

## RELATIONALLY SPEAKING: THE IMPLICATIONS OF TREATING EMBRYOS AS PROPERTY IN A CANADIAN CONTEXT

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*In July 2018, the Ontario Superior Court, in S.H. v D.H., dealt with a dispute between a recently separated couple over a frozen embryo that the couple had created. In his judgment, Justice Del Frate stated that the embryo should be conceived of as property. This was the cause of uproar among feminist legal scholars who were concerned with the possible repercussions for cisgender women of labeling embryos as property. The Superior Court decision was subsequently overturned by the Ontario Court of Appeal this past May (2019). However, given the likelihood that embryos will be treated as property in future disputes, it is important to assess what the ramifications of this type of categorization might be.*

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*In this paper, I employ a feminist relational analysis in order to analyze the implications that categorizing embryos as property might have for three relationships involving cisgender women. I identify these relationships to be: (1) the relationship between cisgendered heterosexual intended parents, (2) the relationship between intended mothers, the embryo, and society, and (3) the relationship between intended parent(s) and an egg donor and/or surrogate. Ultimately, I find that categorizing embryos as property adds to an alarming power imbalance between cisgendered heterosexual intended parents when they are separating and trying to make decisions about what to do with frozen embryos. Secondly, I argue that there are compelling reasons that categorizing embryos as property could perpetuate the idea that cisgender women's bodies are ownable, and that egg donors' and surrogates' bodies are commodities. These are views that could have the effect of perpetuating the long-term oppression and disempowerment of cisgender women. If the trend towards treating embryos as property continues to grow, a feminist reconceptualization of property, such as that proposed by Rosalind Pollack Petchesky would be an important, albeit slow, step to alter notions that cisgender women can be owned or commoditized.*

## INTRODUCTION

In July of 2018 the Ontario Superior Court of Justice issued a judgment on a dispute over frozen embryos.<sup>1</sup> The dispute was between forty-eight-year-old D.H. and her former husband S.H.<sup>2</sup> The couple had purchased donated eggs and sperm from a gamete agency in Georgia, United States which they then used to create two viable embryos.<sup>3</sup> One of the resulting embryos was implanted in D.H., who gave birth to their son.<sup>4</sup> The one remaining embryo was the source of conflict in the case. Whilst D.H. sought to use the embryo, S.H. wanted the embryo to be donated.<sup>5</sup> Neither party had a genetic connection with the embryo.<sup>6</sup> The parties had signed contracts both in Ontario and Georgia agreeing that the embryo would be treated as property.<sup>7</sup> The Ontario contract left the decision to D.H. (the patient) and said that on separation of the spouses, D.H.'s wishes should be respected.<sup>8</sup> The Georgia contract left the decision to the court.<sup>9</sup> Justice Robert Del Frate held that the dispute

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<sup>1</sup> See *SH v DH*, 2018 ONSC 4506 [*SH* ONSC].

<sup>2</sup> See *ibid* at paras 1–3, 6, 13.

<sup>3</sup> See *ibid* at para 4.

<sup>4</sup> See *ibid* at para 5.

<sup>5</sup> See *ibid* at paras 1–2.

<sup>6</sup> See *ibid* at para 4.

<sup>7</sup> See *ibid* at para 8.

<sup>8</sup> See *ibid* at para 9.

<sup>9</sup> See *ibid* at paras 28–29.

needed to be decided based on the contracts that the parties had signed.<sup>10</sup>

In his judgment, he wrote that the Georgia contract went against contract law by putting the responsibility of deciding what to do with the embryo on the court.<sup>11</sup> In his opinion, the parties knew what they were agreeing to when they signed the contract and they could not subsequently apply “buyer’s remorse.”<sup>12</sup> Ultimately, Justice Del Frate followed the Ontario contract, meaning that the embryo went to D.H. However, he went on to say that “[i]t is also clear that the embryo is property,”<sup>13</sup> and since this is a division of property, S.H. should be reimbursed his half of the value of the embryo—a sum of US\$1,438.<sup>14</sup>

S.H. appealed the decision in May 2019 and the Ontario Court of Appeal released a decision written by Justice Fairburn, which overturned the Superior Court’s decision.<sup>15</sup> Justice Fairburn wrote that neither contract, nor property law principles governed in this case.<sup>16</sup> She found that the case should be decided based on the consent-based model imposed by Parliament.<sup>17</sup> In Canada, the *Assisted*

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<sup>10</sup> See *ibid* at para 25.

<sup>11</sup> See *ibid* at para 31.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at para 33.

<sup>14</sup> See *ibid* at para 34.

<sup>15</sup> See *SH v DH*, 2019 ONCA 454 [*SH ONCA*].

<sup>16</sup> See *ibid* at para 4.

<sup>17</sup> See *ibid* at para 5.

*Human Reproduction Act, 2004 (AHRA)*<sup>18</sup> and its associated *Assisted Human Reproduction (Section 8 Consent) Regulations (AHRA Regulations)*<sup>19</sup> govern the use, donation and disposal of human embryos.<sup>20</sup> Under the

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<sup>18</sup> *Assisted Human Reproduction Act*, SC 2004, c 2 [AHRA].

<sup>19</sup> *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137 [AHR Consent Regulations].

<sup>20</sup> The AHRA came into force in 2004 after many years in the making. Members of a royal commission (the “Baird Commission”) had assessed Canadians’ opinions on assisted reproductive technologies and published a report called *Proceed with Care* in 1993. See Ottawa, Privy Council Office, *Proceed with Care - Final Report of the Royal Commission on New Reproductive Technologies* (1993) (Chair: Patricia Baird) [Royal Commission on NRTs]. There were then four attempts to pass legislation before Bill C-6 became the AHRA. Less than two years after the Act came into force, the Quebec government challenged the constitutionality of many of its sections on the basis that it impinged upon provincial jurisdiction. See *Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d’appel, LRQ, ch R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, LC 2004, ch 2 (Dans l’affaire du)*, 2008 QCCA 1167. The Quebec Court of Appeal concluded that the provisions were *ultra vires* Parliament. The Attorney General of Canada appealed the decision to the Supreme Court of Canada (SCC), which declared many of the provisions of the Act unconstitutional. See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61. The sections dealing with the use, donation, and disposal of human embryos are among some of the few sections that were not repealed. See e.g. Dave Snow, *Assisted Reproduction Policy in Canada: Framing, Federalism, and Failure* (Toronto: University of Toronto Press, 2018) for commentary on the AHRA. See e.g. Vanessa Gruben & Angela Cameron, “Quebec’s Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women’s Reproductive Autonomy” in Stephanie Paterson, Francesca Scala & Marlene K Sokolon, eds, *Fertile Ground* (Montreal: McGill-Queen’s University Press, 2014) 126 for commentary specifically on the SCC case.

*AHRA*, no one can use an embryo without the consent of the “donor.”<sup>21</sup> The *AHRA Regulations* explain that a donor is the individual, spouse, or common-law partners who the embryo was created for.<sup>22</sup> When the two people who created the embryo were spouses or common-law partners, when the embryo was created, both of them have to consent to use or donate the embryo, regardless of whether they were genetic contributors or not.<sup>23</sup> This means that even if a couple breaks up, both members need to consent to the embryo’s disposition, even if they used donor gametes. However, if only one of them is a genetic contributor, and the relationship ends before the embryo is used, then the person who provided their genetic material gets exclusive control over the embryo.<sup>24</sup> Disputes arise in cases where both members of the couple have provided genetic material, or as in the case of S.H. and D.H., where both members of the couple did not contribute genetic material, and they cannot agree on what to do with the embryo(s).

In Quebec, this issue is expressly dealt with through *An Act Respecting Clinical and Research Activities Related to Assisted Procreation (Act Respecting Assisted*

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<sup>21</sup> *AHRA*, *supra* note 18, s 8(3).

<sup>22</sup> See *AHR Consent Regulations*, *supra* note 19, s 10(1)(a) and (b).

<sup>23</sup> See *ibid*, s 10(1)(b), which explains that a donor can be defined as “the couple who are spouses or common-law partners at the time the *in-vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo”. See also *ibid*, s 10(2), which explains that both members of the couple have to consent.

<sup>24</sup> See *ibid*, s 10(3), which explains that if the embryo was created from the reproductive material of only one member of the couple, and the relationship breaks down, then only that individual is considered the donor.

*Procreation*)<sup>25</sup> and its associated regulations the *Regulation Respecting Clinical Activities Related to Assisted Procreation (Regulation Respecting Assisted Procreation)*.<sup>26</sup> The regulations require that parties have to agree, before the embryos are created or frozen, about what will happen to the embryos should one party withdraw their consent.<sup>27</sup> No other provinces or territories have put in place legislation dealing with what parties should do in the event that they do not agree about disposition. Since the dispute between S.H. and D.H. took place in Ontario, only the *AHRA* applies. Justice Fairburn ultimately found that S.H. was entitled to withdraw his consent to D.H. using the embryos, and that the Ontario contract did not take away this right.<sup>28</sup>

Much debate has surrounded what embryos are, whether they are “property,” “people,” or something in between—a *sui generis* category for instance.<sup>29</sup> Legal scholar Stefanie Carsley argues that it is clear from

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<sup>25</sup> See *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, RSQ 2009, c A-5.01 [*Act Respecting Assisted Procreation*] and its associated *Regulation Respecting Clinical Activities Related to Assisted Procreation*, OC 644-2010, 7 July 2010, (2010) GOQ II 2253, ss 19–20 [*Regulation Respecting Assisted Procreation*].

<sup>26</sup> *Regulation Respecting Assisted Procreation*, *supra* note 25, s 19.

<sup>27</sup> See *ibid*, s 21.

<sup>28</sup> See *SH ONCA*, *supra* note 15 at para 21.

<sup>29</sup> See Alana Cattapan & Françoise Baylis, “Frozen in Perpetuity: ‘Abandoned Embryos’ in Canada” (2015) 1:2 *Reproductive Biomedicine & Society* 104 at 109.

Canadian law that embryos are not persons.<sup>30</sup> Canadian case law<sup>31</sup> confirms that fetuses are not human beings. The definition of an embryo in the *AHRA* makes it clear that embryos are less developed than fetuses.<sup>32</sup> Thus, it follows that embryos are also not persons.<sup>33</sup> The Royal Commission Report, “Proceed with Care,” upon which the *AHRA* was based, recommended treating embryos as property.<sup>34</sup> However, treating embryos like other property amounts embryos to something which can be bought and sold, and this would be contrary to the *AHRA*’s prohibition on the commercialization of reproductive material.<sup>35</sup>

Although it was overturned by the Ontario Court of Appeal, the Superior Court’s decision in the dispute between S.H. and D.H. was the most recent of three Canadian cases that demonstrate Canadian courts’ willingness to treat reproductive material as property in the context of disputes between couples or friends. In 2005, the

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<sup>30</sup> See Stefanie Carsley, “Rethinking Canadian Legal Responses to Frozen Embryo Disputes” (2014) 29:1 Can J Fam L 55 at 83, n 78 [Carsley, “Rethinking Legal Responses”]; Stefanie Carsley, *Conceiving a Feminist Legal Approach to Frozen Embryos: Exploring the Limitations of Canadian Responses to Disposition Disputes and Donor Anonymity* (LLM Thesis, University of Toronto, 2013) [unpublished] at 40, n 69.

<sup>31</sup> See e.g. *Tremblay v Daigle*, [1989] 2 SCR 530, 62 DLR (4th) 634 [Tremblay]; *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925, 152 DLR (4th) 193.

<sup>32</sup> See *AHRA*, *supra* note 18, s 3 (“embryos”).

<sup>33</sup> See Carsley, “Rethinking Legal Responses”, *supra* note 30.

<sup>34</sup> See Royal Commission on NRTs, *supra* note 20.

<sup>35</sup> See Carsley, “Rethinking Legal Responses”, *supra* note 30; *AHRA*, *supra* note 18, s 2(f).

Court of Queen's Bench of Alberta dealt with the question of whether a woman (C.C.) could have access to embryos created through her eggs and the sperm of a friend (A.W.). A.W. did not, however, consent to the release of the embryos. The court held that the sperm was a gift and that the remaining embryos were C.C.'s property. The court wrote "they are chattels that can be used as [C.C.] sees fit."<sup>36</sup>

In another case, *J.C.M. v A.N.A.*, the Supreme Court of British Columbia dealt with a dispute between two women over thirteen sperm straws that the couple had purchased in the United States.<sup>37</sup> The court relied on *A.W. v C.C.* and the United Kingdom case of *Yearworth v North Bristol NHS Trust* in which the court had stated that: "developments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise."<sup>38</sup> In *J.C.M. v A.N.A.*, Justice Russell found that the sperm had been treated as property by the donor, the gamete agency, the clinic, and the parties. Since the parties had divided all their joint assets when their relationship ended, it followed that the sperm straws should be divided as well. Given the uneven number, J.C.M. got seven, A.N.A. got six, and J.C.M. had to pay A.N.A. for the value of the extra sperm straw.

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<sup>36</sup> See *CC v AW*, 2005 ABQB 290 at para 21.

<sup>37</sup> See *JCM v ANA*, 2012 BCSC 584 [*JCM*].

<sup>38</sup> *Yearworth v North Bristol NHS Trust*, [2009] EWCA Civ 37 at para 45(a).

In other Canadian cases, outside the context of disputes between couples or friends, judges have also faced the issue of whether reproductive material is property. In *Lam v British Columbia*, Justice Butler of the Supreme Court of British Columbia dealt with the issue of whether sperm could be categorized as property for the purpose of provincial legislation dealing with the storage of goods.<sup>39</sup> Howard Lam was the representative of a class of 400 cancer patients who had stored sperm in a freezer in an andrology lab at the University of British Columbia as a preventive measure in case their cancer radiation treatments affected their reproductive potential. An electrical problem with the freezer resulted in damage to the sperm. The patients sued for negligence. Justice Butler held that the sperm was in fact property for the purposes of the provincial legislation. More recently, in *K.L.W. v Genesis Fertility Centre* Justice Pearlman of the Supreme Court of British Columbia dealt with the question of whether K.L.W.'s late husband's sperm was her legal property. Even though her husband (A.B.) had not consented in writing to K.L.W. using his sperm if he died, there was evidence from a number of witnesses that suggested that he wanted his wife to be able to use the sperm to conceive in the event that he died.<sup>40</sup> Justice Pearlman held that the sperm was K.L.W.'s legal property. In other jurisdictions, like the United States, courts have dealt with the issue of what to do with embryos in the context of disputes through reliance on a weighing of rights

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<sup>39</sup> See *Lam v University of British Columbia*, 2013 BCSC 2094 at para 68.

<sup>40</sup> See *KLW v Genesis Fertility Centre*, 2016 BCSC 1621 at para 132.

approach in some cases,<sup>41</sup> but largely through clinic consent forms,<sup>42</sup> property law,<sup>43</sup> or a combination of the latter two approaches.<sup>44</sup>

Despite the growing trend in Canada, and in other jurisdictions, to rely on property law, consent forms, or some combination of the two to manage these disputes, the Superior Court decision of *S.H. v D.H.* was the cause of much public media debate from Canadian lawyers, academics, and the general public.<sup>45</sup> The most common

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<sup>41</sup> See *Davis v Davis*, 842 SW (2d) 588 (Tenn 1992); *In Re Marriage of Witten*, 672 NW (2d) 768 (Iowa 2003) [*Witten*]; *AZ v BZ*, 725 NE (2d) 1051 (Mass Sup Jud Ct 2000); *Human Embryo #4 HB-A v Vergara*, US Dist LEXIS 136782 (La E Dist Ct, 2017).

<sup>42</sup> See *Kass v Kass*, 696 NE (2d) 174, 673 NYS (2d) 350, 91 NY (2d) 554 (App Ct 1998) [*Kass*]; *In Re Marriage of Dahl and Angle*, 194 P (3d) 834, 222 Or App 572 (1998); *Roman v Roman*, 193 SW (3d) 40 (Tex Ct App 2006); *Litowitz v Litowitz*, 48 P (3d) 261 (Wash Sup Ct 2002); *JB v MB*, 751 A (2d) 613 (NJ Sup Ct 2001) [*JB*].

<sup>43</sup> See *York v Jones*, 717 F Supp 421 (Va Dist Ct 1989); *Witten*, *supra* note 41.

<sup>44</sup> See e.g. *Kass*, *supra* note 42; *JB*, *supra* note 42.

<sup>45</sup> See e.g. Stefanie Carsley, "Who has control over frozen embryos after a divorce?", *The Globe and Mail* (13 August 2018), online: <[www.theglobeandmail.com/opinion/article-who-has-control-over-frozen-embryos-after-divorce/](http://www.theglobeandmail.com/opinion/article-who-has-control-over-frozen-embryos-after-divorce/)> [Carsley, "Who Has Control"]; Gabrielle Giroday, "Judge says Sudbury woman can use embryo after legal fight with ex-husband", *Canadian Lawyer Magazine* (30 July 2018), online: <[www.canadianlawyer.com/legalfeeds/author/gabrielle-giroday/judge-says-sudbury-woman-can-use-embryo-after-legal-fight-with-ex-husband-16035/](http://www.canadianlawyer.com/legalfeeds/author/gabrielle-giroday/judge-says-sudbury-woman-can-use-embryo-after-legal-fight-with-ex-husband-16035/)>; Alana Cattapan, "Who gets the frozen embryos in the divorce?", *The Conversation* (8 August 2018), online: <[theconversation.com/who-gets-the-frozen-embryos-in-the-divorce-101022](http://theconversation.com/who-gets-the-frozen-embryos-in-the-divorce-101022)>.

critique of the case, among scholars and lawyers alike, is that it categorized embryos as property. Although it was overturned, it seems likely, based on recent trends, that this conceptualization of embryos as property will arise in other disputes. I use this juncture as an opportunity to assess whether the concerns over the Superior Court's decision to label embryos as property are warranted.

In this paper I employ a feminist relational analysis of autonomy in order to analyze the implications of categorizing embryos as property, like Justice Del Frate did in *S.H. v D.H.* In Part I of this paper, I examine the notion that property is symbolic of autonomy. I argue that this understanding of property is flawed because property has a strong relational component. Categorizing something, like an embryo, as property has implications for people's relationships with others and with society. We can only understand the true effect of categorizing embryos as property by looking at what it means for these relationships. A feminist relational theory of autonomy allows us to examine these implications in consideration of the social, cultural, and historical factors that play into people's relationships.

In Part II, I employ a feminist relational theory of autonomy to analyze three major relationships that will be affected by categorizing embryos as property. I identify these to be: (1) the relationship between cisgendered heterosexual intended parents, (2) the relationship between intended mothers, the embryo, and society, and (3) the relationship between intended parent(s) and an egg donor

and/or surrogate.<sup>46</sup> I focus on relationships involving cisgender women.<sup>47</sup> I do so because of cisgender women's unique (and large) role in reproduction, given that they carry and birth a baby,<sup>48</sup> and their role in the process of creating an embryo is more time-consuming and invasive than that of cisgender men. I additionally focus on cisgender women because of the important role that

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<sup>46</sup> Two other important relationships, that were beyond the scope of this article, are: (1) the relationships between intended parents and children, and (2) the relationship between egg donors, surrogates, and children conceived through donor oocytes and/or carried by a surrogate. I chose not to look at these two relationships for two reasons. Firstly, Jennifer Nedelsky explored the relationship between intended parents and children in her article. See Jennifer Nedelsky, "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6:2 *Can JL & Jur* 343 at 343 [Nedelsky, "Property in Potential Life"]. Secondly, the focus of this paper is on the effects, of categorizing embryos as property, for cisgender women. An analysis of the effects of categorizing embryos as property on the relationship between intended parents, egg donors, surrogates, and children ends up largely being about how the categorization affects the child born from the embryo, rather than about how it affects cisgender women.

<sup>47</sup> In this paper I refer to cisgender women. I acknowledge that my arguments do not apply to/reflect the reality of all cisgender women. However, I use this category because it still has significance in our world. It denotes a structural position. Power is still clustered around and exercised against this category. See Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 *Stan L Rev* 1241 at 1297 [Crenshaw, "Mapping the Margins"]. See also Lena Gunnarsson, "A Defence of the Category 'Women'" (2011) 12:1 *Feminist Theory* 23 at 23.

<sup>48</sup> Second-wave feminist writer Shulamith Firestone, for example, argued that women's unique role with regard to reproduction is the basis of gender inequality. See Shulamith Firestone, *The Dialectic of Sex: The case for the Feminist Revolution* (London: Jonathan Cape, 1970).

property has played in the oppression of people gendered as women.<sup>49</sup>

Ultimately, I come to the following conclusions about the effects, of categorizing embryos as property, on the three relationships I identified involving cisgender women. First, taking into account how characterizing embryos as property will interact with social, cultural, and historical contexts, I find that categorizing embryos as property adds to an alarming power imbalance between cisgendered heterosexual intended parents when they are separating and trying to make decisions about what to do with frozen embryos. This leads me to concur with an argument, put forward by Stefanie Carsley, that categorizing embryos as property could increase the possibility that embryos will be used as a bargaining tool, to cisgender women's detriment, when couples are dividing property.<sup>50</sup> In light of these inequalities, between cisgender men and cisgender women in the division of embryos, embryos should be divided in favour of women. Secondly, there are compelling reasons that categorizing embryos as property could perpetuate the idea that cisgender women's bodies are ownable. Particularly in the context of transnational surrogacy and egg donation, categorizing embryos as property could create a domino effect whereby egg donors' and surrogates' bodies, which enable the creation of this "property," are viewed as commodities. These are views that could have the effect of perpetuating the long-term oppression and disempowerment of cisgender women. If the trend towards

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<sup>49</sup> I discuss this in more detail in Part II of this paper.

<sup>50</sup> Carsley, "Rethinking Legal Responses", *supra* note 30.

treating embryos as property continues to grow, a feminist reconceptualization of property, such as that proposed by Rosalind Pollack Petchesky, would be an important, albeit slow, step to alter notions that cisgender women can be owned or commoditized.<sup>51</sup>

This paper follows the lead of Professor Susan B. Boyd whose work advocates that we question the often unquestioned gendered impact of different legal and policy choices, and how factors such as race and class intersect with this impact.<sup>52</sup> It seeks to respond to her call for more work that uses a feminist paradigm to reveal ongoing and shifting relations of power.<sup>53</sup> This paper is in conversation with Jennifer Nedelsky who argued that the best way to reflect on our choice of a legal category is to examine how that legal category structures relationships.<sup>54</sup> Nedelsky looked at three American cases where embryos were treated by the parties as property, and she explored the ramifications of this for “[r]elationships of respect and

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<sup>51</sup> See Rosalind Pollack Petchesky, “The Body as Property: A Feminist Re-vision” in Faye D Ginsburg & Rayna Rapp, eds, *Conceiving the New World Order: The Global Politics of Reproduction* (Berkeley: University of California Press, 1995) 387.

<sup>52</sup> See e.g. Susan B Boyd, *Child Custody, Law, and Women’s Work* (Don Mills: Oxford University Press, 2003).

<sup>53</sup> In this case, I seek to reveal the way that categorizations of embryos as property impacts power relations. See e.g. Susan B Boyd, “Spaces and Challenges: Feminism in Legal Academia” (2011) 44:1 UBC L Rev 205.

<sup>54</sup> See Nedelsky, “Property in Potential Life”, supra note 46 at 343; Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law’s Relations*].

appreciation for children.”<sup>55</sup> I build on her work by hypothesizing about the implications for three other relationships (involving cisgender women) that could be affected by categorizing embryos as property.<sup>56</sup>

### **PART I: THE RELATIONAL COMPONENT OF PROPERTY**

Beginning with the oldest theories of property, property has been seen as a symbol of autonomy. In Chapter V, Essay Two, of “Two Treatises of Government,” John Locke explains how initially the world belongs to everyone in common. However, every individual is entitled to take some of the common property and make it their own legitimate private property. They do so by mixing labour—their own, or that of someone they employed—into land or

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<sup>55</sup> Nedelsky, “Property in Potential Life”, *supra* note 46 at 355.

<sup>56</sup> See *ibid* at 343, 346–51, 355. In addition to “[r]elationships of respect and appreciation of children,” Nedelsky identified two other relationships that she thought would be affected by designating embryos as property. These are: (1) “[r]elationships of respect for women and honouring of their reproductive capacities and labour,” and (2) “[r]elations of equality, between people of all classes and backgrounds as well as between men and women” (at 355). Nedelsky’s second category of relationships reflects my own second category of relationships. However, whilst Nedelsky discusses possible concerns about exploitation, commodification and alienation of women’s bodies (at 346–51), she does not explicitly look at these from a relational perspective, which is what I do here. Nedelsky’s third category of relationship could encompass the relationship between heterosexual couples and the relationships between intended parents and their surrogate or egg donor. However, she does not discuss these two types of relationships.

other natural resources.<sup>57</sup> “That labour,” writes Locke, “put a distinction between them and common. That added something more to them than Nature, the common mother of all, had done, and so they became his private right.”<sup>58</sup> Locke justifies the right to possess objects outside one’s self through the idea of self-ownership. He writes, “every man has a ‘property’ in his own Person. This nobody has any right to but himself. The ‘labour’ of his body and the ‘work’ of his hands we may say, are properly his.”<sup>59</sup> Since we own our labour, and are mixing this labour to something in nature, the result becomes our property. In Locke’s theory, people have, or should have, *private* property rights. As private owners, people have the “right to possess, the right to use, the right to manage, the right to income of the thing, the right to the capital,”<sup>60</sup> and so on. Locke is suggesting that property comprises a private sphere that people have full autonomy over. Legitimate government should, as its goal, protect rights, such as this private sphere of people’s property rights.<sup>61</sup>

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<sup>57</sup> John Locke, *Two Treatises of Government: Second Treatise*, Rod Hay, ed (London: Printed for Thomas Tegg; W Sharpe & Son; G Ofor; Gand J Robinson; J Evans & Co; R. Griffin & Co Glasgow & J Gumming, Dublin) at 115, online (pdf): <[www.yorku.ca/comninel/courses/3025pdf/Locke.pdf](http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf)>.

<sup>58</sup> *Ibid* at 116.

<sup>59</sup> *Ibid*.

<sup>60</sup> See AM Honoré, *Making Law Bind Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) 161 at 370 for a full list.

<sup>61</sup> See Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale JL & Feminism* 7 at 17 [Nedelsky, “Reconceiving Autonomy”].

### **Feminism and *Autonomy***

This premise that property defines an autonomous sphere, however, is problematic because autonomy itself is flawed. The concept of autonomy has been critiqued heavily, particularly in feminist literature. Critics of autonomy argue that while the concept does not need to be thrown out completely, it needs immense reconceptualization.

Catriona Mackenzie and Natalie Stoljar have helpfully categorized critiques of historical and contemporary conceptions of autonomy into five categories.<sup>62</sup> The first critique has been led by scholars like Lorraine Code. Code's focus is on the character ideal of the "autonomous man", which she argues has been very influential in Western culture.<sup>63</sup> This depiction is that of the man envisioned by Locke who has his own private space within his property and leads a self-sufficient, independent life. This ideal is detrimental because it prioritizes independence over other values, like caring, friendship and responsibility, and treats communities that emphasize these values as problematic. It is also a flawed depiction of persons because it ignores the fact that people become people in relation to others—we are not solely independent beings.<sup>64</sup> Mackenzie and Stoljar label the second grouping

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<sup>62</sup> See Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) at 5.

<sup>63</sup> Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (New York: Cornell University Press, 1991) at 72.

<sup>64</sup> See *ibid* at 44.

of critiques as metaphysical.<sup>65</sup> The main argument of these metaphysical critiques is that we have developed a theory of autonomy on the assumption that people are atomistic and individualistic. However, people are not individualistic in the way that *individualistic* has traditionally been defined. Rather, people are socially embedded. Thus, our conceptualization of autonomy is based on an error. The third set of criticisms are *care* critiques. These relate to Lorraine Code's argument that traditional conceptualizations of autonomy have valued independence and self-sufficiency over interconnection and dependence. Relations of dependence and interconnection, however, are central to cisgender women's lives and are associated with cis and heteronormative femininity. Thus, traditional conceptions of autonomy that prefer independence and self-sufficiency devalue cisgender women's experiences.<sup>66</sup> Fourth are the criticisms that the authors lump into a category called *postmodernist* critiques. These critics argue that ideals of autonomy that assume that people are psychically unified and self-aware are false.<sup>67</sup> Jean Grimshaw, for instance, draws on Freud's psychoanalytic theory to illustrate that people are in fact conflict-ridden.<sup>68</sup> Critics argue that those ideals of autonomy that assume a pure Kantian true self or free will ignore the fact that people are "constituted within and by regimes, discourses, and

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<sup>65</sup> See Mackenzie & Stoljar, *supra* note 62 at 7.

<sup>66</sup> See *ibid* at 5.

<sup>67</sup> See *ibid* at 10.

<sup>68</sup> Jean Grimshaw, "Autonomy and Identity in Feminist Thinking" in Morwenna Griffiths & Margaret Whitford, eds, *Feminist Perspectives in Philosophy* (Bloomington and Indianapolis: Indiana University Press, 1988) 90 at 102–03.

micropractices of power.”<sup>69</sup> There is no one universal notion of autonomy. Autonomy is different for different people because it is based on people’s different historical, social, and cultural contexts. The final critiques are *diversity* critiques. These critics argue that everyone’s identities reflect the multiple groups to which they belong and the ways that these identities (for example: gender, race, class, to name a few) interact.<sup>70</sup> These multiple dimensions of identity cannot be explained as either/or propositions.

For instance, Kimberlé Crenshaw explains that when speaking of women of colour, we cannot explain their identity as “woman” *or* “person of colour.”<sup>71</sup> Crenshaw developed the theory of intersectionality in order to understand the ways that these grounds of identity interact to shape the multiple dimensions of people’s experiences in different contexts. Specifically, Crenshaw employed intersectionality to look at the ways that multiple forms of inequality compound themselves, such as in violence against women of colour<sup>72</sup> and Black women’s employment experiences.<sup>73</sup> Theories of autonomy assume a sense of integrated self; theories of intersectionality, where the self might not be fully integrated, do not fit with

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<sup>69</sup> See Mackenzie & Stoljar, *supra* note 62 at 10.

<sup>70</sup> See Crenshaw, “Mapping the Margins”, *supra* note 47 at 1242.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1 U Chicago Legal F 139 at 141–50 [Crenshaw, “Demarginalizing the Intersection”].

such theories of autonomy.<sup>74</sup> At the heart of all of these critiques is that traditional individual autonomy is individualistic, overly simplistic, and inherently cis and heteronormatively masculine. It ignores the relational component of people's lives and the fact that people's actions are embedded in their historical, social, and cultural contexts.

What this means for property is that when an embryo, for instance, is categorized as property, we might assume, based on traditional theories of property, that the property owner has autonomy over it and acts independently in what they do with it. However, because people are inextricably bound up in their relationships and in their historical, social, and cultural contexts, the ways that people control their property is not autonomous and is affected by their context and by other people. Secondly, because we are not autonomous beings separated from society and from our social relationships, getting property rights in something creates new relationships and impacts our relationships with other people and society. To look at this in any other way would be to ignore the importance of society and relationships, particularly for cisgender women. This way of thinking is also in line with common law jurisprudence which views property as a set of relationships between people with different bundles of sticks of rights, rather than as a relationship with the thing.<sup>75</sup>

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<sup>74</sup> See Mackenzie & Stoljar, *supra* note 62 at 12.

<sup>75</sup> See Denise R Johnson, "Reflections on the Bundle of Rights" (2007) 32 Vermont L Rev 247 at 247-48.

### Relational Theory of Autonomy

A relational theory of autonomy helps us understand the ways that people, context (social, cultural, and historical), and social determinants (race, class, gender and ethnicity) are implicated in our relationships with property. A relational theory of autonomy is the feminist reconfiguring of individual autonomy that adds the relational concept of the self. As I mentioned earlier in this paper, Jennifer Nedelsky advocated that we should reflect on our choice of legal categories through examining how they structure relationships.<sup>76</sup> Nedelsky was also the first person to articulate a feminist account of relational autonomy.<sup>77</sup> Since then, a large number of feminist scholars have employed relational theory across different disciplines. Each of these authors has worked with and articulated relational theory in different ways. The common concern of these different authors is to use relational theory to uncover how oppression seeps into people's decisions, actions, and relationships with others.

The relational theory that I draw on here finds its roots in liberalism, communitarianism, and feminism.<sup>78</sup> "The image of humans as self-determining creatures . . . remains one of the most powerful dimensions of liberal thought."<sup>79</sup> Relational theory, however, rejects the

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<sup>76</sup> See Nedelsky, *Law's Relations*, *supra* note 54.

<sup>77</sup> See Nedelsky, "Reconceiving Autonomy", *supra* note 61.

<sup>78</sup> See Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: University of British Columbia Press, 2011) at 6.

<sup>79</sup> Nedelsky, "Reconceiving Autonomy", *supra* note 61 at 8.

individualism inherent in the idea that people are self-determining. It recognizes that people are socially embedded, and that people, context, and social determinants affect the self.<sup>80</sup> This is where relational theory draws on communitarianism, which acknowledges the way that community relationships mould people's identities and personalities.<sup>81</sup> Finally, I draw on feminism because of the historic significance of relationships in cisgender women's lives.

In *The Second Sex*, Simone de Beauvoir famously argues that women are not seen and defined as themselves, but through their relation to others.<sup>82</sup> In particular, cisgender women are defined and differentiated with reference to men.<sup>83</sup> Men, on the other hand, can think of themselves without women. More recently, Carol Gilligan argued that not only are cisgender women's identities formed and sustained through relationships with others, but cisgender women's "moral voices" are also centered on relationships and responding to others in caring ways.<sup>84</sup> Thus, the relationships created through characterizing embryos as property are likely to be more important to cisgender women and their identities, as cisgender women

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<sup>80</sup> See *ibid.*

<sup>81</sup> See Downie & Llewellyn, *supra* note 78 at 8.

<sup>82</sup> See Simone de Beauvoir, *The Second Sex*, translated by Constance Borde & Sheila Malovany-Chevallier (London: Vintage, 2011) at 6, 10.

<sup>83</sup> See *ibid.*

<sup>84</sup> See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Massachusetts: Harvard University Press, 1993) at 62.

not only have a unique relationship with reproduction, but also have identities in which relationships have always played a significant part.

In examining the possible relationships that might be implicated by characterizing embryos as property, I acknowledge that the ways that this characterization implicates these relationships will depend on people, context, and social determinants. My use of a relational theory of autonomy involves looking at each of these relationships within their social, cultural, and historical contexts. Like many of the relational theory scholars before me, I pay close attention to how the oppression of cisgender women plays into these relationships.

## **PART II: A RELATIONAL ANALYSIS OF THE RELATIONSHIPS IMPLICATED IN CATEGORIZING EMBRYOS AS PROPERTY**

If we think about how and for whom in vitro embryos are created, their intended use, and their special status in society, there is a long list of relationships that could be affected by categorizing embryos as property. These include the relationship between two (or more) intended parents who create the embryo, intended parent(s) and gamete donors, intended parent(s) and surrogates, intended parent(s) and the embryo, intended parent(s) and society, the clinic and/or agency and gamete donors, the clinic and/or agency and surrogates, etc. In this section, I employ a relational theory of autonomy to explore how characterizing embryos as property will interact with social, cultural and historical contexts and what this will mean for the relationships involved. The first relationship that I explore is that between cisgendered heterosexual

intended parents. The second is the relationship between intended mothers and the embryo itself, and the implications for intended mothers' relationship with society. The third is a relationship that arises when an egg donor or surrogate is used and it is the relationship between intended parent(s) and the egg donor and/or surrogate.

### **The Relationship between Cisgendered Heterosexual Intended Parents**

I begin by focusing on the relationship between cisgendered heterosexual intended parents and how characterizing embryos as property could affect their relationship in light of social, cultural, and historical factors. It is when couples are separating and trying to decide what to do with frozen embryos that this characterization could have the biggest effect on the relationship.

Characterizing embryos as property means that embryos can be divided between couples like all other property of the relationship. The first way that characterizing embryos as property could affect intended parents' relationships is that it could cause disputes between couples who are breaking up, where otherwise there might not have been a dispute.<sup>85</sup> In these disputes, embryos might be competed over.<sup>86</sup> This is a concern because of the long history of power imbalances between cisgendered heterosexual women and men when it comes to property rights. Historically, English common law rules

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<sup>85</sup> See Carsley, "Rethinking Legal Responses", *supra* note 30 at 108.

<sup>86</sup> See *ibid.* See also Carsley, "Who Has Control", *supra* note 45.

that were brought to Canada left women with little or no rights when it came to property.<sup>87</sup> When women were married, they lost their separate existence. Their person and any property, including wages, were absorbed by their husbands.<sup>88</sup> Although married women did not lose ownership of their real estate, they lost the right to manage and receive profits from it to their husbands.<sup>89</sup> They were also “incapable of contracting, of suing, or of being sued in their own names.”<sup>90</sup> Husbands thus had control over women’s lives through managing their property, money,

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<sup>87</sup> See Constance B Backhouse, “Married Women’s Property Law in Nineteenth-Century Canada” (1988) 6:2 L & Hist Rev 211 at 211–12.

<sup>88</sup> See *ibid* at 243, n 6. This vesting of self and property to the husband was part of the doctrine of marital unity. Backhouse notes that there do seem to be some exceptions (e.g. with personal claims and debts) where property was not vested absolutely in the husband until he reduced this property into his own possession. The common law rules through which women lost their property have also been described by many authors. See e.g. Lee Holcombe, *Wives & Property: Reform of the Married Women’s Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983); Clara Brett Martin, “Legal Status of Women in the Provinces of the Dominion of Canada (Except the Province of Quebec)” in *Women of Canada: Their Life and Work* (National Council of Women of Canada, 1900) 34. See also William Blackstone, *Commentaries on the Laws of England in Four Books* (1753); Frederick Pollock & Frederick William Maitland, “Chapter VII: Family Law” in *The History of English Law before the Time of Edward I*, 2nd ed (Cambridge: Cambridge University Press, 1898); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (New York: Cornell University Press, 1982); Dorothy M Stetson, *A Woman’s Issue: The Politics of Family Law Reform in England* (Westport: Greenwood Press, 1982).

<sup>89</sup> See Backhouse, *supra* note 87 at 213.

<sup>90</sup> *Ibid*.

and rights. Canadian legislation with regard to women's property rights has since been reformed. However, imbalances with regard to property rights remain a problem in many jurisdictions around the world.<sup>91</sup> These imbalances in power, when it comes to property rights, have a social element just as much as a legal element. While the laws in Canada have changed, this does not mean that the socio-culture of imbalance, when it comes to property rights, have disappeared. A socio-culture of imbalance might still permeate heterosexual couples' disputes over property.

Property law has also been used to marginalize groups of people on the basis of race, ethnicity, and class. Racialized people have not only been denied property rights, but have been treated as property throughout history. Cheryl Harris argues that "[t]he origins of property rights in the United States are rooted in racial domination."<sup>92</sup> Harris is among a number of scholars who have written on how the concepts of race and property have been used to subordinate certain groups of people on the basis of race.<sup>93</sup> Writing from the American context, Patricia

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<sup>91</sup> See e.g. Taiwo Ajala, "Gender Discrimination in Land Ownership and the Alleviation of Women's Poverty in Nigeria: A Call for New Equities" (2017) 17:1 Intl J Discrimination & Law 51; L Fonjong, Lawrence Fombe & Irene Sama-Lang, "The Paradox of Gender Discrimination in Land Ownership and Women's Contribution to Poverty Reduction in Anglophone Cameroon" (2013) 78:3 GeoJournal 575; Prem Chowdhry, ed, *Gender Discrimination in Land Ownership* (New Delhi: SAGE, 2009).

<sup>92</sup> Cheryl Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707 at 1716.

<sup>93</sup> See e.g. Ronald Takaki, *A Different Mirror: A History of Multicultural America* (Boston: Little Brown Company, 1993); Robert A Williams,

J. Williams draws a link between the perspective of a wild fox (in *Pierson v Post*) being pursued by a hunter and his hounds, and the experience of her great-great grandmother, who was a slave owned by a man named Austin Miller.<sup>94</sup> The similarity between her great-great grandmother and the fox was that they were both a form of property—“either owned or unowned, never the owner.”<sup>95</sup> In either situation, the subjects were never given the rights to themselves.<sup>96</sup> In the Canadian context, historian Barrington Walker describes how property law was integral in maintaining the system of slavery in Canada, and is still used to maintain social inequality today.<sup>97</sup> Even where the law has improved, as with the area of gender, the social elements of these imbalances persist. Thus, race, ethnicity, and class also play into power imbalances experienced by cisgender women in property disputes, making it such that these

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*The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1992). See also Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, 1978); Margalynne Armstrong, “African Americans and Property Ownership: Creating our Own Meanings, Redefining our Relationships” (1994) 1 *African-American Law & Policy Report* 79.

<sup>94</sup> See Patricia J Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22:2 *Harv CR-CL L Rev* 401.

<sup>95</sup> *Ibid* at 420.

<sup>96</sup> *Ibid* at 421.

<sup>97</sup> See Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) at 3. See also Barrington Walker, “You Shall Have the Body: Slavery, Property Rights and Resistance in Canada” (Labour Law and Development Research Laboratory Speaker Series delivered at the Faculty of Law, McGill University, 12 September 2017) [unpublished].

imbalances might be especially pronounced for racialized women.

The power imbalance between cisgender women and men is exacerbated by a number of factors that make embryos possibly more valuable to cisgender women than to cisgender men. Firstly, as Stefanie Carsley, Christine Overall, Roxanne Mytiuk, and Albert Wallrap point out, cisgender women play a much larger biological role in creating embryos than men.<sup>98</sup> Men's contribution to creating an in vitro embryo involves ejaculating into a cup. The process is relatively easy and straightforward. For cisgender women, on the other hand, the process is invasive, time-consuming, and can be quite painful. It involves drug regimes, surgery, and anesthesia.<sup>99</sup> The process entails side effects that range from nausea and bloating to ovarian hyper-stimulation syndrome.<sup>100</sup> In the long-term, stimulation may cause or accelerate certain types of cancer, such as breast and ovarian cancer,<sup>101</sup> and might pose risks to future fertility, although there are a lot

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<sup>98</sup> See Carsley, "Rethinking Legal Responses", *supra* note 30; Roxanne Mykitiuk & Albert Wallrap, "Regulating Reproductive Technologies in Canada" in Jocelyn Grant Downie, Timothy A Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Toronto: Butterworths, 2002) 367.

<sup>99</sup> See "The Medical Procedure of Egg Donation" (5 June 2002), online: *Egg Donor Information Project* <[web.stanford.edu/class/siw198q/websites/eggdonor/procedures.html](http://web.stanford.edu/class/siw198q/websites/eggdonor/procedures.html)>.

<sup>100</sup> See *ibid.* OHSS appears in 1–10 percent of donors. Symptoms include: chest and abdominal fluid, and cystic enlargement of the ovaries. It can cause permanent injury and death.

<sup>101</sup> See Helen Pearson, "Health Effects of Egg Donation May Take Decades to Emerge" (2006) 442 *Nature* 607.

of uncertainties because of a lack of long-term risk assessment.<sup>102</sup> Second, cisgender women's fertility seems to decline more rapidly than men's fertility, meaning there is a greater likelihood that cisgender women's eggs will become unviable at an earlier age than men's sperm.<sup>103</sup>

There are also risks associated with retrieving eggs at a later stage. While these issues are not applicable in the case of neither member of the couple being a genetic contributor, there are risks for cisgender women of delaying child-bearing.<sup>104</sup> Thirdly, in vitro fertilization (IVF) is a costly process. Only Ontario offers public funding for IVF; however, there is a limited amount offered, and it is not offered to women above the age of forty-two. Cisgender women, more often than cisgender men, do not work outside the home. When cisgender

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<sup>102</sup> See Mark V Sauer & Suzanne M Kavic, "Oocyte and Embryo Donation 2006: Reviewing Two Decades of Innovation and Controversy" (2006) 12:2 *Reproductive Biomedicine Online* 153 at 153–54.

<sup>103</sup> See Tracey Bushnik et al, "Estimating the Prevalence of Infertility in Canada" (2012) 27:3 *Hum Reprod* 738 at 742, who find that infertility is associated with the age of the female partner. See also Isiah D Harris et al, "Fertility and the Aging Male" (2011) 13:4 *Rev Urol* 184 at 185, who indicate that from a physiological perspective it is logical that age would have a greater impact on female fertility than male fertility, due to the fact that women have a finite number of eggs which declines over time, whereas males can continue to produce sperm. However, Harris et al. observe (at 188) that aging does have a significant impact on male fertility and that there are many unknowns about the extent of this impact. It might be more significant than we think.

<sup>104</sup> See Mary Anne Biro et al, "Advanced maternal age and obstetric morbidity for women giving birth in Victoria, Australia: A population-based study" (2012) 52:3 *Australian and New Zealand J Obstetrics and Gynaecology* 229 at 230–31.

women do work outside the home they are paid lower salaries.<sup>105</sup> The cost of paying for IVF again, and possibly paying for semen donation, is high. As such, IVF might be less accessible to women than it is for men. Fourthly, scholars such as Kristin Park have documented the stigma experienced by individuals who choose not to have children.<sup>106</sup> There is an expectation of cisgender women, more so than of cisgender men, to become parents.

As Rosemary Gillespie observes, “constructions of [cis and heteronormative] femininity and women’s social role have historically and traditionally been contextualized around the practices and symbolism surrounding motherhood.”<sup>107</sup> Motherhood is seen as “natural” and expected for cisgender women, and central to cis and heteronormative femininity.<sup>108</sup> Gillespie argues that she is hopeful that discourses are starting to shift such that cis and heteronormative femininity is no longer conflated with motherhood. However, pronatalist discourses and

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<sup>105</sup> See Melissa Moyser, “Women and Paid Work” in *Women in Canada: A Gender-based Statistical Report* (Statistics Canada, 2017).

<sup>106</sup> See Kristin Park, “Stigma Management among the Voluntarily Childless” (2002) 45:1 *Sociological Perspectives* 21.

<sup>107</sup> Rosemary Gillespie, “When No Means No: Disbelief, Disregard and Deviance as Discourses of Voluntary Childlessness” (2000) 23:2 *Women’s Studies International Forum* 223 at 223.

<sup>108</sup> See *ibid.* See also Evelyn Nakano Glenn, “Social Constructions of Mothering: A Thematic Overview” in Evelyn Nakano Glenn, Grace Chang & Linda Rennie Forcey, eds, *Mothering: Ideology, Experience, and Agency* (New York: Routledge, 1994) 1; Nancy Felipe Russo, “The Motherhood Mandate” (1976) 32:3 *J Social Issues* 143; Erik H Erikson, “Inner and Outer Space: Reflections on Womanhood” (1964) 93:2 *Daedalus* 582.

discourses that denigrate voluntarily childless cisgender women do still persist. Thus, cisgender women may feel as though they have to have children and may worry about experiencing stigma if they do not. This might make the embryos more valuable to cisgender women if they think the embryos might be their only chance at motherhood. Stefanie Carsley points out that across the case law in various jurisdictions, it is generally women who are seeking to use the embryos. There is only one example of a case where a woman withdrew her consent.<sup>109</sup> Carsley's article was written prior the *S.H. v D.H.* case, but of course *S.H. v D.H.* joins the list of cases whereby the woman partner wished to use the embryo and her male partner withdrew consent. This suggests that cisgender women might want the embryos more badly than men.

This leads to the second problem, which is that given these power imbalances and the fact that embryos are possibly more valuable to cisgender women than cisgender men, embryos might be used as a bartering tool.<sup>110</sup> Cisgender women might have to exchange more of other property in exchange for the embryos.

It is of course possible that treating embryos as property might not lead to more disputes, and that embryos might be split equally between the parties. However, the history of power imbalances between cisgender men and cisgender women indicates otherwise. This might be particularly true for racialized cisgender women. In this situation—one in which cisgender women's bigger

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<sup>109</sup> Carsley, "Rethinking Legal Responses", *supra* note 30 at 90. Carsley is referencing *In Re Marriage of Nash*, 150 Wash App 1029 (2009).

<sup>110</sup> See *ibid* at 108.

physical contribution to creating embryos, faster fertility decline, possible inability to pay for more IVF, and societal expectations that cisgender women have children come into play—it seems likely that embryos could become a bargaining chip.<sup>111</sup> Cisgender women could be taken advantage of. As Michelle Sublett suggests, if embryos are treated as property, the court or legislature need to develop some sort of guidelines for distribution.<sup>112</sup> Perhaps these guidelines might need to be that embryos are considered to be a special form of property that always needs to be split equally, as in the sperm straws of *J.C.M. v A.N.A.* Alternatively, embryos should perhaps be split in favour of cisgender women.

### **The Relationship Between Intended Mothers, the Embryo, and Society**

The second relationship that I investigate is the relationship between intended mothers and the embryo itself, if the embryo is considered as property. Much of this section, however, focuses on what categorizing embryos as property could mean for intended mothers' relationship with society, and how intended mothers might be viewed by society.

From a relational viewpoint, it is possible that treating embryos as property could be beneficial for intended mothers' relationship with embryos, and relationship with society. As I stated earlier, it is clear from

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<sup>111</sup> See *ibid.*

<sup>112</sup> See Michelle F Sublett, "Frozen Embryos: What are They and How Should the Law Treat Them?" (1990) 38:4 Clev St L Rev 585 at 597.

Canadian law that embryos are not human beings in Canada since they are less developed than fetuses, which Canadian case law has confirmed are not persons.<sup>113</sup> Treating embryos as people would not only not be in sync with Canada's emphasis on cisgender women's procreative liberty, but could also jeopardize it.<sup>114</sup> In fact, a number of scholars<sup>115</sup> argue that it is even harmful to cisgender women, and their rights, to place too much concentration on respect for the embryo in guidelines and statutes on embryo research, storage, donation, etcetera.<sup>116</sup> The embryo is created through an invasive and large contribution by cisgender women, and as Isabel Karpin points out "the embryo is only connected with its potential

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<sup>113</sup> See *AHRA*, *supra* note 18, s 3

<sup>114</sup> See *Tremblay*, *supra* note 31.

<sup>115</sup> See Maneesha Deckha, "Legislating Respect: A Pro-Choice Feminist Analysis of Embryo Research Restrictions in Canada" (2012) 58:1 McGill LJ 199 [Deckha, "Legislating Respect"]; Jenni Millbank, "Reflecting the 'Human Nature' of IVF Embryos: Disappearing Women in Ethics, Law, and Fertility Practice" (2016) 4:1 J Law & Biosciences 70; Donna L Dickenson, "Disappearing Women, Vanishing Ladies and Property in Embryos" (2017) 4:1 J Law & Biosciences 175 [Dickenson, "Disappearing Women"].

<sup>116</sup> In Canada, all research with embryos is carefully regulated by the Interagency Advisory Panel on Research Ethics Government of Canada. See the Interagency Advisory Panel on Research Ethics Government of Canada (5 February 2016), online: <[www.pre.ethics.gc.ca/eng/tcps2-eptc2\\_chapter12-chapitre12.html](http://www.pre.ethics.gc.ca/eng/tcps2-eptc2_chapter12-chapitre12.html)>. Per the *AHRA*, *supra* note 18, s 5(1)(b), in vitro embryos cannot be created for any reason other than to create a human and provide instruction. They cannot even be created for research. Although the words "respect" for embryos are not included in either document, it is very much implied.

for personhood by female embodiment.”<sup>117</sup> When we argue that all embryos are of equal value, we ignore the important role of cisgender women in creating these embryos and also the fact that cisgender women are necessary for these embryos to become human. Jenni Millbank, whose focus is on embryo disposition laws in Australia, argues that the special status accorded to embryos created through the IVF process means that the cisgender women who create these embryos “disappear” or become an afterthought, even though it is their desire for children and their labor that create the embryos to begin with.<sup>118</sup>

In the Canadian context, Maneesha Deckha investigates whether the “respect” and “dignity” accorded to embryos by the *AHRA* risks jeopardizing support for abortion.<sup>119</sup> Ultimately she finds that it is possible for feminists to promote respect and dignity of embryos while still maintaining a pro-choice stance. However, Deckha argues that there is a real concern that among the general public the *AHRA* will promote rhetoric of “respect” and “dignity” for embryos.<sup>120</sup> The public might not look into the *AHRA* in enough detail to see that it was developed in such a way so that people can abide by the *AHRA* and respect embryos, and also respect cisgender women’s procreative choice at the same time. Deckha’s argument confirms Millbank’s suggestion that when laws emphasize

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<sup>117</sup> Isabel Karpin, “The Uncanny Embryos: Legal Limits to the Human and Reproduction Without Women” (2006) 28:4 Sydney L Rev 599 at 603.

<sup>118</sup> See Millbank, *supra* note 115.

<sup>119</sup> See Deckha, “Legislating Respect”, *supra* note 115.

<sup>120</sup> See *ibid.*

the respect and dignity of embryos, this can take the limelight and cisgender women are overlooked. For Deckha this means cisgender women's procreative liberty is overlooked, whereas for Millbank and Karpin this means that cisgender women's labor in creating and carrying embryos is overlooked.

Donna Dickenson takes this a step further. She argues that not only does cisgender women's reproductive labor get overlooked, but that cisgender women's reproductive labor has never been considered real labor that would entitle cisgender women to ownership rights in the products of their labor.<sup>121</sup> This, Dickenson argues, is consistent with most of cisgender women's labor, which has rarely been recognized as labor and has never given cisgender women the same rights that, in liberal theory, it would give to men.<sup>122</sup> Dickenson suggests that since property comes from the labor of cisgender women's bodies, the labor that cisgender women put into the process of creating an embryo through IVF qualifies as labor in a Lockean sense and should entitle cisgender women to property rights in embryos.<sup>123</sup> Treating embryos as property would be a way to finally recognize cisgender women's reproductive labor as legitimate labor and to recognize cisgender women's right to ownership over the

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<sup>121</sup> See Dickenson, "Disappearing Women", *supra* note 115.

<sup>122</sup> See Donna L Dickenson, "Property and Women's Alienation from their Own Reproductive Labour" (2001) 15:3 *Bioethics* 205 at 206 [Dickenson, "Property and Women's Alienation"]. In liberal theory, labour gives men property rights in the products of their labour.

<sup>123</sup> See *ibid* at 215.

products of this labor.<sup>124</sup> Dickenson is careful to point out that treating embryos as property would not mean that cisgender women own their bodies, but only that cisgender women own the objects resulting from their labor. Dickenson argues that maintaining this distinction ensures that we avoid objectification or commodification of cisgender women's bodies.<sup>125</sup>

Although recognizing embryos as property could possibly mean that cisgender women's role in creating embryos is not overlooked and their labor is finally recognized as such, a further relational analysis reveals that the categorization of embryos as property can have a possible detrimental impact on cisgender women's relationship with embryos and society. First, the property rights that these scholars anticipate cisgender women getting in embryos are based on Locke's theory. I have already pointed out that this theory is flawed. The autonomous control that these scholars anticipate that cisgender women might get over embryos, if they are characterized as property, does not reflect reality.

Second, treating embryos as property implies that we have these property rights because we own the labor that created them. Traditionally, we own our labor because we own our bodies that performed this labor. Farida Akhter argues that "[a] woman is naturally in command over her body. She is by nature in possession of herself."<sup>126</sup> When

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<sup>124</sup> See Dickenson, "Disappearing Women", *supra* note 115 at 176.

<sup>125</sup> See *ibid.*

<sup>126</sup> Farida Akhter, *On the Question of the Reproductive Right: A Personal Reflection* (Book published for the FINRRAGE – UBINIG

cisgender women think of themselves as owners of their bodies, cisgender women are creating a “new social relationship” to this natural power.<sup>127</sup> This is a social relationship which denies that cisgender women’s reproductive capacity is a natural power. It turns cisgender women’s bodies into a reproductive factory and objectifies them. In *The Sexual Contract*, Carole Pateman argues that thinking of ourselves as owners of our bodies overlooks the fact that ourselves are inextricably linked to our bodies.<sup>128</sup> In saying that we own our labor, and thus our bodies, we are conceptualizing these as distinct from our “self”, when in actuality cisgender women’s body and reproductive labor are part of their “self”.<sup>129</sup>

Suggesting that cisgender women have ownership in their bodies has also been contested by radical feminists. This rhetoric of “control” and “property” when it comes to cisgender women’s bodies evokes a history of patriarchal practices of objectifying and gaining access to cisgender women’s bodies, for instance through medical science and population-control agencies.<sup>130</sup> Farida Akhter argues that we live in a society based on private property where

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International Conference hosted in Bard, Kotbari, Comilla, 1989) at 10, online (pdf): *FINNRAGE* <[www.finrrage.org/wp-content/uploads/2016/03/Comilla\\_Proceedings\\_1989.pdf](http://www.finrrage.org/wp-content/uploads/2016/03/Comilla_Proceedings_1989.pdf)> [Akhter, *Question of Reproductive*].

<sup>127</sup> Farida Akhter, *Issues of Women’s Health and Reproductive Rights* (Manila, Philippines, 1990) at 8 [Akhter, *Women’s Health*].

<sup>128</sup> See Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 215.

<sup>129</sup> *Ibid.*

<sup>130</sup> See *ibid* at 388.

cisgender women are owned by men as a means of production of the human species.<sup>131</sup> Carole Pateman argues that the means through which “patriarchy is constituted” is through the contracts of property that people hold in themselves.<sup>132</sup> In the classic texts (other than Hobbes), however, only men have the necessary characteristics to enter into contracts, and so cisgender women are never parties to the contract and are only ever the subject. The sexual contract is the way in which men use their natural right over cisgender women and secure “patriarchal civil right.”<sup>133</sup> These contracts lead to the exploitation of cisgender women, because in such a contract one person is subordinate to the other. Pateman argues that when cisgender women speak of bodily ownership they implicate themselves in “masculine contractarian fictions,” meaning that they reinforce the idea that bodies, and especially cisgender women’s bodies, are ownable.<sup>134</sup> By virtue of being able to be owned, cisgender women’s bodies are reduced to commodities. Commoditizing cisgender women’s bodies brings about its own set of concerns, which I address in further detail in the next section when talking about the effect of categorizing embryos as property on intended parents’ relationships with egg donors and surrogates.

Thus, a relational analysis of the implications of characterizing embryos as property on intended mothers’ relationship with the embryo and society, reveals that it is

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<sup>131</sup> See Akhter, *Question of Reproductive*, *supra* note 126.

<sup>132</sup> Pateman, *supra* note 128 at 2.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

possible for characterizing embryos as property to mean that we no longer overlook cisgender women's role in creating and carrying embryos, and that cisgender women's reproductive labor is seen as *real* labor. However, social, historical, and cultural context point strongly towards the idea that cisgender women would not get the property rights in embryos that they anticipate. Importantly, cisgender women having a property right in embryos implies that cisgender women own their labor, and they own their labor because they own their bodies. Notions of self-ownership intrude on cisgender women's natural command over their body, implicate cisgender women's selves in ownership, and open the door to the idea that cisgender women's bodies are ownable. The biggest concern is the latter. The link between characterizing embryos as property and this idea that cisgender women's bodies are ownable might be tenuous. However, it is still plausible and would be highly oppressive.

Cisgender women owning their labor, however, does not have to bring us back to histories of men owning cisgender women. Rosalind Pollack Petchesky argues that we need to "recuperate the notion of self-proprietty as an indispensable part of feminist conceptions of social democracy and even property more generally."<sup>135</sup> Our understanding of what it means to have self-ownership comes down to how we understand property in general. All too often, property, ownership, and self-ownership are interpreted in historical paradigms of property—most commonly a Lockean paradigm. There are two major problems with that. Firstly, a Lockean paradigm of property draws a sharp distinction between the body as a

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<sup>135</sup> Petchesky, *supra* note 51 at 387.

commodity, and the person as a transactor.<sup>136</sup> It does not consider that there may not be a definite dualism between the two things. Since Locke's theory of property is based on an individualist conception of social life, it does not reveal the relationships involved in self-ownership. It also sees self-ownership as purely instrumental towards owning the products labored by people's body. Second, viewing self-ownership through a Lockean viewpoint has the effect of putting property into economic terms and getting rid of any cultural variation in property.

It is easy to get caught up in thinking that there is only one idea of property, and that it needs to be economic. As a relational view of property reveals, property itself is a product of different social, cultural, and historical circumstances and thus can vary in different contexts.<sup>137</sup> We can see examples in history where ideas about owning one's body have less to do with property in an economic sense and more to do with protecting one's own sexuality and personal security from arbitrary invasion. Petchesky uses the example of Marilyn Strathern's ethnographic study of property relations among New Guinea Highlanders.<sup>138</sup> Strathern found that the New Guinea Highland groups did not have the same notions of rights over things, or even people, as in Western notions of property. Among the Highlanders, ownership is a

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<sup>136</sup> See *ibid* at 388.

<sup>137</sup> See CB Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, reprint edition (Ontario: Oxford University Press, 2010).

<sup>138</sup> See Marilyn Strathern, "Subject or Object?" in Renee Hirschon, ed, *Women and Property, Women as Property* (London: Croom Helm, 1984).

collective authority over resources and involves relationships of caretaking.<sup>139</sup>

Donna Dickenson said that cisgender women's labor has never really fit into a Lockean perspective of property.<sup>140</sup> This is perhaps because as Petchesky suggests, we need a rethinking of property altogether, that would be more appropriate in the context of embryos. This would involve creating a radical conception of property and creating a feminist idea of bodily integrity.<sup>141</sup> In order to develop this, Petchesky argues that we can look at the different approach to concepts like autonomy and self-ownership that have been taken for instance by feminists of color in the United States. A new underlying theory of property would mean a different understanding of self-ownership that might not have the same ramifications that self-ownership has when viewed through a Lockean lens. Given how common it is becoming to refer to embryos as property, this might be a necessary way to ensure that we rethink self-ownership.

### **The Relationship between Intended Parents, Egg Donors, and Surrogates**

In this third section, I pick up on some of the concerns about intended mothers' relationship with the embryo and with society if we categorize embryos as property. I explore how these concerns come into play when an egg donor's genetic material is used to create the embryo, and

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<sup>139</sup> See *ibid.*

<sup>140</sup> See Dickenson, "Disappearing Women", *supra* note 115.

<sup>141</sup> See Petchesky, *supra* note 51 at 389.

when a surrogate carries the embryo. I look generally at what the characterization of embryos as property means for the relationship between intended parents and egg donors, and the relationship between intended parents and surrogates.

As I mentioned in the last section, authors like Donna Dickenson argue that treating embryos as property could be a way to recognize cisgender women's reproductive labour.<sup>142</sup> In the case of egg donors, this could be a way to recognize their labour in producing eggs to create the embryo. It might also call attention to the labour performed by surrogates by saying that embryos are only property until female embodiment enables them to become persons.<sup>143</sup> However, egg donors and surrogates do not get the property rights that come with this labour. Egg donors provide the eggs for embryos that become intended parents' property. Surrogates also do not own the efforts of their labour. Since their labour produces a child, no one owns the property rights since children are not ownable. Intended parents, however, gain parental rights as a result of surrogates' labour.

In the context of disputes over reproductive material, the focus is on the labour of the people whose desire for a child created this embryo. For instance, in *C.C. v A.W.* the court justifies that the sperm was a gift to C.C. not only because A.W. knew what the sperm would be used for, but also because C.C. badly wanted a baby, and put in many years of labour trying to conceive with the sperm,

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<sup>142</sup> See Dickenson, "Disappearing Women", *supra* note 115.

<sup>143</sup> Karpin, *supra* note 117.

and had also paid to store the sperm.<sup>144</sup> In *J.C.M. v A.N.A.*, the sperm straws were the property of J.C.M. and A.N.A. because they had chosen them and paid for them in their efforts to have children.<sup>145</sup> Research on surrogates and egg donors indicates that this is the outcome that both groups want: egg donors donate their eggs to help intended parents produce an embryo and have children, and surrogates carry an embryo so that intended parents can have children.<sup>146</sup> Intended parents' labour in seeking out gamete donors and surrogates, paying for these services, and other efforts entitle them to rights in the embryos and children.

The concern that this raises, however, is that if egg donors and surrogates do not get rights in embryos and children produced as products of their labour, who will be perceived as owning their labour should embryos be characterized as property? At best, egg donors and surrogates own the labour themselves, which raises the concern around self-ownership that I highlighted in the last section. The larger concern is that egg donors' and surrogates' labour will be seen to be owned by the intended parents for whom they perform the labour. Generally, this supports the idea that not only can cisgender women's bodies be owned, but also that they can be owned by people other than themselves.

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<sup>144</sup> See *CC v AW*, *supra* note 36 at paras 20–21.

<sup>145</sup> See *JCM*, *supra* note 37.

<sup>146</sup> See Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* (Berkeley: University of California Press, 2011); Helena Ragone, *Surrogate Motherhood: Conception in the Heart* (Colorado: Westview Press, 1994).

Secondly, Carole Pateman and Jennifer Nedelsky argue that owning the body reduces it to a commodity that can be sold in the marketplace.<sup>147</sup> For Carole Pateman it does not matter whether egg donors and surrogates own their body or intended parents own it. The mere fact of owning it reduces it to a commodity.<sup>148</sup> For intended mothers, who use their own eggs and carry the child themselves, it is problematic to create an image that their bodies can be commodities. However, the reason I discuss this commodification in this section on egg donors and surrogates is that intended mothers are creating eggs and carrying embryos for themselves so they are less likely to perpetuate an idea that their bodies are commodities. Egg donors and surrogates, on the other hand, perform this work for intended parents and this labour is often bought and sold. The idea that egg donors' and surrogates' bodies might be commoditized was a preoccupation of the Baird Commission<sup>149</sup>—the Canadian body of commissioners who were mandated to study and report on the broad “social, ethical, health, research, legal and economic implications” of assisted reproductive technologies (including third party reproduction, like surrogacy and egg donation).<sup>150</sup> This was later manifested in the *AHRA*, which in addition to dealing with embryos, also regulates egg

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<sup>147</sup> See Pateman, *supra* note 128; Nedelsky, “Property in Potential Life”, *supra* note 46.

<sup>148</sup> See Pateman, *supra* note 128.

<sup>149</sup> See e.g. Royal Commission on NRTs, *supra* note 20, vol 2 at xxxii, 13, 22, 52; Alana Cattapan, “Rhetoric and Reality: ‘Protecting’ Women in Canadian Public Policy on Assisted Human Reproduction” (2013) 25:2 *CJWL* 202.

<sup>150</sup> Cattapan, *supra* note 149 at 203.

donation and surrogacy. The *AHRA* prohibits paying for surrogacy, gamete, and embryo donation<sup>151</sup> in order to prevent “trade in the reproductive capabilities of women and men and the exploitation of children, women and men.”<sup>152</sup> However, we know that despite the legislation, Canadians are paying for surrogacy and gametes in Canada on a grey market, or they are going abroad.<sup>153</sup> The fact that many surrogates and egg donors are being paid in Canada escalates this idea that if egg donors’ and surrogates’ bodies can be owned, they become commodities.

The first concern with egg donors’ and surrogates’ bodies being treated as commodities is that egg donors and surrogates may become reduced to what they, or their reproductive labour, can be exchanged for on the market. Jyotsna Gupta, Annemiek Richters, Janice Raymond, and Vandana Shiva argue that cisgender women become

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<sup>151</sup> See *AHRA*, *supra* note 18.

<sup>152</sup> See *ibid*, ss 2(f), 6, 7.

<sup>153</sup> See Alison Motluk, “The Human Egg Trade: How Canada’s Fertility Laws are Failing Donors, Doctors, and Parents”, *The Walrus* (12 April 2010), online: <[thewalrus.ca/the-human-egg-trade/](http://thewalrus.ca/the-human-egg-trade/)>; Kathleen Hammond, *What Money Can Buy: Tracing Egg Transactions in Canada* (Doctoral dissertation, University of Cambridge, 2016) [unpublished] for scholarship and media reports on donors and surrogates being paid in Canada. See Eric Blyth, “Fertility patients’ experiences of cross-border reproductive care” (2010) 94:1 *Fertil Steril* 11; Edward Hughes & Deirdre DeJean, “Cross-border fertility services in North America: A survey of Canadian and American providers” (2010) 94:1 *Fertil Steril* 16; Nicky Hudson et al, “Cross-border reproductive care: a review of the literature” (2011) 22:7 *Reproductive Biomedicine Online* 673; Vincent Couture et al, “Reproductive outsourcing: an empirical ethics account of cross-border reproductive care in Canada” (2018) 45:1 *J Med Ethics* 41 for scholarship on going abroad.

viewed solely as child-bearing machines or breeders.<sup>154</sup> They become viewed as a means to an end rather than being valued for their own intrinsic worth as human beings.<sup>155</sup> Reducing cisgender women in this way further legitimizes and enforces cisgender women's gender oppression. Treating cisgender women as commodities carries connotations of chattel slavery,<sup>156</sup> and trafficking in persons. These examples have shown us the profound moral reasons, like protecting human dignity, for ensuring that people are never treated as commodities.<sup>157</sup>

When egg donors and surrogates are perceived as commodities, this can lead to alienation from their bodies. This has to do with the fact that when reproductive labour is commoditized, we are taken further and further away from the natural. Naomi Pfeffer argued that for cisgender women undergoing IVF, the "mystique" of IVF conditions makes the task more external and less natural, and thus it

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<sup>154</sup> See Jyotsna Agnihotri Gupta & Annemiek Richters, "Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self-Determination" (2008) 5:4 J Bioethical Inquiry 239; Janice G Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (North Melbourne: Spinifex Press, 1993); Vandana Shiva, *Staying Alive: Women, Ecology and Development* (London: Zed Books, 1988).

<sup>155</sup> See Raymond, *supra* note 154 at 203.

<sup>156</sup> See Anita L Allen, "Surrogacy, Slavery, and the Ownership of Life Property" (1990) 13 Harv J L & Pub Pol'y 139 [Allen, "Surrogacy, Slavery"].

<sup>157</sup> See Thomas A Shannon, *Surrogate Motherhood: The Ethics of Using Human Beings* (New York: Crossroad Publishing Company, 1988) at 157; Charis Thompson, "Why we should, in fact, pay for egg donation" (2007) 2:2 Regenerative Medicine 203.

becomes more alienating.<sup>158</sup> The same could be said when egg donors' and surrogates' labour is commoditized. The tasks of producing eggs and child-bearing, when the labour is being performed under market conditions, could lead to donors' and surrogates' alienation from these forms of labour and from their bodies. Margaret Jane Radin argues that through feeling this separation or lack of identity with this form of labour, they will internalize the idea that they as persons are separate from these unique forms of labour they can perform.<sup>159</sup> Cisgender women will experience the pain of the divided self.<sup>160</sup> Radin additionally argues that even if cisgender women do not feel alienation from their bodies, there is a lot of social disapproval connected with commoditizing one's body, and this in itself will exacerbate oppression, making egg donors and surrogates feel more alienated from society.<sup>161</sup>

When egg donors' and surrogates' reproductive labour is seen as a commodity, there is also the possibility that they will be unduly influenced or coerced into selling this commodity. The argument is that cisgender women might be so lured by payment that they will not, or might be unable to, fully evaluate the risks of donating or acting as a surrogate, and thus the consent that they provide might

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<sup>158</sup> See Naomi Pfeffer, *The Stork and the Syringe: Political History of Reproductive Medicine* (Cambridge: Polity Press, 1993).

<sup>159</sup> See Margaret Jane Radin, "Market-Inalienability" (1987) 100:8 Harv L Rev 1849 at 1916.

<sup>160</sup> See *ibid.*

<sup>161</sup> See *ibid.*

not be informed.<sup>162</sup> Feminists such as Christine Overall have argued that this concern is amplified for young, single ethnic minority women of lower socioeconomic class.<sup>163</sup> Scholars, such as Anita Allen, have expressed concern that surrogacy and egg donation will become a new form of racial and class discrimination and that minority cisgender women will be specifically sought out to perform various types of reproductive labour for middle and upper-class intended parents.<sup>164</sup>

There is a lack of research on the experiences of Canadian egg donors and surrogates. However, the body of scholarship on the experiences of surrogates and egg donors in other countries, that has been produced over the last few decades, has helped to shed light on whether these concerns (about surrogate and egg donors' bodies being treated as though they are owned by intended parents and concerns related to their bodies being commoditized) are warranted. The literature on egg donation reports on the experience of donors in countries such as the United States,

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<sup>162</sup> See Françoise Baylis & Carolyn McLeod, "The stem cell debate continues: The buying and selling of eggs for research" (2007) 33:12 *Journal of Medical Ethics* 726; Martin Johnson, "Payments to gamete donors: position of the human fertilisation and embryology authority" (1997) 12:9 *Human Reproduction* 1839.

<sup>163</sup> See Christine Overall, *Human Reproduction: Principles, Practices and Policies* (Toronto: Oxford University Press, 1993); Diana Majury, "Pre-Conception Contracts: Giving the Mother an Option" in Simon Rosenblum & Peter Findlay, eds, *Debating Canada's Future: Views from the Left* (Toronto: James Lorimer & Co, 1991) 197.

<sup>164</sup> See Allen, "Surrogacy, Slavery", *supra* note 156. See also Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: Norton, 1989).

Canada, Finland, and the United Kingdom.<sup>165</sup> This research found that egg donors ranged in age from twenty to thirty-

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<sup>165</sup> See Almeling, *supra* note 146; Hammond, *supra* note 153; Monica Konrad, *Nameless Relations: Anonymity, Melanesia and Reproductive Gift Exchange between British Ova Donors and Recipients* (New York: Berghan Books, 2005); Dorothy A Greenfeld et al, “Similarities and differences between anonymous and directed candidates for oocyte donation” (1995) 12:2 J Assist Reprod Genet 118; Jordan Caren, Cynthia Belar & R Stan Williams, “Anonymous oocyte donation: A follow-up analysis of donors’ experiences” (2004) 25:2 Journal of Psychosomatic Obstetrics & Gynecology 145; Andrea L Kalfoglou & Gail Geller, “A follow-up study with oocyte donors exploring their experiences, knowledge, and attitudes about the use of their oocytes and the outcome of the donation” (2000) 74:4 Fertility & Sterility 660; Nancy J Kenney & Michelle L McGowan, “Looking back: egg donors’ retrospective evaluations of their motivations, expectations, and experiences during their first donation cycle” (2010) 93:2 Fertility & Sterility 455; Firouz Khamsi et al, “Some psychological aspects of oocyte donation from known donors on altruistic basis” (1997) 68:2 Fertility & Sterility 323; Susan Caruso Klock, Andrea Mechanik Braverman & Deidra Taylor Rausch, “Predicting anonymous egg donor satisfaction: A preliminary study” (1998) 7:2 J Women’s Health 229; Sisan Caruso Klock, Jan Elman Stout & Marie Davidson, “Psychological characteristics and factors related to willingness to donate again among anonymous oocyte donors” (2003) 79 Fertil Steril 1312; Steven R Lindheim, Jennie Chase & Mark V Sauer, “Assessing the influence of payment on motivations of women participating as oocyte donors” (2001) 52:2 Gynecologic & Obstetric Investigation 89; Matthew Patrick et al, “Anonymous oocyte donation: A follow-up questionnaire” (2001) 75:5 Fertility & Sterility 1034; Mark V Sauer & Richard J Paulson, “Oocyte donors: A demographic analysis of women at the University of Southern California” (1992) 7:5 Human Reproduction 726; LR Schover et al, “The psychological evaluation of oocyte donors” (1990) 11:4 Journal of Psychosomatic Obstetrics & Gynecology 299; Viveca Söderström-Anttila, “Follow-up study of Finnish volunteer oocyte donors concerning their attitudes to oocyte donation” (1995) 10:11 Human Reproduction 3073; Alanna Winter & Judith C Daniluk, “A Gift From the Heart: The Experiences of Women

two, the majority are Caucasian, and a large number of donors are of a low socioeconomic status, with many of them being students.<sup>166</sup>

However, as Rene Almeling indicates through the example of egg donor Megan, whilst money is a motivator, the money is not usually so much that it makes donating irresistible.<sup>167</sup> In other words, the research on this topic indicates that egg donors do not, generally, seem unduly induced to donate. Egg donors' overall description of egg donation is that it is *quick and easy* but there are a wide range of physical, psychological, and emotional risks involved with donation, many of which egg donors reported experiencing. For instance, egg donation raised personal dilemmas for egg donors surrounding the complicated set of relationships that result from donation—such as between egg donors, intended parents, and an offspring of the donation. Egg donors reported feeling sometimes as though they were just a “means to an

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Whose Egg Donations Helped Their Sisters Become Mothers” (2004) 82:4 J Counseling & Development 483; Samantha Yee, Eric Blyth & A Ka Tat Tsang, “Oocyte donors’ experiences of altruistic known donation: a qualitative study” (2011) 29:4 J Reproductive & Infant Psychology 404; Samantha Yee, Jason A Hitkari & Ellen M Greenblatt, “A follow-up study of women who donated oocytes to known recipient couples for altruistic reasons” (2007) 22:7 Human Reproduction 2040.

<sup>166</sup> See e.g. Kenney & McGowan, *supra* note 165, which found that 45 percent of their sample were students and 18.8 percent were unemployed.

<sup>167</sup> See Almeling, *supra* note 146 at 113. See also Hammond, *supra* note 153.

end.”<sup>168</sup> This, and research that shows that some donors, with particular backgrounds, are more sought out and/or more highly compensated than others supports the notion that egg donors might be treated as commodities, and reduced to their monetary value.<sup>169</sup> Research that has looked at what exactly payment is for and the question of whether it is for egg donors’ labour, or for their bodies, has found that donors themselves seem to characterize payment as being for the process of donation—time injections, surgery, and/or risk, rather than for their bodies.<sup>170</sup>

Karen Busby and Delaney Vun provide an excellent review of the empirical literature on surrogacy that was published at the time of writing the article.<sup>171</sup> In their review, they observe that surrogates are often young (in their late twenties and early thirties) and Caucasian.<sup>172</sup> Overwhelmingly, most surrogates do not have regrets

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<sup>168</sup> Hammond, *supra* note 153 at 117.

<sup>169</sup> See Aaron D Levine, “Self-regulation, compensation, and the ethical recruitment of oocyte donors” (2010) 40:2 *Hastings Cent Rep* 25.

<sup>170</sup> See Almeling, *supra* note 146 at 135; Erica Haines, Ken Taylor & Ilke Turkmendag, “Eggs, ethics and exploitation? Investigating women’s experiences of an egg sharing scheme” (2012) 34:8 *Sociol Health Illness* 1199.

<sup>171</sup> This literature was from the United States and Britain.

<sup>172</sup> See Karen Busby & Delaney Vun, “Revisiting ‘The Handmaid’s Tale’: Feminist Theory Meets Empirical Research on Surrogate Mothers Rethinking Assisted Conception” (2010) 26:1 *Can J Fam L* 13 at 42. Busby & Vun provide a terrific review of the empirical literature in Britain and the United States that has reported on the demographics and experiences of surrogate mothers. They do not, however, discuss the literature on surrogacy across borders.

about the process, they understand what they are agreeing to, and they have a satisfying relationship with the intended parents.<sup>173</sup> A 2019 study, that was published after Busby and Vun’s article, collected data on the experiences of 184 Canadian surrogates. It largely echoed these findings.<sup>174</sup> The study found that most women reported a positive experience, that relationships with intended parents played a large role in this overall rating, and that for the most part these were harmonious, or neutral. However, there were some situations where surrogates and intended parents had a conflictual relationship. For instance, “Surrogate 17” reported feeling as though, as soon as she was pregnant, “it was all about the baby.”<sup>175</sup> Surrogate 38 found that the intended mother she worked with was too invasive.<sup>176</sup> The comments of surrogate 17 reflect the concern of surrogates being reduced to a means to an end. Surrogate 38’s comment alludes to her possibly feeling alienated from her body, that was being invaded by the intended mother. The intended mother might also have been acting as though she had ownership over surrogate 38’s body. Thus, whilst the findings on surrogacy do not generally support concerns

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<sup>173</sup> See *ibid* at 81.

<sup>174</sup> See Samantha Yee, Shilini Hemalal & Clifford L Librach, “‘Not my child to give away’: A qualitative analysis of gestational surrogates’ experiences” (2019) *Women and Birth*, DOI: <10.1016/j.wombi.2019.02.003>. This study is the most recent study on Canadian surrogacy and should be lauded for the large number of participants that the researchers were able to include. It is, however, important to note the possibility of a conflict of interest with this research given that it was conducted by fertility clinic staff (one of whom is a fertility clinic director).

<sup>175</sup> *Ibid* at 5.

<sup>176</sup> *Ibid*.

about surrogates feeling commoditized, being reduced to what they are exchanged for on the market, feeling alienated from their bodies, and/or feeling unduly influenced, there are some exceptions. There has been insufficient research on the experiences of Canadian surrogates to make an accurate assessment on just how many exceptions there are.

The research that I have just recounted describes the experience of domestic egg donors and surrogates. There is also a transnational market in which Canadian intended parents are traveling abroad for paid surrogacy and egg donation and/or arranging for surrogates, egg donors and eggs to come to Canada. There is limited research on Canadians traveling abroad for surrogacy and egg donation, but the research that exists confirms that it is occurring.<sup>177</sup> Concerns about egg donors and surrogates being commoditized has been particularly pronounced in the literature on cross-border reproductive care. Maneesha Deckha points out that this is because the experience of commodification is very different when egg donation and surrogacy is happening domestically versus transnationally.<sup>178</sup> She goes on to argue that given how popular transnational surrogacy has become, we need to revisit earlier Westcentric feminist debates about

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<sup>177</sup> See Blyth, *supra* note 153; Hughes & DeJean, *supra* note 153; Couture et al, *supra* note 153 for research on Canadians traveling abroad for egg donation. See Kristin Lozanski, “Transnational surrogacy: Canada’s contradictions” (2015) 124 Soc Sci Med 383 at 388–89 for research on Canadians traveling to India for gestational surrogacy.

<sup>178</sup> See Maneesha Deckha, “Situating Canada’s Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding” (2015) 61:1 McGill LJ 31 at 35 [Deckha, “Situating Canada”].

commodification. They did not take into account transnational surrogacy and the phenomenon of intended parents traveling from the North to the global South for surrogacy. Given the transnational North–South nature of surrogacy, Deckha argues that we should employ a “postcolonial feminist perspective” to guide research and reform on surrogacy. When she speaks of a postcolonial feminist perspective, she is referring to a “theoretical framework that prioritizes the perspectives of women in the Global South,” and challenges Western analyses including those authored by Western feminists which “encode colonial assumptions about the lives of non-Western women and assume certain normative framings.”<sup>179</sup> Although Deckha is speaking here about gestational surrogacy, her arguments also apply to egg donation, as there is also a transnational egg donor market of oocytes between the North and Global South.<sup>180</sup>

Research on transnational egg donation has observed that eggs are generally purchased in countries where the cost of eggs is lower—from “relatively

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<sup>179</sup> See *ibid* at 54. Deckha observes, however, that even though it is important to take the vantage point of marginalized cisgender women, researchers need to be cognizant that the ability to take this vantage point will be limited by virtue of the fact that researchers are “privileged knowledge makers interpreting the experience of the Other.”

<sup>180</sup> See Catherine Waldby, “Oocyte markets: Women’s reproductive work in embryonic stem cell research” (2008) 27:1 *New Genet Soc* 19 at 22, which documents a number of egg markets that attract intended parents from abroad.

impoverished vendor populations.”<sup>181</sup> This exacerbates concerns around the coercion and undue inducement of donors. Michal Nahman conducted ethnographic research on the experience of Romanian egg sellers. These egg sellers were engaging in what she terms “reverse trafficking.”<sup>182</sup> Egg donors were going through the donation process at a private Israeli-owned clinic in Romania. The eggs were then fertilized at the clinic, and the embryos were imported to intended parents in Israel. Nahman illustrates how the egg sellers that she studies have to, and do, become “savvy participants (even entrepreneurs)” of the neoliberal economy.<sup>183</sup> In an economy where citizenship, and thus worth, is equated with buying power, egg donors capitalize on their bodies (through selling their eggs), which enables them to participate in the market. Ultimately, Nahman argues that the reverse traffic nature of this process heightens inequalities among cisgender women who are situated differently globally. Since the egg donors’ eggs are just sent to the intended parents, the egg donor is invisible to

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<sup>181</sup> Catherine Waldby & Melinda Cooper, “From reproductive work to regenerative labour: The female body and the stem cell industries” (2010) 11:1 *Fem Theory* 3 at 7.

<sup>182</sup> By “reverse traffic” Nahman is referring to the process of importing eggs into one country that come from donors in another country. This is becoming increasingly more common with improvements in the oocyte vitrification process. Eggs can be extracted in one country, frozen, and then shipped to intended parents in another country. See Michal Nahman, “Reverse traffic: intersecting inequalities in human egg donation” (2011) 23:5 *Reproductive Biomedicine Online* 626 at 627.

<sup>183</sup> Michal Nahman, *Extractions: An ethnography of reproductive tourism* (London: Palgrave Macmillan, 2013) at 54.

the intended parents. Her and her role are obfuscated.<sup>184</sup> This phenomenon might exacerbate concerns of cisgender women being commoditized, since the donors themselves are reduced to just being the source of the eggs.

Concerns about cisgender women being commoditized are particularly high in the context of transnational gestational surrogacy. Scholars have remarked that it is the “bodies of poor brown women that now produce babies for rich (primarily) white women and men.”<sup>185</sup> Research on cisgender women acting as surrogates for transnational couples has found that these women are aware of their life circumstances and are making choices that provide them with economic advancement and that are best for themselves and their families.<sup>186</sup> There is agency in these choices to participate in this form of labour.<sup>187</sup> Using the example of surrogacy in India, there are several aspects of the experience that make it seem as though women’s bodies are treated as

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<sup>184</sup> See Nahman, *supra* note 182 at 632.

<sup>185</sup> Deckha, “Situating Canada”, *supra* note 178 at 35–36. India, in particular, has become a particularly popular destination for surrogacy. See Jyotsna A Gupta, “Reproductive biocrossings: Indian egg donors and surrogates in the globalized fertility market” (2015) 5:1 IJFAB 25, online: <utpjournals.press/doi/abs/10.3138/ijfab.5.1.25>.

<sup>186</sup> See Deckha, “Situating Canada”, *supra* note 178 at 59.

<sup>187</sup> See Katy Fulfer, “Commercial Contract Pregnancy in India, Judgment, and Resistance to Oppression” (2015) 30:4 *Hypatia* 846. Amrita Pande specifically describes surrogacy as labour in order to recognize these women as critical agents, and deconstruct the notion of victim, which is often used when discussing the bodies of third-world women. See also Amrita Pande, “Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker” (2010) 35:4 *Signs* 969 at 972.

though they are owned by intended parents, and/or that their bodies are being commoditized. Firstly, disparity in material conditions is what has made it such that there is an abundance of Southern surrogates for Northern parents.<sup>188</sup> Amrita Pande describes how many of the surrogates that she interviewed in India are poor, rural women.<sup>189</sup> Fertility clinics take advantage of the socioeconomic vulnerability of these women, as well as their anxieties about being bad mothers (for instance, by not being able to provide for their children), in order to recruit them.<sup>190</sup>

Secondly, surrogates often stay in a surrogacy hostel throughout the duration of the pregnancy, where they are separated from their families, have to eat certain food, and are limited in what they are allowed to do.<sup>191</sup> The large number of restrictions on their freedom while they are pregnant give the impression that intended parents own their body while surrogates carry intended parents' babies. They are told that they are just providing a home in their womb and that they are to care for the baby and love it more than their own—because it's someone else's. However, they also are told not to get too attached to the child, since this is only temporary. As Pande explains, a surrogate needs to be a nurturing mother while also recognizing their

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<sup>188</sup> See Deckha, "Situating Canada", *supra* note 178 at 56.

<sup>189</sup> See Pande, *supra* note 187 at 971, 974. Thirty-four of the forty-two surrogates that she interviewed had a family income below or around the poverty line in India.

<sup>190</sup> See *ibid* at 975.

<sup>191</sup> See *ibid*. Pande opens her article with a quote from an Indian surrogate describing her timetable at a surrogacy hostel.

disposability as a worker.<sup>192</sup> Expectations such as these, that treat the pregnancy as external, might result in surrogates feeling alienated from their bodies. Thirdly, some surrogates are valued higher because of having certain characteristics like lighter skin. Lisa Ikemoto argues that there is also racial distancing that occurs between intended parents and surrogates. She remarks that the non-whiteness of the surrogate, and them being in a southern location distinguishes them racially from the commissioning couple.<sup>193</sup> This might limit intended parents' scope for empathy.<sup>194</sup> This differential value that is placed on surrogates and distancing from them might lead to these women being reduced to a monetary value.

A relational perspective of intended parents' relationship with egg donors and surrogates, if embryos are treated as property, reveals that intended parents might be perceived as owning egg donors' and surrogates' bodies. Even if egg donors' and surrogates' bodies are not perceived as being owned by intended parents, they might be reduced to commodities, especially when intended parents are paying for eggs or for the surrogacy. When egg donors and surrogates are perceived of as commodities this can result in them experiencing alienation from their reproductive capacities, being reduced to "means to an end," and can involve them being coerced to sell their reproductive labour. The literature on domestic egg donation and surrogacy is largely positive and indicates

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<sup>192</sup> See *ibid* at 978.

<sup>193</sup> See Lisa C Ikemoto, "Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services" (2009) 27:2 *Law & Ineq* 277.

<sup>194</sup> See *ibid*.

that these concerns are not reflected in the lived experiences of donors and surrogates. However, at this point, there is insufficient research on the experiences of domestic Canadian egg donors and surrogates to make an accurate assessment. Existing research on transnational surrogacy and egg donation suggests that the interaction of gender, race, and class make concerns about ownership and commodification more pronounced for surrogates and egg donors in the Global South who are performing labour for intended parents traveling from the North.

It is unclear to what extent treating embryos as property would feed into donors and surrogates being treated as owned, or commoditized. It is possible that embryos being categorized as property is too far removed from the egg donors, whose eggs are used to create them, and from the surrogates who might carry them. Alternatively, if the result of egg donors' and intended parents' efforts are treated as property that can be owned, this might exacerbate a belief that the women (donors and surrogates) who were paid to create these embryos, are ownable commodities. Rethinking property in the way suggested by Petchesky could be a way to ensure that self-ownership no longer implies that women's bodies then become commodities.<sup>195</sup>

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<sup>195</sup> See Petchesky, *supra* note 51.

## CONCLUSION

Whilst I am not able to provide definitive answers on the ramifications to cisgender women of treating embryos as property, a feminist relational analysis reveals that categorizing embryos as property adds to an alarming power imbalance between cisgendered heterosexual intended parents in the context of disputes over embryos, and that categorizing embryos as property could perpetuate the idea that cisgender women's bodies are ownable. Particularly in the context of transnational surrogacy and egg donation, categorizing embryos as property could create a domino effect whereby egg donors' and surrogates' bodies, which enable the creation of this "property," are viewed as commodities. These findings are significant for a number of reasons. Firstly, at this point *S.H. v D.H.* is one of only a few cases in Canada on embryo disputes, and the Ontario Court of Appeal overturned the Superior Court's decision which treated embryos as property. Thus, we have not had the chance to get a sense for what the full effects, for cisgender women, of categorizing embryos as property would be. This might soon change, since the number of individuals and couples creating and storing embryos in Canada is on the rise.<sup>196</sup> This will inevitably lead to more disputes that courts will

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<sup>196</sup> The Canadian Assisted Reproductive Technology Registry provides yearly data on the use of these technologies in Canada. This data shows a constant yearly rise in the number of IVF cycles performed each year. See e.g. Better Outcomes Registry & Network Ontario, *Canadian Assisted Reproductive Technologies Register Plus (CARTR). Preliminary treatment cycle data for 2017* (Montreal, 2018), online (pdf): *Canadian Fertility and Andrology Society* <[cfas.ca/\\_Library/cartr\\_annual\\_reports/CFAS-CARTR-Plus-presentation-Sept-2018-FINAL-for-CFAS-website.pdf](https://cfas.ca/_Library/cartr_annual_reports/CFAS-CARTR-Plus-presentation-Sept-2018-FINAL-for-CFAS-website.pdf)>.

be asked to resolve. If there are more disputes, where embryos are treated as property, this will mean that we might soon feel the negative effects to cisgender women in a bigger way. There might be no ramifications of this categorization. The ramifications might also be worse than I have predicted here. Second, if the ramifications of treating embryos as property are as I have predicted, then this will become one more way that women's unique reproductive capacities, which should be appreciated and used to *empower* women, are in fact used to *disempower* women. In the same vein, this will become yet another way that the concept of property will intersect with gender, race, and class, and be used as a tool to oppress women, particularly racialized women.

This research also highlights a number of issues for further thought and areas for future research. Firstly, it highlights areas where there are gaps, or insufficient amounts of research, in the existing literature. We need further research on how couples make decisions about dividing embryos in a dispute, on the experiences of Canadian egg donors and surrogates, and on the experiences of transnational egg donors and surrogates. Although it was beyond the scope of this paper, research is needed on how categorizing embryos as property might affect other relationships. In particular, it would be helpful to have research on the effects of categorizing embryos as property on the relationships between egg donors and children born through donated oocytes, and surrogates and children carried by a surrogate. Finally, this research suggests possible areas for law and policy reform. In the context of law and policy related to disputes over frozen embryos, one suggestion for law reform is that cisgender women should be given preference to use embryos where

a woman and her cisgender male partner are in a dispute.<sup>197</sup> More radically, this research points to flaws with our traditional definitions of property, and associated concepts of ownership and self-ownership. It suggests that perhaps the most prudent step is to rethink our outdated understanding of these concepts altogether.<sup>198</sup>

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<sup>197</sup> See Carsley, “Rethinking Legal Responses”, *supra* note 30 at 109 for a whole list of recommendations of law reform in the context of embryo disposition disputes.

<sup>198</sup> Such as in the way proposed by Petchesky, *supra* note 51.

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