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## What Money Cannot Buy: A Legislative Response to C.RAC.K.

Adam B. Wolf  
*University of Michigan Law School*

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# WHAT MONEY CANNOT BUY: A LEGISLATIVE RESPONSE TO C.R.A.C.K.

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Adam B. Wolf\*

*Children Requiring a Caring Kommunity (C.R.A.C.K.) is an organization that pays current or former drug addicts \$200 to be sterilized. While generating great public controversy, C.R.A.C.K. is expanding rapidly throughout the country. Its clients are disproportionately poor women of color, who are coerced by the offer of money into permanently relinquishing their reproductive rights. This Note argues that C.R.A.C.K. is a program of eugenical sterilization that cannot be tolerated. Moreover, C.R.A.C.K. further violates settled national public policy by offensively commodifying the ill-commodifiable, by demeaning women, and by starting down a slippery slope with devastating consequences. This Note proposes legislation that would prohibit paid sterilizations.*

here we go again  
history is a life and it is a death  
freedom grows in life and sings of human beings<sup>1</sup>

## INTRODUCTION

Two hundred dollars can buy a woman's fundamental reproductive rights. Children Requiring a Caring Kommunity (C.R.A.C.K.), a nonprofit organization founded three years ago by Barbara Harris in Orange County, California, pays drug-addicted women to undergo permanent or long-term birth control.<sup>2</sup> In exchange for \$200, these women receive tubal ligations, intra-uterine devices

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\* Associate Editor, *University of Michigan Journal of Law Reform*. B.A. 1998, Amherst College; J.D. expected 2001, University of Michigan Law School. The author would like to thank Elaine and Ira Wolf and Noah Lippe-Klein. The author also thanks Mark Rosenbaum and the rest of the crew at the ACLU of Southern California, whose lessons and support I truly treasure. *Amandla! Ngawethu!* (South African liberation cheer: "Power! The Power is ours!").

1. MONGANE WALLY SEROTE, *FREEDOM LAMENT AND SONG* 69 (1997).

2. Most women opt for permanent sterilization over long-term birth control because the entire sum of money is provided sooner to a client who undergoes permanent sterilization. For example, a client who opts for a tubal ligation receives the \$200 once the performing doctor informs C.R.A.C.K. that he conducted the procedure; a client who decides to take Depo-Provera, though, receives a \$25 check from C.R.A.C.K. every three months, and the remainder of the consideration is paid 12 months later. See Telephone Interview with Rodney Harris, Assistant Director of C.R.A.C.K. (Mar. 21, 2000).

(IUDs), five years of Norplant, or one year of Depo-Provera.<sup>3</sup> Sixty-five percent of these women have received tubal ligations and IUDs, for all intents and purposes permanently enjoining their reproductive capacities.<sup>4</sup>

C.R.A.C.K. is allegedly<sup>5</sup> a response to the alarming number of substance-exposed infants (SEIs) born in the United States.<sup>6</sup> Indeed, the number of SEIs is staggering, and something must be done to combat drugs and their pernicious effects on children (SEIs and others). Paying drug-addicted women to get sterilized, however, is not the answer.

Even the most well-intentioned programs can have the most horrifying consequences, as is the case with C.R.A.C.K. Some have called C.R.A.C.K. "a thinly veiled way of coercing women . . . to give up their personal right to bear children."<sup>7</sup> Others have dubbed it exploitation,<sup>8</sup> eugenics,<sup>9</sup> genocide,<sup>10</sup> and social Darwinism.<sup>11</sup> Moving beyond the rhetoric, it is clear that C.R.A.C.K., however well-intentioned, promotes irreparable injury to individuals' basic liberty to procreate, particularly among women of color in an

3. Men are also eligible for the program. They can receive a vasectomy for the same monetary consideration. All but one of C.R.A.C.K.'s 166 clients to date, however, have been women. While the hundreds of potential clients currently reviewing applications for the program include both women and men, only one man has completed and returned the necessary paperwork. See *Children Requiring a Caring Kommunity—Let the Numbers Speak for Themselves* (last modified Apr. 4, 2000) <<http://www.cracksterilization.com/stats/stats.html>> [hereinafter *C.R.A.C.K. Statistics*] (on file with the *University of Michigan Journal of Law Reform*). Hence, the following discussion of C.R.A.C.K. will focus on women.

4. Ninety-four of the first 166 clients received tubal ligations and 14 opted for IUDs; 24 more chose Norplant, and 34 elected Depo-Provera. See *id.* While IUDs and tubal ligations are technically temporary birth control devices, they remain effective until they are surgically removed, a procedure that will likely forever remain beyond the economic means of C.R.A.C.K. clients.

5. C.R.A.C.K.'s extension of its program to *former* drug addicts leads one to question whether its stated objective is a pretext for an ulterior motive. Consider, for instance, its eugenical effects. See *infra* Part II.B. Such clients are free of the drug abuse that allegedly so concerns Barbara Harris, but are similarly being told that they should forfeit their fundamental right to procreate.

6. According to C.R.A.C.K.'s website, 12,338 SEIs were born in Los Angeles between 1992 and 1996, an average of eight every day. See *C.R.A.C.K. Statistics*, *supra* note 3.

7. *Medical Ethics Cash-for-Sterilization: Will It Come to New England?*, American Political Network, Sept. 9, 1999, available in WESTLAW, Westnews Library, ALLNEWSPLUS File.

8. See Greg Barrett, *Mother Cracking Down on Drug-Addicted Newborns*, TULSA WORLD, Sept. 21, 1999, at 5, available in LEXIS, News Library, By Individual Publication Library, Tulsa World File.

9. See Bruce A. Boyer, *Who Is Fit to Parent?*, CHI. TRIB., July 29, 1999, at 21, available in LEXIS, News Library, By Individual Publication Library, Chigago Tribune File.

10. See Andy Goldberg, *Paying Addicts to Not Have Kids Sparks Storm in U.S.*, DEUTSCHE PRESSE-AGENTUR, Sept. 25, 1999, at 11, available in LEXIS, News Library, By Individual Publication Library, Deutsche Presse-Agentur File.

11. See Barrett, *supra* note 8, at 5.

economically vulnerable class.<sup>12</sup> Its bare essentials reveal a program that targets desperate women whose fundamental right to procreate is stripped away in exchange for a paltry, yet coercive, sum of money.

This Note argues that C.R.A.C.K. violates public policy and that legislation should be enacted to put an end to C.R.A.C.K. and its effects. Part I describes the C.R.A.C.K. program and chronicles its ongoing expansion throughout the country. Part II examines how C.R.A.C.K. fits in with the public policy of the country, as set forth in federal and state legislation and published opinions. Part III explores judicial and legislative approaches to prohibiting C.R.A.C.K. sterilizations. This Note concludes that legislation is the proper method by which to eliminate paid sterilizations and proposes such a bill.

C.R.A.C.K., which is expanding rapidly throughout the country despite widespread international disapproval (as well as some acclaim), has faced no legal challenges. However, C.R.A.C.K. imposes a serious limitation on individuals' and society's ability to assert fundamental claims to personhood. Therefore, the C.R.A.C.K. program must be abolished.<sup>13</sup>

12. Poor people of color, youth, and disabled individuals are logically the most likely to suffer from the abuse, undue influence, and coercion of C.R.A.C.K. and C.R.A.C.K.-like programs. See generally Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 83, 100 (1995) (pointing out that socioeconomic circumstances render poor people more likely to sell their organs). For similar reasons, the same is true for paid sterilizations. As the issue of paid sterilization has not been litigated or legislated, this Note will frequently invoke responses to analogous programs, such as paid surrogacy, paid adoptions, and organ selling, all of which concern the purchase of human reproductive capabilities or other items and attributes central to personhood, or that which is "integral to the self." Katherine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 84 (1997).

13. This Note recognizes that exigent circumstances do exist regarding the problem of unwanted children, lack of proper parental care, and SEIs, but it seeks to analyze only one response to the problem: C.R.A.C.K. Therefore, the only conclusion drawn is that C.R.A.C.K. is not an appropriate solution. It does not consider the benefits and drawbacks of other proposed remedies, including greater publicity of states' free reproductive health services and clinics that provide free birth control, information sessions, and drug rehabilitation.

Speaking in front of the House of Representatives regarding the commodification of organs, Dr. Arthur Caplan said, "[s]urely our society can provide better ways for solving the problems of poverty, unemployment, and desperate need than by encouraging people through matters of public policy and law to sell vital organs, or families to parcel out the bodily remains of their loved ones to the highest bidder." *Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong. 355–56 (1983) (statement of Dr. Arthur Caplan, Associate for the Humanities, The Hastings Center). The same could be said of C.R.A.C.K. There must be more acceptable methods to deal with drug abuse and parental responsibility than to entice women to sell their reproductive rights.

## I. C.R.A.C.K.

“If You Are Addicted To Drugs, Get Birth Control—Get \$200 Cash” plead billboards and bumper stickers across the country.<sup>14</sup> Far from being placed randomly throughout the nation, they are positioned strategically in low-income, minority neighborhoods,<sup>15</sup> often at bus stops or welfare agencies.<sup>16</sup> This advertising campaign targets women in economically depressed communities of color.

Women across the country who are desperate for money have seen these ads and are “enticed” and “blinded” into participating in C.R.A.C.K.<sup>17</sup> They call a toll-free number, and a C.R.A.C.K. representative sends them paperwork to complete and return.<sup>18</sup> One of these forms is a contract stating that the client will receive \$200 if she undergoes a sterilization.<sup>19</sup> After receiving a nominal amount of counseling by medical personnel and waiting thirty days,<sup>20</sup> C.R.A.C.K. clients select one of the four procedures endorsed by C.R.A.C.K. within sixty days after the waiting period expires. With documentary proof that the sterilization transpired, C.R.A.C.K., assured that the newly-sterilized woman may never be able to reproduce again, pays the \$200 consideration.<sup>21</sup>

14. See Martha Irvine, *Program Pays Drug-Addicted Women \$200 to Get Their Tubes Tied; Some See Birth-Control Effort Backed by Dr. Laura as Racist, Short-Sighted*, MILWAUKEE J. SENTINEL, July 25, 1999, at 19, available in LEXIS, News Library, By Individual Publication Library, Milwaukee Journal Sentinel File.

15. See Barrett, *supra* note 8, at 5.

16. C.R.A.C.K. also solicits clients through fliers it sends to police departments and jails. See Lynn Smith, *Cash for Sterilization: Coercing Poor Women?*, CHICAGO SUN-TIMES, Apr. 19, 1999, at 27, available in LEXIS, News Library, By Individual Publication Library, Chicago Sun-Times File.

17. *Medical Ethics*, *supra* note 7, at 5.

18. See Children Requiring a Caring Kommunity—C.R.A.C.K.’s Prevention Project (last modified Feb. 19, 2000) <<http://www.cracksterilization.com/prevention/>> (on file with the *University of Michigan Journal of Law Reform*).

19. See *id.* The paperwork sets forth the four options for sterilization. See *id.*

20. Some states have enacted mandatory waiting periods between the time consent to sterilization is given and the procedure is performed. See, e.g., VA. CODE ANN. § 54.1-2974 (Michie 1998) (requiring 30 day waiting period); KY. REV. STAT. ANN. § 212.347 (Michie 1998) (requiring 24 hour waiting period).

21. The money comes solely from private donations that are tax deductible. See *Children Requiring a Caring Kommunity—Donations* (last modified Feb. 19, 2000) <<http://www.cracksterilization.com/donations/>> (on file with the *University of Michigan Journal of Law Reform*).

C.R.A.C.K. refuses to pay for the sterilization procedure itself.<sup>22</sup> Instead, it relies on the state to finance the operation.<sup>23</sup> In addition, it will not pay for birth control pills or other short-term birth control.<sup>24</sup> C.R.A.C.K. argues that the only way to eliminate the problem caused by mixing drugs and procreation is to usurp the procreative ability of drug-addicted women.

As of April 4, 2000, 165 women drug addicts or former drug addicts have accepted sterilization in exchange for the \$200.<sup>25</sup> For most, if not all, of the clients, the money has been the motivating factor for their sterilization.<sup>26</sup> While \$200 might not be coercive to an average American, it is extremely coercive to poor drug addicts.<sup>27</sup> Barbara Harris admits this freely: the money, she says, is the "incentive or motivation."<sup>28</sup> One of C.R.A.C.K.'s first clients, who is fully recovered from her drug habit, and who could clearly deliver non-drug dependent children explicitly claims that she would not have given up her reproductive freedom had the money not been offered to her in a time of desperation.<sup>29</sup> Critics of the program therefore argue that the sterilizations are not voluntary; rather, they are imposed on economically disadvantaged women.<sup>30</sup>

22. See *Program That Pays Addicts for Long-Term Birth Control Going National*, ASSOCIATED PRESS NEWSWIRES, July 24, 1999, available in WESTLAW, Westnews Library, ALLNEWSPLUS File.

23. See Smith, *supra* note 16, at 27.

24. See Tatsha Robertson, *N.H. Addicts Give Up Fertility, Pick Controversial Program Offering \$200*, THE BOSTON GLOBE, Aug. 28, 1999, at B1, available in LEXIS, News Library, By Individual Publication Library, The Boston Globe File.

25. See *C.R.A.C.K. Statistics*, *supra* note 3.

26. See Lynn Smith, *Program in California Gives Cash for Sterilization, Contraception Effort Aims to Limit Number of Children Born to Women with History of Drug Abuse*, THE MILWAUKEE J. SENTINEL, Apr. 17, 1998, at 26, available in LEXIS News Library, By Individual Publication Library, The Milwaukee Journal Sentinel File; see also *infra* notes 27–30 and accompanying text.

27. A recent *People* article observes, "[t]o a woman who is very poor and suffering from substance abuse, \$200 is a lot of money." Anne-Marie O'Neill & Kelly Carter, *Desperate Measure*, PEOPLE, Sept. 27, 1999, at 145, 148 (quoting Rocio Cordoba, Staff Attorney, American Civil Liberties Union of Southern California).

28. Laura Mecoy, *Program Gives Cash for Contraception*, THE PATRIOT LEDGER, July 1, 1998, at 16, available in LEXIS News Library, Individual Publications Library, The Patriot Ledger File.

29. Adams concedes, "I was kind of broke, so I accepted the offer." Tom Berg, *Woman's Drug-Baby Campaign Goes National*, THE ORANGE COUNTY REGISTER, Apr. 4, 1999, at B1, available in 1999 WL 4293079.

30. See, e.g., Irvine, *supra* note 14, at 19 (discussing the comments of Steve Trombley, President and CEO of Planned Parenthood in Chicago, who is also concerned that C.R.A.C.K. clients do not give their informed consent before undergoing the sterilizations); Susan Dodge, *Program Rewards Addicts for Taking Birth Control*, CHICAGO SUN-TIMES, Sept. 13, 1999, at 14.

Of C.R.A.C.K.'s sterilized clients, sixty-three percent are African-American and Latina women,<sup>31</sup> groups that account for only eleven percent of the total American population.<sup>32</sup> The grossly disparate impact on women of color is obvious. They are sterilized by C.R.A.C.K. at a rate vastly disproportionate to their representation in the United States population.

C.R.A.C.K.'s first participants resided in California, though its client base has expanded quickly and recently to Arizona, Florida, Illinois, Michigan, Minnesota, Nevada, New Hampshire, Ohio, Oregon, Pennsylvania, Texas, and Washington.<sup>33</sup> Many more states will be represented shortly, as the program continues to rapidly expand.<sup>34</sup> Through the first three weeks of August 1999, for example, C.R.A.C.K. received more than 200 requests for paperwork from impoverished potential clients.<sup>35</sup> Exponentially more volunteer staff and clients are joining the program from all over the country, local offices are being developed in large and small cities, and a national advertising campaign is permeating communities everywhere.<sup>36</sup>

## II. C.R.A.C.K.ING PUBLIC POLICY

C.R.A.C.K.'s clients are coerced into relinquishing their reproductive rights; it is an arrangement between two parties with grossly unequal bargaining power. The offer of \$200 to the client coerces her into agreeing to undergo a procedure that may render her incapable of reproducing for the remainder of her life. In order to protect future C.R.A.C.K. clients and society in general, legislatures should intercede.

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31. Seventy and 22 of the women are African-American and Latina, respectively, while 69 are Caucasian. See *C.R.A.C.K. Statistics*, *supra* note 3.

32. See *THE WORLD ALMANAC AND BOOK OF FACTS 2000*, at 383 (Robert Famighetti ed. 2000).

33. One hundred and thirty-two clients are from California, 11 from Illinois, four from Washington, three each from New Hampshire, Florida, and Arizona, two from Minnesota, and one each from Michigan, Nevada, Ohio, Oregon, Pennsylvania, and Texas. See *C.R.A.C.K. Statistics*, *supra* note 3.

34. See *id.* (stating that "hundreds . . . have our paperwork and are in the process of getting long term or permanent birth control").

35. See Children Requiring a Caring Kommunity (last modified Apr. 1, 1999) <<http://www.cracksterilization.com>> (on file with the *University of Michigan Journal of Law Reform*).

36. See, e.g., *Children Requiring a Caring Kommunity—New Chapters* (last modified Feb. 20, 2000) <<http://www.cracksterilization.com/chapters/>> (on file with the *University of Michigan Journal of Law Reform*).

What follows are the public policy arguments against C.R.A.C.K. paid sterilizations. Specifically, C.R.A.C.K.'s practices commodify that which is understood to be inalienable;<sup>37</sup> promote race-based population control;<sup>38</sup> negatively alter society's conceptualization of women;<sup>39</sup> propel us down a dangerous slippery slope;<sup>40</sup> and advocate the permanent relinquishment of a vital and treasured fundamental right.<sup>41</sup> Some of the arguments are stronger than others. Some will resonate more clearly than others with certain interest groups. But each of them, in light of prior judicial decisions and legislation, is valuable to a legislature's review of such sterilizations. The arguments, both individually and taken as a whole, compel legislative action.

### A. Offensive Commodification

We live in a society that is obsessed with buying and selling. In spite of radical calls from Judge Posner<sup>42</sup> and his small, yet vocal, minority, however, we cannot buy or sell *anything* that we want. Some things, both courts and legislatures have repeatedly expressed, fall outside the scope of the marketplace.

One such arena in which legislatures and courts have prohibited contracting out for economic consideration is family values,

37. See *infra* Part II.A.

38. See *infra* Part II.B.

39. See *infra* Part II.C.1.

40. See *infra* Part II.C.2.

41. See *infra* Part II.D.

42. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). Judge Posner poses an argument that we should allow alienability in such areas as children, surrogacy, and sex, in order to satisfy parties' expectations and to increase economic efficiency. *But see* Silbaugh, *supra* note 12, at 87; William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 164–67 (1990). Responding to criticism of his approach, Posner stated that he does not advocate a truly free market economy, but rather a regulated market in, for example, babies and abortions. See Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 64, 66 (1987).

Another approach is posited by Guido Calabresi and A. Douglas Melamed. Like Posner, they assign economic value to the arguments in favor of and against markets in areas such as organs. After accounting for externalities, they conclude that entitlements in these areas should be inalienable because to allow otherwise would be economically inefficient. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972). The authors do account for the humanitarian theory, or the moral aversion to commodifying such areas, by assigning significant economic value to this objection. See *id.* at 1112 (referring to such an externality as a "moralism").



including reproduction, generally agreeing that society should disfavor monetization that, like C.R.A.C.K., implicates "the foundation stone of the social order."<sup>43</sup> Into this category falls the sale of intercourse (prostitution),<sup>44</sup> children,<sup>45</sup> marriage,<sup>46</sup> and surrogacy.<sup>47</sup> Human reproductive freedoms and the fruits thereof are off limits to paid contractual relationships. Paid sterilization, by analogy and through the policy arguments set forth below, should likewise be deemed illegal.

In the most celebrated paid surrogacy contract case, *In re Baby M*,<sup>48</sup> the New Jersey Supreme Court expressed this idea explicitly: "[t]here are, in a civilized society, some things that money cannot buy."<sup>49</sup> The Court cited examples of such market-inalienable areas, including child labor.<sup>50</sup> Market-inalienability is the idea that some items or attributes should not be the object of consideration, even though they are not outside the realm of social discourse.<sup>51</sup> They may be given away, but not sold.

There are plenty of examples. For instance, as the *Baby M* court found, we accept surrogacy, as long as it is not paid for. The same holds true for adoptions.<sup>52</sup> As the Supreme Court held over thirty-

43. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 98(J), at 525 (3d ed. 1990).

44. See, e.g., *State v. Grimes*, 735 P.2d 1277, 1278-79 (Or. Ct. App. 1987) (upholding a statute criminalizing "an offer or agreement to engage in sexual conduct for a fee without requiring that there be any further action to carry out the offer or agreement"). See generally Murray, *supra* note 43, § 98(J), at 527 ("An agreement based on the performance of sexual acts is obviously unenforceable.").

45. See, e.g., *Savannah Bank & Trust Co. v. Hanley*, 65 S.E.2d 26, 29 (Ga. 1951) (holding that an arrangement by which a "mother agree[s] to surrender possession of [her] child in consideration of a legacy . . . [is] void as being against public policy").

46. For a thorough discussion of the role of contracts in the institution of marriage, see Wagner, *supra* note 42, at 58-80.

47. See, e.g., *R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998) ("[T]he payment of money to influence the mother's custody decision makes the agreement as to custody void. . . . [C]ompensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and her child to be given away."); *In re Baby M*, 537 A.2d 1227, 1248, 1250 (N.J. 1988) ("With surrogacy, the 'problem' . . . consisting of the purchase of a woman's procreative capacity . . . is caused by and originates with the offer of money. . . . [Thus,] [i]n New Jersey the surrogate mother's agreement to sell her child is void.").

48. 537 A.2d at 1227.

49. *Id.* at 1249-50.

50. See *id.*

51. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987).

52. See *Reimche v. First Nat'l Bank*, 512 F.2d 187, 189 (9th Cir. 1975) (enforcing an agreement for one party adopting a child in exchange for the other party receiving a portion of decedent's estate only because "the adoption was in the best interests of the child and pecuniary gain was not the motivating factor on the mother's part") (emphasis added); *Savannah Bank & Trust Co. v. Hanley*, 65 S.E.2d 26, 29 (Ga. 1951) (voiding on public policy grounds an arrangement whereby a mother promised to surrender possession of her child for adoption in exchange for the mother receiving a portion of an estate at issue).

five years ago, the “custody and welfare of children are not the subject of barter.”<sup>53</sup> Similarly, consensual adult sexual intercourse is not prohibited,<sup>54</sup> except when payment is involved.<sup>55</sup> When one enters into a contract for financial gain accompanying intercourse, it is “obviously unenforceable.”<sup>56</sup> In general, contracts for money are excluded from familial institutions.<sup>57</sup> Courts have not equivocated. For some things, “market rhetoric [is] intuitively out of place . . . so inappropriate that it is either silly or . . . insulting.”<sup>58</sup>

What is the underlying principle upon which these courts have relied? The answer can be found in the Congressional hearings that took place prior to the passage of the National Organ Transplant Act,<sup>59</sup> which, among other things, makes it a federal offense to receive money in exchange for an organ.<sup>60</sup> Debating the sale and purchase of human organs, medical personnel and politicians generally agreed<sup>61</sup> that payment for things like human organs ought to

53. Ford v. Ford, 371 U.S. 187, 193 (1962) (quoting Buchanan v. Buchanan, 170 Va. 458, 477, (1938)).

54. There are two notable exceptions: some states still prohibit adultery and sodomy. See, e.g., ARK. CODE ANN. § 5-14-122 (Michie 1997) (prohibiting sodomy); GA. CODE ANN. § 16-6-19 (1999) (prohibiting adultery); MISS. CODE ANN. § 97-29-1 (1999) (prohibiting adultery); MO. ANN. STAT. § 566.090 (West 1999) (prohibiting sodomy); N.C. GEN. STAT. § 14-177 (1999) (prohibiting sodomy); WIS. STAT. ANN. § 944.16 (West 1996) (prohibiting adultery).

55. See, e.g., ALA. CODE. § 13A-12-110 (1994); HAW. REV. STAT. § 712-1200 (1998); LA. REV. STAT. ANN. § 14.82 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 853-A (West 1997); 1994 TEX. SESS. LAW SERV. 43.02 (West). See generally Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 69 n.1 (1998) (listing statutes of all 50 states prohibiting prostitution).

56. MURRAY, *supra* note 43, § 98(J), at 527.

57. See Wagner, *supra* note 42, at 128 (asserting that contracts for marriages and parent-child relationships have been prohibited).

58. Radin, *supra* note 51, at 1880. The view promoted in this Note should be distinguished from that of strict decommodification, which calls for the dismantling of the market system altogether.

59. National Organ Transplant Act of 1984, 42 U.S.C. § 274e (1994).

60. The Act provides: “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” *Id.* at § 274e(a).

Subsection (b) imposes a penalty of a fine and/or imprisonment for violating § 274e(a), and subsection (c), parts (1) and (3) define “human organ” and “interstate commerce,” respectively. See *id.* at 274e(a), (c)(1), (c)(3). Subsection (c)(2) claims that “valuable consideration” does not include the reasonable expenses incurred by an organ donor pursuant to his or her donation. See *id.* at 274e(c)(2).

61. All those who opposed § 274e(a) at the hearings on the National Organ Transplant Act did not attack the humanitarian basis advanced in this Note. Rather, foes of the commodification provision were concerned that such a prohibition would actually decrease an already alarmingly small number of donated, transplantable organs. See *Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong. 230 (1983) (statement of Rep. Schneider). All of the following organizations went on the record supporting the provision prohibiting organ sales: American Society of Nephrology, American

be prohibited. At stake, our legislators realized, was the monetization of irreplaceable body parts.<sup>62</sup> They found it offensive to make the body, and its parts therein, an object for economic gain.<sup>63</sup> Representative Al Gore, then Chairman of the House of Representatives Subcommittee on Investigations and Oversight for the Committee on Science and Technology, said in support of the noncommodification provision:

[T]his is a practice which we must not allow in this country. The sale of human organs runs counter to virtually every value in our system of social and medical ethics. It blurs the distinction between people and things, as human organs become simply another commodity to be bought and sold in the marketplace.<sup>64</sup>

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Society of Transplant Surgeons, International Society of Transplant Surgeons, International Transplantation Society, National Association of Patients on Hemodialysis and Transplantation (NAPHT), and the United States Department of Health and Human Services. *See id.*

62. For present purposes, I do not comment on the commodification of replenishable fluids, although such a discussion is not wholly off point. Suffice it to say that while the sale of human liquids, such as blood and sperm, does cheapen and commodify human life, it seems less egregious than selling reproductive capabilities because fluids are regenerative, and a sale leads to less "final" results. The same holds true for egg sales, which have also traditionally been commodified. *See* Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691, 702 (1999); Jan Hoffman, *Egg Donations Meet a Need and Raise Ethical Questions*, N.Y. TIMES, Jan. 8, 1996, at A1. Though some states still outlaw the sale of blood, *see National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 98th Cong. 235 (1983) (statement of Rep. Henry Waxman, Chairman), it is now generally acceptable throughout the country. *See* Banks, *supra* note 12, at 50. Some courts have even recognized a limited right to sell certain bodily fluids. *See* *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (declaring that a person may sell his plasma, the proceeds of which must be declared as taxable income). Urine, skin, and samples of other body fluids are also commonly sold. *See* Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1237 (1974).

However, such sales are frequently conducted for the purpose of promoting necessary, often life-saving, research, *see id.* at 1237-38 n.370, a purpose that is inapplicable to C.R.A.C.K. sterilizations. When scientific research is the beneficiary of a sale of objects associated with personhood, the same moral aversion is present, but it is generally muted by the extreme value of the research. *See* *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 493 (Ca. 1990) (refusing to recognize property rights to one's body out of concern that recognizing such rights would have a negative effect on necessary research); Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 258 (1986) (concluding that people should have limited property rights to sell certain parts of their bodies for the purpose of research).

63. *See generally Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong. 217-19 (1983) (statement of Rep. Al Gore, Chairman of the Subcommittee).

64. *Id.* at 218.

Simply put, it is wrong to buy or sell irreplaceable body parts.<sup>65</sup> As with C.R.A.C.K. sterilizations, such sales cheapen the sanctity of the human body. When we put an item on the market, it a priori becomes an object.<sup>66</sup> In the market, “the buyer or seller (the subject) relates only to an object: all orientations are subject-object, never subject-subject.”<sup>67</sup> In this case, the “subject” is C.R.A.C.K., and the “object” is its clients and their reproductive rights. Hence, no longer do we see the women (and their associated fundamental rights) as subjects; they are literally objectified.

To treat the human body and life as a mere commodity demeans the dignity of humanity.<sup>68</sup> We must treat a person as a human being, and not as property.<sup>69</sup> When we understand those items that are integral to personhood as “monetizable. . . [we] do violence to our deepest understanding of what it is to be human.”<sup>70</sup>

We do not view human organs as commodities like a six-pack of soda or a ticket to a baseball game; neither should we view reproductive rights in this way. Reproductive rights are, like organs, not fungible objects. Like a human eye, a heart, or even a cadaver,<sup>71</sup>

65. See *id.* at 246 (statement of Ms. Engebretsen, a mother of an organ donor recipient) (“[I]t is morally and ethically wrong to sell human body parts. . . . [T]his offends my sense of right and wrong.”).

66. See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 J. PHIL. & PUB. AFF. 3, 35 (1975), quoted in Wagner, *supra* note 42, at 193 n.835.

67. *Id.* at 35.

68. See *Organ Transplantation in International Perspective: Ethical Aspects: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Tech.*, 98th Cong. 31, 42–43 (1983) (statement of Warren T. Reich, Professor of Bioethics, School of Medicine and Kennedy Institute of Ethics, Georgetown University).

69. See *National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 98th Cong. 299 (1983). One medical professor expressed this view in his testimony:

[H]uman beings are not . . . like automobiles, of which parts can be bought and sold. There is something inherently offensive to the human conscience, I think, about treating a fellow human being as a thing. We must treat fellow human beings as persons and not as things, and the buying and selling of parts of human beings makes them into things, and I think that is morally repulsive.

*Id.* (statement of Dr. Bernard Towers, Professor of Anatomy, Pediatrics, and Psychiatry, UCLA Medical School); Wagner, *supra* note 42, at 193–94 (referring to the commodification of children, Professor Wagner states, “[t]he child is disposed of as a [thing], not respected as a person”).

70. Radin, *supra* note 51, at 1905–06 (referring to the commodification of “particulars—one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes . . . [as] integral to the self”).

71. Similar humanitarian arguments were made in England in the early 1800s in response to a rash of secret exhumations. See RUSSELL SCOTT, *THE BODY AS PROPERTY* 5 (1981). Graverobbers would disinter corpses to sell to medical schools for a profit (one cadaver brought four Guineas, or eleven times the average weekly wage at the time). See *id.*

reproductive rights are not replaceable or freely exchangeable. They are similar to an organ or an infant, which are both non-commodifiable, "unique and irreplaceable."<sup>72</sup> If we prohibit the sale of a kidney, of which every person has two but can function normally with only one, we should prohibit paid sterilizations, which may irreparably terminate a person's reproductive abilities.

This illegal commodification argument against C.R.A.C.K. is even weightier when one considers that the "object" subjected to alienation is a fundamental right. In *Skinner v. Oklahoma*,<sup>73</sup> the Supreme Court stated that "the right to have offspring" is "basic to the perpetuation of a race."<sup>74</sup> Reviewing Oklahoma's law requiring certain felons to be sterilized, the Court was particularly concerned with the "irreparable injury" to a "basic liberty."<sup>75</sup> Here, while the state is not a party to the action, and while the sterilization is not mandatory<sup>76</sup>—both of which were the case under the Oklahoma sterilizations—the same concern applies: coerced by C.R.A.C.K. money, financially desperate women suffer irreparable harm to their basic liberty to reproduce. Such an injury is something that courts, from *Skinner* forward, have been quick to protect against.<sup>77</sup> Whether the program receives support from the state or not, the government, for the same policy reasons that moved the *Skinner* Court, should safeguard its citizens' fundamental rights from a program that deliberately attempts to strip them away.

This led to the passage of the British Anatomy Act of 1832, which forbade the sale of human bodies. See *id.*; see also *National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 98th Cong. 293 (1983) (statement of Dr. Robert B. Ettinger, President, American Society of Transplant Surgeons); Stephen Ashley Mortinger, Comment, *Spleen for Sale: Moore v. Regents of the Univ. of California and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499, 501-02 (1990).

72. Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 143-44 (1986) (arguing that commercial surrogacy is coercive towards economically disadvantaged women and is akin to slavery).

73. 316 U.S. 535 (1942). *Skinner* is the springboard for a string of cases celebrating reproductive rights and freedoms.

74. *Id.* at 536. Procreation has been considered a fundamental right by the Supreme Court for the past 57 years. See *infra* text accompanying notes 119-20.

75. *Id.* at 541.

76. Participation in C.R.A.C.K. falls somewhere between voluntary and mandatory. While it is true that the women are not being forced (in the traditional understanding of "forced") into selling their reproductive capabilities, they are being coerced and targeted by the program. See *supra* text accompanying notes 27-30. C.R.A.C.K. coercion is similar to that in organ sales, which also has drawn criticism for its likely disparate impact on those in dire economic situations. See Banks, *supra* note 12, at 100-01. The sellers involved in either practice are "victimized by being forced to sell their organs for needed funds." Mortinger, *supra* note 71, at 508-09 (citing Note, *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 404-05 (1983)).

77. See *infra* text accompanying notes 119-20.

Although no legislation has yet been enacted to challenge a program of coerced or quasi-voluntary sterilization, numerous judicial opinions have consistently refused to condone this type of practice.<sup>78</sup> *Savannah Bank & Trust Co. v. Hanley*<sup>79</sup> arose out of a probate action in which a mother surrendered the possession of her child to the husband of the testatrix for adoption in exchange for a promise to leave the entire estate to the mother and her other children.<sup>80</sup> The Georgia Supreme Court, shocked by this arrangement, voided the contract as against public policy.<sup>81</sup> It held that any contract for the barter of children is void, regardless of the benefits that would accrue to the child as a result of the agreement.<sup>82</sup>

An appeals court in Missouri came to the same conclusion two years later. Responding to an arrangement whereby a mother gave her child to the respondents as a Christmas present, the court held that the respondents are not entitled to custody of the child pursuant to this exchange, which the court viewed as a contractual matter.<sup>83</sup> "Children," the court sternly pronounced, "are not subject to barter or contract."<sup>84</sup>

More than three decades after the Georgia and Missouri cases, the *Baby M* court held invalid a paid surrogacy contract entered into between William Stern and Mary Beth Whitehead.<sup>85</sup> As per the terms of the contract, Whitehead was artificially inseminated with the sperm of Stern, whose wife could not conceive.<sup>86</sup> Whitehead was to receive \$10,000 for carrying the fetus to term and then surrendering the child to Stern and his wife.<sup>87</sup> After Whitehead refused to give up the baby, Stern filed a complaint in New Jersey Superior Court to enforce the surrogacy contract.<sup>88</sup>

The New Jersey Supreme Court refused to enforce the contract on a number of grounds.<sup>89</sup> The court held that Whitehead's consent to the arrangement was not dispositive.<sup>90</sup> It stated:

78. See *infra* text accompanying notes 79–98.

79. 65 S.E.2d 26 (Ga. 1951).

80. See *id.* at 27–28.

81. See *id.* at 29.

82. See *id.*

83. See *Tripp v. Brawley*, 261 S.W.2d 508, 511 (Mo. Ct. App. 1953).

84. *Id.* at 511.

85. See *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1987).

86. See *id.* at 1235.

87. See *id.*

88. See *id.* at 1236–37.

89. Among the reasons for the court's holding were that the contract violated statutes that prohibit paid adoptions, require proof of parental unfitness before rescinding parental rights, and allow the revocation of adoptions that take place in private institutions. See *id.* at 1240–46.

90. See *id.* at 1249–50.

There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," or buy women's labor for less money than paid to men for the same job, or purchase the agreement of children to perform oppressive labor, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions. There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.<sup>91</sup>

Whether contemplating the commodification of surrogacy or reproductive rights, consent is nearly irrelevant. Placing such "items" on the market—assigning a monetary value to them—is always offensive.

Though a few courts have permitted paid surrogacy,<sup>92</sup> most have not, and the *Baby M* decision is seen as the authoritative case holding that "hired maternity" arrangements are void as against public policy. In one of the most recent cases to decide such an issue, the Supreme Judicial Court of Massachusetts likewise held that a paid surrogacy contract is unenforceable on grounds of public policy.<sup>93</sup> The relevant terms of the contract were that an infertile couple was to pay \$10,000 to a woman who, "on her own volition," would later give birth and surrender the child to the couple.<sup>94</sup> Ultimately, the court, on public policy grounds, held that "the payment of money to influence the mother's custody decision makes the agreement as to custody void."<sup>95</sup> It was the payment, as opposed to the idea of surrogacy in general, that the court found most problematic: "compensated surrogacy arrangements raise the concern that, un-

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91. *Id.* at 1249 (citations omitted).

92. *See* *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986) (subsequently overruled by the Kentucky legislature in KY. REV. STAT. ANN. § 199.590(4) (Michie 1998)); *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (Sur. 1986).

93. *See* *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

94. The New England Surrogate Parenting Advisors (NESPA), a for-profit organization that acts as a broker between infertile couples and women willing to be surrogates for monetary gain, characterized the payment as one "for services rendered"—not one for the purchase of a child—in an attempt to evade statutes that prohibit the sale of babies. The Massachusetts Supreme Judicial Court recognized that the difference was only semantic, finding that "the father . . . was promised more than those services because, as a practical matter, the mother agreed to surrender custody of the child." *Id.* at 796.

95. *Id.*

der financial pressure, a woman will permit her body to be used and her child to be given away.”<sup>96</sup> It went on to say that if the money were not a major factor in entering the agreement, the conclusion might be different.<sup>97</sup> However, it found that the payment was a significant motivation for the surrogate woman,<sup>98</sup> as it is for the C.R.A.C.K. clients, and therefore that the practice was unsupported.

The Ninth Circuit also focused on the element of payment. In *Reimche v. First National Bank of Nevada*,<sup>99</sup> the court hedged more than the abovementioned courts, holding that a paid adoption was enforceable when, inter alia, “pecuniary gain was not [a] motivating factor on the mother’s part.”<sup>100</sup> Such a ruling does not change the reasoning of the courts that have voided paid arrangements for personhood items or attributes. If the payment is truly incidental to the agreement, its practical and symbolic effects are minimal. In contrast, when the motivation for entering into such an agreement is monetary, the individual’s commitment to the procedure is suspect, and we cannot in good conscience honor the arrangement.<sup>101</sup>

The C.R.A.C.K. program is an example of the latter. For C.R.A.C.K. clients, similar to most paid mothers of adoptees and potential organ sellers, the coercion of economic gain is great.<sup>102</sup> When money provides significant motivation, items or attributes that are inherent to our very existence cannot be commodified. It

96. *Id.* The Massachusetts Supreme Judicial Court made, in effect, an argument for market-inalienability with regard to paid surrogacy:

We recognize that there is nothing *inherently* unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife. . . . If no compensation is paid beyond pregnancy-related expenses . . . the objections we have identified in this opinion to the enforceability . . . would be overcome.

*Id.* at 797 (emphasis added).

97. *See id.* at 796–97.

98. *See id.* at 796.

99. 512 F.2d 187 (9th Cir. 1975).

100. *Id.* at 189.

101. *See National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Env’t of the House Comm. on Energy and Commerce, 98th Cong. 234 (1983)* (statement of Oscar Salvatierra, M.D., Professor of Surgery and Director of Pediatric Renal Transplantation, Stanford University Medical Center).

102. *See id.* at 269 (Dr. Salvatierra explained: “A[n organ-selling] program would discriminate against the poor, since it is the poor, or the individual with financial difficulties, who would most likely serve as a donor.”); Richard L. Barnes, *An Advocate’s View of the Surrogate Mother Problem: Suggested Litigation Strategies*, 12 AM. J. TRIAL ADVOC. 393, 407 (1989) (“[T]here is a substantial risk that the will of these expectant mothers will be overborne by financial needs.”); *supra* text accompanying notes 27–30 (discussing the financial motivations of participants in C.R.A.C.K.).



is demoralizing, dehumanizing, and degrading. To commodify that which is so fundamentally tied to personhood shocked the consciences of the Georgia and New Jersey Supreme Court justices,<sup>103</sup> as it has judges since.<sup>104</sup> To allow C.R.A.C.K. sterilizations, like paid surrogacy or child sales, is to "step backward from . . . [America's] post-Civil War . . . progress toward the decommmercialization of human worth."<sup>105</sup>

### B. Eugenics

No one can reasonably dispute the fact that poor women of color comprise a grossly disproportionate percentage of C.R.A.C.K.'s client base.<sup>106</sup> The organization's queues do not originate in Beverly Hills or on Manhattan's Upper West Side. Intentionally or not, C.R.A.C.K. promulgates a program of population control, or negative eugenics.<sup>107</sup>

The field of eugenics, which seeks "to give to the more suitable races . . . a better chance of prevailing speedily over the less suitable than they otherwise would have had,"<sup>108</sup> has an infamous history in the United States. Starting in the late nineteenth century, the field of eugenics grew quickly. By 1931, thirty-two states had adopted eugenics laws, some of which included statutes forbidding the marriage of "genetic undesirables."<sup>109</sup> It reached its apex around 1927, the same year that the Supreme Court issued its

103. See *supra* text accompanying notes 79–82 (discussing *Savannah Bank & Trust Co. v. Hanley*, 65 S.E.2d 26 (Ga. 1951)); *supra* text accompanying notes 85–91 (discussing *In re Baby M*, 537 A.2d 1227 (N.J. 1987)).

104. See, e.g., *supra* text accompanying notes 93–98 (discussing the Supreme Judicial Court of Massachusetts' decision in *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998)).

105. Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1763 (1988) (referring to the practice of paid surrogacy).

106. See *supra* text accompanying notes 31–32.

107. Negative eugenics is a policy "to discourage the reproduction of genetically inferior individuals." Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850, 1853 (1981). This is contrasted with positive eugenics, or eutelegensis, a program to promote a genetically superior society. See *id.*

Eutelegensis has been practiced much less frequently than negative eugenics. See *id.* An example of eutelegensis is the Repository for Germinal Choice, which collects sperm from Nobel Prize laureate donors and dispenses it to women selected for high intelligence who desire artificial insemination by donor. See *id.* at 1850.

108. FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24 n.1 (1993).

109. See George P. Smith II, *Genetics, Eugenics, and Public Policy*, 1985 S. ILL. U. L.J. 435, 439–44.

ruling in *Buck v. Bell*,<sup>110</sup> which approved a Virginia compulsory sterilization law aimed at the “feeble-minded.”<sup>111</sup> In the years that followed, for a number of reasons, not the least of which was the parallel to Hitler’s extermination of the Jews, Americans began to express a “growing public antipathy toward eugenic theory.”<sup>112</sup> However, C.R.A.C.K.’s promotion of the sterilization of certain segments of the population once again tells people that they are “manifestly unfit from continuing their kind.”<sup>113</sup>

A review of the congressional hearings on the National Organ Transplant Act, as well as of the arguments posited opposing the sale of blood, reveals the reluctance to allow a program that disproportionately affects the personhood of financially disadvantaged people of color. During the hearings, there was general agreement that a program allowing organ sales would prey upon the poor.<sup>114</sup> The concern, obviously, was that such an allowance is yet another way of exploiting the socioeconomically disadvantaged, as “only the poor and powerless will sell their parts and only the white upper class will be able to purchase them.”<sup>115</sup> These arguments apply equally well to the prohibition of C.R.A.C.K. sterilizations. To permit class status to dictate the sale of one’s body or the right to exercise fundamental rights to one’s body ought to be prohibited.

Analyzing a policy of a regulated blood market, Richard Titmuss wrote: “virtually all the [people] who give [blood], by inducement, for money . . . are poor people[,] the indigent, the deprived.”<sup>116</sup> Permitting blood sales would thus attempt to “utilize the inept

110. 274 U.S. 200 (1927).

111. See *id.* at 207 (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”). In *Buck*, the legal challenges to the Virginia statute were grounded in the Due Process and Equal Protection clauses of the Federal and Virginia Constitutions, see *id.*, a strategy that had successfully repelled similar sterilization statutes in other states. See HARRY H. LAUGHLIN, *THE LEGAL STATUS OF EUGENICAL STERILIZATION* 30 (1929).

The Virginia statute authorized the state’s Special Board of Directors to order sterilizations for those it found to be “insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity [would be] the probable potential parent of socially inadequate offspring.” *Id.*

112. Note, *supra* note 107, at 1854.

113. *Buck*, 274 U.S. at 207.

114. See, e.g., *National Organ Transplant Act: Hearings on H.R. 4080 Before the Subcomm. on Health and the Env’t of the House Comm. on Energy and Commerce*, 98th Cong. 282 (1983) (statement of Samuel Gorovitz); see also Banks, *supra* note 12, at 100.

115. Note, *supra* note 62, at 1217.

116. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 286 (1997).

more efficiently” for the benefit of the rich.<sup>117</sup> The disparate impact on only a portion of the population, based on economic stature, is untenable when the “item” sold is as fundamental to humanity as blood. The idea is even more forceful when applied to C.R.A.C.K. because sterilizations, unlike blood sales, have long-term consequences for the oppressed group.

In both situations, there is understandable concern that the offering of money is the impetus for people of a certain socioeconomic status to sell parts of their bodies, elements that are uniquely human. The opposition to blood and organ sales is over the “commercial exploitation of and potential for abuse, undue influence and coercion against the vulnerable participants in such a market.”<sup>118</sup>

The cause for concern is even greater when the permanent loss of reproductive rights is at stake. C.R.A.C.K., stripped to its barest elements, is a program that economically entices desperate women to give up one of the most treasured fundamental rights: the right to procreate. This fundamental right was first recognized in *Skinner v. Oklahoma*, when the Supreme Court stated that the “right to have offspring” is “basic to the perpetuation of a race.”<sup>119</sup> Ever since, the Court has vastly expanded a woman’s right to procreative autonomy.<sup>120</sup> Now, however, poor, drug-addicted, and often homeless women are being coerced into forever foregoing this valued fundamental right.

This disproportionate (on the basis of race and socioeconomic class) loss of a fundamental right has led some to call C.R.A.C.K. a genocidal program.<sup>121</sup> True, it is not a Nazi-esque slaughter, but it retains the element of diminishing the quantity and quality of the lives of certain groups of people by targeting the reproduction of “‘unworthy’ persons.”<sup>122</sup> C.R.A.C.K. says, in effect, that some people do not deserve to reproduce. Intentionally or not, it smacks of eugenics.

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117. *See id.*

118. Banks, *supra* note 12, at 100.

119. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

120. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (upholding the right to an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to cover unmarried people); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right to avoid pregnancy through the use of contraception is protected by the Bill of Rights); Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?* 68 *IND. L.J.* 205, 212 (1992) (citing the right to become pregnant through artificial insemination, and the right of a woman to control her body during pregnancy by choosing, for example, not to have a caesarean section procedure).

121. *See Goldberg, supra* note 10, at 11.

122. Banks, *supra*, note 12, at 105 n.472.

As a matter of public policy, population control that limits the reproduction of poor people of color cannot be tolerated. Disallowing the C.R.A.C.K. program would strike a blow to those who believe that there are socially inadequate classes and degenerative stocks,<sup>123</sup> and who desire to eradicate them through eugenical sterilization.

### *C. Domino Effect*

The previous two subsections addressed the ramifications—both practical and symbolic—of C.R.A.C.K. sterilizations on society. Now I narrow the public policy debate to argue that the effects of the program are severely damaging to one particular group: women, the subjects of the sterilizations. Specifically, allowing C.R.A.C.K. sterilizations both opens the door to further abuses of women and negatively alters society's outlook toward women.

Professor Radin encompasses both of these concerns in her concept of "domino effect."<sup>124</sup> It is a slippery slope argument with a twist. She posits that an object or attribute cannot be both alienable and inalienable, and that when it is rendered alienable, even in one instance, it will, in time, become completely commodified.<sup>125</sup> This is the slippery slope part of the theory. Next, she aptly recognizes that this transition—from inalienability to partial inalienability to full commodifiability—changes the social context by which a society views the item or attribute.<sup>126</sup>

1. *The Changing Conceptualization of Women*—Commodification forces people to think of the object or attribute in question with "market eyes." After undergoing the transition to commodification, an object is suddenly valued for its monetary worth; our previous valuing of the object or attribute is—subconsciously or not—lost. "A change would occur in everyone's discourse" relative to the commodified thing.<sup>127</sup>

Radin applies this aspect of the domino effect to prostitution, baby-selling, and surrogacy, or what she calls "aspects of sexuality

123. See LAUGHLIN, *supra* note 111, at 7, 51 (explaining that "socially inadequate offspring" was the term used in the Virginia statute and cited in *Buck* by Justice Holmes in reference to Carrie Buck's future progeny).

124. See Radin, *supra* note 51, at 1912.

125. See *id.* at 1912–13.

126. See *id.* at 1913.

127. *Id.* at 1922.

and reproductive capacity.”<sup>128</sup> Exploring the risks of commodifying such things, she accounts for the externality of the inevitable changing perceptions about women, women’s sexuality, and sexuality in general.<sup>129</sup> “What if sex were fully and openly commodified?” she asks.<sup>130</sup> Her answer: “[a] change would occur in everyone’s discourse about sex, and in particular about women’s sexuality. . . . The open market might render subconscious valuation of women . . . in sexual dollar value impossible to avoid.”<sup>131</sup> Applying the domino effect therefore reveals that “we do not wish to unleash market forces onto the shaping of our discourse regarding sexuality and hence onto our very conception of sexuality and our sexual feelings,”<sup>132</sup> assuming, of course, that we wish to continue valuing sexuality and women in nonmonetary terms.

This result of the commodification of reproduction—encouraging society to focus on women’s reproductive capacities before seeing women in their totality—is obviously unpalatable. “[S]ociety will once again value women primarily for their reproductive capacities.”<sup>133</sup> It is unarguably degrading to women to be seen with “market eyes.”

Permitting C.R.A.C.K. payments to women who undergo sterilization has this same unsavory consequence. Much like valuing women for their reproductive capacities (as is the case with paid surrogacy), C.R.A.C.K. encourages the devaluing of women for their reproductive abilities. Framed positively or negatively (valuing or devaluing), the focus on reproductive capacity is apparent, and the same disturbing consequences arise.

The degradation of women by associating pecuniary interests with their reproductive capacity has been recognized by courts and

128. *Id.* at 1921–22.

129. *See id.* at 1921–36.

130. *Id.* at 1922. Radin continued:

Suppose newspapers, radio, TV, and billboards advertised sexual services as imaginatively and vividly as they advertise computer services, health clubs, or soft drinks. Suppose the sexual partner of your choice could be ordered through a catalog, or through a large brokerage firm that has an ‘800’ number, or at a trade show, or in a local showroom.

*Id.*

131. *Id.*

132. *Id.*

133. Lieber, *supra* note 120, at 213 (examining typical feminist critiques of paid surrogacy).

legislatures.<sup>134</sup> The justices of the New Jersey Supreme Court found that “the payment of money to a ‘surrogate’ mother . . . [is] potentially degrading to women.”<sup>135</sup> Justice Kennard, of the California Supreme Court, echoed similar sentiments: “treating the female reproductive capacity . . . as [a] product[] that can be bought and sold” is dehumanizing.<sup>136</sup> He was concerned that the commodification of reproductive rights will “reinforce oppressive gender stereotypes.”<sup>137</sup>

Whether in the context of paid surrogacy or C.R.A.C.K. sterilizations, allowing such payment will naturally shift our conceptualization of women and their roles in society. In the absence of these practices, we are less likely to view women as animals or “human incubators”<sup>138</sup> that must be spayed or shut down, and more likely to further a societal construct of “fully developed persons.”<sup>139</sup> Permitting such programs, on the other hand, will mark a significant step backward from the gains made since the women’s rights movement changed the way we value and conceptualize women.

2. *The Slippery Slope*—The premise upon which Radin’s “changing societal conceptions” theory is based is that once we recognize some element of monetization in a certain object or attribute, complete commodification is not far behind.<sup>140</sup> The theory is well-known: once the ball starts rolling, there is no telling if it will stop. Making matters worse, the scope of the slippery slope is boundless; C.R.A.C.K. can be expanded to encompass different groups or the same or different groups in a related area. Currently,

134. See, e.g., Glenda Thornton, *Florida Senators Address Surrogate Motherhood*, 15 FLA. ST. U. L. REV. 885, 894 (1987) (discussing a Florida Senate Bill prohibiting compensation beyond pregnancy-related expenses for surrogacy).

135. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1987).

136. *Johnson v. Calvert*, 851 P.2d 776, 792 (1993) (Kennard, J., dissenting). The majority’s decision acknowledged Kennard’s argument. See *id.* at 784–85. It rejected his claim, however, concluding that such a concern is better addressed by the legislature than a court. See *id.* at 784. In dicta, it conclusively refuted the “untoward results” that Kennard discussed, without further engaging the subject. *Id.* at 785.

137. *Id.* at 792.

138. *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting).

139. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013–15 (1982) (arguing that we must be wary of programs that diminish our prospects of “express[ing] personhood” because this often limits our “opportunities to become fully developed persons”).

140. See Radin, *supra* note 51, at 1912–13 (“[D]omino theory assumes that for some things . . . the commodified and noncommodified versions of some interactions cannot coexist. . . . Under this theory, the existence of some commodified sexual interactions will contaminate or infiltrate everyone’s sexuality so that all sexual relationships will become commodified.”).

the program extends to current and former drug addicts. What, however, is preventing the program from including other disfavored groups?<sup>141</sup> Why would the natural progression of C.R.A.C.K. not be to pay for sterilizations of people with hereditary diseases? What about the mentally handicapped? Or the physically handicapped? Members of these groups, like drug addicts, are easy targets for such a program. They have minimal political power and are often viewed as burdens on the state.

Women who abuse alcohol are likely future targets, as well.<sup>142</sup> But if we can pay all these women to forego their reproductive capabilities, why not include smokers? While we are at it, should we not encourage sterilization for those who have been exposed to toxic substances or who lift heavy objects, as they subject their children to higher incidences of physical and/or emotional impairments?<sup>143</sup>

It is not at all inconceivable for a wealthy anti-Semite, racist, or classist, witnessing the emergence of C.R.A.C.K. as a sign of hope, to promulgate a program of his or her own. The symbolic and practical results would be devastating. "In evil or reckless hands [eugenical sterilization] can cause races or types [that] are inimical to the [sterilizer's] group to wither and disappear."<sup>144</sup>

Unless checked now, C.R.A.C.K. or another organization could spin off like-minded programs in areas unrelated to sterilization, in addition to the broadened sterilization programs mentioned above. For example, an organization could offer money to individuals to relinquish their fundamental right to free speech; do we want to open the door to a program that purchases people's right to protest a program or policy they find detestable? What about a group, operating under the auspices of furthering criminal justice, that pays indigent criminal defendants to waive their *Miranda* rights? There clearly are rights that we hold dear that should not be monetized, and we cannot allow C.R.A.C.K. to erode this understanding.

Such ramifications concerned Titmuss, who worried decades ago that if we allow blood to enter an unregulated market, the commodification of previously market-inalienable things would follow

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141. This issue mimics concerns over eugenics. See *supra* Part II.B.

142. After all, fetal alcohol syndrome (FAS) affects more than one-tenth of one percent of the babies born in the United States, and only seven percent of women who drink heavily have babies without physical or mental impairments. See Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 1001-05 (1998). Moreover, FAS is the leading cause of mental retardation in the Western hemisphere. See *id.*

143. See *id.* at 1004.

144. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

closely on its heels. He explained the reason he picked the monetization of blood to be the subject of *The Gift Relationship*.

The choice of blood as an illustration and case study was no idle academic thought; it was deliberate. Short of examining humankind itself and the institution of slavery—of men and women as market commodities—blood as a living tissue may now constitute in Western societies one of the ultimate tests of where the ‘social’ begins and the ‘economic’ ends. If blood is considered in theory, in law and is treated in practice as a trading commodity, then ultimately human hearts, kidneys, eyes and other organs of the body may also come to be treated as commodities to be bought and sold in the marketplace.<sup>145</sup>

Titmuss could not have been more prophetic. The emerging commodification of human organs after the publication of his book was one of the major impetuses for passing the National Organ Transplant Act.<sup>146</sup>

The multi-directional slippery slope was, in fact, hailed by Harry Olson, former Chief Justice of the Municipal Court of Chicago, as a positive upshot of the *Buck v. Bell* decision. Olson contemplated: “[a]t present the remedy [of eugenics] is used conservatively, but the road is now open for its much wider application.”<sup>147</sup> It is unclear what Olson was suggesting. Did he imagine requiring sterilizations for other “socially inadequate classes”?<sup>148</sup> Did he fathom inflicting other injuries (not related to sterilization) on the “feeble-minded”? The possibilities are limitless and horrifying.

The slippery slope is dangerous. The likely—or at least conceivable—extensions of C.R.A.C.K. are reason enough to seriously question the program. The incredible impact on women and other “target” groups, as well as on unrelated and often unforeseeable activities, is enormous. These externalities are too obvious, important, and powerful to go unnoticed.

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145. TITMUSS, *supra* note 116, at 219.

146. See *infra* text accompanying notes 170–74.

147. LAUGHLIN, *supra* note 111, at 5.

148. *Id.* at 65. In his proposed model sterilization law, Laughlin sought the sterilization of all those in “socially inadequate classes,” including the feeble-minded, inebriates, criminalistic, deaf, and diseased. See *id.*



*D. Permanently Relinquishing Reproductive Rights*

Thus far the discussion has focused on the public policy arguments related to the injury inflicted by C.R.A.C.K. sterilizations on groups or society. For instance, commodification of reproductive rights and eugenics is harmful to society, and the domino effect negatively impacts certain groups. These are examples of externalities, or repercussions generally not accounted for by the contracting parties. The following argument, however, centers on the harm caused to the individual C.R.A.C.K. client.

C.R.A.C.K.'s sterilizations *permanently* bar its clients from exercising their right to procreate.<sup>149</sup> This permanency makes C.R.A.C.K. even more repugnant. C.R.A.C.K. does not provide the option of taking birth control pills in exchange for the \$200.<sup>150</sup> Rather, the organization ensures that its clients will never again be able to assert their cherished fundamental right.<sup>151</sup>

Consider the situation of Sharon Adams, a recipient of a C.R.A.C.K. sterilization who admitted that the monetary incentive was the driving force for her sterilization.<sup>152</sup> She is now completely drug-free and rebuilding her life. She is also, however, one of the many healthy, former drug addicts who is now permanently unable to bear children. The longer C.R.A.C.K. continues, the more people will be in Adams' situation. No matter how badly she wants to have children later in life, she will forever be barred from exercising her fundamental right to procreate.

Similar concerns haunted the *Skinner* court. In Oklahoma, certain convicted felons were sterilized, also prohibiting them from procreating ever again, no matter how and where they lived the rest of their lives.<sup>153</sup> Justice Douglas wrote: "There is no redemption for the individual whom the [sterilization] law touches. Any ex-

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149. See Telephone Interview with Rodney Harris, *supra* note 2 (C.R.A.C.K. clients are given an incentive to opt for permanent sterilization over long-term birth control).

150. See Robertson, *supra* note 24, at B1.

151. The four sterilization procedures are not technically permanent. However, the expense of "undoing" a tubal ligation or removing an IUD, the options chosen by 65% of C.R.A.C.K.'s clients, is beyond the clients' economic means. Thus, such procedures effectively render the women permanently sterilized.

152. See Berg, *supra* note 29, at B1.

153. The Oklahoma statute in question (Oklahoma's Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57, § 171 (West 1935)) provided for the mandatory sterilization of people who were convicted three times in Oklahoma of felonies "involving moral turpitude." See *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

periment which the State conducts is to his *irreparable* injury. He is *forever* deprived of a basic liberty."<sup>154</sup>

In effect, C.R.A.C.K.—like the government in Oklahoma sixty years ago—decides the future use of its client's reproductive rights for her, even though the future inability to rear children is probably the last thing a drug-addicted woman thinks about when she is enticed into a paid sterilization. As with the felons in *Skinner*, this long-term consequence to the individual is unacceptable.

For all of the policy arguments stated above, C.R.A.C.K. is impermissible and is a breeding ground for continuing bad social policy. Part III contemplates which of the traditional forums—judicial or legislative action—is best equipped to remedy such a problem.

### III. CHALLENGING C.R.A.C.K.

One of the most hotly contested issues concerning organized opposition to the commodification of the aforementioned "personhood interests" is the proper forum in which to bring the debate.<sup>155</sup> Legislators frequently seize upon the matter,<sup>156</sup> but in the absence of legislation, courts have been willing to hear such cases.<sup>157</sup>

A judicial solution, however, is unworkable in the C.R.A.C.K. context. First, it is difficult to construct a cause of action in a suit challenging C.R.A.C.K. Unlike in *Skinner* and *Roe*, for example, C.R.A.C.K. sterilizations do not involve the state. In the absence of state action,<sup>158</sup> due process violations, if they do exist here, are not

154. *Id.* at 541 (emphasis added).

155. *See, e.g., Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 493–97, 517–18 (Cal. 1990) (majority arguing that the issue is best left to the legislature, and dissent concluding that it is the court's duty to issue a ruling on the matter). *Compare Savannah Bank & Trust Co. v. Hanley*, 65 S.E.2d 26 (Ga. 1951) (Supreme Court of Georgia voided paid adoption contract) with FLA. STAT. ANN. § 63.2122(d)(I) (Harrison 1999) (prohibiting compensation for adoption) and MD. CODE ANN. FAM. LAW § 5-327 (1999) (same).

156. *See, e.g., N.Y. PUB. HEALTH LAW* § 4307 (McKinney 1985) (making organ sales illegal); OHIO REV. CODE ANN. § 3107.10 (Anderson 1982) (disallowing paid adoptions).

157. *See, e.g., R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998); *In re Baby M*, 537 A.2d 1227 (N.J. 1987). "The fact that the Legislature may intervene if and when it chooses . . . does not in the meanwhile relieve the courts of their duty of enforcing—or if need be, fashioning—an effective judicial remedy for the wrong here alleged." *Moore*, 793 P.2d at 517 (Mosk, J., dissenting).

158. It is improbable that a court would find that C.R.A.C.K. is a state actor, and therefore a possible defendant in an action under 42 U.S.C. § 1983 alleging violations of the Due Process Clause, U.S. CONST. amend. XIV, § 1. Although the state pays for the sterilizations and allows donations to C.R.A.C.K. to be tax-deductible, C.R.A.C.K. is neither performing a

justiciable under the Fourteenth Amendment.<sup>159</sup> Moreover, C.R.A.C.K. practices are not likely actionable in tort or contract.<sup>160</sup>

Second, the adequacy of judicial action appears even more tenuous when one contemplates an appropriate plaintiff and her remedy. A plaintiff who was not sterilized would likely not have standing, while a previously sterilized plaintiff would likely not have a redressable injury.<sup>161</sup>

A legislative solution prohibiting economic consideration in exchange for undergoing long-term or permanent birth control would be more efficacious. Such legislation could provide simply that:

It shall be unlawful for any person to provide valuable consideration in exchange for another to receive temporary or permanent sterilization.<sup>162</sup>

Many activists and courts have taken the position that regulating the field of personhood interests is—for theoretical and practical reasons—“better suited to legislative expression than judicial judgment.”<sup>163</sup>

function that has been “traditionally the *exclusive* prerogative of the state,” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)), nor is it otherwise a state actor.

159. See, e.g., *National Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 181–82 (1988) (holding that defendant is liable under § 1983 only if its activity in question constituted “state action”); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 155 (1978) (same).

160. There does not appear to be any tortious conduct, nor is there a breach of a contract. Moreover, in order to give effect to contracting parties’ justified expectations, see *RESTATEMENT (SECOND) OF CONTRACTS* § 178(2)(a) (1979), courts are loathe to interfere in a contractual relationship, generally upholding the freedom of contract, see *MURRAY*, *supra* note 43, at § 93(G).

161. For a general discussion of standing and redressibility, see *ERWIN CHERMERINSKY*, *FEDERAL JURISDICTION* § 2.3.1 (3d ed. 1999).

162. Federal legislation could be sustained under the interstate commerce clause, U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have [p]ower . . . [t]o regulate Commerce . . . among the several States”):

It shall be unlawful for any person to provide valuable consideration in exchange for another to receive temporary or permanent sterilization if the transfer affects interstate commerce.

This language mimics the National Organ Transplant Act of 1984 and its state counterparts. See *supra* note 61, and *infra* notes 174–75. For a general discussion of federal commerce clause power, see *JOHN E. NOWAK & RONALD D. ROTUNDA*, *CONSTITUTIONAL LAW* §§ 4.1–10 (5th ed. 1995).

163. *Barnes*, *supra* note 102, at 398 (arguing that the appropriate battlefield for the paid surrogacy debate is Congress); see also *Wagner*, *supra* note 42, at 109 (proposing that the then-emerging practice of paid surrogacy contracts requires a legislative—not a judicial—solution).

The Supreme Judicial Court of Massachusetts,<sup>164</sup> the Supreme Court of Kentucky,<sup>165</sup> the New York Superior Court,<sup>166</sup> and the California Court of Appeal<sup>167</sup> all contemplating challenges to paid surrogacy or paid adoption contracts, agreed that the matter is better left to the legislature (even though some of them did, in fact, invalidate the contracts themselves). The Supreme Court of California, in a somewhat related issue, likewise concluded that “the Legislature should make that decision.”<sup>168</sup>

Congress successfully prevented the exploitation of socio-economically poor citizens by passing the National Organ Transplant Act,<sup>169</sup> and it can do the same by prohibiting C.R.A.C.K. sterilizations. Like potential C.R.A.C.K. legislation, the National Organ Transplant Act and similar prohibitory state statutes sprung from one private citizen’s attempt to commodify the ill-commodifiable.<sup>170</sup>

In 1983, Barry Jacobs established a corporation in Virginia to broker human kidneys.<sup>171</sup> Jacobs’ plan was to purchase kidneys from healthy individuals, and then to sell them to people desperately in need of a kidney for the purchase price, plus \$2000 to \$5000 for Jacobs’ services.<sup>172</sup> The Virginia legislature passed a bill less than six months later banning organ sales.<sup>173</sup> Several states followed suit,<sup>174</sup> and the National Organ Transplant Act was not far behind.

Legislators prohibiting organ sales did not enter uncharted territory. State and federal legislatures have passed many bills

164. See *R.R. v. M.H.*, 689 N.E.2d 790, 797 (Mass. 1998).

165. See *Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213–14 (Ky. 1986). The court’s decision, upholding a paid surrogacy contract, was subsequently reversed by state legislation. See *supra* note 92.

166. See *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 818 (Sur. 1986). The court sent its own written opinion to the state legislature for review and guidance. See *Wagner*, *supra* note 42, at 101 n.441.

167. A California Court of Appeal, reviewing a paid surrogacy arrangement, said that the questions raised by the agreement are “for the Legislature to consider.” *In re Adoption of Mathew B-M*, 284 Cal. Rptr. 18, 37 (Ct. App. 1991). The court continued: “Given the impact of surrogacy on both public policy and private lives, we urge the Legislature to do so expeditiously.” *Id.*

168. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 496 (Cal. 1990) (concerning the recognition of one’s property rights to his or her cells).

169. National Organ Transplant Act of 1984, Pub. L. No. 98-506, 98 Stat. 2338 (codified as amended at 21 U.S.C. § 321 and 42 U.S.C. §§ 273–274 (1991)).

170. See Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1023 (1985).

171. See *id.* at 1021

172. See *id.*

173. See VA. CODE ANN. § 32.1-289.1 (Michie 1997).

174. See CAL. PENAL CODE § 367f (West 1999); MD. CODE ANN., HEALTH-GEN. § 5-408 (1984); MICH. COMP. LAWS § 333.10204 (1992); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1985).

prohibiting the commodification of items and attributes in the reproduction arena. For instance, states prohibit the sale of unborn fetuses and babies, usually in conjunction with bills outlawing paid adoptions.<sup>175</sup> Paid surrogacy is another example. State legislatures in Arizona and North Dakota have outlawed any type of surrogacy contract.<sup>176</sup> It is illegal in Kentucky, Louisiana, Nebraska, Utah, and Washington to receive compensation in exchange for providing one's services as a surrogate mother (thus declaring reproduction market-inalienable).<sup>177</sup> Michigan has even criminalized paid surrogacy, making it punishable as a misdemeanor to engage in a paid surrogacy contract and as a felony to assist in or broker such a deal.<sup>178</sup> Other states allow severely regulated surrogacy arrangements.<sup>179</sup> In yet another example, paid adoptions are prohibited by legislation in at least twenty-four states.<sup>180</sup>

Most of the abovementioned statutes were enacted by state legislatures. Ideally, however, statutes prohibiting economic consideration in exchange for undergoing permanent or long-term birth control would be enacted by both federal and state legislatures.<sup>181</sup> While a federal bill would technically encompass only those transactions that implicate interstate commerce, its effects would be expansive. First, a traditionally broad construction of the commerce clause would likely render all sterilizations subject to this federal law.<sup>182</sup> While it is possible that a complete ban on paid sterilizations would take the efforts of the legislatures of all fifty states, passing federal legislation would seriously impair C.R.A.C.K. and future C.R.A.C.K.-like programs and practices. Second, even if the current Court's narrow interpretation of the interstate commerce clause would cause federal legislation to cover only a small percentage of

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175. See Banks, *supra* note 12, at 103.

176. See ARIZ. REV. STAT. ANN. § 25-218 (West 1991); N.D. CENT. CODE § 14-18-05 (1997).

177. See KY. REV. STAT. ANN. § 199.590(4) (Michie 1998); LA. REV. STAT. ANN. § 9:2713 (West 1991); NEB. REV. STAT. § 25-21,200 (1998); UTAH CODE ANN. § 76-7-204(1)(a) (Supp. 1991); WASH. REV. CODE ANN. § 26.26.240 (West 1997).

178. See MICH. COMP. LAWS ANN. § 722.859 (West 1993).

179. See, e.g., N.H. REV. STAT. ANN. § 168-B:17 to -B:26 (1994); VA. CODE ANN. § 20-159 to -165 (Michie 1995).

180. See Thornton, *supra* note 134, at 892.

181. *But see Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong. 317 (1983) (statement of George Annas, Professor of Health Law, Boston University Schools of Medicine and Public Health) (arguing that the regulation of the disposition of human organs should be a concern of state, not federal, legislatures).

182. See generally *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). *But see Printz v. United States*, 521 U.S. 898 (1997) (limiting the powers granted to Congress through the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (same).

C.R.A.C.K. and C.R.A.C.K.-like paid sterilizations, federal legislation could act in conjunction with state legislation to proscribe all such paid sterilizations.

Titmuss sums up: "It is the responsibility of the state . . . to reduce or eliminate or control the forces of market coercions which place [people] in situations in which they have less freedom or little freedom to make moral choices."<sup>183</sup> Legislatures—either or both federal and state—are appropriate bodies to take such action. "[T]he Government [is] the one in a position to decide whether to permit such offers to be made. This society and its government have the capacity . . . to meet the needs of the poor"<sup>184</sup> and have a duty to "safeguard the public interest."<sup>185</sup> These comments were made just before Congress passed the National Organ Transplant Act, and they hold true in the arena of paid sterilizations, which, as with organ sales, adversely affect society in general and the indigent in particular.<sup>186</sup> With the obstacles to bringing a lawsuit against C.R.A.C.K., a legislative solution might be the only way to safeguard fundamental reproductive rights. It is thus Congress' duty, in order to promote the health and welfare of its citizens as detailed above, to pass legislation that prohibits paid sterilizations.

### CONCLUSION

C.R.A.C.K. sterilizations cannot continue. There are better ways to deal with the problems of SEIs and irresponsible procreation than enticing drug-addicted women to permanently relinquish their reproductive rights.

The human impulse to commodify is strong. We are reminded of this every day—when thousands of people, men and women, are arrested annually for prostitution; when one tries to auction off a

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183. TITMUSS, *supra* note 116, at 311.

184. *Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Tech.*, 98th Cong. 341 (1983) (statement of Dr. Veatch, Professor of Medical Ethics, Kennedy Institute of Ethics, Georgetown University).

185. *Id.* at 373 (statement of Dr. Gorovitz, Department of Philosophy, University of Maryland).

186. See Banks, *supra* note 12, at 100; *Procurement and Allocation of Human Organs for Transplantation: Hearings on H.R. 4080 Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Tech.*, 98th Cong. 341, 355 (1983) (statements of Dr. Veatch, Professor of Medical Ethics, Kennedy Institute of Ethics, Georgetown University and Dr. Arthur Caplan, The Hastings Center); *Protesters Tear Down Billboard Offering to Pay Drug Addicts to Use Birth Control*, ASSOCIATE PRESS NEWSWIRE, Oct. 20, 1999, available in WESTLAW, Westnews Library, ALLNEWSPLUS File.

kidney on the internet;<sup>187</sup> and when procreative rights sales are advertised at bus stations. This does not mean, though, that legislatures should not restrict this impulse. We must look to our legislatures to protect our freedoms.

Legislators, policy analysts, and lay people must recognize that there are some things that money cannot buy. If we allow C.R.A.C.K. to continue, it may expand its reach. Who is next: the feeble-minded, the criminalistic, the homeless, the diseased and deformed? C.R.A.C.K. is an odious program with serious consequences. It will continue to devastate unless and until legislatures declare it illegal.

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187. See Amy Harmon, *Illegal Kidney Auction Pops up on Ebay's Site*, N.Y. TIMES, Sept. 3, 1999, at A14.