

WHEN RUMPELSTILTSKIN COMES TO COLLECT: A LABOUR FEMINIST ARGUMENT AGAINST EMPLOYER- SPONSORED OOCYTE CRYOPRESERVATION IN AUSTRALIA

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I INTRODUCTION

In October 2014, the collective ovaries of news media across the world exploded: Facebook and Apple, two of the world's largest tech companies, announced they would offer to pay for female employees to freeze and store their eggs for non-medical reasons, reimbursing up to US\$20 000 per employee in accrued costs.¹ Tipped to join the 'cryopreservation club' are other multinational Fortune 500 companies including Citigroup, JP Morgan, Microsoft and Google,² and the practice has already reached Australia.³ Large employers implementing pay-for-fertility-delay policies thus seems a phenomenon unlikely to disappear.

Egg freezing, also known as oocyte cryopreservation, is an assisted reproductive technology ('ART') technique which entails a woman undergoing hormonal ovarian stimulation, followed by an invasive inpatient oocyte retrieval procedure.⁴ The retrieved oocytes then undergo vitrification, a rapid cooling procedure which suspends cellular metabolism.⁵ This preserves the oocytes, enabling them to be stored at sub-zero temperatures for indefinite periods, until they either undergo in-vitro fertilisation and are implanted (assisted conception)

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1 Danielle Friedman, 'Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs', *NBC News* (online), 14 October 2014 <<http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011>>.

2 Jessica Bennett, 'Company-Paid Egg Freezing Will Be the Great Equalizer', *TIME* (online), 15 October 2014 <<http://time.com/3509930/company-paid-egg-freezing-will-be-the-great-equalizer/>>.

3 Hannah Francis, 'Aussie IVF Company Joins Apple, Facebook by Paying To Freeze Workers' Eggs', *The Sydney Morning Herald* (online), 16 October 2014 <<http://www.smh.com.au/technology/sci-tech/aussie-ivf-company-joins-apple-facebook-by-paying-to-freeze-workers-eggs-20141016-116txz.html>>.

4 See, eg, János Konc et al, 'Cryopreservation of Embryos and Oocytes in Human Assisted Reproduction' [2014] *BioMed Research International* <<http://www.hindawi.com/journals/bmri/2014/307268>>.

5 Aylin P Cil and Emre Seli, 'Current Trends and Progress in Clinical Applications of Oocyte Cryopreservation' (2013) 25 *Current Opinion in Obstetrics and Gynecology* 247.

or are destroyed.⁶ Although safe and non-experimental,⁷ oocyte cryopreservation has yet to become standard practice for healthy women who wish to delay childbearing,⁸ due primarily to its relative novelty, high cost and invasiveness. Facebook and Apple's game-changing new initiative, however, has the potential to bring the practice into the mainstream as an elective choice for career-oriented professionals.

The advent of employer-sponsored oocyte cryopreservation is an entirely new frontier in the application of novel reproductive medical technologies to existing social problems. Like the contraceptive pill, which similarly enabled women to bend their bodies to their will, elective egg freezing has the potential to radically alter the gender landscape in the workplace. As such, it has been heralded as the way of the future, 'leveling the playing field' for women.⁹ By contrast, however, critics argue the policy is 'benevolent sexism',¹⁰ encouraging a culture where a successful career and motherhood are mutually exclusive, and enabling the 'intrusive and creepy'¹¹ assertion of control by employers over their employees' personal choice of when to start a family. As a society, therefore, we are at a crossroads. We must carefully consider the normative implications of employer-sponsored oocyte cryopreservation, deciding whether it will ultimately help or hinder us in building a society in which all are respected and treated equally.

In undertaking this inquiry, we must consider the regulatory context in which these policies would operate. Should a female employee of Apple, Facebook or any other company offering egg freezing choose to accept that offer, as a fringe benefit, the ART service would constitute part of the employment remuneration package. It would correspondingly be subject to the relevant employment contract and governed by the common law. Against this background, there are two broad options for the form that this kind of arrangement might be anticipated to take: either an agreement for an employment benefit, subject to terms and conditions; or a gift.

A Scenario 1: A 'Perk' Subject to Terms of Use

In the event an employer sponsors oocyte cryopreservation, it is conceivable that the offer might be subject to any number of terms or conditions. The specific formulation of the relevant agreement could be drafted in any way the employer

6 Ibid.

7 The Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, 'Mature Oocyte Cryopreservation: A Guideline' (2013) 99 *Fertility and Sterility* 37.

8 Javier Domingo et al, 'Fertility Preservation in Non-Cancer Patients' in Jacques Donnez and S Samuel Kim (eds), *Principles and Practice of Fertility Preservation* (Cambridge University Press, 2011) 23, 28.

9 Jessica Bennett, above n 2.

10 James Hayton, 'Was Egg-Freezing a Perk Too Far from Facebook and Apple?', *The Conversation* (online), 21 October 2014 <<http://theconversation.com/was-egg-freezing-a-perk-too-far-from-facebook-and-apple-33212>>.

11 Editorial, 'Egg Freezing Is a Perk Too Far in Silicon Valley's War', *Financial Times* (London), 16 October 2014, 10.

chooses; whether as simple as a short memorandum signed on an individual basis between the parties, or as extensive as a company-wide policy applying to all grants of reproductive perks. Perhaps most likely would be the inclusion of provisions similar to those governing maternity leave arrangements, which are common in employment contracts. The critical feature would be the undertaking by the employee that their receipt of egg freezing services is contingent upon the satisfaction of whichever requirement(s) were imposed in the agreement or policy.

By way of example, such conditions might provide for prevention of access to or implantation of stored eggs if: certain workplace performance indicators are not met; a specified period of time has or has not elapsed; or employment is terminated. If the cryopreserved eggs have already been implanted, failure to comply with a condition such as those mentioned above might enable the employer to sue for specific performance of the relevant term of the agreement. Although such an arrangement might sound draconian, and difficult to imagine actually being implemented, it is not beyond the realm of possibility. After all, having paid for (very expensive) ART procedures, an employer could argue that it is not unjustifiable to ensure that that investment would be recouped by requiring the recipient employee to commit to working for a certain period of time at a certain level of engagement.

Consider the hypothetical example of a female employee of Apple or Facebook – let's call her the Miller's Daughter – who has accepted the offer of employer-sponsored oocyte cryopreservation. Having done so, she has executed a technically sound agreement that contains a term stating that she will not seek to implant the cryopreserved oocytes through assisted conception within three years following the date of execution (a 'conditional egg freezing contract'). If she were to change her mind within that time frame, that contract would enjoin her from use of her own eggs.

By offering employer-sponsored oocyte cryopreservation to female employees on these terms, employers such as Apple and Facebook are not necessarily benevolent 'fairy godmothers', bestowing choice and opportunity upon women in the workplace. Rather, they seem more akin to Rumpelstiltskin, the manikin of the eponymous fairy tale who appeared to the Miller's Daughter promising to spin straw into gold, where gold is an elusive felicitous coexistence of family and working life – if only she will agree to his conditions of service.¹²

B Scenario 2: A Gift or Unrestricted Grant

In the second scenario, which is perhaps easier to imagine and indeed is the current usual practice in corporate cryopreservation as offered by companies such as Apple and Facebook, no conditions attach to the egg freezing offer. The cryopreservation is a gift, presented as a genuine offer with no strings attached, to make an employer more attractive to female employees and assist them to manage the interaction of their personal and professional lives. While less

12 Noel Daniel, *The Fairy Tales of the Brothers Grimm* (Matthew P Price trans, TASCHEN, 2011) 200–5.

objectionable on their face, and potentially less problematic in legal terms, offers of an egg freezing gift nevertheless pose political and social problems regarding the role of women in society and in the workplace.

Consider a second hypothetical scenario involving our Miller's Daughter, who has been offered an unrestricted egg freezing grant. The Miller's Daughter had planned to have children soon, but the offer is generous and she is concerned that if she does not delay starting a pregnancy for a few years, she might appear to be less committed to her work. There are several factors at play in this scenario, including particularly whether implicit pressure is applied even by unconditional offers of egg freezing and whether such offers imply a mutual exclusivity between work and female parenthood.

Both scenarios posited involve complex personal and professional dynamics, raising questions regarding the interaction between social morality and law, and the role of the latter in regulating changes in social relationships brought about by advances in medical technology. Statute is currently silent on the issue, and so *prima facie* the law takes a *laissez-faire* approach to the minutiae of any reproductive technology-related perks and/or obligations contained within a private employment contract. It certainly does not prohibit employer-sponsored egg freezing altogether. The current absence of overt regulation in this space means that if the law is to step in to ensure that workplace policies and/or agreements do not unduly disadvantage women, it must do so through the courts.

The purpose of this article is to contribute to this discussion by investigating whether the advent of employer-financed egg freezing does indeed pose dangers to working women of childbearing age, and if so, whether there is any avenue for the law to intervene, breaking its silence on the issue to provide stronger protections for women. Correspondingly, this article evaluates employer-sponsored oocyte cryopreservation agreements through the lens of the contract law doctrine of public policy, which in accordance with the maxim *ex turpi causa non oritur actio* ('an action cannot arise from a tainted cause'),¹³ confers discretion upon the court to refuse to enforce a contract which is prejudicial to public policy.¹⁴ In doing so, it takes a labour feminist perspective that draws from contemporary feminist scholarship and is informed by the traditional theoretical discourse of labour law. It does so with reference to the aforementioned hypothetical Miller's Daughter, using her predicaments as suggested in both Scenario 1 and Scenario 2 above as devices to explore both the moral implications of contractually governed employer-sponsored oocyte

13 N C Seddon, R A Bigwood and M P Ellinghaus, *Cheshire and Fifoot: Law of Contract* (LexisNexis Butterworths, 10th ed, 2012) 960.

14 This article uses terms such as 'invalid', 'unenforceable', 'ineffectual' and 'void' interchangeably in order to refer generally to the status of a contractually asserted right, of which the court will refuse to enforce performance, as did Windeyer J in *Brooks v Burns Philip Trustee Co Ltd* (1969) 121 CLR 432, 458. It is possible that a conditional egg freezing contract may be unenforceable on other grounds, such as improper formation, misleading conduct or mistake: See Seddon, Bigwood and Ellinghaus, above n 13, 9–15, 25–6, 34–8. However, such defects largely depend upon the construction or drafting of a particular contract, or the circumstances in which it was concluded, and as employer-sponsored egg freezing is not yet common practice in Australia, no such specific analysis is currently possible.

cryopreservation, and the law's response to this novel development. This analysis will be developed in three stages.

Part II sets out the legal basis for a challenge to employer-sponsored cryopreservation under contract law, suggesting that an otherwise valid and enforceable contract might be void as against public policy if the court considers the contract prejudicial to governing principles of the community. It argues, first, that because paid-for egg freezing raises novel legal issues, it is both relevant and necessary to consider its public policy implications. Second, it explains the contract law doctrine of public policy, and finally argues that for this doctrine to best reflect the public policy principles by which society is governed, the content of those principles must be drawn from both domestic and international legal norms.

Part III considers the first type of cryopreservation contract hypothesised above, in which the offer is conditional and tied to the satisfaction of certain terms and conditions. It suggests that the Australian community is governed by the principle of respect for reproductive autonomy, tendering supporting evidence from both domestic medical law and international human rights law, and argues that conditional egg freezing contracts embarrass this principle, and thus enliven judicial discretion to refuse to enforce such contracts as contrary to public policy.

Part IV focuses on the second type of cryopreservation arrangement contemplated, in which reproductive services are offered by employers as a gift. It contends that gender equality should be recognised as a governing principle of the community, positing that support for the importance of this principle in Australian social morality is found in domestic and international anti-discrimination law. It goes on to argue that even when *not* subject to conditions or restrictions, employer-sponsored oocyte cryopreservation would violate this principle.

As a result, this article ultimately contends that if the question of whether contracts that provide for the provision of oocyte cryopreservation by employers to their employees – whether with or without conditions attached – were to come before a court, it would be open for that court to exercise its discretion to declare that agreement void as against public policy. Furthermore, it posits that in so doing, the court would ensure that the law continues to support a society which values the protection of women, as individuals and as a collective, from attempted encroachment on reproductive autonomy or equality.

II VOID AS AGAINST PUBLIC POLICY: AN AVENUE FOR LEGAL CHALLENGE TO EMPLOYER- SPONSORED OOCYTE CRYOPRESERVATION

If the Miller's Daughter has entered into an agreement that provides for employer-sponsored cryopreservation (whether subject to contractual terms or as a gift), the absence of a legislative framework to regulate that agreement means that the protection of the interests of the Miller's Daughter, the public at large, or

both, that may be prejudiced must be found in the common law. As a result, the sole avenue for intervention may be the contractual doctrine of public policy.

Famously called an ‘unruly horse’,¹⁵ the common law doctrine of public policy is notoriously complex and difficult to apply.¹⁶ However, as a general rule, the court will not enforce a contract that is ‘contrary to justice, morality and sound policy’.¹⁷ Even if that contract is technically sound, the court has the discretion to declare it invalid on the ground that it is ‘so tainted that the law should not lend aid to its enforcement’.¹⁸ Whether the court will consider a contract through the lens of public policy depends on two factors: first, a determination that a public policy analysis of the contract is relevant; and second, judicial recognition that the contract offends a head of public policy, which are so inviolate as to render illegal a contract or term therein which contravenes them.¹⁹

The purpose of this Part is first to argue that the court should engage in a public policy analysis of employer-sponsored oocyte cryopreservation agreements, because such arrangements raise legal issues with which the law has yet to grapple. As any decision in such a case would set precedent, the matter would be of public interest and so should not be considered independently of its public policy implications. Second, this Part sets out the contractual doctrine of public policy, briefly explaining how public policy principles are recognised by law. It then goes on to argue that in developing the common law of public policy, the court should consider evidence drawn from both the domestic law of Australia and international human rights law, and in so doing justifies the consideration of both municipal and international law in Parts III and IV.

A Relevance of Public Policy Analysis: The Public Significance of Determining Novel Legal Issues

Judicial contemplation of public policy issues when adjudicating a contractual dispute is vitally important if that dispute raises implications which go beyond the immediate matter before the court, for ‘if the rest of mankind are concerned as well as the parties, it may properly be said that [the case] regards the public utility’.²⁰ Such implications often arise in novel cases, which, through the handing down of judgments that create precedent where none exists, ensure the mutability of the common law and enable it to respond to changes in

15 *Richardson v Mellish* (1824) 130 ER 294, 303 (Burrough J).

16 *A v Hayden [No 2]* (1984) 156 CLR 532, 559 (Mason J).

17 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 418 (Gibbs ACJ), quoting *Wetherell v Jones* (1832) 3 B & Ad 221, 225–6; 110 ER 82, 84 (Lord Tenterden CJ). See also *A v Hayden [No 2]* (1984) 156 CLR 532, 587–8 (Brennan J); *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 247 (Kirby J).

18 *Lieberman v Morris* (1944) 69 CLR 69, 84 (Rich J), citing *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1892) AC 39, 47, 51.

19 Seddon, Bigwood and Ellinghaus, above n 13, 962. Cf *Brooks v Burns Philip Trustee Co Ltd* (1969) 121 CLR 432, 458 (Windeyer J), noting the artificiality of ‘categories’ of public policy.

20 *Egerton v Brownlow* (1853) 10 ER 359, 423 (Lord Lyndhurst), quoting *The Earl of Chesterfield v Janssen* (1750) 1 Atk 301, 352; 26 ER 191, 225 (Lord Harwicke LC).

society.²¹ In handing down such decisions, it is critical that the court consider public policy issues, for if it does not, it risks failing to appropriately reflect the prevailing social morality of the community it purports to regulate.

A hypothetical action of our Miller's Daughter, seeking to invalidate a contract such as, for example, that proposed in Scenario 1 above, is one such novel case. It would develop the (currently limited) body of jurisprudence regarding the rapidly advancing field of assisted procreation, the regulation of which goes to the community's 'very root'.²² No Australian court has yet had the opportunity to consider a dispute over rights of control over frozen gametes which concerns the assertion of an interest in those gametes by a third party unrelated to the progenitor of the gametes by reason of either biology or marriage.²³ Consideration of the limited body of law which might aid the court's analysis of the competing claims of the Miller's Daughter and her employer to the frozen eggs in dispute illuminates just how opaque this area of law is.

First, it is uncertain which legal framework, either family or property law, would be most appropriately applied in a case where gamete ownership is disputed for the reason that a commercial or financial interest in the gametes exists, by contrast to previous case law which has relied solely on an interest arising from familial proximity. Whether family or property law would be applicable would depend on whether the legal character of gametes is closer to 'people' or 'property' – a question which the courts have thus far been disinclined to answer in certain terms.²⁴ If the former, a family-based guardianship approach, treating the gamete as an entity with future expectations of becoming a child, might be appropriate. Applied to the Miller's Daughter's case, this model would consider her the future mother of any frozen eggs. It is possible this would result in the vesting of parental rights and authority to exercise control rights in relation to the frozen eggs in the Miller's Daughter,²⁵ to the exclusion of her employer.

However, it may be that gametes are considered at law to be closer to property than people, as several scientific procedures lie between a frozen, unfertilized egg and a child who enlivens family law. This approach may be more likely, as although historically a 'no property' rule has applied to human tissue, including gametes,²⁶ a growing body of cases has carved out exemptions, notably

21 Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109.

22 *Taylor v Burgess* (2002) 29 Fam LR 167, 174 (Barrett J). See also *Cattanach v Melchior* (2003) 215 CLR 1, 35 (McHugh and Gummow JJ).

23 In this article, 'gamete' is defined as either a male or female mature haploid germ cell, specifically either a spermatozoon or an oocyte. Cf *Washington University v Catalana*, 490 F 3d 667 (8th Cir, 2007).

24 See, eg, Vanessa White, 'Property Rights in Human Gametes in Australia' (2013) 20 *Journal of Law and Medicine* 629.

25 *Family Law Act 1975* (Cth) ss 61B–61D.

26 *Haynes's Case* (1613) 12 Co Rep 113; 77 ER 1389 is generally cited as the authority for the 'no-property' rule. But see Roger S Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Review* 601, 601. See also Gerald Dworkin and Ian Kennedy, 'Human Tissue: Rights in the Body and Its Parts' (1993) 1 *Medical Law Review* 291; *R v Sharpe* (1857) 169 ER 959.

the famous ‘work or skill’ exception,²⁷ to this rule.²⁸ The extension of these exceptions to gametes culminated in Australia in the 2011 decisions *Bazley v Wesley Monash IVF Pty Ltd*,²⁹ which found that stored gametes of a deceased person constituted property and could form part of the deceased’s estate; and *Edwards; Re Estate of Edwards*,³⁰ which recognised the applicant’s property interest in her deceased husband’s cryopreserved sperm. As such, it seems probable that the court would apply property law to the Miller’s Daughter’s case.

If it were to do so, however, the practical outcome of the case is difficult to predict with any degree of certainty, for the reasoning in *Bazley* and *Re Edwards* was markedly different. Justice White in *Bazley* considered that as gametes were tangible ‘things’, their treatment as property was ‘common sense’,³¹ overruling the ‘no-property’ rule as a legal fiction.³² By contrast, however, Hulme J in *Re Edwards* did not reject the no-property rule. Rather, his Honour expanded the ‘work or skill’ exception, determining that the clinicians who performed the cryopreservation did so as agents of the applicant.³³ The exception thus conferred a proprietary interest in the sperm in favour of the applicant as the ‘intended beneficiary’.³⁴

Applied to the case of our Miller’s Daughter, the property law framework fails to yield a reliable indication as to whether her employer, the payor of the oocyte cryopreservation treatment, would be able to assert an interest in the frozen eggs by virtue of that financial contribution. Precedent provides conflicting guidance: *Bazley* suggests that sole and exclusive holder of rights in gametes is the producer – in this case, the Miller’s Daughter. By contrast, *Re Edwards* indicates that such rights might vest in any number of ‘intended beneficiaries’, including third party claimants such as the Miller’s Daughter’s employer. The courts have had little opportunity to reconcile the two positions.³⁵

Current Australian law is not well equipped to deal with the novel legal questions posed by our hypothetical Miller’s Daughter’s case. Any judgment deciding the matter would therefore affect not only the parties to the immediate dispute, but create precedent affecting society at large. It is therefore critical that the court consider public policy in its reasoning, for although ‘there is a very

27 *Doodeward v Spence* (1908) 6 CLR 406. See also *Moore v Regents of the University of California*, 51 Cal 3d 120 (1990); *Re Organ Retention Group Litigation* [2005] QB 506.

28 See, eg, *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596; *Pecar v National Australia Trustees Ltd* (Unreported, Supreme Court of New South Wales, Bryson J, 27 November 1996); *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276; *R v Kelly* [1999] QB 621; *Yearworth v North Bristol NHS Trust* [2010] QB 1.

29 [2011] 2 Qd R 207 (‘*Bazley*’).

30 (2011) 81 NSWLR 198 (‘*Re Edwards*’).

31 *Bazley* [2011] 2 Qd R 207, 215.

32 *Ibid.* See also *Roche v Douglas* (2000) 22 WAR 331.

33 *Re Edwards* (2011) 81 NSWLR 198, 214–5.

34 White, above n 24, 635.

35 See *Vallance & Marco* [2012] FamCA 653; *Re Floyd* [2011] QSC 218; *Re H [No 2]* [2012] SASC 177; *Re H [No 3]* (2013) 118 SASR 259.

private decision being made about an individual's future, there are also wider repercussions' for society.³⁶

B Mechanics of the Doctrine of Public Policy: What Are Its 'Heads' and from Whence Are They Derived?

If the court agrees that the case of the Miller's Daughter enlivens its discretion to consider public policy, her success in securing a declaration that the contract is invalid will depend on a judicial finding that the contract is so inimical to a 'head' of public policy that it should not be enforced at law. Several recognised heads are established by precedent.³⁷ However, none of these specifically invalidate the heretofore-uncontemplated contract governing employer-sponsored egg freezing which binds the Miller's Daughter. Nevertheless, this does not mean that the contract does *not* contravene public policy, for heads of public policy are not frozen in time. Rather, they develop with social norms, such that old heads may become moribund as new heads emerge.³⁸

It is the role of the court to assess whether a new head of public policy should be recognised.³⁹ The approach it must take in doing so was articulated by Isaacs J in *Wilkinson v Osborne*: specifically, the court must ascertain whether some 'governing principle' has been adopted by the community as a whole, which the court should consequently recognise and enforce.⁴⁰ This is a matter of fact determined by looking to the formal adoption of that principle by law, or tacitly in the general course of life.⁴¹ When applying this test, courts seem most comfortable employing the first limb, preferring to find evidence for governing principles through the familiar lens of doctrinal legal reasoning, by 'look[ing] to various areas where the law has already expressed choices which might bear upon the question'.⁴² For this reason, in arguing for the recognition of new heads of public policy, this article focuses its reasoning on the first limb of the test: the formal legal adoption of a governing principle.

In doing so, this article considers evidence drawn from both domestic and international law. Use of the former is common judicial practice,⁴³ while consideration of the latter is more controversial. However, this article argues that international legal norms, particularly those arising from international human rights law, are persuasive in the judicial assessment of whether a particular

36 Lindy Willmott, Ben White and Donna Cooper, 'Interveners or Interferers: Intervention in Decisions To Withhold and Withdraw Life-Sustaining Medical Treatment' (2005) 27 *Sydney Law Review* 597, 597.

37 *Wilkinson v Osborne* (1915) 21 CLR 89, 96–7.

38 *Re Morris (dec'd)* (1943) 43 SR (NSW) 352, 355–6 (Jordan CJ); *A v Hayden [No 2]* (1984) 156 CLR 532, 558 (Mason J); *Naylor, Benzon & Co v Krainische Industrie Gesellschaft* [1918] 1 KB 331, 342 (McCardie J).

39 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 248 (Kirby J).

40 (1915) 21 CLR 89, 97, cited in *A v Hayden [No 2]* (1984) 156 CLR 532, 558 (Mason J).

41 *Wilkinson v Osborne* (1915) 21 CLR 89, 97.

42 *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 493 (Campbell J).

43 See, eg, *Taylor v Burgess* (2002) 29 Fam LR 167, 173–5 (Barrett J); *Ashton v Pratt [No 2]* [2012] NSWSC 3 [37]–[52] (Brereton J).

principle has been adopted by the Australian community. A compelling rationale for the use of international human rights law in domestic judicial reasoning was expressed by Brennan J, who observed in his seminal judgment in *Mabo v Queensland [No 2]* that ‘international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights’.⁴⁴ Although international rights and obligations are not domestically binding,⁴⁵ and should not ‘mould’ municipal law,⁴⁶ this use of international law as a ‘guide’⁴⁷ has received substantial judicial support.⁴⁸ For example, the Hon Michael Kirby has enthusiastically suggested that ‘the age of reconciliation of international and national law has dawned in Australia’,⁴⁹ noting that it is ‘part of the genius of our [common law] legal system that the courts should ... take cognisance of international human rights jurisprudence’.⁵⁰

International law is especially pertinent to the question of whether the Australian community has adopted a governing principle which should be recognised as a head of public policy. Finding the answer to this question is an exercise which inherently requires analysis of the contemporary values of our nation, which, as Maxwell P notes, are usefully illuminated by international norms.⁵¹ Given our ‘increasing preoccupation with fundamental human rights’,⁵² this inquiry cannot be complete without reference to Australia’s respect for those rights. In the absence of a domestic Bill of Rights, this analysis must necessarily

44 (1992) 175 CLR 1, 42.

45 See, eg, *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 224–5 (Mason J).

46 *Western Australia v Ward* (2002) 213 CLR 1, 389 (Callinan J).

47 *Dietrich v The Queen* (1992) 177 CLR 292, 360–1 (Toohey J).

48 See, eg, *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569 (Kirby P); *R v Granger* (2004) 88 SASR 453, 477 (Perry J); *Tomasevic v Travaglini* (2007) 17 VR 100, 114 (Bell J); Michael Kirby, ‘The Growing Impact of International Law on the Common Law’ (2012) 33 *Adelaide Law Review* 7, 22–3; Sir Anthony Mason, ‘The Influence of International and Transnational Law on Australian Municipal Law’ (1996) 7 *Public Law Review* 20; Murray Gleeson, ‘Global Influences on the Australian Judiciary’ (2002) 22 *Australian Bar Review* 184, 187. Cf *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

49 Kirby, ‘Domestic Implementation of International Human Rights Norms’, above n 21.

50 Ibid.

51 *Royal Women’s Hospital v Medical Practitioner’s Board of Victoria* (2006) 15 VR 22, 39.

52 Kirby, ‘Domestic Implementation of International Human Rights Norms’, above n 21.

be drawn from the rights and principles set out by international human rights treaties and related instruments to which Australia has acceded.⁵³

Furthermore, with regard to the public policy inquiry required in the case of our Miller's Daughter, consideration of international legal norms is critical if the court's reasoning is to be thorough and informed. The particular issues her case raises are difficult and domestically unprecedented questions of bioethics as they relate to human rights, a matter dealt with in far greater depth in the discourse of international law than that of domestic law.⁵⁴ As a result, this article argues that not only is it generally appropriate and persuasive to have regard to international human rights law in the development of the common law doctrine of public policy, but in the case at hand it is of vital necessity if the relevant governing principles of the Australian community are to be properly and fully considered. Consequently, in its forthcoming arguments for the recognition of two novel heads of public policy – first, the principle of respect for reproductive autonomy, and second, the principle of gender equality – this article investigates evidence of the formal adoption of each of those principles by both domestic and international law, arguing that both domestic and international sources provide a valid reflection of the governing principles of the Australian community.

III HANDS OFF MY OVARIES: THE GOVERNING PRINCIPLE OF RESPECT FOR REPRODUCTIVE AUTONOMY

In seeking a declaration that a conditional egg freezing contract – that is, a contract as contemplated in the first scenario posited in Part I – is void as against public policy, our hypothetical Miller's Daughter may be able to argue that a head of public policy exists to protect society's interest in the integrity of reproductive autonomy, and that this is infringed by her contract. This Part argues that the Australian community has formally adopted the governing principle of respect for reproductive autonomy by law, as both domestic medical law and international human rights law provide strong protections for an individual's capacity to self-determine. The domestic medico-legal framework considers consent to be of paramount importance, and so values patient

53 See, eg, *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'); *Report of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1 (18 October 1994, adopted 13 September 1994) annex ('Programme of Action of the International Conference on Population and Development'); *Report of the Fourth World Conference on Women*, 16th plen mtg, UN Doc A/CONF.177/20/Rev.1 (15 September 1995) annexes I–II ('Beijing Declaration and Platform for Action').

54 Margaret Somerville, 'Law, Marching with Medicine but in the Rear and Limping a Little: Ethics as "First Aid" for Law', in Silja Voneky et al, *Ethics and Law* (Springer-Verlag, 2013) 67, 74–5.

autonomy above all else. The international law of human rights specifically protects reproductive autonomy, and additionally provides broad safeguards over the right to make private reproductive choices free of external influence. As a result, this Part contends that both domestic and international legal indicia support the recognition of a head of public policy founded upon the governing principle of respect for reproductive autonomy.

Assuming this head would be recognised, the Part then turns to the issue of whether it would be embarrassed by a contract such as that which binds the Miller's Daughter of Scenario 1. Analysis of these contracts from a labour feminist perspective suggests that an employment agreement providing elective egg freezing subject to contractually enforceable conditions would indeed constitute infringement of the reproductive autonomy of a female employee by her employer. Furthermore, although the Miller's Daughter's entry into the contract could be considered to constitute implied consent to the restrictions on her autonomy, the nature of the power dynamic in an employment relationship arguably means that such consent cannot be truly voluntary, and thus cannot justify its infringement of the governing principle of respect for reproductive autonomy. If a court in its discretion were to find that a contract as contemplated by Scenario 1 breached a new head of respect for reproductive autonomy – or indeed, any recognisable head of public policy – that contract would be rendered void and the Miller's Daughter's employer would be unable to compel her specific performance of the relevant terms of use.

A Recognition of the Principle of Respect for Reproductive Autonomy as a Head of Public Policy

1 Protections for Reproductive Autonomy under Domestic Law: The Importance of Consent in ART Treatment

Patient autonomy has long been a crucial element of the ethical practice of medicine in Australia,⁵⁵ and is ensured by the doctrine of full, informed and voluntary consent.⁵⁶ Generally speaking, no medical treatment or other interference in an individual's medical care is permitted without consent,⁵⁷ except where the patient is not legally competent.⁵⁸ As a result, even where intervention would be in the best interests of the patient, for example, where a competent patient refuses life-saving treatment, that intervention is both illegal and

55 G M Stirrat and R Gill, 'Autonomy in Medical Ethics after O'Neill' (2005) 31 *Journal of Medical Ethics* 127, 127.

56 *Rogers v Whitaker* (1992) 175 CLR 479. Informed consent is also protected by legislation in the ACT and Victoria: *Human Rights Act 2004* (ACT) s 10(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c).

57 Ian Kerridge, Michael Lowe and Cameron Stewart, *Ethics and Law for the Health Professions* (Federation Press, 4th ed, 2013) 328–9.

58 See, eg, *Children and Young Persons (Care and Protection) Act 1988* (NSW); *Emergency Medical Operations Act 1973* (NT); *Consent to Medical and Palliative Care Act 1995* (SA); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, approved in Australia by *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 ('*Marion's Case*').

unethical.⁵⁹ Furthermore, for consent to be effective, it must be voluntary. If a patient makes a medical decision that seems to have been unduly influenced by a third party, such that the patient 'does [not] really mean what [she] says, or ... is ... merely saying it ... to satisfy someone else'⁶⁰ (a situation that might conceivably arise when a patient believes she must comply with a contractual obligation), that medical decision may be judged invalid.⁶¹

Autonomy is not an uncontested concept, and the scope of the right to self-determine in the medical context remains under debate in the bioethics discourse. However, even for bioethicists who do not hold that patient autonomy is of paramount importance, this debate is focused upon the balance between the autonomy that must exist for both the patient and the doctor in the medical relationship.⁶² That relationship is one of trust, where the patient relies upon the medical practitioner's advice and skill. While no doctor can perform a medical procedure on a patient without that patient's consent, patient autonomy does not extend to requiring that a doctor perform any treatment without the consent of the doctor. Stirrat and Gill propose that the model of autonomy in bioethics should be:

a principled version of patient autonomy that involves the provision of sufficient and understandable information and space for patients, who have the capacity to make a settled choice about medical interventions on themselves, to do so responsibly in a manner considerate to others.⁶³

Accordingly, even under the doctrine of full, informed consent, limits can be placed on patient autonomy.

Nevertheless, although the bioethics literature does not always hold that patient autonomy is the fundamental principle of medical ethics, the notion of patient autonomy still functions as a protection *against* intervention. Limits to patient autonomy will generally arise where a patient seeks a particular course of treatment and the relevant medical practitioner does not consent to provide that treatment. Respect for the autonomy of the doctor and the needs of the community will trump the individual patient's autonomy, for a doctor cannot be compelled to perform a procedure that, by way of example, he or she considers morally repugnant, would be detrimental to the rights of others, or would be an irresponsible use of scarce resources.⁶⁴ It is unlikely, however, that any restriction on patient autonomy from the active intervention of a medical practitioner or a

59 *Marion's Case* (1992) 175 CLR 218, 234 (Mason CJ, Dawson, Toohey and Gaudron JJ), citing *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, 93 (Cardozo J). See also *Hunter & New England Area Health Service v A* (2009) 74 NSWLR 88; *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84; Alec Buchanan, 'Mental Capacity, Legal Competence and Consent to Treatment' (2004) 97 *Journal of the Royal Society of Medicine* 415. But see Anne Flamme and Heidi Forster, 'Legal Limits: When Does Autonomy in Health Care Prevail?' in Michael D A Freeman and Andrew D E Lewis (eds), *Law and Medicine: Current Legal Issues* (Oxford University Press, 2000) vol 3, 141.

60 *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649, 662 (Lord Donaldson).

61 Cameron Stewart and Andrew Lynch, 'Undue Influence, Consent and Medical Treatment' (2003) 96 *Journal of the Royal Society of Medicine* 598, 599.

62 See, eg, Stirrat and Gill, above n 55.

63 *Ibid* 128.

64 *Ibid*.

third party that has the effect of compelling a patient to take or to not take a particular course of action, would be permitted. In this way, autonomy is a shield that will always defend the patient's supremacy over his or her own body and medical choices, but will not allow the patient to pierce the shield protecting the autonomy of the medical practitioner.

These issues are particularly complex in the realm of reproductive medicine, for arguments defending a patient's autonomy over her own body and treatment are more difficult to sustain when she is pregnant, and her decisions take on the dimension of directly affecting the body and health (and future expectation thereof) of her unborn child. A woman's autonomy as an obstetrics patient, for example, will not extend to compelling the obstetrician to perform a late-term abortion. There are two reasons for this limitation on autonomy: first, the conflict that would arise between the interests of the pregnant woman and the interests of the foetus; and second, the conflict that would arise between the interests of the pregnant woman and the medical practitioner. The latter conflict has already been discussed above, and the arguments that would be advanced are not substantially different in the domain of reproductive bioethics to those in bioethics more generally.

However, the former conflict raises a number of queries in relation to a woman's right to self-determine her reproductive medical choices. The question of whose autonomy reigns supreme is not limited to the competing interests of patients, doctors and others in the healthcare system, but also the interests of a future child. According to Australian law, a foetus does not itself hold rights or powers.⁶⁵ Rather, medical decisions are made by the mother. Even where threats to foetal rights are posed by its mother,⁶⁶ there is no true rights-based recourse to protect the child, because the law has struggled to reconcile the corporeal indivisibility of mother and baby.

It has been suggested that foetal legal rights should be recognised as a means to protect the interests of the potential child,⁶⁷ which might be considered to hold a legitimate expectation of separate legal personality and commensurate human rights. However, the currently recognised crystallisation of personhood at birth depends on the mother's decision to carry to term.⁶⁸ It thus seems counterintuitive that the expected live birth of the foetus *itself* gives rise to a prenatal expectation of future personhood capable of competition with that of the mother's pre-existing autonomy and right to self-determine. At such an impasse, the 'deciding vote' must surely be given to the party possessing not only capacity for decision-making and articulation thereof,⁶⁹ but also parental rights to consent on the

65 *Watt v Rama* [1972] VR 353.

66 Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Hart Publishing, 2002) 296–8.

67 See, eg, *ibid* 38 ff.

68 H Catarina M L Rodrigues, Paul P van den Berg and Marcus Düwell, 'Dotting the I's and Crossing the T's: Autonomy and/or Beneficence? The "Fetus as a Patient" in Maternal-Fetal Surgery' (2013) 39 *Journal of Medical Ethics* 219, 221–2.

69 See, eg, *Harriton v Stephens* (2004) 59 NSWLR 694.

child's behalf,⁷⁰ and indeed the practical choices of continuation of pregnancy and presentation of the foetus to medical professionals for care.⁷¹

As such, we might assume that a woman's medical autonomy, personal and physical liberty and right to consent (subject to restrictions such as those canvassed above) continues uninterrupted by pregnancy.⁷² However, such an assumption leads to the position that although it would seem, *prima facie*, less objectionable that a pregnant woman should refuse a medical procedure that would benefit her unborn child for reasons of religious conviction rather than a mere fear of needles, in theory either rationale would be acceptable to justify such a refusal.⁷³ This position is, to a certain degree, unsettled. However, certain limits on a pregnant woman's decision-making power do exist. Her rights do not, by way of example, extend to the right to demand a late-term abortion, as discussed above.⁷⁴

In summary, the principle of autonomy is one that is of great significance in medical law, both generally and in the reproductive space. The principle of respect for autonomy does not constitute an unqualified right to demand treatment from a medical professional or from a healthcare system that is responsible for responsibly allocating its resources. Neither does it constitute an unqualified power for a pregnant woman to make decisions which would materially adversely affect the health of her unborn child. However, what is clear from the bioethics discourse regarding the importance and scope of autonomy and from its silences, is that while limitations on autonomy do exist, they do not exist to enable the intervention of third parties who are not linked to a patient by virtue of the doctor-patient relationship or a direct and personal interest that will be materially affected by the decision being made.

Turning more specifically to the regulatory frameworks governing ART in Australia provides some assistance in further examining the question of whether reproductive autonomy is considered critical in Australia. State and federal legislative schemes all demonstrate a focus on respect for patient autonomy and the importance of consent. Victoria, New South Wales, South Australia and Western Australia are each governed by their own legislation dealing with assisted reproduction.⁷⁵ All other jurisdictions are governed by the national framework set down by the National Health and Medical Research Council Guidelines.⁷⁶ Although these regulatory frameworks vary slightly, the

70 Simon Cobb, 'The Treatment of a Child without Parental Consent' (2007) 15 *Australian Health Law Bulletin* 57.

71 Rodrigues, van den Berg and Düwell, above n 68, 220.

72 See Kelly E Maier, 'Pregnant Women: Fetal Containers or People with Rights?' (1989) 4 *Affilia* 8.

73 Anna Walsh, 'Can There Be a Positive Maternal Duty of Care to the Unborn in Australia?' (2010) 18 *Australian Health Law Bulletin* 22.

74 See, eg, Lachlan J de Crespigny and Julian Savulescu, 'Abortion: Time To Clarify Australia's Confusing Laws' (2004) 181 *Medical Journal of Australia* 201.

75 *Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Act 1988* (SA); *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA).

76 National Health and Medical Research Council, 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research' (Guidelines No E78, June 2007) ('*NHMRC Guidelines*').

consent provisions operating in each jurisdiction are substantially similar. Generally, consent should be in writing and clearly stipulate the details of ART procedures which may be performed on or using the gamete, including specifying time limits on storage.⁷⁷ This consent must be fully informed, may be modified or revoked at any time,⁷⁸ and must be given voluntarily, free from any influence or coercion.⁷⁹ These requirements mirror the aforementioned general common law standard of consent discussed above, and similarly reflect the important place consent and autonomy occupy in the medico-legal framework. Furthermore, both curial and academic analyses of the legal requirements for consent in ART treatment confirm that the consent of the gamete producer is the primary concern in determining whether the gametes may be either used in an ART procedure, stored or permitted to lapse.⁸⁰

Informed consent and protection of the medical autonomy of gamete producers, as patients undergoing ART procedures, can therefore be considered to be of significance in legal frameworks governing medical treatment. It follows that the principle of respect for medical and reproductive autonomy has been formally adopted in Australian medical law, albeit with certain limitations, which ensure the continued protection of the autonomy of medical practitioners in the doctor-patient relationship, and ensure that adequate protection for any unborn children is provided in matters of reproductive decision-making.

2 *Protections for Reproductive Autonomy under International Human Rights Law*

The principle of respect for reproductive autonomy has also been formally adopted under international human rights law. As a general rule, the international community considers individuals to be ‘autonomous agents who have the right to self-determination and to be fully responsible for their own decision-making’.⁸¹ More specifically, women’s reproductive freedom is protected by the

77 Ibid 37. See also *Assisted Reproductive Technology Act 2007* (NSW) ss 19, 25; *Assisted Reproductive Treatment Act 2008* (Vic) ss 10–11, 31; *Assisted Reproductive Treatment Regulations 2009* (Vic) sch 1.

78 See, eg, *Assisted Reproductive Technology Act 2007* (NSW) s 17(4); *Assisted Reproductive Treatment Act 2008* (Vic) s 20.

79 *NHMRC Guidelines*, above n 76, 44.

80 See, eg, *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231; *Re Floyd* [2011] QSC 218; Rebecca Collins, ‘Posthumous Reproduction and the Presumption against Consent in Cases of Death Caused by Sudden Trauma’ (2005) 30 *Journal of Medicine and Philosophy* 431; Belinda Bennett, ‘Posthumous Reproduction and the Meanings of Autonomy’ (1999) 23 *Melbourne University Law Review* 286.

81 Camille Sullivan, *Two’s Legal but Three’s a Crowd: Law, Morality and Three-Parent Embryos: Regulation of Mitochondrial Replacement Therapy* (LLB Thesis, Australian National University, 2013) 14.

interoperation of a range of treaties and other human rights instruments, which relevantly enshrine the rights to reproductive health and privacy.⁸²

(a) *Rights to Reproductive Health*

At international law, female reproductive autonomy ensures the freedom to self-determine one's procreation, and is directly protected by the right to reproductive health. Not a right merely to be 'healthy',⁸³ this right is construed broadly, although there has at times been dissent in the international community regarding the scope of the rights, freedoms and duties it encompasses.⁸⁴ It is generally considered to include, for example, the right to: marry and found a family;⁸⁵ health;⁸⁶ bodily integrity;⁸⁷ and family planning.⁸⁸ Often conceived as 'the capability to reproduce and the freedom to decide if, when and how often to do so',⁸⁹ the right to reproductive health has a wide remit, encompassing, inter alia, the prevention of unwanted pregnancy and the 'elimination of involuntary sterility and subfecundity'.⁹⁰

In particular, the right to family planning provides strong protection for reproductive autonomy. Recognised by the 1974 Bucharest World Population Conference as the right to decide upon the number and spacing of one's children,⁹¹ the right to family planning unambiguously promotes procreative liberty in protecting the power to decide when and if to have children.⁹² Such clear and powerful protection for reproductive autonomy in international human rights law, particularly the *Convention on the Elimination of All Forms of Discrimination against Women*, a treaty by which Australia has agreed to be bound, provides compelling evidence for the proposition that the Australian

82 See, eg, *UDHR*; *ICCPR*; *ICESCR*; *CEDAW*; *Programme of Action of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1, annex; *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20/Rev.1, annex I; *Report of the United Nations World Population Conference 1974*, UN Doc E/CONF.60/19 (30 August 1974) pt I, ch 1 ('*World Population Plan of Action*').

83 World Health Organisation, 'Health Population and Development' (Position Paper No WHO/FHE/94.1, 1994) 24 [89], endorsed domestically in Australian Medical Association, 'Sexual and Reproductive Health – 2014' (Position Statement, 17 July 2014).

84 Maja Kirilova Eriksson, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* (Kluwer Law International, 2000) 167.

85 *ICCPR* art 23.

86 *UDHR* art 25; *ICESCR* art 12; *CEDAW* art 12. See also *United Nations Economic and Social Council, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000).

87 *UDHR* art 3.

88 *CEDAW* art 12; *Final Act of the International Conference on Human Rights*, 25th plen mtg, UN Doc A/CONF.32/41 (13 May 1968) 14–5.

89 Rebecca J Cook and Bernard M Dickens, 'The Injustice of Unsafe Motherhood' in Belinda Bennett (ed), *Health, Rights and Globalisation* (Ashgate Publishing, 2006) 47, 58, quoting *Programme of Action of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1, annex.

90 *World Population Plan of Action*, UN Doc E/CONF.60/19, pt I, ch 1 [29(c)].

91 *World Population Plan of Action*, UN Doc E/CONF.60/19, pt I, ch 1.

92 *CEDAW* art 16(e).

community has formally adopted the principle of respect for reproductive autonomy as a governing principle.

(b) *Right to Privacy*

Protection for women's reproductive autonomy is strengthened further by the right to privacy. Guaranteed by all major global human rights treaties,⁹³ this right is also protected in Australia by domestic privacy law,⁹⁴ and has been acknowledged to be of 'fundamental value' to Australians.⁹⁵ It includes the right to private family life,⁹⁶ which is a broad term 'not susceptible to exhaustive definition'.⁹⁷ Personal autonomy and reproductive decisions fall within this private domain,⁹⁸ and so it follows that 'the right of the individual to choose on matters related to procreation is an inherent right in itself'.⁹⁹

As a general rule, any interference in the privacy or private life of an individual will infringe that individual's rights. However, the right to privacy is not absolute, and non-arbitrary interference by the state is permitted.¹⁰⁰ Non-arbitrariness is a high threshold, interpreted by the Human Rights Committee to mean that any interference with privacy must be proportional and necessary.¹⁰¹ By way of example, interference in an individual's privacy will generally only be acceptable where that intervention will prevent rights abuses such as forced sterilisation.¹⁰² According to that high standard, any intrusion of a non-state third party actor in an individual's privacy is effectively always impermissible.

As a result, in the matter of her pregnancy, a woman's rights of privacy prevail over all others – including the rights of the putative father to family planning.¹⁰³ Indeed, the courts will not permit a husband to assert a right even to be consulted about his wife's abortion, considering the infringement of the wife's privacy disproportionate and unnecessary.¹⁰⁴ Given that it is unreasonable to pierce the 'shield' of a woman's right to privacy, which protects her reproductive autonomy, to enforce a biological father's interest even to *know* her reproductive

93 See, eg, ICCPR art 17(1).

94 *Privacy Act 1988* (Cth) s 2A(h).

95 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 30–2, 35–6.

96 UDHR art 12; ICCPR art 17(1).

97 *X v The Netherlands* (1985) 91 Eur Court HR (ser A), [22]; *Bensaid v United Kingdom* [2001] I Eur Court HR 303, 320–1 [47].

98 *Van Kück v Germany* [2003] VII Eur Court HR 1, 22–3 [69]; *Pretty v United Kingdom* [2002] III Eur Court HR 155, 193 [61]. See also *Roe v Wade*, 410 US 113 (1973).

99 Eriksson, above n 84, 251. But see *A, B and C v Ireland* [2010] VI Eur Court HR 185, 255–6 [214].

100 Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy) – The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) [4].

101 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.3] ('*Toonen v Australia*').

102 Eriksson, above n 84, 252–9.

103 Rebecca J Cook and Mahmoud F Fathalla, 'Advancing Reproductive Rights beyond Cairo and Beijing' in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers, 2001) vol 3, 73, 86–7.

104 *Paton v United Kingdom* (1981) 3 EHRR 408.

decisions, it follows that any third party intervention in those decisions would be unlawful under international human rights law as an infringement of her privacy. The robust protection of these rights under international human rights law and concomitant acknowledgement of their significance in the domestic legislative framework supports the proposition that the principle of respect for reproductive autonomy, as a fundamentally private freedom held by each individual woman, has been formally adopted by the community.

B Contracts Prejudicial to the Principle of Reproductive Autonomy: The Argument against Conditional Egg Freezing Contracts

If the court were to accept these arguments and so recognise a new head of public policy which protects reproductive autonomy, it is arguable that a conditional egg freezing contract such as that which binds our Miller's Daughter *does* offend that principle of public policy. Analysis of such contracts from a labour feminist perspective demonstrates that within the employment context, the offer by an employer to pay for a female employee's oocyte cryopreservation subject to contractually-enforceable terms and conditions is normatively objectionable, for it is an inappropriate exercise of power over the reproductive choices of the female employee. It follows that such contracts formalise the infringement of the reproductive autonomy of employees such as the Miller's Daughter in a manner contrary to a public policy interest in respect for that autonomy.

In our liberal democratic society, autonomy is considered an important moral value in itself.¹⁰⁵ It entails the power to make choices and the agency to act on those choices, facilitating individual human dignity, integrity and independence.¹⁰⁶ Any unreasonable restriction on the autonomy, including the 'procreative liberty',¹⁰⁷ of an individual is therefore morally objectionable. It is particularly intolerable when it is perpetrated by that individual's employer, for the employment relationship is characterised by the employer's power to command and the employee's duty to obey,¹⁰⁸ and consequently authorises the former to restrict the autonomy of the latter. This is because the employment market favours employers,¹⁰⁹ who consequently enjoy a disproportionate degree of power over their employees.¹¹⁰

Recognition of this fundamental power imbalance forms the basis of the conceptual framework of labour law proposed by Kahn-Freund, who considered

105 Immanuel Kant, *Foundations of the Metaphysics of Morals* (Lewis White Beck trans, Macmillan, first published 1985, 1990 ed) 29–33 [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785) and *Beantwortung der Frage: Was ist Aufklärung?* (first published 1784)].

106 Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) 6.

107 Robertson, above n 67, 16.

108 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons, 3rd ed, 1983) 18.

109 Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 5.

110 See, eg, Jenifer Ross, 'Marginal Notes? Gender and the Contract of Employment' in Anne Morris and Thérèse O'Donnell (eds), *Feminist Perspectives on Employment Law* (Cavendish Publishing, 1999) 89, 89.

that 'the main object of labour law has always been, and [I] venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.¹¹¹

However, the traditional discourse of labour law, influenced heavily by Marxism and its 'proletariat versus bourgeoisie' paradigm,¹¹² tends to adopt a binary view of participants in the labour market, classing its participants as either 'workers' or 'employers' and assuming homogeneity of members within each group. In doing so, it operates on the presumption that all workers conform to an archetypal standard, the embodiment of which is 'biographically and empirically male ... with no domestic responsibilities'.¹¹³ Labour feminist scholars such as Conaghan argue that this approach, in ignoring the heterogeneity of workers, fails to deal with the disproportionate disadvantages faced by women,¹¹⁴ who have long been marginalised by structural barriers to accessing and exercising power in the workplace.¹¹⁵

Conaghan and her peers are correspondingly concerned with the legal regulation of the relationship between a woman and her employer,¹¹⁶ against a backdrop of pluralism which recognises female employees as atypical workers who are not uniformly atypical.¹¹⁷ For these women, the necessary function of the law is not to protect them from the tyranny of their employers: rather, it is to recognise their individual needs in employment and empower them to address those needs. If the law is to achieve this effect, its effective protection of employee autonomy is critical. As such, the law must constrain the inherent subordination (and concomitant restriction on personal autonomy) of the employee to within the reasonable domain of the workplace. Outside that domain, a woman's autonomy in her private life (including reproductive matters) should be beyond her employer's sphere of influence.¹¹⁸

Application of the framework to our hypothetical Miller's Daughter demonstrates that conditional egg freezing contracts frustrate the law's protection of personal autonomy and procreative liberty. The contract enables the Miller's Daughter's employer to assert control over her reproductive choices by

111 Davies and Freedland, above n 108, 18.

112 See Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) 302.

113 Joanne Conaghan, 'Feminism and Labour Law: Contesting the Terrain' in Anne Morris and Thérèse O'Donnell (eds), *Feminist Perspectives on Employment Law* (Cavendish Publishing, 1999) 13, 26.

114 Ibid 22–6.

115 Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book, 1994) 238.

116 Anne Morris and Thérèse O'Donnell, 'Employment Law and Feminism' in Anne Morris and Thérèse O'Donnell (eds), *Feminist Perspectives on Employment Law* (Cavendish Publishing, 1999) 1, 3.

117 See, eg, Linda Dickens, *Whose Flexibility? Discrimination and Equality Issues in Atypical Work* (Institute of Employment Rights, 1992).

118 It should be remembered that the distinction between the public and the private is problematic in feminist theory, and it is difficult (if not entirely fallacious) to truly delineate the two: see, eg, Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1. However, for the purposes of this article, the term 'private life' is useful in order to draw boundaries regarding which aspects of an individual's life may reasonably be influenced by that individual's employer, and which may not.

restricting access to her frozen reproductive material. It follows, therefore, that although the availability of elective oocyte cryopreservation appears to represent a power shift in favour of the Miller's Daughter – and certainly usage of the terminology of 'fringe benefits' and 'perks' suggest this is so – such a perspective is so optimistic as to be rose-tinted. It fails to consider the fact that in providing ART treatment to the Miller's Daughter subject to contractually-enforceable conditions, her employer would ultimately be exercising influence over her reproductive decision-making, compelling her to make reproductive choices that conform to the terms of the contract. In doing so, her employer is reaching beyond the public, employment-related domain into the private, personal realm of procreation and family life. As such, the conditional egg freezing contract binding the Miller's Daughter is an infringement upon her reproductive autonomy that should be declared void as against the newly-recognised head of public policy in respect for reproductive autonomy.

C Reconciling Protection and Paternalism: Can One Choose to Give Up a Future Choice?

Should the hypothetical case of our Miller's Daughter come before the courts, and the foregoing arguments be made in favour of setting aside the conditional egg freezing contract, the counterargument might be raised that the Miller's Daughter's entry into the contract constituted a voluntary waiver of her right to reproductive autonomy. It is therefore possible that a court would consider the abrogation of the Miller's Daughter's reproductive autonomy to be merely an agreed-to feature of the bargain she has made with her employer. If this is so, the court might enforce the otherwise technically sound contract, for it may consider any intervention to be unduly paternalistic judicial interference in a privately concluded contract between two parties.

Generally, the law will allow competent individuals to engage in conduct which carries risk, as long as they give their voluntary and informed consent.¹¹⁹ This is especially true of contract law, which at its core is the legal expression of a 'bargain struck'.¹²⁰ It is traditionally predicated upon the notion that parties are free to agree to be bound by whichever terms they choose,¹²¹ and is fundamentally governed by the principle that a promise freely made should be performed.¹²² Any declaration of contract illegality for public policy reasons might therefore be considered improper judicial intervention, infringing upon the

119 Lori B Andrews, 'Surrogate Motherhood: The Challenge for Feminists' in D Kelly Weisberg (ed), *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work, and Reproduction* (Temple University Press, 1996) 1092, 1096.

120 *Beaton v McDivitt* (1987) 13 NSWLR 162, 168 (Kirby P).

121 Cf P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 687.

122 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. But see *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 118 CLR 418, 447 (Toohey, Gaudron and Gummow JJ), providing that freedom of contract is not absolute.

agency of the Miller's Daughter to make any legally enforceable promise she so desires.¹²³

Indeed, such judicial intervention might fail to recognise pluralism among women. Not all women perceive their circumstances in terms of vulnerability and domination:¹²⁴ some may consider oocyte cryopreservation agreements, even those which include restrictive clauses on the future uses of frozen reproductive materials, advantageous when overcoming barriers on the career ladder.¹²⁵ Indeed, an individual woman's decision to sign such a contract might be considered a positive expression of female autonomy and reproductive self-determination. If so, surely a feminist would argue that her decision should be given the force of law. To do else but enforce the freedom of an individual woman to make her own choice to enter into an agreement with her employer that will assist her to overcome systemic barriers to workforce participation seems, surely, to run counter to the goal of advancing women. It certainly flies in the face of current prevailing 'post-feminist' wisdom espoused by choice feminists and neoliberal feminists.¹²⁶ These schools suggest that in a society characterised by gender-based inequality (assuming that this condition is met in almost all cultures across the world), the success and freedom of choice of the individual woman is just as important to the cause of feminism as is the dismantling of existing social structures that reinforce gender inequality.¹²⁷ In theory, the success of any one woman – particularly her promotion and presence on corporate boards and in executive leadership teams – has a 'trickle-down' effect that drives gender equality. As a critical mass of women reach senior levels, presumably bringing more women with them, society gradually becomes accustomed to women in roles traditionally associated with male privilege: ultimately resulting in gains in equality.¹²⁸

However, this approach to the feminist cause has been criticised for its failure to look beyond the efforts made by the individual woman to hurdle the obstacles of the hidden gender of the traditional workplace.¹²⁹ Ultimately, the neoliberal feminist cause does not account for intersectionality, and the dominant voice that is heard in its discourse is one of privilege. The neoliberal feminist is a woman capable of self-responsibility and self-determination, usually assisted to be so by virtue of social advantage, such as education, wealth or race, and whose goal is to

123 Cf *A v Hayden* [No 2] (1984) 156 CLR 532, 559 (Mason J), noting that 'the refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of the subordination of private right to public interest'.

124 Deborah L Rhode, 'Feminist Critical Legal Theories' (1990) 42 *Stanford Law Review* 617, 624.

125 See, eg, Norma Juliet Wikler, 'Society's Response to the New Reproductive Technologies: The Feminist Perspective' in D Kelly Weisberg (ed), *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work, and Reproduction* (Temple University Press, 1996) 1080, 1085.

126 See, eg, Angela McRobbie, 'Post-Feminism and Popular Culture' (2004) 4 *Feminist Media Studies* 255; Michael L Ferguson, 'Choice Feminism and the Fear of Politics' (2010) 8 *Perspectives on Politics* 247.

127 Catherine Rottenberg, 'The Rise of Neoliberal Feminism' (2014) 28 *Cultural Studies* 418.

128 Ibid, 425–6, discussing Sheryl Sandberg, *Lean In: Women, Work and the Will To Lead* (Alfred A Knopf, 2013) 7.

129 See, eg, Rottenberg, above n 127; McRobbie, above n 126; Nancy Fraser, 'Feminism, Capitalism and the Cunning of History' (2009) 56 *New Left Review* 97.

strive for representation at the boardroom table. Her goal is laser-focused on the surmounting of professional gender inequalities by the individual, and the debate rarely considers women who will never have access even to the bottom rung of the career ladder. As such, the approach is considered to fail to provide a truly effective path to 'collective solutions to [the] historic injustices' of gender inequality.¹³⁰

It is against this prevailing post-feminist background that discussion of the importance of the individual choice of the empowered, independent woman takes place. However, choices and desires are not formed in a vacuum, but are informed by the social context in which that choice is made. As the neoliberal woman is encouraged to make the choice to 'lean in',¹³¹ she is less likely to consider whether she might prefer instead to 'lean out' or to 'lean sideways'. Several critics have argued that the language of choice feminism, which speaks of 'girl power' and 'taking charge' has created 'choice' as a requirement that women self-manage their decision-making through an individualist lens that does not consider the inequalities that limit those choices.¹³² Instead, 'choice is configured as a new mode of disciplinary power through which traditional femininity and sex-gender roles are re-chosen'.¹³³

Consequently, it is a fallacy to suggest that a law, regulation or policy is 'anti-feminist' merely because it might prejudice the interests of a single woman or modify in some way her capacity to make a choice. The interests, desires and choices of every woman have long suffered prejudice and been affected by externally-imposed social mores as a result of the subordination of the female gender. Policies that attempt to address the social structures that continue to give rise to the privileging of male interests over female interests should correspondingly not be considered contrary to the feminist cause merely because they may impact on the immediate interests or choices of an individual.

In addition, the argument that the Miller's Daughter should have the freedom to enter into any agreement she perceives as professionally beneficial, even if that means the limitation of some of her rights, assumes that she has capacity to give voluntary, informed consent to the surrender of all or part of her reproductive autonomy, in exchange for financial assistance in accessing ART treatment. It is not clear that such consent is possible within the confines of an employment context characterised by Kahn-Freund's power imbalance. Employees are continually exposed to workplace pressures, which are exerted subtly by the structural organisation of labour institutions and which inherently promulgate employer dominance in the workplace. As a result, an implicit element of compulsion is present in the Miller's Daughter's dealings with her

130 Rottenberg, above n 127, 428.

131 Sandberg, above n 128.

132 Kinneret Lahad, 'The Single Woman's Choice as a Zero Sum Game' (2014) 28 *Cultural Studies*, 240, 241.

133 Ibid 248.

employer, which results in a ‘coerced voluntariness’¹³⁴ that arguably vitiates her ability to freely consent to contract out of her reproductive freedoms.

Furthermore, the law generally regards the voluntary surrender of rights with suspicion. The High Court has ruled that where it is in the public interest that individuals retain their rights, such rights cannot be ‘bargained away’.¹³⁵ Even under international law, which *does* allow the waiver of rights,¹³⁶ international courts of arbitration are reluctant to uphold such waivers.¹³⁷ Under international human rights law, the mere fact that the restriction of an individual’s rights is voluntary or confers some benefit upon them is insufficient to render that restriction lawful.¹³⁸ Rather, waiver of rights is valid only in exceptional circumstances which require, inter alia, that the waiving party be free from pressure or constraint,¹³⁹ and not in a position of specific vulnerability.¹⁴⁰ This is a high standard, which is especially difficult to meet in cases where the waiving party is an employee of the party benefiting from the waiver, or is otherwise in the benefiting party’s power.¹⁴¹ As a result, it is doubtful that the Miller’s Daughter’s entry into a conditional egg freezing contract with her employer would constitute a valid waiver of her reproductive autonomy under international law.

Any argument based upon a waiver or voluntary abrogation of reproductive autonomy by the Miller’s Daughter should not, therefore, preclude the court from exercising its discretion to refuse to enforce her conditional egg freezing contract on the grounds that it is prejudicial to a public policy principle in respect of reproductive autonomy. If the court were to take this approach, the practical consequence of such a declaration would be that the Miller’s Daughter, restricted by a contract that requires her to satisfy a condition prior to accessing her eggs, as broadly contemplated by Scenario 1 in Part I, would not be compelled by law to satisfy that condition, as the workplace would be enjoined from enforcing the contract through, for example, specific performance.

134 Kathryn Pauly Morgan, ‘Women and the Knife: Cosmetic Surgery and the Colonization of Women’s Bodies’ in Susan Sherwin and Barbara Parish, *Women, Medicine, Ethics and the Law* (Ashgate Publishing, 2002) 343, 356.

135 *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 145 (French CJ, Crennan, Kiefel and Bell JJ).

136 See, eg, Rebecca J Cook, Bernard M Dickens and Mahmoud F Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford University Press, 2003) 157; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2nd ed, 2014) 493–4, 497–8.

137 But see Olivier De Schutter, ‘Waiver of Rights and State Paternalism under the European Convention of Human Rights’ (2000) 51 *Northern Ireland Legal Quarterly* 481.

138 *Pfeifer and Plankl v Austria* (1992) 227-A Eur Court HR (Ser A).

139 *Pretty v United Kingdom* [2002] III Eur Court HR 155, 196 [72]. See also *Deweere v Belgium* (1980) 35 Eur Court HR (Ser A); *Madsen v Denmark* (2003) 36 EHRR CD61; *Wretlund v Sweden* (2004) 39 EHRR SE5; *Wilson v United Kingdom* [2002] V Eur Court HR 49.

140 *DH v Czech Republic* [2007] IV Eur Court HR 241.

141 See especially *Deweere v Belgium* (1980) 35 Eur Court HR (Ser A).

IV 'ALL ANIMALS ARE EQUAL, BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS':¹⁴² THE GOVERNING PRINCIPLE OF GENDER EQUALITY

The Miller's Daughter may also be able to argue that a second new head of public policy protecting gender equality should be recognised, and if so, that this head is infringed not only by a conditional egg freezing contract such as that proposed in Scenario 1 in Part I above, but also by *any* employer-sponsored egg freezing agreement, including the 'gift' arrangement proposed in Scenario 2. This Part first argues that the Australian community has formally adopted the governing principle of gender equality. In doing so, it initially considers the legislative framework which governs the Australian workplace, arguing that its objects provide evidence of the community's commitment to advancing equality between the sexes. It then looks to instruments of international human rights law to which Australia is a party, finding evidence for the adoption of this principle in prohibitions against gender-based discrimination and formal goals set for the achievement of gender equality. As a result, this Part posits that evidence drawn from both domestic and international legal norms justifies the judicial recognition of a head of public policy founded upon the governing principle of gender equality.

On the basis that the court accepts this argument and recognises gender equality as a head of public policy, the Part then considers whether this new head would be contravened by the mere offer by an employer to finance oocyte cryopreservation through an unrestricted grant, encouraging female employees like our Miller's Daughter to delay childbearing. A labour feminist evaluation of such offers reveals that they would inherently disadvantage women as a group, and threaten the advancement of workplace gender equality. As such, any contract arising from offers for employer-sponsored oocyte cryopreservation should be regarded with suspicion by the court, to whom it would be open to declare the contract void as against public policy. If a court in its discretion were to make that declaration, finding that an employer-sponsored egg freezing arrangement breached a head of public policy protecting gender equality, any contract providing for that arrangement would be rendered void.

A Recognition of Gender Equality as a Governing Principle of the Australian Community

1 Protection from Sex Discrimination and Promotion of Workplace Gender Equality under Domestic Australian Law

The legal adoption of the governing principle of workplace gender equality by the Australian community is reflected most clearly in the objects of the statute which prohibits gender-based discrimination and legislates for affirmative action

¹⁴² George Orwell, *Animal Farm: A Fairy Story* (Penguin Books, first published 1945, 2000 ed) 97.

policies in the workplace.¹⁴³ Relevantly, the objects of the *Sex Discrimination Act* are, inter alia:

- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex...; and ...
- (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.¹⁴⁴

These objects are echoed in state and territory legislation,¹⁴⁵ and are supported by a range of substantive prohibitions.¹⁴⁶ As Gray J has noted, these provisions are designed ‘for the purpose of achieving substantive [gender] equality’.¹⁴⁷ Furthermore, they include criminal prohibitions along with the civil offences.¹⁴⁸ Arguably, this indicates that the objects expressed in the law (to wit: gender equality and non-discrimination) are considered by the legislature to be such fundamental community principles that their frustration justifies the imposition of criminal sanctions.

Similar objects are found in the *Workplace Gender Equality Act*, which relevantly seeks:

- (a) to promote and improve gender equality ... in the workplace; and
- (b) to support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the disadvantaged position of women in relation to employment matters; and
- (c) to promote, amongst employers, the elimination of discrimination on the basis of gender ...¹⁴⁹

To these ends, the *Workplace Gender Equality Act* promotes ‘women’s full and equal participation’¹⁵⁰ by imposing a positive duty upon employers to implement affirmative action initiatives geared at eliminating structural barriers and inequality faced by women in the workplace.¹⁵¹

Both the *Sex Discrimination Act* and the *Workplace Gender Equality Act* explicitly state that a primary object of the legislature in enacting each law is to advance gender equality in Australia. Correspondingly, they provide relevant mechanisms in their substantive provisions which seek to achieve this goal in

143 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 28 October 2010, 1074 (Kate Lundy).

144 *Sex Discrimination Act 1984* (Cth) s 3.

145 See *Fair Work Act 2009* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

146 But see Beth Gaze, ‘The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 107, critically evaluating practical limitations of implementing the Act.

147 *Walker v Cormack* (2011) 196 FCR 574, 583.

148 *Sex Discrimination Act 1984* (Cth) pt IV.

149 *Workplace Gender Equality Act 2012* (Cth) s 2A.

150 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2012, 2442 (Julie Collins).

151 Minister for Employment (Cth), *Workplace Gender Equality (Minimum Standards) Instrument 2014*, F2014L00365, 26 March 2014. See also Chris Ronalds, *Affirmative Action and Sex Discrimination* (Pluto Press, 2nd ed, 1991) 12–13, cited in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 156–7.

practice. As such, this article posits that the enactment of these statutes by the Commonwealth Parliament, in conjunction with counterpart legislation in the states and territories, unmistakeably indicates a formal adoption of the principle of gender equality as a governing principle of the Australian community, and demonstrates that the realisation of full and substantial gender equality is a critical goal for our nation.

2 *Protection of Gender Equality under International Human Rights Law*

Evidence for Australia's adoption of the principle of gender equality as one which governs the community is also found in its ratification of and action upon norms of international human rights law.¹⁵² At international law, the 'improvement of [women's] political, social, economic and health status is an important end in itself',¹⁵³ and gender equality is considered an essential value of the global community.¹⁵⁴ As such, one of only eight Millennium Development Goals adopted by the United Nations General Assembly in 2000 is to '*promote gender equality and empower women*'.¹⁵⁵ In an effort to achieve this goal, international law enshrines both general protection for gender equality in the right of all people to non-discrimination based on sex,¹⁵⁶ and specific protection for gender equality in the workplace.¹⁵⁷ Relevantly, it provides that the 'biological role of women in the reproduction process should in no way be used as a reason for limiting women's right to work'¹⁵⁸ and that male and female workers should be given equal opportunity, notwithstanding their maternity or family responsibilities.¹⁵⁹ It follows that international law does not tolerate gender-based inequity, particularly in the workplace.

152 See, eg, *UDHR* art 2; *Charter of the United Nations* art 1(3); *Equal Remuneration Convention*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953) ('*ILO Convention 110*'); *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) ('*ILO Convention 111*'); *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983) ('*ILO Convention 156*'); *Convention Concerning the Revision of the Maternity Protection Convention (Revised)*, opened for signature 15 June 2000, 2181 UNTS 253 (entered into force 7 February 2002) ('*ILO Convention 183*').

153 *Programme of Action of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1, annex [4.1].

154 *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th sess, 8th plen mtg, Agenda Item 60(b), UN Doc A/RES/55/2 (18 September 2000) 2.

155 *Road Map towards the Implementation of the United Nations Millennium Declaration – Report of the Secretary General*, UN GAOR, 56th sess, Agenda Item 40, UN Doc A/56/326 (6 September 2001) annex ('*Millennium Development Goals*') 56 (emphasis added).

156 See, eg, *CEDAW*.

157 *ILO Convention 110*; *ILO Convention 111*; *ILO Convention 156*; *ILO Convention 183*.

158 *Report of the International Conference on Population*, 1984, UN Doc E/CONF.76/19 (14 September 1984, adopted August 1984) 17 ('*Mexico Conference*').

159 *ILO Convention 156*. See also *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, UN Doc A/CONF.116/28/Rev.1 (26 July 1985) 19 [54] ('*Nairobi Conference*').

As part of the broader global community, Australia regards gender equality as similarly significant. Australia is an active member of the Commission on the Status of Women,¹⁶⁰ is party to all relevant treaties and other international instruments which protect and promote the realisation of gender equality,¹⁶¹ and has incorporated these principles into domestic law.¹⁶² In addition, both government and independent authorities have emphasised that the achievement of gender equality is a priority for Australia in its domestic and foreign affairs policy agendas. For example, the Minister Assisting the Prime Minister for Women has stated that Australia is ‘unwavering in our commitment to the empowerment of women and girls’,¹⁶³ and the Australian Sex Discrimination Commissioner has noted the commitment of the Australian community to realising gender equality and promoting the Women’s Empowerment Principles.¹⁶⁴ Indeed, Australia’s commitment to gender equality is such that in 2011 the government created the role of ‘Ambassador for Women and Girls’,¹⁶⁵ a decision endorsed by Parliament as reflective of Australia’s ‘deep commitment to gender equality’.¹⁶⁶

As a consequence, this article argues that Australia’s formal adoption of the governing principle of gender equality is easily visible in both Australia’s anti-discrimination framework and in our nation’s participation in the international discourse and action in promoting women’s rights. It therefore contends that the principle of gender equality should be judicially recognised as a head of public policy, and that any contracts which impugn the advancement of gender equality in Australia should enliven the discretion of the court to refuse to enforce the contract as prejudicial to that goal.

160 See Department of the Prime Minister and Cabinet, ‘Report of the Australian Government Delegation to the 58th Session of the United Nations Commission on the Status of Women’ (Report, 2014); Michaelia Cash, ‘Australian National Statement’ (Speech delivered to the 58th session of the United Nations Commission on the Status of Women, New York, 11 March 2014) <<https://ministers.dpmc.gov.au/cash/2014/fifty-eighth-session-united-nations-commission-status-women>>.

161 See, eg, *CEDAW*; *Millennium Development Goals*.

162 *Sex Discrimination Act 1984* (Cth) s 3(a).

163 Commonwealth, *Parliamentary Debates*, Senate, 14 May 2015, 3205 (Marise Ann Payne, Minister for Human Services, quoting Michaelia Cash).

164 Elizabeth Broderick, ‘Equality Means Business: Advancing Gender Equality through Corporate Leadership’ (Speech delivered at the Women’s Empowerment Principles Summit, Sydney, 1 October 2014) <<https://www.humanrights.gov.au/news/speeches/equality-means-business-advancing-gender-equality-through-corporate-leadership>>; Elizabeth Broderick, ‘Towards a Gender Equal Australia’ (Speech delivered at the Big Ideas under the Dome Lecture, State Library of Victoria, 18 November 2014) <<https://www.humanrights.gov.au/news/speeches/towards-gender-equal-australia>>.

165 Phil Lynch, ‘Australia Appoints First Ambassador for Women and Girls’ (2011) 36 *Alternative Law Journal* 280.

166 Commonwealth, *Parliamentary Debates*, Senate, 24 March 2014, 1835 (Scott Michael Ryan quoting Michaelia Cash).

B Agreements Prejudicial to the Principle of Gender Equality: The Case against Employer-Sponsored Deferral of Fertility for Working Women

This article argues that if this head of public policy in gender equality were to be recognised, it would be affronted by an offer of oocyte cryopreservation as a fringe benefit. Although *prima facie* highly encouraging for women, offering greater choice in their lives than ever before, such offers pose serious questions about the social role of women and their equal treatment in the workplace when scrutinised from a critical labour feminist perspective.

Employer-sponsored fertility deferral is a workplace practice which should be evaluated within the social context in which it is offered. This context is one of inequality between men and women, which is perpetuated through legal and social structures that lead to the disadvantage of women in the labour market.¹⁶⁷ Workplace gender inequality is rife in Australia: women's labour force participation is significantly lower than men's;¹⁶⁸ the 'gender pay gap' stands at 17.3 per cent,¹⁶⁹ even as women attain higher educational qualifications;¹⁷⁰ and, of the chief executives of the top 200 companies listed on the Australian Stock Exchange, fewer are women than are named Peter.¹⁷¹ For labour feminist lawyers, it is common ground that this undervaluation of women's contribution to the workforce and corresponding disempowerment in the workplace is unacceptable. As such, any workplace initiatives that may exacerbate gender inequality are normatively objectionable. This section argues that employer-sponsored oocyte cryopreservation is just such an initiative, and correspondingly that any egg freezing contracts which arise from this practice should not be given the force of law.

1 Workers or Mothers: The Message to Women Regarding the Female Social Role

According to the sales pitch presented by Apple and Facebook, employer-sponsored egg freezing (with or without conditions attached) empowers working women. In this story, the Miller's Daughter has the choice to delay pregnancy and childbearing in order to follow the famous advice of Sheryl Sandberg, Facebook's Chief Operating Officer, and 'lean in' to her career.¹⁷² Arguably, enabling the Miller's Daughter to exercise greater choice in her working life must be a positive development in the eyes of the feminist. However, when assessed in

167 Laura Bennett, above n 115, 238.

168 Australian Bureau of Statistics, 'Gender Indicators, Australia' (Issue No 4125.0, 24 February 2015).

169 Workplace Gender Equality Agency, 'Gender Pay Gap Statistics' (Factsheet, March 2016) 2.

170 Australian Bureau of Statistics, 'Women and Men in Australia: How Are They Faring?' (Media Release No 23/2015, 24 February 2015).

171 Peter Martin, 'Why Are There So Few Female Chief Executives? Why Are So Many CEOs Named Peter?', *The Sydney Morning Herald* (online), 8 March 2015 <<http://www.smh.com.au/federal-politics/political-opinion/why-are-there-so-few-female-chief-executives-why-are-so-many-ceos-named-peter-20150307-13xamk.html>>.

172 Sandberg, above n 128.

light of a feminist framework that exposes a patriarchal hegemony, these offers can also be seen to be tools of oppression rather than empowerment.

Conaghan argues that workplace gender inequality is a result of the institutionalisation of workplace structures which value the ideal of 'the homogenous [male] worker'.¹⁷³ These structures exist to serve both him and his master, and are correspondingly ill-equipped to deal with any divergence of the worker's identity from that of the full-time, non-flexibly-working male to which they are accustomed.¹⁷⁴ In this context, the offer of elective egg freezing is not a solution, but merely the medicalisation of the social problem of structural workplace inequalities that inherently marginalise women.¹⁷⁵

Oocyte cryopreservation, in delaying the problem female fertility and pregnancy poses for employers whose interests are in maximising the productivity of their employees, is a new and sophisticated way to compel women to conform to the dominant male norms of the workplace, encouraging full female participation only when their natural reproductive functions are suppressed. This has happened before: female workplace participation skyrocketed following the advance of the contraceptive pill. However, the pill's suppression of female biology has merely enabled women to fit in to a workplace designed for men, and that workplace has correspondingly not had to adapt.¹⁷⁶ As Almeling, Radin and Richardson note, 'the structural organisation of work has proved more inflexible than women's ovaries'.¹⁷⁷

The message this sends to working women undermines the notion of workplace gender equality. In instituting pay-for-fertility-delay initiatives such as elective egg freezing, employers are sending the message to their female employees that women's concurrent participation in professional and family life is undesirable. This message is not unfamiliar: Pocock notes that childbearing women are put straight on the 'mummy track'.¹⁷⁸ As Williams observes, a woman is able to 'break through the glass ceiling'¹⁷⁹ to succeed at work *only* if she functions as the perfect worker according to a male-oriented standard of evaluation – that is to say, if she behaves like a man. However, this success comes to an abrupt stop when she becomes a mother, if she suddenly is unable to conform to the dominant masculine ideal and hits the 'maternal wall'.¹⁸⁰

173 Conaghan, above n 113, 21.

174 Ibid 27.

175 W Dondorp et al, 'Oocyte Cryopreservation for Age-Related Fertility Loss' (2012) 27 *Human Reproduction* 1231, 1234.

176 Rene Almeling, Joanna Radin and Sarah S Richardson, 'Egg-Freezing a Better Deal for Companies than for Women', *CNN* (online), 20 October 2014 <<http://edition.cnn.com/2014/10/20/opinion/almeling-radin-richardson-egg-freezing/>>.

177 Ibid.

178 Barbara Pocock, *The Work/Life Collision: What Work Is Doing to Australians and What To Do about It* (Federation Press, 2003) 146–8.

179 Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do about It* (Oxford University Press, 2000) 68–9.

180 Ibid 69–72; Joan C Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 92–3.

According to this framework, the ‘choice’ of employer sponsored egg freezing does not empower women – it merely encourages them to undergo invasive medical treatment to delay childbearing in order to better conform to the masculine workplace ideal. The offer insinuates that career advancement is possible only if women ‘choose’ not to reproduce, a message which directly contravenes the principle that women’s reproductive function and family responsibilities should not limit their right to work. Far from advancing gender equality and promoting the coexistence of work and family, the employer’s offer is merely the purchase of the undivided attention of its employee for the price of ART cryopreservation and storage. The implication is that if a woman wants to be a mother, perhaps the workplace is not the ideal place for her.

2 *My Employer Wants to Control My Ovaries, But Not the Testes of My Colleagues: The Problem of Gender-Specific Workplace Initiatives*

In addition to sending the message to women that motherhood and a career are mutually exclusive, an employer’s offer of oocyte cryopreservation is a policy that undermines procedural and substantive gender equality by treating female employees differently to male employees based on characteristics associated with their sex.

In doing so, these offers disempower women as a collective. First, the very offer of oocyte cryopreservation without a counterpart offer for freezing sperm, even though evidence suggests that men too have ‘biological clocks’ and suffer similar declines in fertility to women, albeit over a greater period of time,¹⁸¹ is a procedural distinction between men and women. This in itself is not necessarily morally problematic; indeed, providing women with workplace facilities to breastfeed or express milk is not discriminatory in the absence of similar facilities for men. What is problematic, however, is that the reason behind the disparity is that male reproduction is not considered a labour risk.

Employers are simply not interested in controlling the private reproductive lives of their male employees, because those employees already fit the standard of the ‘ideal worker’. Expectant fathers are supported in their dual role as workers and parents by existing social structures. As a result, their productivity is perceived to be less adversely affected by procreation than expectant mothers, who are disproportionately impacted by pregnancy and childbirth,¹⁸² who shoulder a far greater proportion of the unremunerated reproductive labour burden, such as caring for dependent children,¹⁸³ and who are not supported by social structures in the way men are. The substantive effect of this difference in the formal management of male and female employees is that employers are able to influence the reproductive choices of the women in their employ, for the

181 Ewen Callaway, ‘Fathers Bequeath More Mutations as They Age’ (2012) 488 *Nature* 439.

182 Katharine K Baker, ‘Biology for Feminists’ (2000) 75 *Chicago-Kent Law Review* 805, 808.

183 Caroline Lambert, ‘Reproducing Discrimination: Promoting the Equal Sharing of Caring Work in CEDAW, at the ILO and in the SDA’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 153, 158–60.

purpose of optimising their work performance within the dominant 'standard male model'.

Analysis of offers for employer-sponsored oocyte cryopreservation in light of Kahn-Freund's theory of the unbalanced power distribution inherent in the employment relationship reveals that the offer made to the Miller's Daughter is a 'command under the guise of an agreement',¹⁸⁴ for it is accompanied by an implied directive by the employer: that uptake of the offer is desirable from a productivity standpoint.¹⁸⁵ Although subtle and couched in terms that imply the conferral of choice and/or benefit, it is nevertheless an exercise of power over her reproductive decision-making.¹⁸⁶ No such exertion of influence is contemplated over the Miller's Daughter's male peers. Consequently, the offer could be considered a subtle form of workplace discrimination, as the employer is demonstrably treating the Miller's Daughter differently to a Miller's Son in the same position. In light of a history of reproduction in which the law has had little regard for female autonomy,¹⁸⁷ assuming women's self-abnegation to be a necessary corollary of pregnancy and maternity,¹⁸⁸ such an attempt to influence the private reproductive lives of women is cause for serious concern – particularly as no similar attempt is made to influence men.

Offers by employers to finance elective egg freezing, such as that accepted by our Miller's Daughter, are a gendered initiative that not only sends the message to women that their wombs are not welcome at work, but results in substantively different, disadvantageous treatment of one class of workers, based on sex. As such, any contract arising from such an offer should be declared void as against the head of public policy in gender equality.

Should the court exercise its discretionary power to make such a declaration, the practical outcome for the Miller's Daughter in either Scenario 1 or Scenario 2 would be quite different. As discussed in Part III, should the interests of a woman be directly prejudiced by a restrictive term or condition in an oocyte-cryopreservation agreement, a declaration of that agreement as void and unenforceable would result in material protection for her and for any future woman who had been subject to an agreement imposing mandatory requirements on her as part of arrangement in which her employer sponsored an egg freezing procedure. However, the impact of a declaration that an agreement is void as against public policy would be of little pragmatic use. Ultimately, it is not the interests of an individual woman that would be adversely affected, but of women as a collective; and it is not the role of the courts to adjudicate on what is best for society in general, where there is no readily discernable past or imminent harm or

184 O Kahn-Freund, 'Introduction' in Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge & Kegan Paul, 1949) 1, 28.

185 Davies and Freedland, above n 108, 35.

186 See Michel Foucault, 'The Political Technology of Individuals' in Luther H Martin, Huck Gutman and Patrick H Hutton (eds), *Technologies of the Self: A Seminar with Michel Foucault* (University of Massachusetts Press, 1988) 145.

187 Ruth Deech and Anna Smajdor, *From IVF to Immortality: Controversy in the Era of Reproductive Technology* (Oxford University Press, 2007) 91.

188 Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001) 3.

dispute to resolve – particularly in a matter such as this, governed by contract law and so expressly excluding the interests of the many through the privity rules. Rather, this is a matter for the legislature.

Consequently, it is only a woman in Scenario 1 who will be able to find protection through a court's contemplation of the contractual doctrine of public policy. However, the arguments made in this Part IV suggest that even in the absence of any harm actionable in a court, Australia should carefully consider whether the law's current silence on these issues remains desirable. The social implications of employer-sponsored egg freezing for women are complex, and rather than bestowing choice on women, reinforce their status as problematic employees as a result of their reproductive function. Although in practice, the solution is unlikely to be found in a court challenge to the validity of an egg freezing agreement, a legal or regulatory solution is likely to be needed as the practice of employer-sponsored oocyte cryopreservation becomes common practice.

V CONCLUSION

This article has advanced arguments regarding the public policy implications of the elective use of fertility-delaying ART techniques, specifically egg freezing, by working women in order to focus on their career progression. It has focused upon the advance of employers paying for female employees to access oocyte cryopreservation in two scenarios: first, where their financial sponsorship of this treatment is provided subject to contract; and secondly where that sponsorship is granted without restriction. This advance in ART has the potential to dramatically alter women's experience of and participation in work, and in so doing to materially affect the gender landscape of Australia.

The medical technology has arrived, but the law regulating it has thus far failed to crystallise: as Windeyer J famously remarked, the law 'march[es] with medicine but in the rear and limping a little'.¹⁸⁹ It has been the argument of this article that in attempting to catch up with advances in ART, the law should be developed with an eye to public policy issues – and that with regard to employer-sponsored oocyte cryopreservation contracts, the public policy indicia suggests that the court ought to exercise its discretion to refuse to enforce such contracts.

First, this article argued that in the absence of legislative regulation of egg freezing in the workplace, it is both relevant and necessary to evaluate employer-sponsored oocyte cryopreservation contracts through the lens of the common law doctrine of public policy. It then explained the mechanics of this doctrine, and justified the use of both domestic and international legal norms in its development by the judiciary.

Second, the article posited that two new heads of public policy should be judicially recognised: respect for reproductive autonomy and gender equality. It

189 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395.

found substantial support for the Australian community's formal adoption of these values as governing principles in domestic and international law.

Concurrently, this article adopted a labour feminist perspective, arguing that employer-sponsored oocyte cryopreservation contracts are inimical to these novel heads of public policy for two reasons. First, that conditional egg freezing contracts enable the unacceptable restriction of a woman's procreative choices by her employer; and second, that the mere offer of employer-sponsored egg freezing by an employer frustrates the advancement of workplace gender equality, limiting the ability of women to participate in both family and work life, and disadvantaging them in the workplace.

The central contention of this article has therefore been that the advance of employer-sponsored oocyte cryopreservation should be regarded by women with caution, as a threat to their autonomy; by society with suspicion, as a threat to equality; and by the law as void, as against public policy – even though such a declaration would only be of utility in certain circumstances. For although it may first appear that Rumpelstiltskin has come to spin straw into gold, at what cost does this come to the Miller's Daughter, who unwittingly agrees to her inequality with men at work and signs away her right to determine her reproductive future?