CLONES, CONTROVERSY, CONFUSION, AND CRIMINAL LAW: A REPLY TO PROFESSOR CAULFIELD

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I. INTRODUCTION

Professor Caulfield is undoubtedly disappointed with the statutory criminal prohibitions contained within Bill C-56, *An Act Respecting Assisted Human Reproduction*.[1] Last year, he wrote an article in which he denounced the federal government's plan to pass a criminal statute proscribing certain procedures associated with new reproductive technologies, such as human cloning.[2]

Caulfield's article is problematic in some respects. Although his position on the use of criminal statutes to govern this area is clear, the exact form of legislative regime he thinks is appropriate is difficult to discern. Moreover, a close reading of his article reveals a misunderstanding of the nature of criminal legislation. Perhaps most troubling is the undemocratic form of some of Caulfield's recommendations.

If there is to be a uniform legislative regime in Canada governing assisted human reproduction, it must be criminal in nature. The appropriate scheme could consist of statutory prohibitions such as those contained in Bill C-56, or a more complex mechanism involving subordinate legislation. If the latter option is chosen, the regulation-making body's work must be reviewable by elected officials.

II. AN AMBIGUOUS THESIS

The bulk of Caulfield's article is devoted to showing why criminal law should not be used in the areas of genetics and reproductive technologies. Indeed, the abstract of the article states, "[I]t is argued that the use of the criminal law as a regulatory mechanism is neither warranted nor appropriate."[3] In the body of the article, Caulfield describes the proposal to use criminal prohibitions to ban specific activities in this sphere as weak.[4] He buttresses his position by arguing that issues concerning new reproductive technologies do not engender a high degree of social consensus and that criminal laws should be reserved for areas where this degree of consensus exists.[5] Moreover, he endorses the statement that criminal prohibitions have the potential to cast

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1 Bill C-56, *An Act Respecting Assisted Human Reproduction*, 1st Sess., 37th Parl., 2002 (passed second reading and referred to Committee 28 May 2002).

2 T. Caulfield, "Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39 Alta. L. Rev. 335.

3 *Ibid.* at 335.

4 *Ibid.* at 337.

5 *Ibid.* at 338.

a chill on important areas of research, presumably because of the stigma associated with criminal convictions.[6]

Nevertheless, when it comes to suggesting a different approach, Caulfield advocates using criminal prohibitions if an individual breaches the terms of a licence issued by a regulatory body or undertakes an activity on a moratorium list created by a regulatory body.[7] Thus, despite philosophical and utilitarian objections to the application of criminal law to the practices associated with new reproductive technologies, Caulfield seems to endorse the use of criminal law, albeit in the form of regulations passed by a regulatory body under a criminal statute.[8]

Whether an activity is prohibited directly by a criminal statute that specifically proscribes a particular practice, or by a regulation passed under a criminal statute that explicitly delegates articulation of specifically banned activities to a regulation-making body, the end result is the same. The practice, whether it be prohibited specifically by the criminal statute or indirectly by regulations passed pursuant to the criminal statute, is still proscribed by criminal legislation and those convicted under such legislation still face the stigma and penalties associated with a criminal conviction. Thus, despite the fact that most of Caulfield's article is devoted to demonstrating the folly of using criminal law to deal with new reproductive technologies, Caulfield's recommended approach is actually to use this type of legislation.

His real problem with the government's proposal and the ensuing Bill is that the criminal legislation used is purely statutory. He views a purely statutory form of prohibition as being more difficult to amend in a timely fashion than would be the case if the prohibited activities were contained in regulations passed pursuant to an enabling criminal statute. An implicit theme running throughout Caulfield's article is that political pressures and uninformed opinion could influence the drafting of statutory prohibitions because politicians table this type of legislation. He thinks that many of these influences would not be felt if the prohibitions were specifically delineated in regulations drafted by experts comprising the regulation-making body.

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6 *Ibid.* at 343. I surmise that it is the stigma associated with a criminal conviction and not the possibility of imprisonment that Caulfield believes could chill research activity because the federal Parliament, acting under heads of power other than its criminal law power, and even the provincial Legislatures, acting under s. 2(15) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*], have the power to authorize a court to order imprisonment. So a breach of non-criminal federal legislation or provincial legislation can result in a lengthy term of imprisonment, even a federal penitentiary term of imprisonment (two years or more). For more detail pertaining to the division of powers and punishment, see P. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2002) at 19.20, 19.24.

7 Caulfield, *ibid.* at 345.

8 Indeed, Caulfield states that "[u]sing the suggested moratorium list [coupled with criminal prohibitions if an activity on the moratorium list is engaged in], instead of straight criminal prohibitions, would allow for maximum flexibility, encourage ongoing consultation, require only minor modifications to the current proposal, and create a framework capable of having long-term relevance." *Ibid.* at 345.

The foregoing represents what I consider to be a reasonable view of Caulfield's article, excluding his concluding paragraph. The article lacks unity (criminal law is inappropriate in this area versus criminal regulations are the form of law that is needed in this area) but Caulfield's recommended approach is clear. This clarity however, is diminished by statements Caulfield makes in his conclusion.

To understand why the conclusion is confusing and how it obscures his vision of reform, one must examine Caulfield's discussion of constitutional principles. He states that one of the reasons the federal government's scheme makes use of criminal prohibitions is jurisdictional, as s. 91(27) of the *Constitution Act, 1867* gives Ottawa the power to enact criminal laws, while s. 92(16) has been interpreted as giving the provinces extensive authority over public health as a local or private matter.[9] Caulfield concludes that there "seems little doubt that the federal government can use the criminal law power to enact such legislation [concerning the regulation of new reproductive technologies]."[10] He later cites *R.* v. *Hydro-Québec*[11] for the proposition that legislation passed pursuant to the federal criminal law power need not take the form of a simple criminal prohibition coupled with a penalty, but can take the form of a complex regulatory scheme. Then, in his conclusion, he states the following:

> [T]he drawbacks associated with criminal prohibitions in this context are so clear and acute that a reconsideration of legal instruments is essential. *Yes, constitutional issues remain.* Nevertheless, the government should not let *this constitutional uncertainty* force the creation of a regulatory framework that is destined to fail.[12]

So, prior to his concluding paragraph, Caulfield suggests that a scheme of criminal prohibitions pertaining to certain new reproductive technologies would be laudable and constitutional if they took the form of regulations passed pursuant to a criminal statute. But in his conclusion he states that criminal prohibitions — presumably of any kind — are not advisable and that, because criminal law, no matter what its form, should not be used in this area, there remain constitutional issues if the federal government is going to legislate in this sphere. Consequently, after reading this article in its entirety, it is reasonable to wonder exactly what type of legislative scheme, a criminal or non-criminal one, Caulfield is advocating.[13]

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9 See *Schneider* v. *British Columbia*, [1982] 2 S.C.R. 112.

10 Caulfield, *supra* note 2 at 344.

11 *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213 [hereinafter *Hydro-Québec*].

12 Caulfield, *supra* note 2 at 345.

13 Of course, if Caulfield's real thesis is that no form of criminal law should play a part in dealing with new reproductive technologies, his discussion regarding the social consensus needed before one uses criminal prohibitions and the research chill caused by criminal prohibitions would bolster his recommended approach. If Caulfield's real thesis is that regulations under a criminal statute should be used to prohibit certain practices associated with assisted human reproduction, his arguments concerning social consensus, research chill, and criminal law undermine his proposal.

III. CRIMINALIZATION AND LEGISLATIVE PROCESS

Because there is some uncertainty as to whether or not Caulfield believes criminal law is an appropriate tool to regulate assisted human reproduction, this portion of my reply is divided into two parts. Part A assumes that Caulfield's true thesis is that criminal law is an inappropriate legislative response to the problems posed by the new reproductive technologies. Part B proceeds on the basis that Caulfield thinks criminal law, in the form of regulations drafted by an expert regulatory body and passed pursuant to an enabling criminal statute, is the type of legislative mechanism that is best suited to this area.

A. ANALYZING THE ARGUMENTS FOR AND AGAINST CRIMINALIZATION

Caulfield's position that "[c]riminal law should be reserved for areas where there is a high degree of social consensus"[14] is fraught with difficulty. As authority for this proposition he cites a federal government study and a report of the Law Reform Commission of Canada, neither of which make such a statement.[15] What these studies and others advocate is that the criminal law should be used with restraint, but restraint is not synonymous with social consensus.[16] Indeed, the Law Reform Commission Report states that criminal law should only deal with acts that contravene fundamental societal values, such as human dignity.[17] The Law Reform Commission uses this statement to justify the criminalization of hate propaganda,[18] the banning of which does not enjoy a high degree of social consensus.[19]

The most likely source of Caulfield's idea that social consensus should be a prerequisite to enacting a criminal ban is an article written by Dean Alison Harvison Young and Angela Wasunna on regulating new reproductive technologies,[20] an article that he cites in his article. However, Harvison Young and Wasunna do not suggest that social consensus should be a prerequisite to enacting a criminal ban. They simply respond to a certain assertion made by the Royal Commission on New Reproductive Technologies, whose recommendations have largely informed the government's approach in Bill C-56.

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14 Caulfield, *supra* note 2 at 338.

15 See Canada, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982) and Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Law Reform Commission of Canada, 1976).

16 For a comprehensive description of the genesis and evolution of the idea that criminal law should be used with restraint, see D. Stuart, *Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2001) at 62-66.

17 Law Reform Commission of Canada, *supra* note 15 at 19, 20, and 21.

18 *Ibid.* at 21.

19 See, *e.g.*, the dissenting judgment of McLachlin J. (as she then was) in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 and H.W. Arthurs, "Hate Propaganda: An Argument Against Attempts to Stop It By Legislation" (1970) 18 Chitty's L.J. 1.

20 A. Harvison Young & A. Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 Health L.J. 239.

The Royal Commission concluded that, because there is a large degree of social consensus regarding certain activities associated with new reproductive technologies, these activities must be prohibited by the federal government under threat of criminal sanction.[21] All this statement really stands for is the dubious proposition that if there is a large degree of social consensus regarding the banning of a practice, criminal law must be used. It does not state the minimum requirements that must be met before a criminal law *should* be used, rather it states when a criminal law *must* be used to deal with a practice. In other words, the Royal Commission is silent as to the appropriateness of using criminal law if there is not a large degree of social consensus regarding the banning of an activity.

Harvison Young and Wasunna attempt to achieve a number of objectives. They attack the factual foundation for the necessity of using criminal law in this area by suggesting that there does not exist a large degree of social consensus for the criminal proscription of certain activities dealing with assisted human reproduction. They disagree with using a criminal law regime to govern new reproductive technologies. But what they do not do, or even attempt to do, is present a test, tied to social consensus, for when criminal law should be used to prohibit a practice. In fact, Harvison Young and Wasunna note the difficulty of assessing social consensus:

> [I]t is not at all clear how one legitimately sorts through many diverse and often contradictory views to distill the views of the "collectivity", especially in a multi-cultural country like Canada. In addition, the methodologies and types of questions used in ... surveys have been criticized, and to the extent that these criticisms are well founded, the conclusions as to what Canadians want may be unreliable on their own terms.[22]

Thus, if Caulfield obtained his initial idea pertaining to social consensus and the use of criminal law from Harvison Young and Wasunna, he has taken their comments in this area out of context.

Harvison Young and Wasunna do provide a basis of support for Caulfield's argument that the use of criminal law to regulate assisted human reproduction is inappropriate. Caulfield cites Harvison Young and Wasunna's proposition that criminal law is a "blunt instrument that is ill-suited to both the nuances and subtleties that pervade this area, and to the realities of rapid change."[23] Harvison Young and Wasunna do state that criminal law is a blunt instrument, but they never indicate their reasons for taking this position. They are simply leery of the efficacy of any form of legislation to govern this area.[24] Although they conclude that law has some role to play in the new reproductive-technology field, they see the role of law as more peripheral than other societal institutions and means such as the media, educational institutions and programs, and

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21 Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993) at 1022.

22 Harvison Young & Wasunna, *supra* note 20 at 247 [footnote omitted].

23 Caulfield, *supra* note 2 at 337, n. 11.

24 See the discussion in Harvison Young & Wasunna, *supra* note 20 at 243-46.

professional self-regulation.[25] So when Harvison Young and Wasunna state that they believe criminal law is too blunt an instrument to use in this area, what they really mean is that any form of law *as an instrument of commanding social control* in this sphere is inappropriate.[26]

Their statement about the bluntness of criminal law should not be taken as a recommendation to use another form of law to prohibit certain activities, but rather should be seen as a critique of the institution of law in general to achieve social objectives. So Harvison Young and Wasunna would consider any type of prohibitory legislation to be a blunt instrument compared to using other societal institutions to govern inappropriate behaviour. In the same vein, the Law Reform Commission of Canada has stated:

> [C]riminal law is not the only means of bolstering values. Nor is it necessarily always the best means. The fact is, criminal law is a blunt and costly instrument — blunt because it cannot have the human sensitivity of institutions like the family, the school, the church or the community, and costly since it imposes suffering, loss of liberty and great expense.[27]

The contention that criminal law is not nuanced enough to be used in the area of assisted human reproduction reveals a fundamental misconception of the nature of criminal law. Criminal legislation is more solicitous of an accused's rights and liberty interests than other types of legislation. For instance, before a criminal conviction can be imposed, it is a constitutional imperative for the Crown to prove the *actus reus* and *mens rea* of the offence beyond a reasonable doubt.[28] For non-criminal offences, there is nothing unconstitutional about placing a persuasive burden of proving a due-diligence defence on the accused.[29] Thus strict liability offences under non-criminal federal legislation and provincial statutes, even those under which conviction means the possibility of a term of imprisonment, are constitutionally valid. Moreover, it is an

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25 *Ibid.* at 271-76.

26 For instance, Harvison Young and Wasunna believe that contract law might be an appropriate legal regime for dealing with assisted human reproduction. The common law of contracts is not coercive but presupposes the voluntary coming together of two or more parties on terms and conditions agreed to by the parties. To the extent that the traditional paradigms of contract law do not recognize the social inequities inherent within some of the practices associated with assisted human reproduction, Harvison Young and Wasunna suggest that some aspects of an agreement may well be subject to formal regulation.

27 Law Reform Commission of Canada, *supra* note 15 at 27. As I noted earlier in this reply, a prohibitory legislative regime other than one that is criminal can impose significant loss of liberty. These other legislative means can also impose much suffering and expense.

28 *R.* v. *Oakes*, [1986] 1 S.C.R. 103. This is a small overstatement. Pursuant to *R.* v. *Whyte*, [1988] 2 S.C.R. 3, any type of persuasive burden of proof on an accused is *prima facie* a breach of the presumption of innocence in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter *Charter*] but it is possible, although difficult, to save the proscribing legislation under s. 1. It is also apparent that the Supreme Court has not decreed, as a constitutional precondition, a subjective form of *mens rea* for very many types of criminal offences. For an excellent discussion of the high court's jurisprudence on constitutional fault, see T. Quigley, "Constitutional Fault during the Lamer Years" (2000) 5 Can. Crim. L.R. 99.

29 *R.* v. *Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154.

established rule of statutory interpretation that where real ambiguity exists in determining the meaning of a criminal statute, the interpretation that is most generous to the liberty interests of the accused must prevail.[30] There is no similar rule governing the interpretation of non-criminal statutes. Finally, in recent years, the number and ambit of criminal defences has broadened considerably.[31]

Caulfield states that the political time and energy needed to change criminal laws give them "terminal characteristics in an area as dynamic and controversial as reproductive technologies."[32] Yet this statement may be difficult to defend. It takes no more time and energy to pass a federal criminal statute than it does to pass a non-criminal statute through Parliament. The same legislative process is required for both types of legislation. Indeed, there are many examples of criminal statutes getting speedy approval in both the House of Commons and the Senate.[33]

Again Caulfield cites Harvison Young and Wasunna as authority for his claim, and again, a contextual reading of their statements calls into question whether their words do in fact provide strong support for Caulfield's position. As previously noted, Harvison Young and Wasunna do state their belief that criminal law is ill-suited to the realities of rapid change that pervade the area of assisted human reproduction. Nevertheless, the reason they take this position is that they also believe using prohibitory regulations passed under an enabling criminal statute may lead the courts to conclude that such legislation does not constitute true criminal legislation.[34] Consequently, Parliament may lack the constitutional jurisdiction to pass such legislation. In their view, to ensure jurisdiction Ottawa must use statutory criminal prohibitions, which cannot be amended as quickly as regulations. Thus, the reason criminal law is ill-suited to the realities of rapid change concerning assisted human

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30 *R.* v. *Paré*, [1987] 2 S.C.R. 290.

31 See, *e.g.*, the recognition of the defence of officially induced error for criminal offences in *R.* v. *Dubeau* (1993), 80 C.C.C. (3d) 54 (Ont. Gen. Div.) and the striking down of the immediacy and presence requirements for the defence of duress in *R.* v. *Ruzic*, [2001] 1 S.C.R. 687 [hereinafter *Ruzic*]. In *Ruzic*, the Supreme Court recognized that the principles of fundamental justice in s. 7 of the *Charter* require that defences have to meet a minimum constitutional standard in the form of moral involuntariness. To the extent that any defence does not meet this standard, it will presumably have to be modified (which will usually mean that its ambit will be broadened). For a recent decision in which the court rather unexpectedly reduced the ease with which a defence could be utilized, see *R.* v. *Stone*, [1999] 2 S.C.R. 290 [hereinafter *Stone*]. In *Stone*, the court placed the persuasive burden of proof for the defence of sane automatism on the accused even though the issue of onus was not raised by any counsel in the case. Prior to *Stone*, all that an accused had to do to avail himself or herself of this defence was to raise a reasonable doubt pertaining to the voluntariness of his or her actions.

32 Caulfield, *supra* note 2 at 337.

33 For instance, the anti-terrorism amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 and other federal statutes were first introduced into the House of Commons on 15 October 2001 with many of the provisions coming into force as quickly as 18 December 2001. See *Anti-Terrorism Act*, S.C. 2001, c. 41. Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*, 3d Sess., 34th Parl., 1993, among other things, created the offence of criminal harassment (commonly known as stalking). The Bill was first introduced on 27 April 1993 and it received Royal Assent on 23 June 1993.

34 Harvison Young & Wasunna, *supra* note 20 at 258.

reproduction is that, in order for such legislation to be found constitutionally valid, it must take the form of a statute which takes more time to amend than regulations.

However, Harvison Young and Wasunna's belief that the courts may not characterize a legislative scheme as criminal if it makes extensive use of regulations instead of statutory prohibitions, has not been proven by the test of time. Harvison Young and Wasunna observe that *Hydro-Québec* is the latest decision of the high court regarding the division of powers and criminal law and, at the time of their paper, this observation was correct. In that case, the court upheld a complex regulatory scheme as valid criminal legislation in a narrow 5-4 decision. Harvison Young and Wasunna speculate that, because the composition of the court has changed since the case was decided, more flexible and elaborate regulatory schemes may not be construed by the court in the future as valid criminal legislation.[35] Yet in *Re Firearms Act*,[36] a case decided one year before the publication of Caulfield's article but after the Harvison Young and Wasunna paper, the Supreme Court unanimously upheld such a scheme as validly enacted pursuant to Parliament's criminal law power. Therefore there is now strong authority for the proposition that the criminal law power authorizes complex legislation, including even discretionary administrative authority. There is now no doubt that prohibitory regulations passed pursuant to an enabling criminal statute would be considered valid criminal legislation. The ease and speed with which regulations can be passed ensures that criminal law can keep abreast of developments regarding new reproductive technologies.

Caulfield attacks the wisdom of using criminal law to prohibit certain practices associated with the new reproductive technologies by questioning the link between these activities and morality, which is the heart of criminal law. The example that he uses is human cloning.[37] Caulfield argues that Ottawa endorses a deterministic view of genetics because Ottawa asserts that human cloning does not respect individuality and therefore should be banned.[38] However, this statement is somewhat of an exaggeration. No government documents indicate that the federal government is moving to criminalize human cloning because it believes that clones will have the same thoughts, aspirations, and temperament as those individuals whose DNA they share. The concern is that, through cloning, certain aspects of individuals that help make them unique, particularly physical attributes and appearance that are largely genetically determined, would be duplicated. It is in this sense that the individuality and diversity of human beings is diminished. Accordingly, the attack on cherished societal values

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35 *Ibid.* at 261. Implicit within this analysis is the idea that legislation taking the form of prohibitory regulations may be characterized as more regulatory than criminal simply because of the legislative tool that is used. Although at one time courts might have been willing to engage in this type of analysis, in my view such a conclusion was never warranted and confused the meaning of "regulations" with "regulatory."

36 *Re Firearms Act*, [2000] 1 S.C.R. 783 [hereinafter *Re Firearms Act*].

37 Caulfield, *supra* note 2 at 342-43. Caulfield makes clear that he thinks human cloning is not a "good idea" because there are health and safety issues with the technology. But he does argue against a criminal "ban" on the practice.

38 *Ibid.* at 342.

such as individuality, privacy, and diversity may justify the criminal prohibition of human cloning.[39]

The final argument that Caulfield makes against the use of criminal law to govern assisted human reproduction is that it would create a chill on important research activity.[40] But far from being a negative aspect of using criminal law in this area, this "chill" is the very reason to use criminal proscriptions. To the extent that the heightened stigma attached to a criminal conviction will deter individuals from engaging in proscribed practices, this result is laudable.

The argument that criminal law will create a research chill presupposes that the fruits of the research are more important than the harms that the research practice causes to both the public's health and to important societal values. As recently noted by Professors Baylis and Downie:

> As a warning to those who continue to chant the mantra that ... [criminal] legislation ... could hamper research of considerable medical and economic value, let's recall the words of the late philosopher Hans Jonas: "Too ruthless a pursuit of science would make its most dazzling pursuits not worth having."[41]

To the extent that certain practices are proscribed by criminal legislation even though a strong case can be made that they do not unduly endanger public health or morality, the legislation should be amended to reflect the reality of the situation. As I previously demonstrated, criminal legislation, whether it takes the form of statutes or regulations, is as adaptable as other legislative regimes. To the extent that provisions are too broadly or amorphously worded, this is a problem of legislative drafting that should be rectified. But it is a problem that is not exclusively inherent to criminal law.

Perhaps the most compelling practical argument in favour of Parliament using the criminal law power in the area of new reproductive technologies is that there is no other head of federal power under which they can validly legislate. The Royal Commission on New Reproductive Technologies concluded that the federal government could regulate new reproductive technologies under the national-concern branch of the peace, order, and good government power (POGG).[42] However, the Commission failed to realize that there is a major stumbling block to using POGG to pass legislation in

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[39] It can be argued that a problem is created for identical twins by the idea that it is against conceptions of morality to have genetically identical individuals in society. This is obviously not the federal government's view. It is more reasonable to assume that it is the deliberate creation of genetic duplicates that Ottawa argues infringes societal conceptions of morality. For instance, consider the moral implications presented by the following scenario: In the not too distant future, an individual goes to a bar to get a drink. Unknown to him, someone collects a saliva sample from his drinking glass after he has left the bar. Using new reproductive technology, the DNA from the saliva sample is used to create a clone of the patron.

[40] Caulfield, *supra* note 2 at 343.

[41] F. Baylis & J. Downie, "Ban cloning: Do you copy?" *Globe & Mail* (2 July 2002) A13.

[42] Royal Commission on New Reproductive Technologies, *supra* note 21 at 18.

this area. In *R.* v. *Crown Zellerbach*,[43] the court stated that, for a matter to come within the national concern branch of the POGG power, the topic must have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[44] Hogg compares health to inflation, which the high court found was a subject matter that did not have the requisite amount of distinctiveness to be the subject of the POGG legislating power.[45] Patrick Healy provides an extensive analysis of the potential for using POGG to legislate in the area of new reproductive technologies.[46] He concludes that "the matters touched by reproductive technologies are so disparate that they affect a wide variety of federal and provincial powers and thus defy any finding that reproductive technologies have the singleness or coherence required for federal action [under POGG]."[47] Because there is no other viable head of legislative power that can be utilized by the federal government to legislate in this area, the criminal law power must be used.

B. LEGISLATIVE FORM

Caulfield's other potential thesis, that criminal law in the form of regulations drafted by an expert regulatory body and passed pursuant to an enabling criminal statute is the type of legislative mechanism best suited to this area, is also subject to a serious objection. It is a proposal that, if left unmodified, could result in an elitist, fundamentally undemocratic, and potentially inflexible regime.

Caulfield's recommendation is largely based on the idea that health and safety issues as opposed to morality are the best rationales for regulating this area. This position supports the composition of the regulation-making body as consisting of experts in the health and safety matters surrounding assisted human reproduction. Indeed Caulfield wants the definition of the prohibited activities to be "responsive to the reality of genetics and reproductive technologies."[48]

But having the membership of the regulation-making body drawn from such a narrow pool has serious drawbacks. It would mean that physicians and scientific researchers, some of the key constituencies targeted by the legislation, would be in charge of determining its content. This could be seen as analogous to the foxes being in charge of the henhouse. Moreover, as I have previously shown, moral issues continue to be a key consideration regarding assisted human reproduction, and doctors and researchers certainly have no special expertise or monopoly on morality. Even if

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43 *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401.

44 *Ibid.* at 432.

45 See Hogg, *supra* note 6 at 18.11, where he characterizes health as an "amorphous topic." The case in which the court held that the subject matter of inflation did not come within the POGG power was *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

46 P. Healy, "Statutory Prohibitions and Regulation of New Reproductive Technologies under Federal Law in Canada" (1995) 40 McGill L.J. 905 at 916-19.

47 *Ibid.* at 919.

48 Caulfield, *supra* note 2 at 345.

doctors and researchers had a special insight into moral issues as well as health and safety concerns, they are not elected representatives of the people. Any legislative regime set up by such a body might be the embodiment of wise policy, but it is not democratic.

It can be argued that Caulfield's article does not advocate that the only views considered by his proposed regulatory body be those of its members. In fact, he suggests that the regulatory body be mandated to perform ongoing consultations with individuals from a wide variety of disciplines.[49] While these consultations may inform the regulations made by the regulatory body, they may also simply provide the superficial appearance of inclusive decision-making without actually influencing the content of the regulations. Indeed, Caulfield does not propose that even broadly supported proposals emanating from the consultations should bind the regulatory body. Even if the regulatory body took seriously its duty of consultation, the time required to engage in such consultations could diminish the capacity of the regulations to deal with the dynamism of reproductive technologies.

It could be contended that a requirement of broad-based consultation prior to drafting of regulations would mean that new regulations take as long to pass as statutory amendments. Therefore, statutory prohibitions, in the form of the prohibitions in Bill C-56, may be the preferable form of legislation to govern this area. At least they would not be seen as undemocratic or completely controlled by specialized interest groups.

Another possibility, one that has been endorsed by Caulfield subsequent to the writing of his article, is the idea of using prohibitory criminal regulations with a negative-resolution mechanism.[50] The idea of a negative-resolution mechanism was first proposed by the Canadian Sentencing Commission.[51] Regulations made by the expert body would come into force subject to the House of Commons rejecting them by resolution. An affirmative-resolution process would require that the regulation-making body's prohibitory regulations be the subject of time-consuming debate in Parliament. With the negative-resolution process, it would only be necessary to provide time for discussion and debate in the House if a minimum number of members brought forward a negative resolution rejecting the regulations. Such a mechanism would give a voice to the people if the expert drafting body was not responsive enough to public

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[49] Caulfield, *ibid.* at 344.

[50] National Health Law and Family Law Sections of the Canadian Bar Association, "Submission on Draft Legislation on Assisted Human Reproduction" (2002) 10 Health L. Rev. 25 at 27. Professor Caulfield was one of the authors of the submission and endorses the idea of using a negative-resolution process (personal communication with T. Caulfield, 30 July 2002). Interestingly, he cites my work as authority for such a legislative scheme (see S. Anand, "Sentencing, Judicial Discretion and Juvenile Justice, Part II" (1999) 41 Crim. L.Q. 485 at 499). Although the National Health Law and Family Law Section of the Canadian Bar Association advocates the use of a negative-resolution mechanism, it also retains the idea of a mandatory broad consultation process, apparently without recognizing the deleterious effect such a consultation process may have on the timeliness of passing regulations.

[51] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1988) at 305-309.

concerns, while in all other instances it would allow the timely and informed promulgation and amendment of legislation.

IV. CONCLUSION

Bill C-56 is not as flawed as many people think. In this reply I have sought to establish that the federal government's proposal to use criminal legislation to govern the area of assisted human reproduction is both necessary[52] from a constitutional perspective and wise from a policy perspective. Bill C-56 already provides for statutory criminal prohibitions pertaining to certain practices associated with assisted human reproduction. Although reasonable people may differ as to the propriety of banning some of the practices slated for proscription, it is difficult to attack the form of the legislative scheme.

For those who believe that the legislative process involved with the passing of statutes does not respond quickly enough to changes brought on by new reproductive technologies,[53] prohibitory regulations passed pursuant to an enabling criminal statute may be the answer. Section 65 of Bill C-56 already gives broad regulation-making power to the Governor in Council, but these powers, at present, do not extend to specifying prohibited activity. A minor statutory amendment could give regulation-making power, including the power to prohibit certain activities, to the Assisted Human Reproduction Agency, which would constitute the expert regulation-making body.

The government's current proposed legislative scheme allows the House of Commons to review most regulations before they become law. Section 66 of the Bill mandates that, before a regulation is made under s. 65, the Minister of Health must refer the proposed regulation to both the House of Commons and the Senate. If the final form of the regulation does not incorporate a recommendation of the committee of either chamber, the Minister must indicate the reasons for non-incorporation. The regulation can take effect 60 days after it has been laid before Parliament or at an earlier time, but only after both the House and the Senate have reported their findings with respect to the proposed regulation. Yet s. 67 allows the government to forgo the requirement of submitting the proposed regulation to either House if the changes it makes to an existing regulation are insubstantial, or if the proposed regulation must be made immediately to protect the health or safety of any person.

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[52] It is necessary if one assumes that a uniform legislative response governing these activities throughout Canada is required. For a view that suggests that the provinces should legislative in this area and there is not really a need for a federal legislative regime, see Harvison Young & Wasunna, *supra* note 20 at 255-56.

[53] It should be noted that s. 70 of Bill C-56 mandates that three years after the coming into force of s. 21, which establishes the Assisted Human Reproduction Agency of Canada, the Act will be reviewed by a Parliamentary committee that will suggest changes to the Act or its administration. Nothing prevents Parliament from amending the Act prior to the three-year period. Moreover, there is no requirement of continuous three-year Parliamentary reviews. However, pursuant to s. 24 of the Bill, the Assisted Human Reproduction Agency of Canada has the power to monitor developments in new reproductive technologies and provide advice to the Minister of Health concerning the Act's provisions.

It would take little effort to amend the government's proposed legislative scheme to allow for a negative-resolution process, and such a change would have salutary effects. The potential s. 67 loophole designed to "protect the health and safety of any person" would be closed by using a negative-resolution process. Such a process would also not undermine the ability of the law to respond to technological and societal change in a timely and democratic fashion.