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The Assisted Human Reproduction Act Reference and the federal criminal law power

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I — Introduction

This paper has two basic objectives. The first is to recharacterize the disagreement between the Chief Justice and Justices Lebel and Deschamps in the *Assisted Human Reproduction Act Reference* ("Reference").[2] There is a dispute about principle, namely as to the conditions for exercising the criminal law power, and a dispute about what the impugned provisions of the Assisted Human Reproduction Act ("AHRA" or "Act")[3] actually do. I shall argue that the Chief Justice is on firmer doctrinal ground than Justices Lebel and Deschamps on the question of principle, but that her analysis of the legal effects of the impugned provisions is questionable. Specifically, she appears to be too quick to dismiss as unimportant the licensing requirement for assisted reproduction activities which are not prohibited by the Act or its regulations.

My second objective is to discuss, from a somewhat broader perspective, the scope and limits of the criminal law power. The vagueness of the conventional three-part test derived from the *Margarine Reference*[4] has left many, apparently including Justices Lebel and Deschamps, unconvinced that the test establishes any limits at all. I can understand the dissatisfaction with *Margarine*, but I do not agree that the criminal law power has no doctrinally discernable limits. It is just that we need to look beyond the

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[2] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457.
[3] S.C. 2004, c. 2.
[4] *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1.

Margarine case to identify them. In particular, I do not agree with Justices Lebel and Deschamps' suggestion that it is necessary, in order to circumscribe the criminal law power, to introduce a "reasoned apprehension of harm" threshold below which the power may not be used.

In the next part of the paper, I provide a very brief summary of the structure of the Act and of the Reference (II), before analyzing the disagreement between the two main opinions (III), and addressing the broader question of the scope and boundaries of the federal criminal law power (IV). Part V concludes.

II — The Act and the Reference

The principal prohibitory provisions of the AHRA are of two types: sections 5 to 9 of the Act prohibit outright certain activities ("prohibited activities"); and sections 10 through 12 prohibit certain other activities ("controlled activities") from being carried out "except in accordance with the regulations and a licence." In addition, section 13 prohibits licensees from undertaking controlled activities in unlicensed premises.

The constitutionality of some of these provisions was not disputed. In particular, the Quebec Government, which brought the reference that culminated in the Supreme Court's decision, conceded the criminal law character, and hence the validity, of sections 5 through 7 of the Act. However, Quebec argued that in relation to sections 8 and 9 (a prohibition against the use of reproductive material without the donor's consent, and against the use of reproductive material from a donor under 18 years of age); all of the controlled activities prohibitions; and other provisions of the Act concerning the administration of the scheme by a federal agency, the Act went beyond federal powers.

The jurisprudence establishes three requirements for a valid exercise of the criminal law power conferred by s. 91(27) of the Constitution Act 1867: the law must consist of a prohibition, it must impose a penalty, and the law must be directed at a valid criminal law

purpose.[5] The first two requirements are often described as requirements as to form, whereas the last is a requirement as to substance. In the Reference, all nine justices agreed that the impugned provisions of the AHRA satisfied the formal requirements. However, the justices were divided as to whether any or all of them possessed a valid purpose. In the opinion of the Chief Justice (with whom three justices concurred), they did; in the opinion of Justices Lebel and Deschamps (with whom two other justices concurred), they did not. The tie-breaking vote was cast by Justice Cromwell, who concluded that, taken as a whole, the "challenged provisions cannot be characterized as serving any purpose recognized by the Court's jurisprudence" (par. 287), but that ss. 8, 9 and 12, considered individually, could be so characterized. These latter provisions were, therefore, within the power conferred by s. 91(27).

The federal government declined to argue that the validity of any of the provisions could be maintained on the basis of any federal power other than the criminal law power. Thus, Justice Cromwell's agreement with Justices Lebel and Deschamps that some of the impugned provisions did not come within the criminal law power entailed the conclusion that those provisions were invalid.

III — The disagreement between the Chief Justice and Justices Lebel and Deschamps

In this section, I analyze the nature of the disagreement between the two main judgments. As we have seen, the disagreement between the Chief Justice and Justices Lebel and Deschamps ostensibly relates to the purpose requirement for criminal legislation. I wish to suggest that this impression is misleading; the substance of their disagreement lies elsewhere.

[5] *Margarine Reference*, p. 50. Non-colourability is often mentioned as an additional requirement. I omit it here because it is not a requirement unique to the criminal law power: it is a general principle, rather than one specific to laws enacted in reliance on s. 91(27), that validity is governed by the impugned law's actual purpose, rather than by its ostensible purpose.

Case law recognizes health, morality and personal security as legitimate purposes for criminal legislation.[6] According to the Chief Justice, these were the interests safeguarded by the impugned provisions, as well as by the Act as a whole, which has as its "dominant purpose to prohibit inappropriate practices" (par. 37). By contrast, in the view of Justices Lebel and Deschamps, the purpose of the impugned provisions was not to protect these interests against any "serious risk" (par. 251) posed by the controlled activities, but was instead to "establish mandatory national standards for assisted human reproduction" (par. 226, 251).[7]

Two things are puzzling about the manner in which the justices present their disagreement. One is that it appears to be about semantics. The question whether the purpose of the Act or the impugned provisions is to prohibit conduct that harms health, morality or security, or rather to establish national standards for the controlled activities, is akin to arguing about whether the purpose of a teenager's curfew is to prevent late nights out or rather to establish the time at which the teenager's evening excursions must end. The choice between these two descriptions of the purpose of the rule does not appear to turn on any matter amenable either to objective verification or to reasoned argument.

The second concerns the several paragraphs devoted by Justices Lebel and Deschamps to constructing an argument that a threshold of harm should be a component of the requirement of a valid criminal law purpose (par. 236-40), and that any risk posed by the controlled activities does not meet this threshold (par. 248-49). This discussion might lead one to assume that the divergent conclusions reached by the Chief Justice and Justices Lebel and Deschamps turn on a disagreement between them as to the level of risk or harm necessary before criminal prohibitions may be applied, but this assumption would be incorrect. The Chief Justice characterizes the Act as authorizing the Governor in Council to identify under what circumstances the controlled activities are harmful or dangerous, and as prohibiting that subset of them; it would be difficult to dispute that the

[6] *Margarine Reference*, p. 50*; AHRA*, par. 41 (Chief Justice) and 232 (Lebel and Deschamps).
[7] Cromwell J. concurred in the conclusion that the "challenged provisions cannot be characterized as serving any purpose recognized by the Court's jurisprudence" (par. 287). Justice Cromwell did specify what, in his view, the purpose of the impugned provisions. He came closest to doing so when he suggested, earlier in his reasons, he that an "examin[ation of] both their purpose and effects" led him to conclude that the "essence" of the provisions "the regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction" (par. 285).

scenarios described by the Chief Justice, against which she supposes that prohibitory regulations will be directed, represent serious harms.[8]

It appears to me that the question that actually separates the Chief Justice and Justices Lebel and Deschamps is not what the threshold of harm is, but which set of activities must meet that threshold: the controlled activities in general, or only the prohibited subset of them. (See the quotations in the box at right.) Within this question reside two others: a question of principle and a question as to what the impugned provisions of the Act actually do. The question of principle is whether, in circumstances where a given activity (X) is not intrinsically harmful or dangerous but may be harmful or dangerous if carried out in a particular manner or under particular circumstances (X'), it is a permissible exercise of the criminal law power to authorize the executive to determine and prohibit X'. This is a question relating to the form of criminal legislation. The second issue is whether authorizing the prohibition of X' is all the impugned provisions actually do and, more precisely, whether they do not also alter the legal status of activities falling outside X'.

> "Acting under s. 10, the executive may prohibit reprehensible conduct, while leaving the positive aspects of assisted reproduction untouched."
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> *The Chief Justice, par. 101*
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> "[T]he controlled activities … include practices … on which … a broad consensus exists [that they are legitimate]."
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> *Justices Lebel and Deschamps, par. 209*

A — The permissibility of delegated prohibition

Can a criminal law delegate to the Governor in Council the authority to determine and prohibit by regulation the harmful or dangerous forms of an activity which is not intrinsically harmful or dangerous? A negative answer to this question faces a formidable

[8] E.g., "ovarian hyperstimulation syndrome (a potentially dangerous condition)" (par. 97), "cerebral palsy" and other health problems (id.), "elevated risk of developing deformities, functional disturbances, and cancer" (id.), "sex-selective abortions" (par. 100), "cross-species hybrids," "baby farms," and "devaluation of persons with disabilities" (id.).

doctrinal obstacle in the form of the Supreme Court's ruling in *Hydro-Quebec*,[9] which is directly on point and answered the question in the affirmative.

In *Hydro-Quebec*, the Supreme Court upheld under the criminal law power provisions of the *Canadian Environmental Protection Act* ("CEPA")[10] whereby the Minister of the Environment was authorized to designate certain substances as "toxic" and to prescribe the maximum quantity and concentrations in which those substances may be released into the environment. The relevant prohibition under the CEPA — a general prohibition against contravening the regulations — was even less specific than the controlled activities prohibitions within the AHRA. Yet, a majority of the Court held that the Act satisfied the form requirement for legislation under the criminal law power. In the words of the majority judgment, "the Act ultimately prohibits" the emission of the "listed substances … in a manner contrary to the regulations" (*Hydro-Quebec,* par. ___).

Hydro-Quebec appears to be conclusive as to the formal permissibility of a system of delegated prohibition. The emission of substances in general is not intrinsically harmful to the environment; the CEPA authorized the Minister to determine the subset of substances susceptible of harming the environment, and the quantities and circumstances under which the emission of those substances would be harmful, and to proscribe only the latter. The case squarely raised the question whether such a scheme satisfies the form requirement for criminal law, and the Court's answer was that it does.

If one wished to mount an argument against the conclusiveness of *Hydro-Quebec*, one strategy would be to rely upon the *Firearms Reference,*[11] a more recent decision of the McLachlin court. In the latter judgment, the Court made a point of referencing the dissenting judgment in *Hydro-Quebec,* observing that the firearms registration offences related to conduct defined in the statute, rather than by the executive (par. 37). The Court also emphasized that guns "pose a pressing safety risk in many if not all of their functions," which explained why the regulation of gun possession is valid criminal law

[9] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213
[10] *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.).
[11] *Reference re Firearms Act (Can.),* 2000 SCC 31, [2000] 1 S.C.R. 783. It is telling that Justices Lebel and Deschamps cite the *Firearms Reference* eight times and *Hydro-Quebec* only once. By comparison, the Chief Justice cites *Firearms* six times, and *Hydro-Quebec* seven times.

even if the regulation of, for instance, motor vehicles would not be (par. 43). One might be tempted to infer from *Firearms* a requirement that an activity be dangerous before it may be subjected to a regime enacted under the criminal law power and a principle that, even then, the prohibited conduct should be defined within the statute rather than by reference to regulations promulgated by the executive.

However, the proposition that *Firearms,* rather than *Hydro-Quebec,* defines the outer limits of the criminal law power does not strike me as especially compelling from a doctrinal standpoint. The *Firearms Reference* does not purport to overrule *Hydro-Quebec*. *Firearms* was also not a borderline case: once the Supreme Court had accepted the proposition that all guns, and not only handguns and automatic firearms, are intrinsically dangerous, the legislation in that case could even be argued to fall within the category of traditional crimes.[12] To the extent that *Firearms* was not a borderline case, it is of limited assistance in defining the border. It should be understood as presenting facts falling well within the boundaries established in *Hydro-Quebec,* rather than as narrowing those boundaries.

Another strategy is to attempt to distinguish the environmental protection legislation upheld in *Hydro-Quebec* from the AHRA. In *Hydro-Quebec*, the majority emphasized that delegation of the authority to determine and proscribe the harmful sphere of conduct was necessary in light of "the particular nature and requirements of effective environmental protection legislation" (par. 147). This observation, of course, invites the question whether the effective prevention of harms relating to assisted human reproduction shares, or does not share, these "particular … requirements."

Moreover, the CEPA contained a definition of "toxic" such that it is reasonable to believe that the Governor-in-Council's determination whether to add a substance to the list of toxic substances, and in what quantity and concentration the emission of the substance should be permitted, is to be based on whether the emission would "constitute a danger to the environment [or] to human life or health" (CEPA, s. 11). The absence of a similar cue

[12] *Firearms*, par. 22-23, 33 ("gun control has traditionally been considered valid criminal law because guns are dangerous"), 53 ("gun control has been the subject of federal law since Confederation").

in the AHRA requires us, to a greater extent, to accept on faith that the prohibitions will ultimately be directed at harmful or dangerous practices.

These strategies aside, on the question of principle as to whether delegated prohibition is constitutionally permissible under the criminal law power, the better doctrinal view is that it is. The Chief Justice is on firmer ground on this question than Justices Lebel and Deschamps.[13]

B — The legal effect of the impugned provisions

In addition to the question of principle, there is also a question as to what the impugned provisions of the AHRA actually do. To be more specific, the question concerns the relationship between the licensing provisions of the Act and the prohibitory provisions.

We have seen that delegated prohibition is permissible within the criminal law power. If there is a subset of activities related to assisted human reproduction that "would undercut moral values, produce public health evils, and threaten the security of donors, donees and persons conceived by assisted reproduction"[14] --- in short, that are harmful or dangerous --- Parliament may prohibit this subset either directly or by authorizing the Governor in Council to define the prohibited sphere.

But this is not all that the impugned provisions do. Sections 10 to 13 also subject activities that are not within the prohibited sphere to a requirement that they be carried out only with a federal licence. Sections 14 to 19 impose information gathering, reporting and disclosure requirements upon licensees; and s. 40(6) confers discretion upon a federal agency to attach terms and conditions to any licence at any time. In short, the AHRA imposes significant legal burdens, by means of a requirement of federal licensing, on the controlled activities.

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[13] It is also worth noting that Justice Lebel and Deschamps' position would call into question the validity of the *Hazardous Products Act*, R.S.C. 1985, c. H-3, which also employs the device of delegated prohibition, and which has been assumed to be valid criminal law, including by the Supreme Court. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, par. 42; *R. v. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345. This point is also made by B. von Tigerstrom, "Federal Health Legislation and the Assisted Human Reproduction Act Reference" (2011), 74 Sask. L. Rev. 33, at par. 8.

[14] The Chief Justice's opinion (par. 20), summarizing the federal government's description of the harm targeted by the legislation.

Parliament does not appear to have made any judgment that the controlled activities, outside the zone of prohibition to be established by the Governor in Council, are harmful or dangerous.[15] Yet, neither *Hydro-Quebec* nor *Firearms* goes as far as to authorize the imposition of a federal licensing requirement upon an activity that is neither harmful nor dangerous: in *Hydro-Quebec*, there was no licensing scheme; in *Firearms*, there was, but the Court there emphasized that the activity was intrinsically dangerous.

If the licensing requirements are valid, it must be because they are incidental to the prohibitory features, which is to say that they must be sufficiently minor and sufficiently related to the functioning of the prohibitory features.[16] The Chief Justice concludes that they are. On the one hand, she decides, primarily on the basis of the breadth of the provincial property and civil rights power, and the fact that the licensing provisions do not create civil rights, that the "incursion on provincial jurisdiction" is but minor (par. 137).[17] On the other hand, the requirements "help to ensure that the Act's prohibitions are respected" (par. 145).

There is, however, another perspective on the matter. To say that the licensing requirements are incidental to the prohibitory features is arguably another way of saying that the prohibitory features of the AHRA are its dominant features, its "pith and

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[15] For instance, s. 2 of the AHRA, which sets forth the principles underlying the Act, contains no suggestion that Parliament considers assisted human reproduction to be dangerous, let alone harmful. Nor, in its factum, did the federal government contend that the controlled activities, outside the zone of prohibition established by the Governor in Council, are harmful or dangerous. The federal government did argue that "the practices addressed by the Act … pose unique risks to morality or health, or both, because the practices involve the artificial creation of human life" (Appellant's Factum, par. 32; see also par. 6, 134), but this falls short of a claim that the activities are harmful or dangerous. The operation of motor vehicles poses risks, too; yet, a federal driver's licensing scheme would not be valid criminal legislation. See *Firearms*, par. 43. Similarly, the Chief Justice does not suggest that the controlled activities are, in general, harmful or dangerous; rather, she regards the scheme of the controlled activities provisions as one in which the Governor in Council is authorized to determine the harmful or dangerous subset of them, while leaving the others "untouched" (Chief Justice, par. 101).

[16] The Chief Justice comes close to suggesting, at one point, that the licensing provisions are a form of delegated prohibition in themselves; the idea would be that the terms set by the licensing agency define, for each licensee, the sphere of prohibited conduct (par. 149). The conflation of licensing and prohibition is, however, doctrinally problematic (see Part IV.B.3, infra); and the Chief Justice's observation arises in the context of an overall argument the thrust of which is not that the licensing provisions are in themselves criminal prohibitions, but that licensing is useful for the effectiveness of the criminal prohibitions elsewhere in the Act (par. 147-151).

[17] The considerations identified by the Chief Justice were also relied upon in *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641.

substance."[18] Indeed, in characterizing the AHRA, the Chief Justice concluded that the "dominant effect" of the Act is to prohibit certain things (par. 32). For her to reach this conclusion despite the licensing provisions, it is not sufficient for her to be persuaded that the "incursion" effected by the licensing provisions is small relative to the enormity of the property and civil rights power; she needs to determine that the licensing requirements are minor relative to the rest of what the Act does. The questions that become relevant, but which the Chief Justice does not ask, are: how large is the prohibited sphere of activity (including the sphere prohibited by regulation) relative to the licensed, non-prohibited sphere; and how onerous are the legal requirements placed upon licensees?

It is a shortcoming of the Chief Justice's opinion that she simply asserts prohibition to be the "dominant effect" of the regime, without asking the questions necessary in order for that conclusion to be warranted.[19] It does not strike me as immediately obvious that the licensed sphere will be much smaller than the prohibited sphere, or that the obligations of licensees are not substantial. Evidently, neither Justices Lebel and Deschamps, nor Justice Cromwell, [20] were persuaded that the legal effect of the impugned provisions upon non-prohibited behaviour is minor in this sense.

In summary, the actual disagreement between the Chief Justice and Justices Lebel and Deschamps has little to do with the purpose of the AHRA or of the impugned provisions. Rather, it concerns, on the one hand, the permissibility of delegated prohibitory legislation and, on the other hand, the significance of the federal licensing requirement for assisted human reproduction activities not falling within the prohibitory zones

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[18] See Peter W. Hogg, *Constitutional Law of Canada*, 2011 Student Edition, sec. 15.9(c).

[19] The relevant part of Chief Justice's reasons are in par. 31-33. This analysis is rather thin; it appears to consist of an acknowledgment that the Act "has an impact on the regulation of medical research and practice and hospital administration" followed by an assertion that "dominant effect" of the Act is prohibitory despite its "impact on provincial matters."

[20] Justice Cromwell, for instance, adopts the Quebec Court of Appeal's assessment: "With respect to everything that is not subject to a total prohibition, the Act constitutes a complete code governing all clinical and research activities relating to assisted reproduction. In fact Parliament first of all empowers the government to regulate more than 25 areas of activity relating to assisted reproduction. These include standards relating to the qualification and licensing of materials, facilities, and the persons engaged in these controlled activities, as well as the form of consent to be given by the donor of human reproductive material. It then creates the Agency, on which it confers the double mandate of qualifying and licensing establishments and persons involved in assisted reproduction activities in compliance with the regulations, and of overseeing the application of the Act."

established by the statute or the regulations. While the doctrine favours the Chief Justice's view that delegated prohibition is permissible under the criminal law power, she does not acknowledge, let alone meet, her burden of showing that the licensing requirements are sufficiently minor that they do not affect the characterization of the Act.

IV — The scope of the criminal law power

The foregoing analysis has focused narrowly on a small handful of precedents, especially *Hydro-Quebec* and *Firearms,* and on the impugned Act. In the remainder of this paper, I offer some observations about the scope of the criminal law power from a broader perspective.

A — The conventional view of the problem

I begin by describing the problem posed by the interpretation of the criminal law power, as I believe it is conventionally understood.

It is trite to say that the criminal law power is difficult to define.[21] Indeed, a common move in judicial analyses of s. 91(27) is to describe it in vague terms either as a "plenary power" (especially when a federal law is being upheld)[22] or as a power that is "broad, [but] not unlimited" (especially when a federal law is being invalidated).[23]

In search of greater precision, it is conventional to refer to three requirements derived from the opinion of Justice Rand in the *Margarine Reference* and which are considered definitive of the scope of the criminal law power: a prohibition, a penalty, and a valid criminal law purpose.[24] However, while uncertainty as to the meaning of doctrinal

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[21] Eg., Hogg, sec. 18.2 ("very difficult to define"). *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at p. 236 ("Criminal law is easier to recognize than to define."); Reference, par. 230 ("a difficult task") (Lebel and Deschamps JJ.)

[22] *A.G.B.C. v. A.G. Canada*, [1937] A.C. 368 ("Section 498a Reference"); *A.G.B.C. v. Smith,* [1967] S.C.R. 702; *Hydro-Quebec*, par. 118, *RJR-Macdonald*, p. 240, *R. v. Malmo-Levine*, 2003 SCC 74, at par. 73.

[23] Reference, par. 245 (Lebel and Deschamps JJ.); *Ward v. Canada*, 2002 SCC 17, [2002] 1 SCR 569, at par. 51. (Admittedly, in both cases the passage is a quotation from *Firearms*, in which federal legislation was upheld.)

[24] See, e.g., Reference, par. 35 (Chief Justice), 233 (Lebel and Deschamps JJ.)

requirements is a fact of life, in the case of the *Margarine* criteria, these uncertainties come dangerously close to placing in doubt whether the requirements have any content at all.

For instance, while the requirement of a prohibitory form is presumably intended to distinguish "prohibition" from "regulation,"[25] one may wonder whether this requirement has any substance if, as Justices Lebel and Deschamps stated, "a regulatory scheme, [taking] the form of exemptions from a prohibitory scheme, falls within the field of criminal law."[26] In other words, a system of prohibitions and exemptions so detailed and extensive that it amounts to a regulatory scheme may nonetheless comply with the requirement of a prohibitory form.

As for the requirement of a valid criminal law purpose, the non-exhaustive list of purposes recognized by the cases --- "public peace, order, security, health, morality"[27] --- is so encompassing that the list may as well read "peace, order and good government." Indeed, Justices Lebel and Deschamps' proposal to tweak the purpose requirement by introducing what they call a "threshold" of risk is a response to their belief that, otherwise, the power "would in reality have no limits" (par. 240).

My own view is that, while the limits of the criminal law power have not always been successfully articulated, it is not the case that the power has no doctrinally discernible limits. A discussion of these limits is the subject of the next section.

B — The relationship between the criminal law and property and civil rights powers

It is almost too obvious to mention that if a law enacted in reliance on the federal criminal law power is held to be ultra vires, the law will often have been held to come

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[25] This distinction is made in another context by the Judicial Committee: *Local Prohibition Reference*, at p. ___ (the "regulation of trade and commerce" does not include the prohibition of a trade).
[26] Reference, par. 234.
[27] *Margarine Reference*, p. 50.

instead within the provinces' jurisdiction over property and civil rights.[28] It appears, therefore, that an account of the scope of the criminal law power must describe its relationship to the provincial power over property and civil rights.

In my view, a useful description of this relationship might have the following three elements which I shall describe more fully below. First, the criminal law and property and civil rights powers are dual plenary powers. Second, judgments as to the classification of a law as between the two powers involve an assessment as to whether the material features of the law more closely resemble legislation in a criminal or civil paradigm. Third, within the gray area between the two paradigms, the limits of Parliament's criminal law jurisdiction are crossed when a federal law assumes control over an activity in order to suppress one harmful or dangerous form of the activity; on the other hand, Parliament may prohibit that form either directly or via delegated legislation.

1. Dual plenary powers

The category of criminal law enters our constitutional lexicon in the Quebec Act 1774,[29] where it is distinguished from private law. The Imperial instrument provided that disputes involving "property and civil rights" would be governed by French civil law (Art. VIII); nevertheless, the "criminal law of England" would continue to be observed in the colony (Art. XI). The same dichotomy appears in Blackstone's Commentaries, which, for instance, distinguishes private wrongs, defined as the infringement of the civil rights of individuals, from crimes, defined as the violation of "public rights or duties" (Book 3, Ch. 1).[30] Criminal law, in other words, is the domain of public wrongs.

The structure established by the Quebec Act illuminates the sense in which the federal criminal law power is a "plenary power." As has sometimes been observed, several of the enumerated federal classes of subjects appear to have been carved out from the broader

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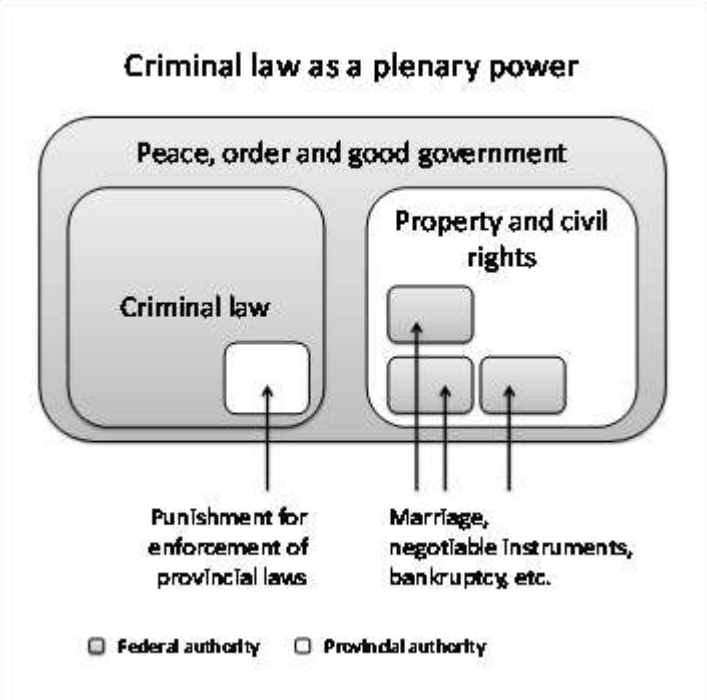
[28] E.g., *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, *Margarine Reference, supra; Dominion Stores Ltd. v. R*, [1980] 1 S.C.R. 844; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914.

[29] R.S.C. 1985, Appendix II, No. 2.

[30] See also *Re Alberta Statutes*, [1938] S.C.R. 100, at p. ___ (Cannon J.).

concept of property and civil rights.[31] Marriage, bills of exchange and promissory notes, for instance, were governed by civil law in Quebec prior to Confederation[32] and, but for their specific enumeration within s. 91, would come within the general provincial authority in relation to property and civil rights.[33] This is not the case with the criminal law, which has occupied, nearly since the Conquest, a space separate from and opposite to property and civil rights. In fact, one of the classes of subjects enumerated in s. 92 — the imposition of punishment for the enforcement of provincial laws (s. 92(15)) — can be understood to be a subtracted subset of the broader concept of the criminal law. Thus, the federal criminal law power, like the provincial property and civil rights power, is plenary, in the sense that it is not a carved-out subset of a broader class of subjects within the legislative jurisdiction of the other level of government.[34] (See figure at right.)



[31] See W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597, at 602-03.
[32] See *Civil Code of Lower Canada 1866*, Book 1, Title 5 (Of marriage); Book 1, Title 4 (Of bills of exchange, notes and cheques). Bankruptcy and insolvency would likely also have come within the concept of property and civil rights, although English-based commercial statutes had begun to displace French-based bankruptcy law in Lower Canada as early as 1830. See Alain Vauclair and Martin-François Parent, "Harmonization of Federal Legislation with Quebec Civil Law: Some Examples from the Bankruptcy and Insolvency Act" (Dept. of Justice Canada, 2001) at p. 2.
[33] H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*, 5th ed., p. 477.
[34] In a dissenting judgment in the Alberta Court of Appeal in the *Firearms Reference*, Conrad J.A. described the criminal law power as a "carve-out from provincial jurisdiction" over property and civil rights (*Reference Re Firearms Act* (1998), 164 D.L.R. (4th) 513, at par. 465). Conrad J.A.'s view was rejected by the Supreme Court: *Firearms*, par. 28.

2. *Classification of laws*

The dividing line between two concepts may be difficult to pin down; yet, a core of paradigmatic and undisputed applications of each concept may exist.[35] One way of thinking about the classification of laws is as a judgment as to whether the law more closely resembles paradigmatic legislation within one sphere of jurisdiction than within another. Thus, for instance, a provincial prohibitory law the purpose of which is to suppress traditionally criminalized conduct is sufficiently similar to laws within the settled core of the criminal law power that it is reasonable to conclude that the law's subject matter comes within that power, and is therefore incompetent to the provinces.[36]

Labels such as "regulation" are not especially useful in making the judgment as to whether a law more closely resembles the criminal or civil paradigm. Consider, for instance, the prohibitions against agreements to restrain competition, price discrimination and participation in a combine,[37] on the one hand; and the prohibitions against the sale of a food product under a particular grade or designation, without meeting the standards for the use of that grade or designation, on the other hand.[38] The former were upheld as criminal legislation, and that latter were deemed invalid. Yet, in a sense, all of the laws in both groups are regulatory laws — in particular, they aim to modify the behaviour of commercial actors.

We can say more about each of these laws than that they are regulatory, and the additional details are what make the difference. In the case of the competition and price discrimination laws, the activity is prohibited on the theory that it is harmful to the public

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[35] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 at 607 (distinction between the "core of settled meaning" of legal concepts and the surrounding "penumbra of debatable cases"). I recognize that this is a proposition about which the Supreme Court has recently manifested a lack of enthusiasm, albeit in a different context: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at par. 43 (expressing reservations about the doctrine of interjurisdictional immunity because of its reliance on the "attribution to every legislative head of power of a "'core' of indeterminate scope").

[36] *Attorney General for Ontario v. Hamilton Street Railway Co*, [1903] A.C. 524 (non-observance of Lord's Day); *Birks v. City of Montreal*, [1955] S.C.R. 799 (non-observance of religious feast days); *Re Alberta Statutes*, [1938] S.C.R. 100 (Cannon J.) (seditious libel); *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (abortion); *Westendorp v. R.*, [1983] 1 S.C.R. 43 (prostitution).

[37] *Proprietary Articles Trade Association v. Canada*, [1931] A.C. 310; *Section 498a Reference*, *supra.*

[38] *Dominion Stores*, *supra* ("Canada Extra Fancy" apples); *Labatt*, *supra* (alcoholic content of "light beer").

and, in particular, on the theory that it constitutes an exploitation by relatively powerful economic actors of relatively powerless ones (especially consumers).[39]

In the case of the grading standards laws, one might admittedly attempt to characterize the misuse of a grading standard as misleading and, therefore, the harm prevented by the laws as the deception of the public. However, the power to penalize the misuse of a standard presupposes the authority to create standards.[40] It therefore becomes relevant that the establishment of standardized product grades or names is a mechanism to reduce the informational costs associated with transactions in those products. Reasonable consumers may well wish to purchase, and businesses wish to sell to them, products having different characteristics, including different levels of quality. Such transactions are facilitated if there are standard names for frequently-desired characteristics, or for products having certain bundles of characteristics.

It was possible for a court reasonably to conclude that a law making it an offence for the powerful to injure the weak resembles paradigmatic criminal law, whereas a law establishing what are in essence standardized contractual terms for the purpose of reducing the cost of doing business, and penalizing departures from those terms, is closer to the contract law (and therefore the civil law) paradigm than to the criminal law paradigm.

In order to accept the basic propositions being defended in this section, a reader need not agree with the Judicial Committee or Supreme Court's judgment calls as to the classification of the particular laws just discussed, but only allow that (1) there are clear, or paradigmatic cases of criminal law and of laws dealing with civil rights, and (2) classification may be conceptualized as an exercise in examining the similarities and dissimilarities of the impugned enactment with the paradigm examples, and making a judgment thereupon as to the relative proximity of the legislation to each of the paradigms.

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[39] See *Goodyear Tire and Rubber Co. v. R.*, at p. 313 (the anti-combines provisions are "concerned solely with the harmful effects upon the economic life of the public of the control and the exactions for which [the prohibited agreements] provide").

[40] *Labatt*, at p. 934

3. Doctrine

The classification process just described is further constrained by stare decisis. Specifically, principles of decision for the classification of legislation falling between the two paradigms may be inferred from the pattern of outcomes in previously decided cases, and the reasons given for those outcomes.

At least four principles appear to be useful for the classification of the impugned provisions of the *Assisted Human Reproduction Act*.

First, a federal law cannot be upheld as criminal legislation without its being determined that its purpose is to suppress some harmful or dangerous conduct. This principle is a way of stating the requirement that the legislation concern a public wrong. In at least two cases, this principle has been the ground on which a federal law was held not to come within the criminal law power. One of the cases was, of course, *Margarine*, in which the Judicial Committee adopted Justice Rand's observation that "there is nothing of a general or injurious nature to be abolished or removed: it is a matter of preferring certain local trade to others" (par. 16). In the other case, *Boggs*,[41] the Supreme Court invalidated the Criminal Code offence of driving while under suspension on the ground that a driver's licence could be suspended by a province for reasons having nothing to do with road safety, and that the prohibition was therefore "wholly inarticulate" as to the harm it sought to prevent (p. 65).[42]

Second, delegated prohibition is permissible. We have seen that criminal legislation involves the suppression of harmful or dangerous conduct. The legislation may prohibit the harmful or dangerous conduct directly; or, where particular conduct is not harmful or dangerous in all of its forms, the legislation may delegate to the Governor in Council the authority to determine the harmful or dangerous forms of conduct and may prohibit the forms of conduct designated under such authority. As previously discussed, this is the

[41] *Boggs v. R.*, [1981] 1 S.C.R. 49

[42] Another way of explaining the result is that the federal provision appeared to be directed at the enforcement, through the imposition of a punishment, of provincial driver licensing laws. Thus, it came within s. 92(15), a class of subjects carved out from s. 91(27) and conferred exclusively upon the provinces.

principle on which *Hydro-Quebec* was decided and it underpins the conventional understanding that the federal hazardous products scheme is valid criminal legislation.

Third, Parliament may not "assume control" over an activity which is not in itself harmful or dangerous in order to prevent the harmful or dangerous forms of the activity. This point is clearly made in *Reciprocal Insurance*,[43] in which it was held to be beyond federal powers conferred by s. 91(27) to make it an offence to "mak[e] or carr[y] out … an insurance contract in the absence of a licence from the Minister of Finance issued pursuant to the … Insurance Act of Canada." Justice Duff, sitting on the Judicial Committee, wrote:

> It is one thing … to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.[44]

In other words, there is no harm per se in making or carrying out an insurance contract. The federal Parliament could not, therefore, submit the activity to federal licensing, though it could prohibit the harmful forms of the activity.

The second and third principles do not contradict one another. The environmental protection legislation was upheld in *Hydro-Quebec* on the assumption that the acts proscribed --- the emission of substances in quantities, concentrations or circumstances defined by regulation --- were harmful. There is, by contrast, no suggestion that the conduct proscribed in *Reciprocal Insurance* — the making or carrying out of an insurance contract without a federal licence — was harmful.

Fourth, the third principle does not preclude the assumption of control by Parliament over harmful or dangerous activities. Thus, for instance, in the *Firearms Reference,* the Court's determination that Parliament regarded guns as intrinsically

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[43] *Re Reciprocal Insurance Legislation,* [1924] A.C. 328.
[44] Page ___

dangerous was critical to its conclusion that the possession of firearms may be subjected to a requirement of federal licensing under the criminal law power.[45]

A related notion is that an activity considered harmful or socially undesirable by Parliament may be conditionally tolerated or conditionally prohibited by legislation under the criminal law power. It is on this basis that provisions that, in some sense, assume control over the procurement of abortions, by prescribing the conditions under which that activity would not be criminal, were upheld in *Morgentaler (1976).*[46] Similarly, in *RJR-Macdonald*, the fact that the sale of a product that "kills" is tolerated does not prevent Parliament from making it a crime, in essence, to "induc[e] Canadians to consume" it.[47]

4. Should there be requirements as to the type or magnitude of public harm?

Some have suggested that the purpose requirement entails, or ought to entail, requirements as to the type or magnitude of harm to the public.[48] I do not share this view. I have argued that the concept of criminal law refers to a sphere of law defined in opposition to property and civil rights. It is a plenary power defined by the concept of a public wrong; it is not a power conferred only in relation to certain types of public wrong.

In *RJR-Macdonald*, Justice Major attempted to introduce a requirement that the conduct targeted by the legislation "pose a significant, grave and serious risk of harm" (par. 201-02). This proposal was not endorsed by the majority and, in my view, with good reason. The premise of Major J.'s proposal is that criminal prohibition is a more muscular intervention than non-criminal regulation; lesser means should be used for lesser threats. However, this assumption does not stand up to scrutiny. Severe sanctions, such as

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[45] See, e.g., par. 33 ("Parliament views firearms as dangerous and regulates their possession and use on that ground"); par. 42 ("Guns are restricted because they are dangerous"); par. 43 ("Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms").

[46] At p. 627 ("What is patent on the face of the prohibitory portion of s.251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment.")

[47] Par. 32. It may be that the fourth principle is not needed in order to account for the results in *Morgentaler 1976* and *RJR-Macdonald*. In each of these cases, the legislation could be characterized simply as prohibiting a behaviour deemed to be socially harmful (this suffices to make it criminal law). It is immaterial that a more broadly defined offence — an unqualified prohibition against abortion, or a prohibition against the sale of tobacco — would also have qualified as criminal law.

[48] See, for instance, Mark Carter, "Federalism Analysis and the Charter" (2011), 74 Sask. L. Rev. 5, at par. 5.

imprisonment, are equally available under our constitution for the enforcement of so-called regulatory laws, including provincial laws. And it is simply not the case that all criminalized conduct is necessarily more serious than conduct which is "merely" subject to regulatory penalties: a petty theft, for instance, is not intrinsically more serious than a workplace safety violation.

In *Malmo-Levine*, the Court flirted with a different threshold; the Court's reasons for concluding that the criminal restrictions on marijuana were valid included the observation that Parliament was entitled to "act upon a reasoned apprehension of harm" (par. 78). In their reasons in the Reference, Justices Lebel and Deschamps attempt to transform this observation into a legal requirement (par. 236). Yet, there is no legal requirement of a "reasoned basis" for the exercise by the provinces of the property and civil rights power. The argument for such a requirement in the case of the criminal law power rests on the assumption that the power is intrinsically disruptive of the division of powers between the federal and provincial governments,[49] whereas the power is better thought of as one of its pillars. The preferable view is that reasonableness is not a legal requirement but, at most, a practical evidentiary burden: the absence of a reasonable apprehension of harm may entitle a court to conclude that the prevention of such harm was not the true purpose of the legislation.[50]

In *Ward*,[51] the Court, having held that a ban on the commercial sale of certain types of seals was valid under the federal fisheries power, added that it was not criminal legislation because it was directed at a fisheries management purpose, not at "public peace, order security [or] morality"(par. 55-56). The reasoning is not fully articulated,

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[49] An analogy can be made to the requirement of a "rational basis" for a judgment by Parliament that the circumstances warrant the use of its emergency power: *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at p. ___. A concern about disruption to the balance of powers is manifest in the reasons of both Justices Lebel and Deschamps (par. 238-40) and the Chief Justice (par. 43).

[50] In par. 43, the Chief Justice suggests that, when combined with the doctrine of paramountcy, an insufficiently confined criminal law power might "upset the constitutional balance of federal-provincial powers." In *Firearms*, however, the McLachlin Court was unmoved by a similar argument; there, it observed that "the most important jurisdictional effect of [legislation restricting an activity under s. 91(27)] is [to] eliminat[e] the ability of the provinces to <u>not</u> have any regulations [on this activity]" (par. 52). The fact that Parliament has the discretion to prohibit none, some or all of the forms of a harm-causing activity under the criminal law power does not prevent the provinces from legislating as to any forms which are not prohibited.

[51] *Ward v. Canada*, [2002] 1 S.C.R. 569.

presumably because the entire analysis is *obiter*. However, bearing in mind that the impetus for the ban was the threat posed to the export market for Canadian fisheries products generally by protests, mainly in other countries, against the perceived cruelty of the seal hunt, there are at least two ways of interpreting the *Ward* decision. One possibility is that harm to the value of a public resource is not the right type of harm for criminal legislation. Alternatively, the prohibited act is not a wrong because it is not in itself socially undesirable, but only becomes so because of the anticipated reactions of the consumers of other fish products, and legislators in other countries.

Unfortunately, neither of these interpretations of the *Ward* obiter reveals it to rest on a satisfactory principle.[52] It is not a desirable principle that the harmed public interest must be of a particular type (e.g., moral versus economic) in order for behaviour causing the harm to be deemed to be socially undesirable and designated a public wrong. As a doctrinal matter, of course, economic wrongs have been upheld under the criminal law power.[53] And the criminal law is not limited to acts which are intrinsically wrong; whether a given act is or is not socially undesirable often depends on the context. In the circumstances of *Ward*, in light of conditions in the market for fisheries products, the commercial sale of seals could be understood to be a socially undesirable activity.[54]

To reject the idea that only certain categories of public wrong come within s. 91(27) is not to endorse a "limitless" criminal law power. As previously discussed,[55] laws may be judged to fall outside the criminal sphere to the extent that they more closely resemble the paradigm examples of legislation about civil rights, such as legislation about contracts, than the paradigm of a public wrong. This is why laws that prescribe standard contractual terms or product names so as to reduce bargaining costs do not come within s.

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[52] A third interpretation which has the merit of avoiding these unfortunate principles is to read the case as analogous to *Margarine*, that is, as a case involving legislation directed at protecting the interests of some fisheries traders at the expense of others (sealers). Unfortunately, this would be a strained reading of the *Ward* decision. The Court nowhere suggests that the seal ban was motivated by anything other than a legitimate public interest in the economic value of the fisheries.

[53] E.g., *PATA*, *supra* (participation in a combine); *Section 498a Reference*, *supra* (price discrimination).

[54] Also, the presence in the causal chain of intervening acts by consumers and foreign legislators does not prevent the commercial sale of seals from being designated as harmful, any more than the intervening decision of a consumer whether or not to purchase and use cigarettes prevented tobacco advertising from being treated as harmful in *RJR-Macdonald*.

[55] See Part IV-B-2.

91(27). And the provinces possess the exclusive power to punish violations of their own laws by virtue of s. 92(15), which is carved out from s. 91(27) in the same way that federal jurisdiction over marriage, negotiable instruments and bankruptcy is subtracted from s. 92(13). Finally, within the "debatable penumbra," decided cases constrain the classification process. These constraints include the principle that Parliament may not assume control over a generally harmless, non-dangerous activity in order to suppress only the harmful or dangerous forms of the activity.

V — Conclusion

It is fair to say that the criminal law power is broad; this is in large part because the concept of a public wrong is broad. The power has perhaps also been enlarged as a result of *Hydro-Quebec,* which recognizes that the socially undesirable or dangerous conduct that constitutes the wrong does not even have to be defined in the statute itself; it can be defined by regulation.

Justices Lebel and Deschamps go too far in insisting that sections 8 and 9 are invalid. Section 8, which prohibits the use of reproductive material without the donor's consent, and s. 9, which prohibits the use of reproductive material from a donor under 18 years of age, are close to the paradigm of assault, a traditional crime.[56]

As for ss. 10-12, to the extent that they prohibit the carrying out of specified "controlled activities" otherwise than in accordance with regulations, the fact that the controlled activities are not in themselves dangerous or socially undesirable does not undermine the character of the prohibitions as criminal law. It is not unreasonable to conclude, as the Chief Justice did, that the prohibited, harmful sphere of conduct is defined by regulation, as permitted under *Hydro-Quebec.*

There is, however, a problem in the requirement under ss. 10-13 that the controlled activities be licensed, and in the imposition elsewhere in the Act of substantial legal obligations upon licensees: this regime is difficult to distinguish from the scheme that

[56] This appears to be the view taken, as well, by Justice Cromwell. See par. 289.

was deemed invalid in *Reciprocal Insurance*. Even if one assumes that the prohibitory regulations will be directed at harmful or dangerous practices, the licensing requirements are applied to activities which, by definition, are not prohibited either by the Act or by the regulations. Sections 10-13 seek to license, therefore, activities which neither Parliament nor the Governor in Council has determined to be harmful or dangerous. To paraphrase Justice Duff, it is one thing to declare (including by delegated legislation) certain forms of assisted reproduction to be a criminal offence; it is another thing to assume control over all assisted reproduction activities by requiring them to be carried out under a federal licence.[57]

The Chief Justice's conclusion that the licensing provisions are valid depends vitally on her determination that they are incidental to the prohibitory provisions. This determination in turn rests upon the somewhat artificial observation that licensing obligations are modest next to the vastness of the property and civil rights power. The more salient question appears to be whether the licensing of controlled activities and the imposition of obligations upon licensees are a major part of what the impugned provisions do; if so, then the Chief Justice's reasoning amounts to allowing the (prohibitory) tail to wag the (licensing) dog.[58]

[57] See quotation accompanying note 44, supra.

[58] Of the three opinions in the Reference, Justice Cromwell's comes the closest to the outcome my analysis would recommend. The main difference between the outcome recommended here and that reached by Justice Cromwell is that he would uphold s. 12, which prohibits the reimbursement of the expenses incurred by donors and surrogate mothers except in accordance with a licence and the regulations. In singling out s. 12 from the other controlled activities provisions, Justice Cromwell describes it as a "form of exemption from the strictness of the regime" imposed in ss. 6 and 7, which prohibit the payment of consideration to a surrogate mother or donor (par. 290; Justice Cromwell adopts, almost verbatim, the Appellant's characterization of the provision: Appellant's Factum, par. 78). One way of situating Justice Cromwell's reasoning within the framework developed here is that it comes within the fourth principle: unlike the other controlled activities, the making of any payments whatsoever to donors and surrogate mothers is socially undesirable, but is tolerated under the conditions set forth in s. 12, which include licensing.