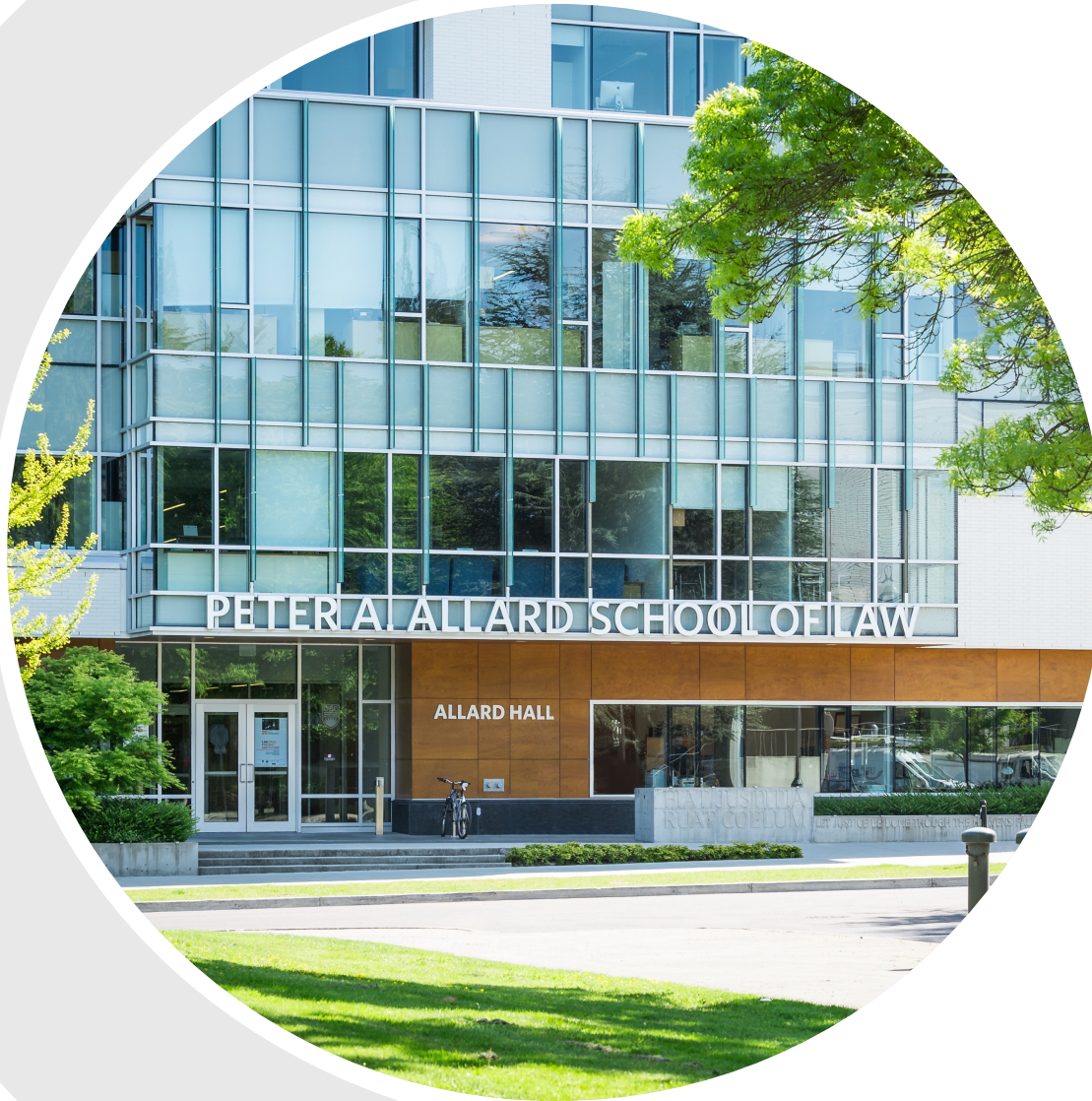




**PETER A. ALLARD
SCHOOL OF LAW**



REPRODUCTIVE AUTONOMY IN THEORY AND PRACTICE

BIRTH, LAW, AND MEDICINE

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OUTLINE

1. Reproductive Autonomy
in Theory
 - A. Reproductive Freedom
 - B. Reproductive Autonomy
 - C. Reproductive Justice
2. Reproductive Autonomy
in Practice
 - A. Regulation of Health
 - B. Regulation of Health Care Professionals
 - C. Selected Issues



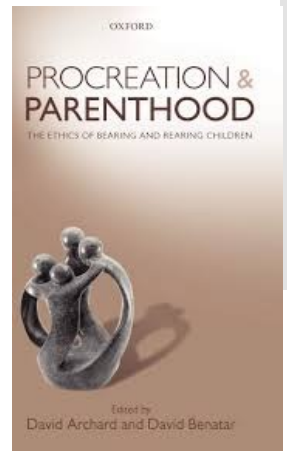
1. REPRODUCTIVE AUTONOMY

Theory



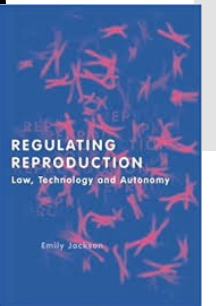
A) Procreative Liberty/ Reproductive Freedom

- John Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth" (1983) 69:3 Virginia Law Review 405
 - "Full procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses"
 - Negative liberty
- David Benatar and David Archard, 'Introduction' in David Benatar and David Archard eds, *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford; New York: Oxford University Press, 2010)
 - What is a right to reproductive freedom?
 - Reproduce/not reproduce
 - Who
 - Scope



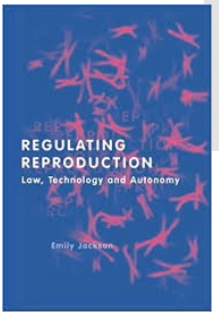
B) Reproductive Autonomy

- Emily Jackson, *Regulating Reproduction. Law, Technology and Autonomy* (Oxford; Portland, Or: Hart, 2001)
 - What should regulation be concerned with when it comes to human reproduction?
 - « In order to treat individuals with dignity and respect, we should therefore give them both the ***freedom to exercise reproductive choice***, and ***a set of realistic and valuable reproductive opportunities*** »
 - « **we are not self-sufficient, atomistic individuals** relentlessly pursuing our own purely self-interested ends, but rather we should be thinking about what sort of laws, institutions and services might allow us to **maximize our capacity to exercise control over reproduction given the network of social constraints that will always tend to limit our options** »



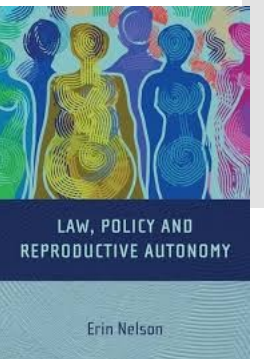
B) Reproductive Autonomy

- Emily Jackson, *Regulating Reproduction. Law, Technology and Autonomy* (Oxford; Portland, Or: Hart, 2001)
 - « A rich understanding of autonomy, as a capacity that is dependent upon the existence of strong social support and constructive networks of relationships, can help us to identify the law's task in regulating reproduction. We should, I argue, be alert to the web of constraints that may impoverish many people's reproductive lives, and think about ways in which we might be able to foster each individual's capacity to exercise meaningful and enriching reproductive choice. » (p 9)



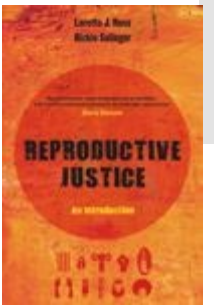
B) Reproductive Autonomy

- Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford and Portland, OR: Hart, 2013) (“**Nelson**”)
 - Reproductive autonomy is contested and elusive.
 - Autonomy is more than liberty
 - Reproductive autonomy is personal and political
 - « Ideally, respect for reproductive autonomy requires the adoption of an explicit , comprehensive policy framework aimed at creating conditions in which reproductive choice can be exercised meaningfully » (p 55)
 - Core of the framework = women’s bodily integrity (see def’n at p 62-63)
 - « The history of reproductive regulation is a history of attempts to enforce a traditional view of women and their proper social roles » (p 66)



C) Reproductive Justice

- Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (Berkeley: University of California Press, 2017) pp 58 ff
 - What is reproductive justice?
 - **Reproductive** right + social **justice**
 - « we objected to the ways [...] isolated reproductive rights issues from other social justice issues [...] for vulnerable people »
 - 3 primary values
 - Right not to have a child
 - Right to have a child
 - Right to parent a child in safe and healthy environment
 - « The problem is not defining reproductive justice but achieving it » p 65



2. REPRODUCTIVE AUTONOMY

Practice



2. A) REGULATION OF HEALTH IN CANADA

- The context of the Confederation (1867)
- Explicitly health-related areas
 - 91(11) Quarantine and Marine Hospitals
 - 92(7) Hospitals, Asylums *and al*
- "[H]ealth' is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question."
 - *Schneider v. The Queen*, [1982] 2 SCR 112, p 142

2. A) REGULATION OF HEALTH IN CANADA

FEDERAL (s. 91)

- 2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
- 3. The raising of Money by any Mode or System of Taxation.
- 7. Militia, Military and Naval Service, and Defence.
- 11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
- 22. Patents of Invention and Discovery.
- 24. Indians, and Lands reserved for the Indians.
- 25. Naturalization and Aliens.
- 26. Marriage and Divorce.
- 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
- 28. The Establishment, Maintenance, and Management of Penitentiaries.

PROVINCIAL (s. 92)

- 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
- 6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
- 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- 8. Municipal Institutions in the Province.
- 12. The Solemnization of Marriage in the Province.
- 13. Property and Civil Rights in the Province.
- 16. Generally all Matters of a merely local or private Nature in the Province.

2. A) REGULATION OF HEALTH IN CANADA

- Primarily provincial: ss 92(7), 92(8), 92(13), 92(16)
 - Federal jurisdiction: the spending power → ss 91(1)(A), 91(3), 106
 - Federal jurisdiction: POGG → s 91
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- To go further: Alana Klein, « Jurisdiction in Canadian Health Law » in Joanna N. Erdman, Vanessa Gruben & Erin Nelson, Canadian Health Law and Policy, 5th ed (Toronto: LexisNexis, 2017)

2. A) REGULATION OF HEALTH IN CANADA

[Canada Health Act, RSC, 1985, c C-6](#)

WHEREAS the Parliament of Canada recognizes:

—that it is not the intention of the Government of Canada that any of the powers, rights, privileges or authorities vested in Canada or the provinces under the provisions of the *Constitution Act, 1867*, or any amendments thereto, or otherwise, be by reason of this Act abrogated or derogated from or in any way impaired;

—that Canadians, through their system of insured health services, have made outstanding progress in treating sickness and alleviating the consequences of disease and disability among all income groups;

—that Canadians can achieve further improvements in their well-being through combining individual lifestyles that emphasize fitness, prevention of disease and health promotion with collective action against the social, environmental and occupational causes of disease, and that they desire a system of health services that will promote physical and mental health and protection against disease;

—that future improvements in health will require the **cooperative partnership of governments, health professionals, voluntary organizations and individual Canadians**;

—that continued **access to quality health care without financial or other barriers** will be critical to maintaining and improving the health and well-being of Canadians;

AND WHEREAS the Parliament of Canada wishes **to encourage the development of health** services throughout Canada **by assisting the provinces in meeting the costs** thereof;

CANADA HEALTH ACT, RSC, 1985, C C-6

Primary objective of Canadian health care policy

- **3** It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

Purpose of this Act

- **4** The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.

2. B) REGULATION OF MEDICAL PROFESSIONALS

- Professionals
 - Professional regulation (self-regulation model)
 - [Health Professions Act, RSBC 1996 c 183](#)
 - Colleges model
- Institutions
 - [Hospital Act, RSBC 1996 c 200](#)

2. B) REGULATION OF HEALTH CARE PROFESSIONALS

Input regulation

- Licensure
- Certification
- Registration

Output regulation

- Competence
- Professional Discipline
- Civil Liability
- (...)

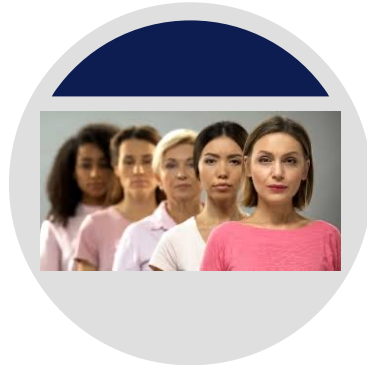
- To go further: Amy Zarzeczny, « The Role of Regulation in Health Care – Professional and Institutional Oversight » in Joanna N. Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis, 2017)

3. SELECTED ISSUES



STATUS OF THE FETUS

- [*Tremblay v Daigle*, \[1989\] 2 SCR 530](#)
- [*Winnipeg CFS v DFG*, \[1997\] 3 SCR 925](#)
- [*Montreal Tramways Co v Léveillé*, \(1933\) SCR 456](#)



AGENCY OF PATIENTS

- [*E. \(Mrs.\) v. Eve*, \[1986\] 2 SCR 388](#)
- [*Winnipeg CFS v DFG*, \[1997\] 3 SCR 925](#)
- [*Dobson \(Litigation Guardian of\) v. Dobson*, \[1999\] 2 SCR 753](#)



CONSENT TO CARE

- [*Health Care \(Consent\) and Care Facility \(Admission\) Act*, RSBC 1996, c 181](#)

FOR FURTHER REFLEXIONS



TORTS

Selected cases

- [*Gilmore v Love*, 2023 BCSC 1380 \(CanLII\)](#)
- [*Florence v Benzaquen*, 2021 ONCA 523 \(CanLII\)](#)
- [*Edinger*](#) and [*Cojocaru*](#)



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