

OUTLINE: Law 311D Property Law & Theory
Life for Sale? How Much Ownership & Property Rights Should Reside in
Reproductive Tissue?

Professor Douglas Harris

Dia Montgomery

March 29, 2010

INTRODUCTION: Should there be a proprietary interest in one's reproductive tissue?

The Tensions:

- **The Uncontrolled Marketplace:**
 - Canadian laws allow only for altruistic transfers of reproductive tissue between individuals.
 - In reality, there exists a robust underground marketplace for the sale of reproductive materials in Canada, both online and through fertility clinics.
 - How well can legal prohibitions curb this practice? Should laws surrounding commodification be enhanced or repealed?
- **Policy concerns surrounding property rights in reproductive tissue:**
 - What are the current legal and market constraints surrounding excised reproductive tissue in Canada?
 - How far does society wish to take the conception of ownership over excised reproductive tissue?
 - Does commodifying reproductive tissue serve to empower individuals or to exploit them?
 - How do policy concerns shape property law in this area?

LAW: An overview of the international & domestic laws surrounding the ownership and transference of human tissue.

- **International:**
 - World Health Organization: 1991 Guiding Principles on Human Organ Transplant.
- **Canada:**
 - Current Federal law: Assisted Human Reproduction Act (AHRA).
 - B.C. law: Human Tissue Gift Act.
 - Other provinces' similar legislation regarding human tissue gifting.
 - No cases have arisen in Canada regarding the content of the AHRA. (The Quebec Court of Appeal's 2009 challenged the AHRA's constitutionality based on the division of powers. This case is currently before the Supreme Court of Canada.)
- **United States:**
 - The United States does allow for the transfer and commodification of human reproductive tissue.

- Case law: Moore: Hecht: Davis: all three judicial decisions represent the court's hesitance to eschew a purely proprietary approach to issues surrounding bodily tissue. The law in this area is primarily shaped by public policy with reference to state legislation.

THEORIES OF PROPERTY: An overview and analysis of the different theories surrounding the scope of a proprietary interests in bodily tissue.

- **Locke:** Locke may be interpreted as allowing an ownership interest in one's bodily substances and any products derived from those substances.
- **Radin:** There is a danger of alienation from the commodification of human tissue. As a society, we have made choices about what is suitable for commodification. An economic orientation can distort society's comprehension of personal characteristics as alienable objects rather than personal attributes.
- **Nedelsky:** A feminist analysis on the issue of proprietary interests in reproductive tissue. Property rights are used as a means of structuring relationships. Within these relationships, society should exercise extreme care to prevent exploiting women to gain their reproductive tissue.
- **Steinbock:** Whether there are property rights in reproductive tissue is a moral issue as well as a property issue. If there are moral reasons why something should not be used, destroyed, given away or sold then that thing should not be treated as property.
- **Rao:** The element of transfer is the critical difference between privacy and property rights. The interest that society is seeking to protect should define when the human body is classified as a property interest and when it is classified as a privacy interest.
- **Katz:** A bundle of rights approach to property does not account for the entirety of the phenomenon of ownership. It is the exclusivity of the owner's right to set the agenda for that resource which determines ownership.

CONCLUSION:

- The need to protect women from exploitation is the most important policy concern when defining proprietary interests in reproductive material.
- Autonomy of the individual is also a very important policy concern.
- In order to protect these concerns, a proprietary interest in reproductive material should allow for the transference of human reproductive material but not the right to profit monetarily from such transfers.
- Using the agenda-setting ability of ownership (Katz) as the defining characteristic in determining a proprietary interest in reproductive material, individuals are protected from encroachment (Nedelsky) by others and allowed to maintain privacy (Rao).
- The above analysis fits well with current Canadian laws prohibiting the sale of reproductive material.
- The AHRA does provide criminal sanctions against the sale of reproductive materials. These sanctions are not yet sufficiently enforced. Should they be enforced, will they be enough to curb the trade in reproductive material?

- While the inability to purchase reproductive tissue is an unfortunate result for those unable to conceive on their own, the risks of commodifying reproductive tissue are too great to allow such commodification.