to proceed with property as a legal category and paradigm for embryos, despite its possible recuperation. She writes:

In choosing a legal category perhaps the most important starting point of inquiry is what the presumptions are, what will require justification, what norms will have to be argued against, what values will be taken as given.¹²⁵

Nedelsky later continues, "The choice of legal category is a strategic one. And the first step of the strategy is to ensure that the category will facilitate, rather than obstruct, the outcomes we most care about."¹²⁶ Nedelsky worries that classifying embryos as property would ultimately detract from a relational understanding of autonomy for women and children born from these technologies.¹²⁷ Nedelsky articulates the difficulty en-

¹²³ Indeed, Reva Siegel has noted the rising prominence in recent years of the claim that abortion harms women and of corresponding, woman-protective anti-abortion arguments. As she explains, "[T]he antiabortion movement has borrowed core elements of the pro-choice claim, and produced a woman-protective antiabortion argument that mixes new ideas about women's rights with some very old ideas about women's roles. Prohibiting abortion, the movement now emphasizes, protects women's health and choices as mothers" ("New Politics", *supra* note 59 at 992-93).

¹²⁴ Nedelsky, *supra* note 73 at 351-52 (discussing the influential work of Petchesky in this regard). See Rosalind Pollack Petchesky, "The Body as Property: A Feminist Re-vision" in Faye D Ginsburg & Rayna Rapp, eds, *Conceiving the New World Order: The Global Politics of Reproduction* (Berkeley: University of California Press, 1995) 387.

¹²⁵ Nedelsky, *supra* note 73 at 353.

¹²⁶ *Ibid* at 354.

¹²⁷ *Ibid* at 356.

tailed in undoing a problematic legal category (property) once assigned, especially one that is hegemonic, given the antecedent presumptions, norms, and values. But it is for this very reason that feminists must be alert to how the embryo is framed; in rejecting a property categorization, they may also have to reject those representations that imply or approach personhood for fetuses because of personhood's antecedent presumptions, norms, and values. This is not to reinforce a dualistic property-personhood framework, as Fox warns against, but to connect and embody the liminally located human embryo, regardless of its location.¹²⁸

Thus, despite espousing relational theoretical commitments that may be more generous to the embryo or fetus, feminists need to be concerned about how the embryo in the *in vitro* context is represented and legally protected because of the pro-life understandings of this protection that dominate in the public sphere. Women's bodies need to be recentred even with respect to *in vitro* embryos; a disembodied representation of the *in vitro* embryo fortifies a reading of embryo personhood that imperils what personhood should mean for women.¹²⁹ Embodied feminist rationales, rather than pro-life understandings for the restrictions, need to be better promoted in order for pro-choice feminists to endorse the *AHRA*. As it stands now, feminist endorsement of the *AHRA* due to compatibility between feminist commitments and the statute *in theory* risks supporting *in practice* the dominant embryocentric reading of the *AHRA* at the expense of women. The final part of this article identifies some regulatory steps that could help recuperate and promote a feminist reading of the statute and thus enable pro-choice feminists to support the statute.

V. Recommendations for Reform

The *AHRA* is overdue for review.¹³⁰ Revisions proposed by the federal government so far are (1) to eliminate the AHRAC as of 2013 and (2) to update the *AHRA* in light of the recent Supreme Court of Canada reference that struck down large sections (none pertaining to embryo research) on federalism grounds after complaints from Quebec that the *AHRA* intruded on provincial jurisdiction in relation to health care.¹³¹ None of the-

¹²⁸ See Fox, "Cyborgs," *supra* note 87.

¹²⁹ See Isabel Karpin, "The Uncanny Embryos: Legal Limits to the Human and Reproduction Without Women" (2006) 28:4 Sydney L Rev 599 at 623.

¹³⁰ Legislative review was to occur three years after the coming into force of section 21(*AHRA*, *supra* note 6, s 70).

¹³¹ See *Re AHRA*, *supra* note 19. A five-to-four majority held the following provisions unconstitutional and thus invalid, as they exceeded the ambit of the federal criminal law power granted under the *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, App II, No 5): sections 10 and 11, which prohibited "controlled ac-

se proposed revisions, however, would address the concerns that have been outlined thus far in this article. It is, then, still critical to consider how the *AHRA* should be revised by feminists.

Feminist organizations have been working on proposals for revisions with respect to the entire statute.¹³² I am unable to address here all the revisions of the *AHRA* that could ensue from these feminist deliberations. As Fox comments in her review of the reform process of parallel UK legislation from 1990 that culminated in an amending statute in 2008, there were at least three other issues in addition to the regulation of embryo research that attracted feminist attention, and rightfully so: the definition of the “family”; access to data held by the regulating authority; and genetic screening of embryos intended for IVF.¹³³ Similar observations can no doubt be made about the *AHRA*—that it requires an overhaul beyond its embryo research provisions and apart from the constitutional issues regarding federalism or the elimination of the regulator. This part focuses on embryo research only, specifically the provisions relating to the *AHRA*’s restrictions on the use of the in vitro embryo and the problematic embryo-centred reading they impart. Three changes to the statutory wording are proposed to undo this centring.

A. *Articulate the Feminist Reasons to be Concerned about the In Vitro Embryo*

Currently, the ethical principles underlying the *AHRA* are delineated in its section 2. This section includes a specific subsection highlighting the heightened concerns that reproductive technologies present for women. It reads:

The Parliament of Canada recognizes and declares that

...

tivities” carried out contrary to regulations, including the manipulation, storage, and destruction of human reproductive material, as well as transgenic engineering; section 13, which monitored the premises of the licensed “controlled activity”; sections 14-18, which governed the collection, report, disclosure, and access to health reporting information; subsections 40(2), 40(3), 40(3.1), 40(4), 40(5), 44(2), and 44(3), which enabled the Assisted Human Reproduction Agency of Canada, in accordance with the regulations, to issue licenses and inspect facilities. See also Barbara von Tigerstrom, “Federal Health Legislation and the *Assisted Human Reproduction Act Reference*” (2011) 74 Sask L Rev 33 and John D Whyte, “Federalism and Moral Regulation: A Comment on *Reference Re Assisted Human Reproduction Act*” (2011) 74:1 Sask L Rev 45.

¹³² I have participated in two workshops, one run by the National Association of Women and the Law in 2007 and a recent one co-sponsored by the University of Manitoba and the *Canadian Journal of Women and Law*.

¹³³ Fox, “Embryology Act”, *supra* note 7 at 336-39 (commenting on the recently enacted *Human Fertilisation and Embryology Act 2008* (UK), c 22, amending *Human Fertilisation and Embryology Act 1990* (UK), c 37, *Surrogacy Arrangements Act 1985* (UK), c 49).

(c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;

The current wording in subsection 2(c) recognizes that women's bodies are more involved than men's in assisted reproduction. While this is a promising statement, it is inadequate to link concerns about "health and well-being" to the rationale for embryo-use restrictions. More needs to be inserted into the statute to articulate this link and thus preclude the embryocentric reading of the statute that would suggest a moral status has been ascribed to the embryo.¹³⁴ Further wording could be inserted directly into subsection 2(c) as follows:

(c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies, especially in relation to the creation and use of in vitro embryos;

In a statutory environment such as the *AHRA*, which implements significant restrictions on embryo use, including research, the feminist basis for the restrictions should be made explicit so that embryocentric rationales do not dominate and obscure the concerns that embryo research raises in regard to women's bodies.

For greater clarity that embryo research restrictions are adopted to protect women and are not meant to assign a legal status to the embryo in vitro due to an embryocentric vision, a provision such as the one that follows would be useful:

Section 2.1. Nothing in this Act is to be i) interpreted as ascribing personhood or any other legal status to an in vitro or in utero embryo, fetus or other unborn entity...

This type of wording does not frustrate a viewpoint that would imbue the human embryo with dignity and respect. Yet, it bars an interpretation that the statute is supportive of personhood or any new legal status for the in vitro embryo and thus, by eventual extension, the in utero embryo. It pre-empts arguments that would seek to conflate the in vitro embryo with the in utero embryo and thus attempt to unsettle the jurisprudence that denies personhood to unborn entities.

¹³⁴ See Deckha, *supra* note 1 at 77-78.

B. Affirm Women's Rights to Bodily Integrity and the Need for Abortion Services Irrespective of the Moral Status of the Embryo

Although the legal status of abortion in Canada appears secure for the foreseeable future, it is still useful to signal respect for women's reproductive freedoms in, at the very least, the policies the AHRAC is empowered to create, if not in the statute itself. While feminists have shown why the recognition of fetal personhood is not fatal to the defensibility of women's right to abort,¹³⁵ a provision affirming abortion rights would clarify the precise scope of the *AHRA*. This could be accomplished by adding onto the recommended provision above as follows:

Section 2.1. Nothing in this Act is to be interpreted as i) ascribing personhood to an in vitro or in utero embryo, fetus or other unborn entity; or ii) infringing on a woman's right to security of the person including, in particular, the right to choose whether to terminate her pregnancy.

Such a provision would clarify that nothing in the *AHRA*, or in the way it is interpreted or applied, competes or contradicts with the legal availability of abortion. The inclusion of "security of the person" would signal the legislative intent that the availability of abortion is protected by women's section 7 *Charter* rights and would comply with feminist conclusions discussed above on how best to locate this right for women (i.e., not in privacy but in bodily autonomy).¹³⁶

C. Distinguish Between the In Vitro and In Utero Context in Terms of the Ethics Raised

For clarity as to the *AHRA*'s purpose and scope, the in vitro embryo and the ethical issues it raises in the context of assisted reproduction should be identified as distinct to it and not transportable to the in utero context where other considerations prevail. For example:

Section 2.2. Nothing in this Act suggestive of ethical concerns regarding the creation and use of in vitro embryos extends to embryos created in the in utero context, where a woman's decision-making capacity about her body is paramount.

To the extent that the *AHRA* institutes "respect" or "dignity" for the in vitro embryo, a provision such as this would guard against the extension of these concepts to the in utero context. While some may still wish to visualize a separate entity in a woman's body as worthy of "respect" and "dignity", at least the legislative intent would be clearer that it is not nec-

¹³⁵ See Thomson, *supra* note 62.

¹³⁶ See Part III, above. See also Joanna N Erdman, "In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada" (2007) 56:4 *Emory LJ* 1093.

essary to start thinking of in utero embryos in this fashion; the *AHRA* would not serve to jump-start this conceptualization in public discourse. For in utero embryos, their spatial location inside women's bodies and their inseparability from this corporeality would be a critical point of ethical distinction.

Taken together, these three recommendations—(1) highlight feminist rationales for embryo concern; (2) affirm the right to abortion; and (3) distinguish between in vitro and in utero embryos as to how the *AHRA* should be revised—would make the statute more amenable to pro-choice feminist support. If the recent reform process with respect to the UK legislation in this area is a model to follow, obtaining these amendments may well be a difficult task requiring, at the very least, a sustained messaging campaign to make the feminist impact of these changes more apparent to the public and Members of Parliament.¹³⁷ It is instructive to learn from Fox that feminist input on reforms to embryo research regulation in the recent UK reform process was largely absent preceding the 2008 amending statute. This absence occurred despite the fact that embryo research regulation was an area closely associated with feminist impact in the debate leading to the original statute (as with the *AHRA* in Canada).¹³⁸ Fox observes that the focus on the ethics of embryo research and the status of the embryo preceding the enactment of the original 1990 UK statute was displaced by a different anxiety over embryos by the time the 1990 statute came up for reform—the spectre of human-animal embryonic combinations.¹³⁹ As Fox notes, “Dislodging the human embryo from its central and problematic role in reprotchnologies has thus created the space for other, less familiar, embryos to emerge and become the repositories of our hopes and fears.”¹⁴⁰

Given the swift pace of reproductive and regenerative technology, by the time the review process for the *AHRA* proceeds, the contours of the reform debate as compared with those of the debates leading up to the original 2004 statute may also shift. Canadian feminists will need to scrutinize any new discourses commanding public attention for their feminist implications. But, at the very least, for all the reasons mentioned here, feminists will have to make embryo research regulation, and in particular, the question of the status of the embryo, a part of their contributions. Adoption of the three steps outlined above would be a welcome feminist

¹³⁷ See Fox, “Embryology Act”, *supra* note 7 at 342.

¹³⁸ *Ibid* at 340. See Backhouse & Deckha, *supra* note 24.

¹³⁹ Marie Fox, “Legislating Interspecies Embryos” in Stephen W Smith & Ronan Deazley, eds, *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Surrey: Ashgate, 2009) 95 at 98.

¹⁴⁰ *Ibid*.

development to help maintain the current Canadian permissive legal position on abortion.

Conclusion

In Canada, feminists provided the early catalyst for government deliberations that eventually culminated in the enactment of the *AHRA* in 2004. With respect to regulating in vitro embryo research, feminists supported restrictions due to concerns about the exploitation of women that might occur in the pursuit of eggs from which to create research embryos. Others, however, spoke of the need to respect embryos as a basis for restrictions on their use in research. This position raises the theoretical question of whether it is possible for pro-choice feminists to advocate “respect” for the in vitro embryo based on rationales that do not imperil pro-choice arguments. I have argued here that it is possible to do so by locating this recognition of respect for in vitro embryos in feminist values of anticommmodification, anti-exploitation, and relational thinking.

Despite this theoretical consistency, however, it is unlikely that such a feminist understanding of the restrictions occupy a marked place in the minds of the public. Instead, pro-life sensibilities about why embryos deserve respect have emerged as dominant, encouraging the discursive connection between pro-life protection of embryos and the current legislation. Apart from a few contributions in the context of the fresh or research embryo issue, it is difficult to find publicly available reports outlining any feminist reasons for respecting the embryo research restrictions now legislated in the statute, much less nuanced discussion of these rationales. Given this void in mainstream media and official government publications, particularly on the AHRAC website¹⁴¹ and in Hansard debates after the *AHRA*'s passage, it seems unlikely that the public would understand feminist rationales for the research restrictions.

Instead, the public is more likely to view the restrictions as a compromise position between scientists and those promoting anti-abortion values, despite the feminist forces that advocated for such provisions in the first place. Indeed, this is how the issue was taken up in parliamentary debates preceding the *AHRA*'s enactment. This distorted understanding of the rationale for embryo research restrictions may have detrimental effects on how the public perceives embryos in general and thus affect the public perception and support of abortion practices. To counter this potential spillover effect and popularize feminist explanations of the statute that do no imperil support for abortion, the *AHRA* should be revised with provisions that make the connection between embodied feminist ration-

¹⁴¹ Online: Assisted Human Reproduction Agency of Canada <<http://www.ahrc-pac.gc.ca>>.

ales and embryo research restrictions clearer. The change should (1) articulate the feminist reasons to be concerned about the in vitro embryo; (2) affirm women's rights to bodily integrity and the need for abortion services irrespective of the moral status of the embryo; and (3) distinguish between the in vitro and in utero context in terms of the ethics raised.
