

ARTICLE

(COM)MODIFYING EXPERIENCE

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I. INTRODUCTION

Medical technologies affect the people who use them, altering their bodies and perhaps their sensibilities. Might medical technologies alter the sensibilities of observers? Those who merely learn about powerful technologies could come to think about people as they do objects and commodities. I call this a "modified-experience" argument.

Modified-experience arguments differ from slippery-slope arguments, which allege that an acceptable practice will lead to an immoral practice.¹ This Article focuses on the argument that the technologies alter sensibilities and attitudes, not that they lead to bad acts.² Though altered sensibilities can lead to bad acts, the changed attitudes and experiences are themselves harms.³ Modified-experience concerns also differ from worries that general technological expansion alters sensibilities.⁴ The argument asserts that in a culture already pervaded by technology, certain medical technologies will alter experience.

Modified-experience arguments differ from attitude-reinforcement claims.⁵ Modified-experience arguments suggest that permitting a technology risks dramatic changes in the sensibilities of participants and

1. See, e.g., DAVID LAMB, DOWN THE SLIPPERY SLOPE (1988); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

2. Joel Feinberg, in identifying harm-based reasons for limiting seemingly self-regarding acts, isolates one that sounds like an offense-based argument: The act threatens the sensibilities of those who observe or know about it, and those sensibilities have great social utility. As an example, he gives the slippery-slope idea that act A will lead to a changed sensibility that will then lead to practice B, which is harmful. Feinberg separates this concern from the perfectionist argument that the lost sentiment is essential to humanity. Feinberg, however, seems to ignore the intermediate harm-based argument that the lost sentiment, whether essential or not to some notion of humanity, makes our lives more full and pleasurable. See JOEL FEINBERG, OFFENSE TO OTHERS 78-86 (1985).

Modified-experience arguments also differ from what Feinberg calls the "bare knowledge problem" of profound offense: that someone might be deeply offended by the mere knowledge that an act takes place. *Id.* at 60-61. I focus not on the offense of knowing but on the harm of being permanently altered for the worse by that knowledge.

3. Modified-experience claims also differ from some claims based on symbolism. Although arguments using the words "symbolic harm" are sometimes modified-experience arguments or slippery-slope claims, often they focus on a separate harm of inconsistent or inappropriate symbols. Although I do not think it is her intent, some of Radin's discussion in her Comment (this symposium) can be understood in these terms. She says, "Recognition of the symbolic meaning surrounding cultural institutions and practices is indeed useful and important." Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341 (1991).

4. See, e.g., MANFRED STANLEY, THE TECHNOLOGICAL CONSCIENCE (1978).

5. Several important ideas in this Article were either absent or significantly less clear in the draft made available to symposium participants. That draft did not rely on the distinction between modified-experience arguments and attitude-reinforcement claims, and did not distinguish sufficiently between participant and observer effects. As a result, the published comments responding to this Article may not reflect or discuss those ideas.

observers. Attitude-reinforcement claims point out that technologies might entrench, reinforce, or make seem more natural and inevitable, attitudes or beliefs that are already widely held. Although there is some similarity between modified-experience and attitude-reinforcement arguments, there are important differences in the psychological claims needed to support them.⁶

Finally, modified-experience arguments differ from nonconsequentialist moral claims, though they sometimes sound similar. For example, a nonconsequentialist might claim "treating others only as means to an end, or as an object, or as a commodity, is immoral." This claim uses language like the consequentialist modified-experience argument. But the latter rests on a prediction that technology will lead people to feel toward others as they do toward objects or commodities. The modified-experience assertion and its nonconsequentialist counterpart are independent.⁷

The term "commodification" has many meanings; it can refer to actions that (1) violate a duty of respect for persons by treating the person as a thing that can be sold;⁸ (2) alter a person's moral status so that the person becomes a thing without a will;⁹ (3) alter the sensibilities of people directly involved in market transactions by causing them to

6. Additionally, although attitude-reinforcement claims discuss the sensibilities of people who retain bad attitudes, it is my sense that those who make such claims are concerned with the ways bad attitudes lead to bad behavior and are therefore much more closely aligned with slippery-slope concerns.

7. Actually, as many commentators have pointed out, the distinction between consequentialist and nonconsequentialist arguments does not always serve us well. *See, e.g.,* J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM FOR & AGAINST* 82-93 (1973). In her Comment on this Article, Nancy ('Ann') Davis offers a version of a modified-experience concern that is less consequentialist than the ones I discuss here, though it is more consequentialist than the argument that we should not sell people because treating persons as we treat commodities is itself wrong. Davis points to the possibility that technologies will alter sensibilities in a way that makes human life less desirable but not from the preference-satisfaction perspective of most consequentialist theories. Indeed, people would like their new sensibilities. Still, says Davis, we should rightly regard such change as a deprivation of the ability to live fully human lives. Nancy ('Ann') Davis, *Morality and Biotechnology*, 65 S. CAL. L. REV. 355 (1991).

Davis is clearly right to say that modified-experience claims can have concerns apart from preference satisfaction and that these can be motivated by a nonconsequentialist view of the human good. In order to have this concern, though, one must still be concerned that the feared change in sensibilities will happen. To this extent, this Article applies to Davis's argument, whether one calls it consequentialist or not.

8. *See, e.g.,* Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 72 (1990) (describing commodification of persons using a Kantian account of failing to value persons in the appropriate way).

9. "Commodify" in this usage is etymologically similar to "beautify"—altering something to make it beautiful. *See, e.g., id.* at 80 ("Commercial surrogacy attempts to transform . . . women's labor . . . into a commodity.").

regard each other as objects with prices rather than as persons; and (4) alter the sensibilities of people who learn about or live in a society that permits the sale of persons but who do not participate in such transactions themselves. This Article focuses on claims of the third and particularly the fourth variety.

As claims (3) and (4) illustrate, modified-experience arguments vary in breadth.¹⁰ Narrow versions highlight the effects on participants: dangers to actual users of certain technologies. Surrogacy might alter the sensibilities of surrogate mothers, adoptive parents in surrogacy arrangements, or children of surrogates. Broader arguments allege effects on all members of a society in which the technology is common—observer effects. Of course, middle positions are available.¹¹

Through most of this Article, I focus on broad modified-experience claims. I maintain this focus because many modified-experience claims use broad language that suggests technologies will alter everyone's experience. This Article cautions against such broad claims.

Modified-experience claims are attractive for at least three reasons. First, broad modified-experience claims offer reasons to oppose practices engaged in by others, apparently voluntarily, without falling prey to the objections against paternalism or external preferences. By claiming a personal harm, the proponent achieves a legitimate form of argument even in the eyes of those consequentialists who tend toward a Millian individualism and who reject "mere" moralisms as inappropriate reasons for social decision.¹² Observers become victims of otherwise self-regarding acts.¹³

Second, because modified-experience arguments sound and feel like nonconsequentialist moral claims, they permit those who hold consequentialist views, but are also attracted to some nonconsequentialist ideals, to translate their nonconsequentialist intuitions into psychological, consequentialist terms. Those dissatisfied with the supposed mystery of

10. This aspect can be called the "audience at risk." See Michael Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 352 (1990).

11. See *supra* text accompanying notes 163-65.

12. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1909-12 (1987) (explaining the need for a domino effect to respond to the libertarian claim for alienability).

13. Only broad modified-experience claims can be appealing for this reason, which might explain why most modified-experience claims are made in broad terms. If this is the main attraction of modified-experience arguments, then my conclusion—that claims about observers are not easily supportable though concerns for participants might be—could deprive modified-experience arguments of their appeal.

deontological ethics and with the alleged crassness of consequentialist theories gain comfort from modified-experience theories.

Third, the temptation toward broad modified-experience theories might be part of an intellectual trap set by social theory. Theorists move too readily from the unobjectionable idea that reality is socially constructed¹⁴ to the mistaken conclusions that reality is therefore either fragile and subject to quick and unpredictable change at the hands of forces beyond our control or fragile and easily manipulable by us.¹⁵

I offer reasons for thinking reality sturdier than modified-experience theorists suppose. Though reality is socially constructed, it is somewhat resistant to either accidental or purposive revision. Of course, resistant to revision is not the same as unchanging. But such changes are exceptionally complex. Arguments for making important decisions based on concern for preserving sensibilities, especially observers' sensibilities, should be greeted with great caution.

Modified-experience arguments are rarely made as conclusive reasons to ban or regulate a technology.¹⁶ Rather, they are offered as one consideration to be weighed with other practical and moral concerns in reaching delicate decisions. In this Article, I explore the structure of modified-experience arguments and look for evidence relevant to evaluating them. By maintaining this focus, I do not mean to denigrate other concerns. In fact, I recommend basing policy decisions on effects of technologies that are more predictable and more likely.¹⁷

14. See, e.g., PETER BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967).

15. See MICHAEL THOMPSON, RICHARD ELLIS & AARON WILDAVSKY, *CULTURAL THEORY* (1990); Aaron Wildavsky, *Help Ma, I'm Being Controlled by Inanimate Objects*, 65 S. CAL. L. REV. 241 (1991).

16. Such arguments could be used to support technologies if the technologies were thought to change experience for the better. For example, difficult and expensive reproductive technologies might have the beneficial side effect of intensifying devotion to children, both among those who use the technologies and among others.

A more complete consideration would also note that the availability of new technologies that we fail to use might alter sensibilities in harmful ways. So even if the allegations of modified-experience supporters are true, they do not lead to the conclusion that we should set extant technologies aside, unless we have reason to think that the changes from using the technology will be worse than changes wrought by having and ignoring them.

17. This Article falls into a category of work that has become far too common, a category I call "shh articles." A "shh article" argues that a particular subject should not be a focus of attention. But of course, like people who work for silence by saying "shh," the tactic threatens to be counterproductive by contributing to the discussion of the topic rather than talking about what the author really thinks is important. In this case, for example, I urge theorists not to focus so much on modified-experience arguments and instead to discuss other concerns. Yet, this Article is about modified-experience arguments and only mentions other concerns in passing. All I can say by way of defense

In Part II, I set out examples of relatively broad modified-experience arguments, offering defenses of these arguments as applied to certain technologies.¹⁸ First, surrogacy can lead to commodification of persons: Everyone might come to think about and feel toward people as they do toward the items they buy and sell. Second, technology that encourages the use of one person as a resource to save the life or health of another might lead observers to think about and feel toward others as they do about resources. Finally, control over children's characteristics might lead to erosion of noncontingent bonds of affection and duty, which could undermine the ability to maintain unconditional love and noninstrumental relationships.

In Part III, I respond to these arguments in two ways. First, I note practices similar to these technologies that appear not to have produced dramatic modified-experience effects. These precedents raise a presumption against modified-experience claims. Second, I consider social and psychological reasons to be skeptical of modified-experience claims. In their broadest form, I conclude modified-experience arguments are unpersuasive. I suggest that they are best restated either in terms of attitude-reinforcement or as narrowly focused on participant effects. In Part IV, I consider more subtle modified-experience arguments and argue that, even if these less dramatic claims are true, we should not consider them in practical decisions. I conclude with some thoughts about slippery-slope arguments.

II. ARGUMENTS FOR MODIFIED-EXPERIENCE EFFECTS

Theorists do not always explain how knowing about or living in a society with certain practices will alter one's experience. They sometimes seem to rely on psychological mechanisms such as dissonance reduction and association.¹⁹ These psychological reactions sometimes destroy norms and beliefs, and sometimes change attitudes and affect.

A new technology might be widely perceived as violating an important norm, such as the infinite value of life, the equal worth of all people, the impropriety of treating others only as means, or the ideal of unconditional love or duty. In order to reduce dissonance, people confronting a

is that sometimes saying "shh" works. In any case, I'll not say more for fear of starting a discussion about whether people should write "shh articles," a discussion that I fear might turn into "meta-shh."

18. I say "relatively broad" because the writers I consider all focus on harms to observers to some extent, though each sometimes qualifies the account by acknowledging that not all observers will react alike. Shapiro is especially clear on this point. See Shapiro, *supra* note 10, at 354.

19. Shapiro discusses a third mechanism. See *infra* text accompanying notes 51-55.

technology that violates such a belief might abandon or modify their commitment to this norm.²⁰ If these norms play a central role in maintaining important personal experiences, then technology could lead to the modified experience. I call this the norm-loss argument. Norm-loss arguments often rely on a dissonance-reduction mechanism.

Technologies might alter attitudes or feelings without changing any particular beliefs. Attitude-change arguments often rely on an associational mechanism. Initially, someone treats a person (or something that resembles a person) in a way usually associated with treatment of things: They sell it, improve it, or mine it. Because people learn, remember, and feel through association of concepts in schemas, observers might transfer attitudes from sales, products, or resources to persons. Finally, they might be unable to recover the attitudes or feelings formerly attached to persons because they have been displaced by feelings and attitudes toward things.²¹

This summary of psychological mechanisms is far too simple and universal. A more precise theory would distinguish between the reactions of participants and observers and among differently situated observers. In the following discussion, however, I maintain this universal stance in order to develop the best theory I can to support modified-experience claims in the broad form they are usually made.

A. COMMODIFICATION

"Commodification," as used in modified-experience claims, refers to the attitudes and feelings thought often to accompany selling and pricing things.²² These include thinking of the thing as fungible with things of

20. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (arguing that people actively attempt to avoid or reduce dissonance); ROBERT WICKLUND & JACK WILLIAMS BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* (1976).

21. The arguments are not wholly distinct. Sometimes associational mechanisms are alleged to lead to norm loss. Sometimes the weakness of norms is the reason for associational concerns. Sometimes norm loss leads to attitude change. Nonetheless, I think the basic ideas are sufficiently separable that the distinctions help to analyze these issues.

22. Margaret Jane Radin, *Justice and the Market Domain*, in *MARKETS AND JUSTICE: NOMOS XXXI*, at 165 (John W. Chapman & J. Roland Pennock eds., 1989); Radin, *supra* note 12; Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982) [hereinafter Radin, *Property*]. Although Radin's discussion is by far the most detailed, others have made similar claims about the commodification dangers of surrogacy. See, e.g., Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 *N.C. L. REV.* 128, 142-47 (1986); Barbara Rothman, *Reproductive Technology and the Commodification of Life*, in *EMBRYOS, ETHICS AND WOMEN'S RIGHTS* 95 (Elaine Baruch et al. eds., 1988). Those who argue against the commodification of persons face a prior difficult question of explaining why and when these attitudes are objectionable. I do not consider this important question.

similar value, and feeling indifferent between the thing and its dollar value.²³

Margaret Jane Radin suggests that knowing about sales can impair a person's ability to think and feel in a way that makes the thing sold more meaningful than its exchange value.²⁴ Not only might markets have this effect on those who sell (the participant effect), they might also have a domino effect, infecting the ability of observers to relate to similar things that are not sold. Selling some children might make it difficult to regard not only those children, but also other children, in terms other than dollar value.²⁵ The "domino" is actually double—infection of nonparticipants and infection of thought and feelings about things that resemble the thing sold. Noting the dangers of a domino effect for surrogacy, Radin says:

There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized.

23. The word "commodify" can of course be used in many other ways, most of which do not assert anything about the likely changes in beliefs or attitudes held by observers to the commodification. See, e.g., Anderson, *supra* note 8, at 72 (defining commodification as a Kantian wrong, and focusing on some consequentialist harms, but only harms to participants); THOMAS SHANNON, SURROGATE MOTHERHOOD 69-70 (1988).

Some of Radin's work seems to be making empirical claims about the beliefs and attitudes of observers. Her discussion of domino effects seems especially committed to this interpretation of commodification. See Radin, *supra* note 12, at 1912-14. Other parts of her work use the word "commodification" in a way more consistent with nonempirical claims that do not depend on modified-experience effects. Her Comment for this symposium includes commodification as a form of objectification, and then says that objectification is "roughly what Kant would not want us to do." See Radin, *supra* note 3. Insofar as Radin is making nonconsequentialist claims, nothing in this paper applies to her arguments.

24. See Radin, *supra* note 12. There is some difficulty in thinking that this description is really true of much at all. One cannot infer from willingness to sell something that the thing had no meaning apart from its exchange value. Sometimes people sell very meaningful things out of desperation or in order to buy other meaningful things.

For example, in the story *The Gift of the Magi* by O. Henry, the woman who sold her hair in order to buy a watch chain felt indifferent between her hair and the money she received only in the technical economic sense. She felt some strong connection to her hair and to the gift she purchased. Sometimes arguments about commodification seem to trade on this homonym of the word "indifference."

I do not mean to suggest that Radin thinks otherwise. She makes clear in her work that fungibility is a spectrum. See Radin, *Property*, *supra* note 22, at 987. She also points out that perhaps property rights in a physical object cannot be wholly fungible. *Id.* at 1004.

On the other hand, some of the things that Radin has written seem to miss this aspect of fungibility. She says: "A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can pass in and out of a person's possession without effect on the person as long as its market equivalent is given in exchange." Radin, *supra* note 12, at 1880. This seems to me misleading because there is not such a close correspondence between "having no effect on the person" and "being replaceable with other objects," as *The Gift of the Magi* shows.

25. Radin, *supra* note 12, at 1912-14.

Surrogates with "better" qualities will command higher prices in virtue of those qualities. . . . We must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, *commodification of some children means commodification of everyone*.²⁶

Radin's commodification is a modified-experience effect with very broad scope: not only are the surrogate and child endangered, but all children could become commodified for all observers and participants.

Why would knowing about sales transform attitudes so dramatically? Something very powerful is being attributed to selling and pricing. Playing tennis with someone does not lead people to conceive of their partners as tools for exercise. Much less does merely knowing about tennis playing have this effect. Why would pricing and selling overwhelm our thinking or feeling?

The suggestion is not intended as logically compelled: Because markets price things, everyone must view the thing priced as commensurate with its market price. Nor does it rely on constant association of the thing with its sale to create such dramatic effects. Someone who spends all day estimating the value of art might eventually have difficulty appreciating the art in any way other than as worth a certain amount. But this participant effect does not demonstrate that those who do not participate directly or repeatedly will be similarly affected, which seems central to the scope of broad modified-experience claims.

Does pricing have special salience without constant exposure or direct participation? Perhaps most people are unable easily to forget knowledge about price in order to have noncommodified attitudes toward the things.

One reason prices might be powerful can be found in schema theory.²⁷ People collect and retain information, as well as associated attitudes and feelings, according to schemas. These schemas have strong associative tendencies. Someone who regards an object as falling under a

26. *Id.* at 1932-33 (emphasis added).

27. See SUSAN T. FISK & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1984); William Brewer & Glenn Nakamura, *The Nature and Function of Schemas*, in 1 *HANDBOOK OF SOCIAL COGNITION* 119 (Robert S. Wyer & Thomas K. Srull eds., 1984). This can also be described as a "vividness effect." See, e.g., Shapiro, *supra* note 10; *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982) [hereinafter *JUDGMENT UNDER UNCERTAINTY*]; *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (Richard Nisbet & Lee Ross eds., 1980) [hereinafter *HUMAN INFERENCE*].

schema automatically and unconsciously associates other aspects of the schema with the object, including beliefs and feelings.²⁸

Following this theory, perhaps many people have a powerful market schema. When they perceive something as belonging in a market because someone sells it, attitudes and feelings associated with markets simply follow the object.²⁹ This explanation relies on an attitude-change version of the associational argument for a modified experience.

Radin suggests that knowledge of a price might make difficult the belief that something is priceless. Further, because pricing leads to differential pricing, and therefore to comparisons of value, pricing could endanger the belief in equality. These are norm-loss theories of how technology could alter experience. They might rely on dissonance reduction: When people see things priced differently they change their beliefs about equal worth to preserve the belief in the rightness of the pricing system.

B. DEVALUATION OF PERSONS

Medical technologies that shorten or risk the life of a person, or something that resembles a person, for the benefit of another supposedly reduce respect for human dignity. Such technologies demonstrate that persons have noninfinite value and that people treat others as objects that can be used solely as means.³⁰

Stanley Benn, for example, argues that abortion might be wrong even if fetuses are not persons entitled to rights because people who regard fetuses as expendable might callously disregard persons as

28. See, e.g., FISK & TAYLOR, *supra* note 27, at 322 ("When an instance is fit into an affect laden schema, the appropriate affect is cued."); Abraham Tesser, *Self-Generated Attitude Change*, 11 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 289, 294 (1978).

29. For research on the connection between affect and schema, see Susan T. Fiske, *Schema-Triggered Affect: Applications to Social Perception*, in AFFECT AND COGNITION 55 (Margaret S. Clark & Susan T. Fiske eds., 1982); Susan T. Fiske, *Social Cognition and Affect*, in COGNITION, SOCIAL BEHAVIOR AND THE ENVIRONMENT 227 (John H. Harvey ed., 1981).

30. Sometimes decisions about life are thought to commodify, raising problems discussed in the prior section. If a price is placed on life by offering damages for wrongful death, or by discontinuing treatment because of its cost, some people think that life has been given a price. This is one central theme in GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978). Cf. Able, *Torts, in THE POLITICS OF LAW* 185, 195 (David Kaereys ed., 2d ed. 1982) (Able points to commodification of human relations in tort damages for pain and suffering and for lost personal relations. However, he seems to be making a nonconsequentialist moral claim rather than a psychological claim about the effects of pricing.).

expendable. Whether this happens depends on whether fetuses are sufficiently developed that people associate them with babies.³¹ Benn goes on to suggest that this callousness might be harmful because it could lead to bad acts. However, the slippery-slope concern with bad acts can be separated from the modified-experience argument identifying coarsened attitudes as a harm.³²

Similar arguments can be made about transplanting organs from anencephalic infants;³³ transplanting fetal tissue;³⁴ preserving the life of a brain-dead pregnant woman in order to permit a child to be born;³⁵ and disposing of fertilized embryos in the *in vitro* fertilization (IVF) procedure.³⁶ These practices use one individual (who seems in some respects like a person) to preserve the life of, or otherwise benefit, another without the consent of the first. Using anencephalic infants as organ donors or transplanting tissue from fetuses looks something like treating a person as medicine. Maintaining brain-dead pregnant women until their children are born looks something like using a person as a machine. Disposing of embryos in connection with IVF looks something like treating a person as a disposable resource.

By suggesting that these practices *could* be seen as devaluing, I do not mean that they must. Fetal tissue transplants use tissue that would otherwise be discarded, not tissue that would otherwise grow into persons. IVF embryos do not look much like persons. These practices might not strike people as disrespectful. Nonetheless, modified-experience arguments suggest, people might perceive these practices as disrespectful toward persons.

31. Stanley Benn, *Abortion Infanticide, and Respect for Persons*, in *THE PROBLEM OF ABORTION* 92, 102 (Joel Feinberg ed., 1973).

32. See FEINBERG, *supra* note 2, at 77-86 (1984).

33. See Norm Fost, *Organs from Anencephalic Infants: An Idea Whose Time Has Not Yet Come*, 18 *HASTINGS CENTER REP.* NO. 5, 8 (1988) (differentiating concern for altered sensibilities from the bad acts that such sensibilities might produce and rejecting the former as insufficient reason for prohibiting the use of organs from anencephalic infants).

34. See PETER JOHN McCULLAGH, *THE FETUS AS TRANSPLANT DONOR* 165-69 (1987) (discussing the forms of dehumanizing damage to society posed by using fetuses as organ donors).

35. Thomas A. Shannon, *Ethical Issues*, in *FETAL DIAGNOSIS AND THERAPY* 311, 313 (Mark Evans et al. eds., 1989); Thomas A. Shannon, *Keeping Dead Mothers Alive During Pregnancy*, in *BIOETHICS* 223 (Thomas A. Shannon ed., 1987).

36. Cf. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 *VA. L. REV.* 437, 505 n.181 (1990) (noting concern for symbolic devaluation of human life even among those who think embryos have no rights).

If these practices were legitimated through state sanction,³⁷ observers might become used to treating humans as medical resources, whose lives or dignity can be traded against their uses in preserving other peoples' lives. Observers might abandon norms such as the infinite value of life or the prohibition against using others only as means. The perception that widely approved actions use people purely as means or treat life as having limited value might create dissonance between the belief in ends-only morality or the infinite value of life and the belief in the basic justice of the world.³⁸ To reduce this dissonance, observers might alter their belief in the infinite value of life or the prohibition on using others only as means.³⁹

People could have difficulty developing friendships or living with dignity if people begin to think of others as having limited value or as only means to be used in pursuing their own ends. Perceiving the use of humans as resources might alter sensibilities through association of persons with objects, preventing us from thinking of others as humans.⁴⁰ Viewing others as means could make noninstrumental relations more difficult if one became used to interpreting human actions as instrumental.

As all human action is subject to such interpretation, the belief in instrumentality can be self-confirming.⁴¹ If one begins to see many actions as instrumental, evidence of this belief will tend to seem abundant. Most people see vividly evidence supporting their beliefs,⁴² and the selfishness of human action is notoriously difficult to disconfirm.⁴³ Belief in instrumentality is also partially self-fulfilling. People who believe that

37. For a review of the debate over whether legal sanction has any demonstrable legitimating effect, see Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

38. MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD* (1980).

39. See works cited *supra* note 20.

40. This is not the same as the argument that the practices are wrong because they treat humans as means (though each practice can be subject to this sort of argument).

41. See Michael Shapiro, *Performance Enhancement*, 65 S. CAL. L. REV. 11 (1990).

42. See, e.g., HUMAN INFERENCE, *supra* note 27, at 179-86; Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 27, at 149-50; Morgan P. Slusher & Craig A. Anderson, *Belief Perseverance and Self-Defeating Behavior*, in SELF-DEFEATING BEHAVIORS 11 (Rebecca C. Curtis ed., 1989).

43. Some theories assert that all love is reducible to self-love or that altruism is really selfishness. See, e.g., JOHN H. BECKSTROM, *SOCIOBIOLOGY, AND THE LAW* 12-15 (1985); AYN RAND, *THE VIRTUE OF SELFISHNESS* (1965). Of course, there is no lack of scholarship on the other side of this issue. See, e.g., THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970); BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990); John H. Berkowitz, *The Self, Selfishness, and Altruism*, in ALTRUISM AND HELPING BEHAVIOR 143 (Jacqueline Macaulay & Leonard Berkowitz eds., 1970); Hoffman, *Empathy, Role Taking, Guilt, and Development of Altruistic Motives*, in MORAL DEVELOPMENT AND BEHAVIOR 124 (Thomas Lickona ed., 1976).

instrumental behavior is acceptable would more often engage in it themselves, which would produce more evidence of such behavior. Therefore, there is a danger of a self-fulfilling cycle of instrumentality.

C. EXPOSURE OF NONCONTINGENT BONDS

A third form of modified-experience fear is erosion of noncontingent loving relations or moral obligations. I consider arguments by Michael Shapiro⁴⁴ and Ann Davis.⁴⁵

If technologies reveal that some relationships are more contingent on people's characteristics than is usually recognized, observers might accept this fact. Learning that affection and duty are contingent on certain properties could lead people to view relationships merely as means to possess those properties, and therefore nothing more than instrumental. In this way, recognition of contingent bonds could destroy or reduce the possibility of noninstrumental relations.⁴⁶

According to Shapiro, technologies threaten to reveal contingency in several ways. First, gaining control over previously random events can demonstrate contingency.⁴⁷ People who cannot control the sex or intelligence of children accept what they receive. Control makes more obvious the characteristics one might want to control. Indeed, if preferences are shaped in part by what people perceive as possible, control over children's characteristics will increase people's desire to have, and definition of, better children.⁴⁸

Control over the characteristics of children could lead those who fail to control their children's characteristics to reject, emotionally or physically, the imperfect child. The ability to increase the intelligence, attractiveness, or talent of one's offspring might create a taste for perfection. Noticing that one wants better children could make clear that people want children with certain qualities for selfish reasons, leaving observers in the cynical cycle of viewing relations as instrumental.

44. See Shapiro, *supra* note 10.

45. Ann Davis, *Reproductive Technologies and Our Attitudes Toward Children*, 9 LOGOS 51 (1988).

46. In this respect, the noncontingent-bond concern and the reduction-of-the-value-of-human-life concern discussed above converge.

47. See Shapiro, *supra* note 10, at 348-49. There is some debate over whether any current or foreseeable technology generally does increase control. Genetic engineering of the sort needed to create children with particular characteristics does not exist and might never come to exist. Many of the technologies that do exist sometimes seem to users wholly uncontrolled. For example, IVF so often fails that users may come to feel more acutely their lack of control over procreation.

48. See *id.* at 355-57.

Second, contingency can be displayed through the rejection of a bond for reasons formerly thought illegitimate.⁴⁹ Although ultimately Shapiro rejects this application, he points out that the problem is potentially posed by surrogacy: Giving up a child in exchange for money displays the contingency of human love and obligation.⁵⁰ That a woman would be willing to part with the child she bore in exchange for cash seems to demonstrate that human love and obligation can be contingent on not having better opportunities.

Recognizing contingency could alter experience through several mechanisms. People might abandon the norm of unconditional love and duty toward certain intimates to reduce dissonance. Or they might undergo attitude change. After perceiving others as subject to perfecting through their control, observers might transfer attitudes from other areas where people exercise such control, such as product manufacture.

Shapiro offers an additional mechanism for modified-experience effects: category failure.⁵¹ Technologies fragment the world so that new entities sometimes fit no preexisting category and sometimes fit several. Fragmentation can impair the ability to think about and feel emotionally connected to these processes and entities. Because people think and feel using categories, people whose categories become pervasively inadequate cannot think clearly or define their feelings adequately. As Shapiro says, we need "markers and borders to control [our] conceptual agoraphobia."⁵²

To illustrate this idea, Shapiro recounts Mary Douglas's discussion of the African tribe called the Lele, who consider flying squirrels taboo. Douglas explains that these creatures do not fit the Lele categories of animals and birds.⁵³ Shapiro suggests that children born under surrogacy contracts, especially disputed contracts, do not fit our categories in something like the way flying squirrels do not fit the Lele categories.⁵⁴

49. *Id.* at 364.

50. *Id.*

51. *Id.* at 341-44.

52. *Id.* at 341.

53. *Id.* at 339-40; MARY DOUGLAS, PURITY AND DANGER 167 (1984). Douglas offers a very similar explanation of the dietary restrictions in Leviticus. *Id.* at 53-57.

54. Shapiro's use of category failure has many facets. He seeks to diagnose people's discomfort with certain technologies as connected to category breach. Such diagnosis can become the basis for moral argument without resort to modified-experience accounts. For example, some writers believe that discomfort can be a moral clue. Other writers suggest that creating a belief system that maintains coherent categories is itself morally desired. Therefore, even if erosion of a system is not at stake, we should use discomfort as a clue to conflict in categories and sometimes regard maintaining

Category failure might facilitate destruction of noncontingent bonds. By disrupting reliance on usual categories, technologies jar people into noticing contingencies they might otherwise ignore, acting as a catalyst to modified-experience effects.⁵⁵

Davis shares Shapiro's concerns but offers a somewhat different account of how genetic engineering might erode noncontingent bonds.⁵⁶ Davis suggests that medical technologies such as genetic engineering⁵⁷ could exacerbate already problematic aspects of the parent-child relationship. In making decisions, parents often want to benefit their children but are tempted to benefit themselves.⁵⁸ The possibility of improving children might exacerbate this problem because it provides an additional temptation for parents to pursue their own interests through their children, increasing potential conflicts.⁵⁹ The increased costs of raising children intensifies this problem. As parents perceive that they must sacrifice in order to have children, they tend to look for more in return from the children, increasing the temptation to use children to ensure such return.⁶⁰ Davis notes that this problem could become widespread. People able to procreate without technological assistance might be tempted to use genetic engineering, if social pressures to have more intelligent, talented or attractive children lead people to see unassisted procreation as likely to lead to defective children.⁶¹

Davis, unlike Shapiro and Radin, is mostly concerned with the effects on participants rather than on observers. She focuses on how parents and children who use genetic engineering will have different and less humane sensibilities. Therefore, her arguments do not really qualify as a broad modified-experience claims. Additionally, because she focuses on

coherence as itself a moral reason for rejecting some acts. See JEFFERY STOUT, *ETHICS AFTER BABEL* (1988).

55. Shapiro perhaps also means to identify category failure as a form of modified-experience harm in itself; that is, destruction of categories and the emotional malaise it might occasion is a harm. The suggestion seems closely tied to fears of technology generally more than the kinds of concerns over specific technologies that this Article addresses. See Shapiro, *supra* note 10. If there is such a conceptual failure that we need to fear, it would be difficult to detect amid the more general malaise often attributed to nontechnological aspects of modern life, including moral relativism and antifoundationalism.

56. Davis, *supra* note 45.

57. Like Shapiro, Davis is primarily concerned with a technology that does not now exist—the ability intentionally to produce smarter or more attractive children using germ-line genetic manipulation. *Id.*

58. *Id.*

59. *Id.* at 59.

60. *Id.*

61. *Id.* at 63.

exacerbating already common attitudes, her argument is as much about attitude reinforcement as about modified experiences.⁶² However, because she fears that genetic engineering could become widespread, her theory relies on fear of contagion to many people's sensibilities and therefore does share an element with modified-experience accounts. Unlike other theorists, Davis does not fear a domino effect from mere knowledge. Rather, technologies on her account might alter sensibilities because the technologies would become widely used.⁶³

III. RESERVATIONS ABOUT MODIFIED-EXPERIENCE THEORIES

Although these arguments deserve serious consideration, I offer three reasons that modified-experience claims should play little role in policy decisions. First, although revolutionary in some ways, the technologies discussed in Part II have been foreshadowed. Precedents suggest either that everyone has already descended to the problems forecast by the modified-experience theories or that at least some people avoid such descent. I suggest that most people have avoided it to some degree and that precedents give reason to think these technologies will not make significant further changes in observers' sensibilities. The most plausible aspects of modified-experience accounts are best restated either as attitude-reinforcement arguments or as narrow modified-experience concerns for participants.

Second, I think it no accident that many observers of, and participants in, monetized instrumental behavior have not yet been reduced to purely instrumental or monetized relations. The concern for conceptual contamination by association ignores motivations and tendencies not to associate certain concepts. The concern for norm loss by dissonance reduction ignores evidence that people can and do maintain beliefs in the

62. Davis's argument is something of a hybrid between a modified-experience argument and an attitude-reinforcement argument. She does not rely on dramatic departures from current attitudes. She does, however, have a concern that certain technologies will do more than merely reinforce extant attitudes. They will intensify them to the point that a very significant change occurs.

63. In her Comment, Davis tells a fable to illustrate several difficulties with my argument. Davis, *supra* note 7. Among the many lessons I draw from Davis's story, I find most important two ideas: (1) Medical technologies might alter individual incentives in a way that changes relationships; and (2) technologies might intervene directly to alter sensibilities. Though some of the ideas in my Article give reason to doubt that technologies will have these effects, I find her suggestions more likely than the main modified-experience effects I discuss in the text. These rely on technologies to alter experience of observers merely because they become known. Davis suggests that there are more realistic dangers posed by certain technologies.

face of apparent counterexamples.⁶⁴ People can often more easily reduce dissonance by not noticing, or recharacterizing, dissonant information than by abandoning prior commitments.⁶⁵

In Part IV, I offer a third reason for rejecting modified-experience claims as a basis for public policy decisions. Even if the predictions made by less dramatic versions of modified-experience claims are true, trying to take account of such changes will likely lead decision makers to emphasize less important concerns than they would were they to ignore these possibilities.

None of my reservations is wholly new. Indeed, many proponents of modified-experience arguments have been careful to note that their arguments have limits and that they often should not determine social policy.⁶⁶ Although I see these limits as more significant than prior writers have, my analysis supplements rather than refutes theirs.

A. PRECEDENTS

If broad modified-experience theories were correct, similar practices would already have altered everyone's perceptions, feelings, and beliefs in just the way predicted for the feared technologies. Either everyone has already changed (in which case the technology poses no threat) or practices of this sort do not have the effects predicted, at least not on everyone (in which case perhaps there is little reason to worry about modified-experience effects of the technologies). I do not claim that these precedents have had no effect on sensibilities, though I see no evidence of dramatic changes in the past. The precedents' pervasiveness and similarity to new technologies suggest that significant change is now unlikely, whatever effects past precedents have had.

64. Joel Feinberg makes a similar response to the slippery-slope dangers of abortion and infanticide. These supposedly tend to deprive people of their natural tenderness for children and for the people they become. *See, e.g.,* Benn, *supra* note 31, at 135. Feinberg commented:

The weakness of the argument consists in the difficulty of showing that the alleged coarsening effects really do transfer. . . . I think that the factual premise in arguments of this form usually underestimates human emotional flexibility. We can deliberately inhibit a sentiment toward one class of objects . . . yet give it free rein toward another class.

FEINBERG, *supra* note 2, at 85.

65. *See, e.g.,* WICKLUND & BREHM, *supra* note 20.

66. Shapiro, *supra* note 10, at 356-57 ("The argument . . . rests on features of human cognition. This is not an argument clearly establishing that certain technologies should be avoided, . . . but it merits attention."); Davis, *supra* note 45, at 52 ("It is surely too soon to say with any confidence what would happen if, for example, 'surrogacy' and *in vitro* fertilization (IVF) were more commonly practiced, but it is not too soon to raise questions about what it might mean to us if they were."); Radin, *supra* note 12, at 1914 ("[T]he feared domino effect of market rhetoric need not be true. . . . we should evaluate the domino theory on a case-by-case basis.").

Four responses to this argument are available: (1) The prior precedents are not relevantly like the feared technology; (2) much change has already occurred, but this should be mourned; further incremental change should be forestalled or past decline should be reversed; (3) if the important changes have not yet occurred, there is reason to think that this technology could be the straw that will break the camel's back; and (4) changes are not universal and the precedents support modified-experience claims that focus on narrower groups.

Though the plausibility of each response varies, I find the argument from precedents more persuasive. The precedents seem relevantly like the new technologies. Response two suggests that the fear articulated as a modified-experience concern largely reduces to an attitude-reinforcement concern. I doubt camel's-back worries primarily because the precedents are so pervasive. Finally, insofar as modified-experience claims narrow their focus to specific vulnerable groups, I suspect that they will be forced to concentrate on participants. I return to these responses below⁶⁷ after first identifying and discussing particular precedents.

This analysis is impressionistic; it relies on my intuitions about the past effects of familiar practices. My only defense is that it is no more impressionistic than modified-experience allegations, and lacking any more rigorous means of considering the matter, we must decide nonetheless.

1. *Surrogacy and Commodification*

Could widespread pricing of something undermine many people's ability to create important or intimate relations with those or similar things, by displacing the belief in equality and the infinite value of life, or by disabling them through associative thinking?

The evidence that such effects are not absolute and universal seems to me significant.⁶⁸ Some people sometimes think of each other in terms other than dollar values. I feel safe in making this assumption, first because it seems true to my experience. Second, if it is false, the fears of surrogacy are unfounded, as everyone is already commodified.

67. See *infra* Part III(A)(4), text accompanying notes 121-24.

68. This evidence need not prove that markets never alter perceptions. For a discussion of some evidence that they do not, see Robert E. Lane, *Market Choice and Human Choice*, in *MARKETS AND JUSTICE: NOMOS XXXI*, *supra* note 22, at 226. One can admit the experiential effects of a market system and still deny that permitting surrogacy in a society that already includes many markets will have any significant effect on observers' sensibilities.

Pricing and sales sometimes coexist with intimate thoughts and feelings not reduced to money terms. People buy pets and know that prices vary depending on the quality of their characteristics. Although some people think of their pets as investments, most rarely think about the price of their pets and develop personal relationships with the animals.⁶⁹

Prostitution has existed in nearly every society. The existence of prostitutes is well known, as is the fact that prostitutes charge different prices depending on their particular characteristics. Nonetheless, some people manage to have nonmonetized sexual relations. One might think the prostitution example supports modified-experience claims. Perhaps prostitution has altered some people's sensibilities by making intimacy difficult. But those who think that intimacy is not possible do not usually attribute this to thinking of sex as exchanging the price of a prostitute.⁷⁰

Adoption procedures in many states permit transfer of funds from the adoptive couple to the biological parent—usually the mother.⁷¹ Prices vary. Advertisements appear in newspapers, stating that particular prices will be paid for children. Nonetheless, adoptive couples, biological parents, and children report that loving relations are possible. To the extent that participants face trauma and difficulty—regret at having given up a child, difficulty adjusting to a child not genetically related to oneself, or a sense of longing and rootlessness from not knowing one's genetic parents—none of these difficulties appears to stem from monetary

69. There is a body of literature on the important psychological and sociological role played by pets in some cultures; nowhere is this more true than in America. See, e.g., CONSTANCE PERIN, *BELONGING IN AMERICA* 107-141 (1988).

70. Eric Mack, *Dominos and the Fear of Commodification*, in *MARKETS AND JUSTICE: NOMOS XXXI*, *supra* note 22, at 198, 212. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 218 (1987).

Radin discusses the plausibility of the domino effect in connection with prostitution and notes that sex remains nonfungible despite the known availability of prostitutes. Radin, *supra* note 12, at 1922. But, she says, "We must evaluate the seriousness of the risk if commodification proceeds Suppose newspapers, radio, TV, and billboards advertised sexual services" *Id.* Radin goes on to hypothesize a series of market devices that might actually change our abilities to be intimate without thinking of sex in money terms. Several facts about this argument seem to me worthy of note.

First, even in places such as Amsterdam, where prostitution is legal and advertisements for prostitution exist, prices are not displayed. If what we most fear is the possibility that personal attributes will be treated like cars, there is empirical reason to think that such fears are ungrounded.

Second, if pervasive inundation with price information is required for the domino effect, the domino effect is unlikely to result from transactions such as organ sales or surrogacy. There will never be enough demand for surrogates in this country to permit this sort of inundation.

Third, if we have fears about domino effects, we should simply enact advertising bans or prohibit explicit statements of price in advertisements, as Radin suggests.

71. WILLIAM MEEZAN ET AL., *ADOPTIONS WITHOUT AGENCIES* 182-98 (1978).

transactions. Further, there is no evidence that paid adoption has affected observers who merely know about it.

More pervasive than any other pricing of humans is wage labor. People receive different wages for different characteristics, including strength, beauty, and intelligence—the very sorts of characteristics that surrogacy might commodify. Nonetheless, most people think about each other in terms other than income. Admittedly, some people seem to act as if they evaluate others solely in terms of their wealth.⁷² But we view them as aberrations.

Other examples can be multiplied. There is a large black market in children,⁷³ and a small black market in wives from other countries.⁷⁴ There have long been many people who explicitly marry for money and suspicions that many more do so implicitly.⁷⁵ The practices of dowry and bride-price had long histories.⁷⁶ Courts have paid damages for breach of promise to marry,⁷⁷ alienation of affections,⁷⁸ and loss of consortium.⁷⁹ They permit damages for wrongful death, which vary with the person's potential income.⁸⁰ We all have complex relationships with people whose services we purchase; the paradigm is the relationship between patient and psychiatrist.⁸¹

These precedents undermine broad modified-experience claims in three ways.⁸² First, they demonstrate that such effects have not been

72. People might alter their impressions of others when they believe that the persons are poor or wealthy. I do not take this to support domino effects. The fact that we cannot help altering our opinions about people based on wealth suggests neither that we relate to them *only* as earners of money nor that altering our market system to include practices such as surrogacy would marginally affect our ability to cabin the effect of price on personal relations.

73. See, e.g., NANCY C. BAKER, *BABYSELLING: THE SCANDAL OF BLACK-MARKET ADOPTION* (1978); Margaret V. Turgno, Note, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976).

74. See, e.g., *Soviet Women Seek U.S. Guys—By Mail*, CHI. TRIB., Dec. 9, 1990, § 1, at 5.

75. Consider the literature that regards all marriage as just a trade of goods and services in a marriage market. See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981).

76. See WILLIAM J. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* (1963). I do not mean to make too much of these examples. Dowry is currently practiced in cultures that also tolerate bride burning and other violence against women. Perhaps pricing plays some role in this violence. Pricing sometimes coexists with intimacy, though of course it also coexists with violence.

77. See, e.g., MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 33-63 (1985).

78. See Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472 (1934).

79. See, e.g., *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974).

80. W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* 949-50 (5th ed. 1984).

81. Some of these examples are problematic. For example, some practices, though widespread, are not officially sanctioned. If public ratification were thought important to commodification effects, then I would need to limit my list of precedents.

82. These three points are elaborated *infra* Part III(A)(4), text accompanying notes 121-24.

absolute and universal (which perhaps no one ever meant to claim). Second, they suggest that effects might not happen at all because the precedents offer no examples. Third, the pervasiveness of the precedents raises questions about how new technologies could have much effect.

Modified-experience theorists might make several responses, two of which occupy the remainder of this section: (1) The analysis of precedents failed to find past effects by ignoring particular viewpoints; (2) precedents provide poor evidence because other factors prevented the feared effects in the past.

Evidence for modified-experience effects might be found in prostitution. Perhaps considering whether prostitutes who sell sex, and women who are so often portrayed and treated as sexual objects, can still manage intimacy will reveal prostitution's modified-experience effects.

Even if analysis reveals evidence for modified-experience effects, prostitution counsels caution. If part of the feared commodification effect of surrogacy is that those who view but do not participate in surrogacy will be harmed, prostitution suggests that this is not necessarily so for everyone.⁸³ Commodification's scope might be limited to participants (or to only some observers⁸⁴), calling into question the domino effect.

Even considering claims of participant effects and narrower observer effects, prostitution offers little evidence of commodification. Sexual objectification is not commodification. "Commodification" as used in modified-experience arguments means that sales will lead people to think of themselves and others only in terms of dollar value. As I understand the difficulty of sexual objectification, women feel demeaned because (some) men think of them and treat them as useful only for the man's sexual gratification, or as ornaments to enhance the man's status, and not as having independent wills, deserving respect and concern, or as individuals with feelings and goals of their own. Although commodification might lead to a similar feeling, there are other ways to feel objectified than feeling reduced to dollar value. Sexual objectification is a different sort of objectification than commodification.⁸⁵

83. If the entire question of whether prostitution prevents intimacy for men strikes readers as offensively elitist or male-centered, I suggest that in part the modified-experience arguments have a very elitist quality. Insofar as arguments about prostitution or surrogacy are occupied with altering the mental environment of those not involved in the practices, they are somewhat elite concerns. See *infra* Part IV(A), text accompanying notes 159-61. Radin has commented on this distributional concern. See Radin, *supra* note 12, at 1917.

84. See *infra* Part IV(A), text accompanying notes 159-61.

85. Shapiro notes that commodification is a form of objectification. Shapiro, *supra* note 10, at 350.

If prostitutes or women generally are unable to obtain acceptable intimacy, it is important to ask why. I assume that poverty, patriarchy, rape, and other sorts of oppression are part of the answer. Before accepting prostitution as a precedent for the limited modified-experience effect of making those who are sold, or are like those sold, lose the ability to think and feel appropriately about intimacy, one should consider the causal role of pricing.

I question whether the difficulties faced by prostitutes, and by women who are treated as sexual objects, are significantly due to pricing. Direct effects on prostitutes seem to be more connected to patriarchy and the degradation that comes from being compelled by economic circumstances to submit to anonymous sex, than to being priced. Difficulties for women who seek more satisfying intimacy come from the patriarchal institution of viewing and treating women as sexually available objects, an institution sustained by such varied practices as workplace discrimination, advertising, television, prosecution of rape, as well as prostitution.⁸⁶ But these practices rely less on pricing than on the content of pervasive stereotypes.

Of course, that many things besides pricing contribute to sexual objectification does not show that pricing plays no role. Perhaps in the context of widespread objectification supported by a web of interdependent practices, the pricing of prostitutes reinforces the idea of women as available objects for sex.⁸⁷ Prostitution therefore suggests that pricing might contribute to the emotional deprivation of those priced and of some observers.

Rescuing prostitution as a precedent by showing how it contributes to the image of women as sexual objects, which itself makes intimacy difficult, changes the argument from a modified-experience claim to an attitude-reinforcement argument. Rather than showing how a practice alters attitudes, feelings, or beliefs, this argument shows how a practice

86. This seems to be a central theme of feminist critiques of heterosexual intimacy: Women cannot find intimacy in a society so pervaded by patriarchy. Most women who believe that they have found intimacy have therefore really just learned to enjoy oppression. ANDREA DWORKIN, *RIGHT WING WOMEN* (1983).

87. That commodification depends on context does not really contradict Radin's ideas about commodification. She points out that different things will be more or less subject to commodification. Radin, *supra* note 12, at 1914.

reinforces or fails to combat already widespread feelings, attitudes, and beliefs.⁸⁸

Modified-experience arguments claim that desirable beliefs and attitudes are too fragile to survive a technology. Attitude-reinforcement arguments claim that undesirable beliefs and attitudes are difficult to undermine, and that the technology will contribute to their sturdy entrenchment.

This change might seem small. But it is important. My doubts about modified-experience claims stem from a skepticism that medical practices can easily generate radical shifts in the sensibilities of observers. By showing that a practice reinforces or fails to alter objectionable but preexisting beliefs, the prostitution example does nothing to undermine this skepticism. If anything, the entrenchment of patriarchal ideas, feelings, and attitudes supports my doubts that technologies could radically alter sensibilities.

Attitude-reinforcement arguments have their own difficulties. One must evaluate whether the reinforcement is significant enough to warrant abandoning a practice despite its other benefits. For example, it might be that when a woman marries a man, or has children, or accepts a job in a traditionally female occupation, her decision reinforces stereotypes, which in turn lead those who hold them to oppress women. No one advocates prohibiting these decisions, because we value autonomy for individual women and see alternate routes to fight attitude reinforcement. Questions of tactics arise in evaluating whether legalized prostitution does more to foster power and autonomy for those who participate or to reinforce the image of women as objects.⁸⁹ This inquiry seems to me appropriate for evaluating medical technologies. It is not, however, a modified-experience concern.

A second response to the precedents tries to explain the absence of identifiable commodification as the result of special circumstances.

88. Cf. Radin, *supra* note 3 (warning that rejecting modified-experience claims might privilege the status quo, and urging that we should view the precedents as a reason to reexamine many practices, not as a reason to think the new technologies pose no worry). This statement supports the connection between modified-experience arguments and attitude-reinforcement arguments.

89. This question requires thought about the benefits and harms of prostitution; the violence against and degradation of individual prostitutes must be weighed against the possibility that prostitution is the best available option for some women. Cf. Radin, *supra* note 12, at 1915-17 (discussing the "double-bind" theory). It also raises questions of risk: Are the attitudes reinforced by prostitution sufficiently precarious that the tactic of banning prostitution *and* using a variety of other political tactics to attack these attitudes might lead to real progress? Or are they so entrenched and reinforced by so many institutions that limiting prostitution in order to undermine these attitudes offers little or no hope of progress and therefore sacrifices the welfare of individuals in vain?

Radin identifies as nonfungible property apartments, homes, and wedding rings—all notably items that are sold.⁹⁰ She thinks that individuals maintain some connection to things that are sold because government regulations limit the extent and manner of sales.⁹¹ Radin points to rent control and limits on work (child labor laws, minimum wages, and maximum hours) as regulations that help people maintain noncommodified attachments to things they sell.⁹²

I disagree with Radin's causal suggestion. First, it is over- and underinclusive. We sell personal things such as art, homes, and wedding rings in relatively unregulated markets.⁹³ We sell fungible things such as insurance and securities in highly regulated markets. If regulation were the bulwark protecting priced items against commodification, we would not expect this.

Second, things sold in regulated markets are priced just as fully as things sold in relatively unregulated markets. If the harms of commodification were caused by pricing, especially by differential pricing, one would expect to see these harms in all markets. Regulated sales should destroy the belief in pricelessness or in equality just as much as unregulated sales.

Radin's argument has a core of truth: Regulations sometimes mitigate the ills of markets. Regulation permits some workers to maintain a noncommodified connection to their work by limiting poverty or oppression. Regulations protect connections between some apartment dwellers and their homes by preventing people from being evicted or priced out. But buying, selling, and pricing do not cause people to be unable to have healthy relationships. Poverty, patriarchy, and other oppressive circumstances have this effect. One cannot infer from the fact that some markets have bad effects that sales and pricing generally commodify personal things or that regulation stems commodification.

Wedding rings and houses offer different lessons. People buy and sell both personal and fungible things. People purchase a wedding ring, intending a gift. Some people purchase diamonds for investment, hoping to resell when the time is best. Someone might make both purchases on

90. Radin, *Property*, *supra* note 22, at 959, 992-93; *see also* Radin, *supra* note 12, at 1918-19.

91. Radin, *supra* note 12, 1919-20; Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362-63 (1986).

92. Radin, *supra* note 12, at 1919-20.

93. Radin understands that there is no such thing as an unregulated market. All sales must be regulated by some set of rules. I assume that by "regulations protecting incomplete commodification," she is referring to departures from the traditional set of regulations: "free markets." *Id.*

the same day, from the same store, subject to the same regulations. The difference lies neither in pricing nor in regulation but in emotional states and intentions. That one buys something for reasons other than profit and intends not to resell it just because a good price is offered can itself prevent the psychological ill of commodification.

The precedents lead me to doubt commodification concerns about surrogacy. The discussion of pets, homes, and wedding rings suggests that surrogacy would not commodify children. Even if people come to think of surrogacy as the selling of children, they would not consider the acquisition to be for investment purposes. At least most people in modern western cultures want children, if at all, to rear and to love. For this reason, both observers and participants in such a culture would often avoid thinking of children in terms of their market value, just as people manage to do with paid adoption, pets, homes, wedding rings, and spouses.

Looking to the lessons of prostitution suggests that commodification concerns are justified for surrogacy, if at all, as concerns for participants or as attitude-reinforcement concerns. In considering participants' sensibilities, surrogacy could pose dangers more serious than paid adoption. Perhaps surrogates will more often regret their decision. Unlike many birth mothers in paid adoption, surrogates might have avoided the difficult circumstance altogether. Perhaps children of surrogates will adjust less well to their origins than children of paid adoption. They must come to terms with what might seem to them as having been created like a product and then sold by their mother.

Participants in surrogacy face less significant challenges to their sensibilities than do prostitutes. Unlike prostitutes, surrogates participate only once or twice, probably not because of financial or other desperation. Neither they nor the children experience being priced and repriced every day.

Whatever conclusion one reaches on the participant effects of surrogacy, no precedent suggests that observers of surrogacy will be deprived of the ability to think of children in intimate terms. Either observer effects do not take place, or observers have already been deprived of certain sensibilities by observing paid adoption, labor markets, and prostitution. Though I see no way to adjudicate between these possibilities, the prevalence of precedents makes significant observer effects from surrogacy unlikely.

Surrogacy does raise attitude-reinforcement concerns. Sales of procreative services connect to broader social institutions in the way that sexual objectification, including prostitution, limits the emotional life of some women. Women are often seen and treated, and sometimes come to see themselves, not just as accessible sexual objects, but as accessible procreative objects.⁹⁴ Sales of procreative services could reinforce this image.

This concern might be weaker than in prostitution. The treatment and image of woman as procreative object, though lively, seems less pervasive and expanding than the image as sexual object. Many of the relevant institutions are contested.⁹⁵ Further, the image is less clearly associated with lack of intimacy.⁹⁶

Weak or strong, however, this argument is not about commodification, destruction of available intimacy, or any other modified-experience harm. It is a concern over attitude reinforcement. The relevant inquiry is whether working to ban surrogacy (together with other actions) might affect the institution of treating women as procreators, given other social practices.⁹⁷

94. Attitudes toward infertility, admissions to certain professions, treatment of pregnancy in the workplace, and many portrayals of women in literature, television, and film all reinforce the image of woman as baby maker.

95. I have in mind the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), tit. VII, access to abortion and birth control, and especially cases such as *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Of course, there are contrary trends, including the movement to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and fetal abuse prosecutions.

96. One allegation against surrogacy is that it threatens the connection between parents and children by placing a dollar value on children. If the example of prostitution teaches that commodification requires some institution that already weakens the possibility of intimacy, I think that this example argues against destruction of bonds between parents and children. Further, even considering concerns that women living under patriarchy cannot find acceptable intimacy with men, I have not heard claims that this problem is closely connected to forced procreation.

I emphasize that I am only discussing modified-experience arguments. By suggesting that the existence of the image of woman as procreative object does not seem to be strong support for a modified-experience argument, I do not mean that it offers weak reasons for prohibiting surrogacy. Arguing for prohibition of surrogacy because it perpetuates harmful stereotypes linked to objectionable discrimination, however, is not the same as arguing that surrogacy destroys intimacy because it commodifies women and babies by leading us to think about reproduction only in terms of money.

97. I am not arguing that the central issue in making decisions about prohibition or regulation is whether surrogacy affects the ability of surrogates or of others to find appropriate intimacy. Radin also makes clear that the question is only one among many to be considered. She is particularly concerned about the double-bind problem: Even if prostitution or surrogacy does harm those who participate, precluding the market for these services may harm them as much or more in different ways. See Radin, *supra* note 12, at 1915-17.

2. *Treatments that Devalue Persons*

Might the perception of using one person to benefit another undermine respect for the infinite value of life or the prohibition on treating others only as means? Doctors transplant organs from cadavers and use blood from living humans.⁹⁸ They perform about 1.5 million abortions in the United States every year⁹⁹ and millions more elsewhere in the world.¹⁰⁰ Women choose abortion to protect their lives, to protect their health, to protect their careers and other life choices, and for a variety of other reasons.

If the perception of using a fetus for the benefit of a living person were likely to undermine respect for life or the prohibition of using another as a means, surely the much publicized and debated fact of abortion would already have done so.¹⁰¹ Why would transplanting tissue from a few fetuses, for reasons that most people would perceive to be at least as significant as the reasons for most abortions¹⁰² significantly alter perceptions?

Disposal of IVF embryos was foreshadowed by the use of IUDs. If destruction of embryos led either to a norm loss or attitude change, it would already have happened. Millions of women have used IUDs, destroying and discarding embryos no less developed than those sometimes destroyed in IVF. Perhaps the IUD precedent is not ideal because many people do not understand that IUDs destroy embryos. But in part, this is my point. People might also ignore the fact the IVF destroys embryos.

Using anencephalic infants as organ donors is similar to extracting organs from the recently dead with the consent of their families even if the deceased never consented to the procedure.¹⁰³ Maintaining brain

98. Admittedly, these technologies are different in that they are voluntary.

99. See STATISTICAL ABSTRACT OF THE UNITED STATES 1990, 71, tbl. 100.

100. See, e.g., Mark Savage, Note, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027 (1988).

101. I am not taking a position on the moral claim that abortion demeans human life or uses another as a means.

102. By suggesting that using fetal tissue to cure disease is as good a reason as exists for most abortions, I do not mean to say that the case for legalizing fetal tissue use is as strong as the case for keeping abortion legal. The numbers of women affected by abortion, as well as the autonomy and equality issues presented by the abortion debate, make the questions very different.

103. See Uniform Anatomical Gift Act § 2(b).

dead pregnant women until the child is born resembles the common practice of extending life briefly to maintain organs for donation.¹⁰⁴

3. *Noncontingent Bonds, Genetic Engineering, and Surrogacy*

Many practices challenge the belief in unconditional affection or duty. People often try to improve their children.¹⁰⁵ If gaining control over specific characteristics of children could lead to perfectionism, how could genetic engineering add much in light of education, athletic lessons, music lessons, plastic surgery, genetic screening, and medical treatment?

Shapiro notes the existence of such precedents. He suggests that genetic engineering might be different because it would be a dramatic departure from current practices, whereas the precedents are integrated into modern life.¹⁰⁶ But genetic engineering and other fragmenting technologies might soon seem well-integrated. Observers will integrate them using the same means as they integrated plastic surgery and other medical care, which seemed dramatic when they were new.

People often breach supposedly noncontingent bonds. If witnessing rejection of a bond for a less than well-justified reason threatened the belief in unconditional connection, it would already have disappeared. Consider all the practices, long lived, that foreshadow the giving up of a child by a surrogate mother.¹⁰⁷ Some parents have always abandoned,¹⁰⁸ beat,¹⁰⁹ sexually abused,¹¹⁰ and killed their children.¹¹¹ Fifty percent of

104. Kenneth J. Ryan, *Tissue Transplantation from Aborted Fetuses, Organ Transplantation from Anencephalic Infants, and Keeping Brain-Dead Pregnant Women Alive Until Fetal Viability*, 65 S. CAL. L. REV. 683 (1991).

105. We seek friends and lovers with particular characteristics. Many of our practices surrounding affectionate bonds suggest contingency: We praise the characteristics of our friends, lovers, and children. Often we even do so in response to questions about why we like them so much. When we do break off a relationship—between husband and wife or parent and child—we sometimes offer reasons about how the person changed in a way that makes them no longer acceptable to us.

106. See Shapiro, *supra* note 10, at 362-63.

107. Shapiro suggests that, because of some legitimization effect, we should be less concerned over the public breach of supposedly noncontingent bonds than with the publicly sanctioned breach of such bonds. Therefore, because my list of precedents includes many officially prohibited behaviors, the list is not wholly relevant. Still, adoption is approved, as are no-fault divorce, wife rape (in all too many places), and failure to support parents in old age.

108. JOHN BOSWELL, *KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN* (1988).

109. See, e.g., JEANNE GIOVANNONI & ROSINA BECERRA, *DEFINING CHILD ABUSE* 31-77 (1979).

110. See, e.g., DEBORAH DARO, *CONFRONTING CHILD ABUSE* 37-39 (1988).

111. Kathryn Mosely, *The History of Infanticide in Western Society*, 1 ISSUES IN L. & MED. 345 (1986).

marriages fail.¹¹² After marriages end the majority of men do not fulfill their court-ordered alimony or child support payments in full,¹¹³ and a large minority never make any child support payments.¹¹⁴ There is wife abuse and rape,¹¹⁵ elder abuse,¹¹⁶ and neglect and abandonment of parents in old age.¹¹⁷ These facts would have undermined any belief in the unconditional nature of responsibility toward intimates if such belief exists and were easily destroyed.¹¹⁸ No doubt some victims and perpetrators of these acts abandon belief in unconditional love. However, merely knowing about these activities need not destroy beliefs.

Davis recognizes many precedents to her concern over the combination of making children expensive and controlling their qualities. In part the strength of her theory is that it does not rely on the uniqueness of genetic engineering or on the fragility of human sensibilities. Rather, she fears that genetic engineering could exacerbate serious problems already with us by increasing unfortunate incentives. She notes, for example, that children are made more expensive by the fact that women want careers. Some parents therefore increasingly view children as costly limits on those careers.¹¹⁹

By focusing on different means of changing sensibilities, Davis avoids many of the problems with other modified-experience arguments. Nonetheless, the precedents to Davis's concern raise questions. Children have been increasingly expensive since our society ceased being agrarian. Perhaps this increase has exacerbated the danger of thinking of children as investments. But the fact that children have been costly and subject to improvement for so long makes me wonder how medical technologies could affect a problem already so pervasive.

112. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 16 (1985).

113. *Id.* at 284.

114. *Id.*

115. See, e.g., DAVID FINKELHOR & KERSTI YLLO, *LICENSE TO RAPE* (1985).

116. David Mathews, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653 (1988).

117. See, e.g., Suzanne Steinmetz, *Dependency, Stress, and Violence Between Middle-Aged Caregivers and Their Elderly Parents*, in ABUSE AND MALTREATMENT OF THE ELDERLY 134, 139 (Jordan Kosberg ed., 1983).

118. I think that the belief in unconditional responsibility has been destroyed as to spouses. There is little left of the notion that one marries for life, at least among many people in modern America. As to responsibility to one's children, it seems to me that there is a great deal left of the belief that one is responsible for one's own children, no matter what (at least for young children). The fact of commitment to responsibility in tandem with widespread failure to fulfill the obligation suggests that (1) the belief is not apt to be destroyed by something like surrogacy or gene splicing; and that (2) these beliefs are not altogether effective in altering behavior.

119. Davis, *supra* note 45, at 57.

College education has become a major expense for many, especially those in and above the middle class who Davis suggests are also at risk from these technologies.¹²⁰ Like the technologies Davis fears, college has become increasingly necessary to compete, and so increasingly an imperative for people to provide to their children.

Some, perhaps many, parents pressure their children into going to college, and many parents are unclear about their mixed motives. Is there reason to think that more parents pressure their children for selfish reasons now that college is available than when other means for competition and upward mobility were available? To the extent college has provided an outlet for disturbing behavior—kindergartens most likely to lead to admittance to Harvard, and tests to screen entrance into those kindergartens—why fear any worse from medical technologies or expect any better from not permitting those technologies?

The temptation to use our children has always existed, and the temptation to do so by enhancing their ability to compete exists wherever there is competition. Some parents resist, some give in, almost all fit between these. The competition and possible parental conflict might shift from college to prenatal manipulation. But the dangers and temptations will remain.

4. *Conclusions About Precedents*

None of the precedents is conclusive. They offer reasons to be skeptical about modified-experience arguments. The number of precedents and their similarity to the feared technologies raise several different difficulties for modified-experience theories.

If the theories claim that technologies will completely deprive all observers of certain sensibilities, the precedents undermine this claim by showing that many observers have survived similar practices with some ability to relate and feel in non-instrumental ways.

The precedents are not easily rejected as dissimilar. Objections to surrogacy based on commodification presume that buying, selling, and pricing of personal things destroys personal connections for observers of the practices. Paid adoption, pets, prostitution, and job markets seem like good comparisons for theories based either on norm loss or attitude change. Each involves the buying, selling, or pricing of something intimate. Abortion seems a close analogy to using fetuses for tissue transplant if the fear is that visible use of a fetus for the benefit of a person will

120. *Id.* at 61-63.

destroy observers' respect for individual humans. Education and plastic surgery seem close parallels to genetic engineering if the worry is that the ability to improve children will destroy unconditional love and duty. Child abuse and abandonment seem close precedents for the concern over surrogates' public rejection of children for less-than-compelling reasons.

As Professor Davis notes, the effects of technologies depend more on how they are perceived than on mere analytical similarities.¹²¹ I see no reason to think new technologies will be perceived differently from the precedents. I point to similarities to support this conclusion. Perhaps despite these similarities, some observers will regard fetal tissue transplant very differently from the way they regard abortion. But in order to consider why that might be, one needs a theory. For me, these precedents shift the burden of persuasion to those who believe that modified experiences are likely. They must offer reasons for thinking the new technology would be perceived differently from the precedent.

Modified-experience advocates can escape this critique by making clear that they intend more modest claims: New technologies and past precedents pose dangers of incremental change in observers' sensibilities, some of which have happened, and some of which we should now forestall. Perhaps if little change has taken place, new technologies could trigger significant change.

This more modest position makes two problematic claims: that past precedents did alter observers' sensibilities and that we have reason to fear future incremental changes. The precedents offer some reason to doubt both suggestions. First, the precedents offer no evidence of changed sensibilities. I do not put much weight on this absence of evidence. No one can easily evaluate the effects of past practices.¹²² Perhaps without many of these precedents, human sensibilities really would be very different. Still, the absence of evidence gives reason to hesitate.

Second, the precedents give strong reason to doubt similar practices will cause future change. Whatever effect precedents have had in forming our sensibilities, similar practices on a small scale will not likely alter them much now. The precedents do not prove that we have survived all these things intact. They do suggest that our current sensibilities have

121. Davis, *supra* note 7.

122. Davis's parable offers a very nice example of how changes in a person can blind the person to the fact of a change. *Id.*

survived these practices and are therefore unlikely to be vulnerable to change by similar practices.¹²³

I doubt that the existence of a few thousand surrogate mothers, a bit of genetic engineering, or the use of fetal tissue to treat some very ill people could dramatically alter observers' sensibilities against a background of much more common, long-lived, often more public practices that seem to have similar characteristics, such as prostitution, paid adoption, labor markets, abortion, and education.

Proponents might alter their argument in response to these conclusions in one of two ways. First, they might alter their claims that technologies will modify experience into claims that technologies will reinforce or fail to destroy already prevalent attitudes or beliefs. Each of the arguments I discuss can be reformulated to express concern over the failure to undermine, or the possibility of reinforcing, attitudes or sensibilities that the theorist dislikes. Perhaps the dramatic claims of some modified-experience arguments were never intended as more than rhetorical flourishes to attitude-reinforcement concerns.

The precedents I mention are relevant to attitude-reinforcement arguments, but in a different way than they are to modified-experience claims. Attitude-reinforcement claims rely on the possibility that limiting a technology might help slow the spread of, or actually start to undermine, widely held beliefs. The precedents are important in thinking about the prudence of such a tactic. If the belief or attitude is also supported by many of the precedents, then whether to ban a technology to combat extant attitudes might depend on whether any of these other precedents might also be prohibited. If not, the tactic might be futile.

Second, modified-experience proponents might reformulate their claims more narrowly to suggest that participants or only some observers are at risk. Though I think such a response is much more convincing than the broad theories, I offer some reasons in the next two sections for caution even about narrow theories.

123. Perhaps this analogy will make the point clear. A scientist might observe that a particular species has been exposed over the last million years to five hundred different forms of *X* (predator, chemical—whatever) and that, though we are uncertain what changes in the species have taken place in response to these forms, we can now feel some confidence that introducing a very similar version of *X* will not likely alter the species greatly.

B. NONASSOCIATION AND IDEAL PRESERVATION

The extent to which a technology affects reasoning, perception, values, and relations is an empirical question about which precedents offer limited evidence.¹²⁴ Because people sometimes buy things and still relate to them in nonmonetary terms, and treat some other people as objects without relating to all people as objects in all circumstances, theorists should seek to explain how participants and observers elude modified-experience effects.

Shapiro explains that whether a technology alters participants' and observers' sensibilities depends on questions addressed by cognitive psychology. How one perceives a technology depends on which of the multiple characterizations to which events are always subject seems most salient.¹²⁵

This explanation seems right. I add that many people have tendencies and motivations to view a technology in one rather than another way, as well as not to notice it at all.¹²⁶ Some might not see a practice as commodification, objectification, or noncontingency in the first place. Others might cabin the experience in a way that prevents it from infecting other experiences or undermining beliefs in important norms.

Most people have internalized strong cultural norms. Many believe that the world is basically just;¹²⁷ that life has infinite value;¹²⁸ that persons are to be treated as ends rather than only as means;¹²⁹ and that certain relationships carry with them obligations and affections that do not depend on the actions or characteristics of the other person. Although commitments to carry out these beliefs often falter, and although the world is filled with evidence of failure, many people remain committed to these abstract propositions.

124. See, e.g., Radin, *supra* note 12, at 1933 ("[I]t does not seem that women's reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage,"); Shapiro, *supra* note 10, at 334 ("It may be unclear in any given case whether fears of objectification at the hands of biological technologies are reasonable.").

125. Shapiro, *supra* note 10, at 364-65.

126. I say tendencies and motivations to avoid committing myself unnecessarily to a position in a controversy among psychologists who study belief perseverance. Some attribute the phenomenon to dissonance reduction, and some talk only of the tendency to ignore evidence in certain situations, whatever our motivations. See, e.g., HUMAN INFERENCE, *supra* note 27, at 175-88; Slusher & Anderson, *supra* note 42.

127. See, e.g., LERNER, *supra* note 38.

128. See, e.g., HELGA KUHSE, THE SANCTITY-OF-LIFE DOCTRINE IN MEDICINE (1987).

129. See ONORA O'NEILL, CONSTRUCTIONS OF REASON (1989).

When confronted with an event that seems to contradict one of these norms, people often rely on social and psychological devices to incorporate the experience in the way that permits them to continue believing in the norms. Belief perseverance helps explain the failure of dissonance-reduction arguments for modified experiences.

People value certain experiences. When they can perceive an event in several ways, some of which threaten to destroy the experiences, many people perceive the event in the less threatening way. Motivated nonassociation explains to some extent the failure of the associational arguments for a modified experience.

Belief perseverance and motivated nonassociation can be supported by research in psychology, sociology, linguistics, and anthropology suggesting that when an event challenges a widely or strongly held belief or other need, individuals and groups find ways to ignore or to redefine the event in a less threatening way so that it is either seen as coincident with the norm or as an aberration. I first outline the theories I have in mind and next show how they might work in context to avoid the modified-experience effects of various technologies.

From psychology, theories that people preserve a belief in a just world by recharacterizing victims or the nature of events, or by denial of injustice,¹³⁰ and theories of dissonance reduction¹³¹ or of defenses and ego protection¹³² support the view that many people are motivated to and do preserve beliefs in internalized norms. Dissonance theory usually holds that prior commitments are less subject to change as a means of reducing dissonance than are perceptions and future actions.¹³³ Therefore, one would expect people to avoid perceiving something as conflicting with a norm more readily than they would change their norm when confronted with contrary evidence.¹³⁴ Furthermore, people maintain

130. See LERNER, *supra* note 38.

131. See sources cited *supra* note 20.

132. CHARLES BRENNER, *THE MIND IN CONFLICT* 55, 75 (1982).

133. WICKLUND & BREHM, *supra* note 20, at 3-4.

134. In discussing belief perseverance, I do not mean to suggest that our cultural norms are impervious to change and that no technology or other new practice could alter the way we view the world. For a taste of the literature of the dramatic effects of technology on social life, see *TECHNOLOGY AND CONTEMPORARY LIFE* (Paul T. Durbin ed., 1988). Surely such an assertion would itself be subject to historical counterexample. However, we should not expect such changes from medical technologies in a world already dramatically infused with technological control. They are not likely to ever become highly visible, constant intruders into our daily lives. Nothing about these activities will necessarily force itself on us to make such cabining very difficult.

false beliefs in the face of disconfirming evidence, even when the belief is not attached to some psychologically important norm.¹³⁵

Though there is some limit on the ability to ignore disconfirming evidence, the contradictions involved in medical technologies are likely to be especially easy to ignore. Most studies find that people can ignore disconfirming evidence that is clearly contradictory. It will be even easier to ignore the conflict between medical technologies and widely held norms because these technologies do not contradict those norms so clearly.

Consider more details from schema theory. I explained above that the fear of commodification might be grounded if coming to view a biological process as part of the market schema would lead people to associate other beliefs, attitudes, and feelings usually attached to market objects with human beings. However, schema theorists also note that objects and events commonly fall into several possible schemas and that the classification of an object or event into a particular schema is itself psychologically motivated.¹³⁶ Schema theory supports belief perseverance.¹³⁷

From linguistics, there is evidence that when new events fit ambiguously into several categories, they are linguistically absorbed into the category that permits preservation of cultural myths.¹³⁸ "Brain dead" is a good example.¹³⁹ So is "surrogate mothering."¹⁴⁰

From sociology and anthropology, there is evidence that certain social beliefs are preserved. Consider the persistence of racial stereotypes in the face of contrary evidence,¹⁴¹ Levi-Strauss's view that myth often

135. HUMAN INFERENCE, *supra* note 27; Ross & Anderson, *supra* note 42; Slusher & Anderson, *supra* note 42.

136. See, e.g., Tesser, *supra* note 28, at 306-09; FISK & TAYLOR, *supra* note 27, at 176.

137. FISK & TAYLOR, *supra* note 27, at 171-73.

138. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS 94 (1987) (citing R.M.W. DIXON, WHERE HAVE ALL THE ADJECTIVES GONE (1982)).

139. We call some people "brain-dead" rather than "body-alive" in part because the designation helps us to accept treating the person as dead for some purposes.

140. We could call them gestation vendors or ova vendors. But I suspect that we find the image of a substitute mother more consonant with the image of foster mother and baby-sitter. It invokes an image of care giving rather than one of markets.

141. For a brief review and citations, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336-39 (1987) (citing Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 183, 187-90 (D. Hamilton ed., 1981)).

functions to resolve perceived contradictions in a culture,¹⁴² and theories of how myths about poverty and victims bolster just-world beliefs.¹⁴³

In supporting the idea of a modified-experience theory, Shapiro relies on psychological and sociological theories, many of which focus on the idea that experience is shaped by belief systems. Although I agree with this insight, it is important not to move from this realization to an assumption that our belief systems are fragile.

Shapiro notes the Lele's abhorrence of the flying squirrel, which does not fit the Lele distinction between birds and animals.¹⁴⁴ The bridging of categories poses special dangers, Shapiro thinks, for our "conceptual agoraphobia." This bridging contributes to the jarring effect of some technologies, increasing the likelihood that people will reject norms violated by the technology. However, it is central to Douglas's discussion that the Lele do not abandon their belief system in the face of a challenging phenomenon. They accommodate the flying squirrel using taboo, one of many mechanisms for maintaining important beliefs and institutions in the face of threats. The lesson of the flying squirrels is more of the resilience of culture and category than of their fragility.¹⁴⁵ If we are conceptual agoraphobes, we are sufficiently adaptive to rebuild and patch our conceptual shelters.¹⁴⁶

The arguments for belief preservation do not suppose that norms maintained by denial or recategorization are wholly false. To the contrary, sometimes these devices lead to adaptive and partially self-fulfilling beliefs.¹⁴⁷ By partially self-fulfilling, I mean that when people believe something that is not entirely true, it can become closer to being true because people believe it. People overstate the possibility of fulfilling their norms. By doing so, many people manage to protect themselves from abandoning norms altogether, which enables them to have the experiences and values that modified-experience phenomenon suggest would become problematic.

142. CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 206-31 (1963).

143. LERNER *supra* note 38.

144. Shapiro, *supra* note 10, at 340.

145. DOUGLAS, *supra* note 53, at 167. *See also id.* at 39 (listing various ways that taboo and pollution beliefs function to reinforce norms).

146. Shapiro admits this as possible. Shapiro, *supra* note 10, at 362 ("It may well be that some classification systems admit of considerable plasticity In such cases, classification 'challenges' may not greatly disrupt descriptive or normative thinking."). To this analysis I mean to add that the plasticity of classification systems is more a characteristic of us than of the particular system and that therefore there are psychological reasons to think plasticity very common.

147. Sometimes they are highly destructive. *See infra* text accompanying notes 165-66.

Having canvassed in broad outline some reasons to doubt the strength of modified-experience effects, I next apply these ideas to particular arguments.¹⁴⁸

1. *Noncontingent Bonds*

How, in the face of the precedents demonstrating contingency of love and duty, does anyone believe in unconditional love and duty? How does anyone create relationships that have important noninstrumental aspects?

I offer the following hypotheses: First, there is no such thing as a wholly noncontingent bond. We all love, like, desire, and feel obliged on the basis of contingent facts. We feel duties and affections for reasons (sometimes unknown to us). Bonds differ not on whether they are contingent but on what they are contingent. In this regard, bonds differ widely. Some seem much closer to noncontingency than others. For example, if affection is contingent on aspects of another's personality, character, or past that are not apt to change, then the fact that we care about them *for* these reasons is not very likely to lead to a breach of the bond and therefore not likely to be noticed as something on which our affection is contingent. Further, some bonds really do approach noncontingency. Some people do care for their parents in old age despite the onset of diseases such as Alzheimer's, which alter many of the parent's traits that the child formerly valued.

Second, many people believe in a relatively strong norm of unconditional love for and duty toward children and a somewhat less strong notion of unconditional love and duty toward other intimates.¹⁴⁹

148. Although I will not consider details, these theories have some relevance to attitude-reinforcement arguments as well. Social and psychological methods of belief perseverance are barriers to any political effort at undermining bad attitudes and beliefs—as is well-attested to by the seeming invincibility of racial stereotypes. This difficulty is simply part of the political decision of whether prohibiting a practice as a means of combatting bad beliefs is in any given case practicable.

149. I am not certain that “unconditional” really expresses the norm. Rather, the relationship (between parent and child or one between lovers) acts as a reason to continue caring—a very strong reason that overcomes most reasons to the contrary. To be unconditional, love would have to work like an exclusionary reason. See J. RAZ, *THE MORALITY OF FREEDOM* 57-62 (1986).

Even as an ideal, most people do not think in these terms. The parent-child bond might be an exclusionary reason during the early years of the child's life. But then during adulthood, although we expect parents to stand by their children, even if the child is a relatively bad person, we do not expect the love to continue even if the child abandons or abuses the parent.

For the love between lovers, the ideal is also conditional. We expect continued love despite hardship and disease. We do not, however, expect continued love despite violence and infidelity.

Third, people want to believe in noncontingency of certain relationships. People want security and certainty. Nothing is more certain than the permanence of a noncontingent bond of affection or duty.¹⁵⁰

These three points—that no relation is wholly noncontingent, though sometimes contingency is less visible and some relationships are less contingent; that many people believe in noncontingency; and that people might need to believe in noncontingency—lead me to wonder if there are means for preserving the belief in and experience of noncontingent bonds. I think there are.

Failing to notice the contingency of relationships is not so difficult. Contingency is not apparent unless the contingent fact disappears or fails to happen and one then abandons the relationship or fails to fulfill some obligation. Otherwise, pretending noncontingency faces little dissonant evidence. People often rationalize contingency, explaining the end of relationships in ways that maintain the belief in unconditional love. People decide that they were not in love. People also rationalize attempts to alter intimates in ways that do not challenge the belief in unconditional love and duty: One attempts to improve other people for their benefit, rather than for one's own.¹⁵¹ Whether people do so based on psychological need or just because people tend to preserve whatever beliefs they have, people can preserve belief in the norm of unconditional love and duty.

Many people would use these means to continue believing in unconditional love or duty if they learned about or used genetic engineering or surrogacy. The possibility of viewing genetic engineering as a gift to the

This makes me think that the norm of love is a strong reason to continue affection, not an exclusionary reason.

Finally, there is nothing in our norms that precludes decreased intensity of love in response to bad acts or changed characteristics.

150. We do, though, need nonintellectualized emotional experiences of love as well. Although it may be true that when we intellectualize our relationships, we can produce reasons for them that lead to the conclusion that the affection is contingent on those reasons, we usually do not experience the benefits of relationships in such intellectual terms. In order to preserve the nonrational aspect of these relationships, we might have reason not to examine too closely the reasons for our bonds, which reveal their contingent nature, and destroy their nonintellectualized aspects.

151. This seems especially true of the ways that parents improve their children. Undoubtedly there is some truth to both positions. Parents improve their children for mixed reasons. Sometimes we think parents are living vicariously because the mix seems somewhat less dedicated to the child. Sometimes the parent seems less interested in their own pride.

The important point here is partly seen by Shapiro when he points out the possibility of multiple characterizations. Shapiro, *supra* note 41. There are almost always several ways of characterizing things. I add just that this fact together with some motivations to prefer one characterization over another gives us reason to think that we can avoid noticing almost any counterexample to an incompletely fulfilled norm in which we have reason to want to continue believing.

children, rather than a condition for love, together with the need to preserve the ideal of noncontingency, will lead observers for the most part to think of it in these terms, especially at moments when commitment to the ideal of unconditional love might otherwise be threatened.

People need not notice the contingency of genetic engineering unless it fails. Love will not seem contingent on Johnny being tall if Johnny is tall. Of course technology can fail, both directly (when Johnny is not tall) or socially (when he plays basketball badly).¹⁵² Technological failure is a concern. But I see no reason to expect more failures from genetic manipulation than from piano lessons or school tutors. Parents have lived with no-talent pianists and bad students. Even parents who really wanted their children to be good pianists and students find ways to live with the failure. Some of course do not. Nevertheless, this social difficulty need not increase as a result of technology.

One dangerous aspect of genetic engineering is the fact that it would not be available to all. Those who lack access might have difficulty maintaining belief in noncontingency.¹⁵³ But the tendency to avoid developing tastes for unavailable things might counter such a process.¹⁵⁴

Surrogacy regularly and publicly displays the rejection of the mother-child bond. However, just as giving up a child for adoption is often viewed as for the benefit of the child, surrogacy can also be viewed as beneficial to the child. This possibility will not be neglected in the long term. Women act as surrogates for many reasons; many report that money is fairly low on the list.¹⁵⁵ Whether this is true is not important. As long as the explanation is plausible to people who have reason to want to believe it because of their attachment to the norm of unconditional love, the "rejection-of-child-for-less-than-pressing-reason" aspect of surrogacy might not be much noticed.

152. *Id.*

153. Shapiro, *supra* note 10, at 341-44.

154. One might object that although we might have reason not to notice the contingency of our relationships because of prior commitment to the ideal of noncontingency, or because of need for feelings of certainty, we have contrary needs that might work in the opposite direction. For example, psychoanalysts often point out the strength of our drive for control and our fantasies of omnipotence. Surely genetic engineering will not be ignored if it connects with this need.

Although I expect we are attracted to genetic engineering in part for this reason, I do not take this to undermine my main point. There is nothing necessarily incompatible in the need to believe in unconditional bonds and the need to feel powerful. Unless our drive for power requires not only that we feel in control, but also that we feel unconcerned about the welfare of those we control, we can simultaneously enjoy the power of genetic manipulation (or of instructing our children or making them more attractive) and continue to believe that we do these things for the children's benefit.

155. Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623 (1991).

When this means of understanding surrogacy does not work, others seem to be used. Surrogates have been falsely portrayed as unstable or driven by poverty, and the likelihood that they will change their minds has been overstated. These inaccuracies help to maintain the myth of noncontingency. When people find a contingency, they understate its prevalence and then label the person who demonstrated it as aberrant. The magnification of the possibility that surrogates will regret their decision might really be an expression of dismay over the fact that they do not. The portrayal of surrogates as unstable might be attractive as an antidote to the fear that they are really much like the rest of us.

Finally, although people do not love unconditionally, the belief that they should and do is partially self-fulfilling. People who believe they should love children no matter what are probably more likely to continue loving them under more trying conditions than were they to accept the contingency of relations. This has the dual effect of cementing bonds, and creating evidence of noncontingency, which—like all evidence that confirms beliefs—will seem more dramatic and salient than contrary evidence.

Of course, the ability to continue believing in the noncontingency of intimate relationships has an unfortunate side. People believe in unconditional love in a world filled with physical, sexual, and mental abuse and neglect of intimates. The ability to continue believing that individually and collectively we love the people we treat this way plays a role in the pervasiveness of these practices, just as it does in the persistence of our ideals.

These social and psychological means of insulating oneself from change will not be equally available to everyone. However, they seem most available to observers of technologies. Merely knowing about a technology is just the sort of relationship best suited for rationalization or denial. Observing will be easiest if one can form a view of the technology that permits it not to be a constant source of tension. Because observers need not think about or confront a technology repeatedly and often, they are in the best position to avoid being affected.

Although to some extent these same devices are available to participants, they might not be as effective. For example, a parent who in fact has a child for whom genetic engineering failed might have great difficulty maintaining some appropriate relationship with the child. A surrogate mother who regrets giving up a child might really come to view certain relationships as pervaded by money.

As to Davis's concern about increasing the costs of children, it is not clear to me which way costs cut psychologically. Rural parents making decisions at a time when children were a plausible financial investment might have been more likely to think of their children as investments than are parents today who know that child rearing will be expensive. Even if parents look for emotional "payback," I do not think parents who pay large sums, and who suffer greatly in trying to obtain a child, will be more apt to be dissatisfied with the imperfect child. Cognitive dissonance theory would suggest the opposite. People will be more pleased if they have paid much and worked hard for something than if they did not.

2. *Commodification*

Why do people think of intimates in terms other than their income? First, we all have psychological needs to create something special of our lives and to have noninstrumental, nonfungible relationships with things and people. Therefore, we have a strong motivation to avoid thinking of others only in terms of their dollar value. Second, most of us internalize widely held norms that insist that we should not focus too closely on money. In many social circles, for example, one cannot ask a stranger, or even some friends, about their income or net worth. People do not look at the price of presents they receive, and most people disapprove of the open pursuit of wealth to the exclusion of other values.

These social facts are not just norms; they are means of segregating monetized from nonmonetized aspects of our lives. People need not stop pricing to preserve the ability to think in terms other than price. They can accomplish such cabining of ideas with much simpler mechanisms, such as taboos on the constant discussion of price. People avoid becoming obsessed with prevalent aspects of the world just by having and maintaining customs.

Each of us has some need to maintain the (not-wholly-true) belief that we are not materialists seeking wealth. Preserving this belief creates an incentive not to view things sold as wholly reducible to their dollar value. Because people are able to maintain the belief that things are not fungible, they create lives in which things are not. The belief is therefore partially self-fulfilling.

The fear that surrogacy will lead observers to think of children or women in monetary terms seems undermined by the need for intimacy.

The need that drives many to want children or other important relationships will be an incentive for all of us to think of children as persons rather than as items for investment.

Whether these same devices work to permit surrogates and adoptive parents to think of their children, or to permit children born to such relationships to think of themselves in nonmonetary terms is perhaps less clear. However, they too share the need and desire to create a way of thinking and feeling that is not reduced to dollars.

3. *Respect for Persons*

People might have any number of reasons for wanting to believe in the absolute value of life and in persons as ends rather than as means. We want to think of ourselves as infinitely valuable and as part of a special community. We do not like to think that others view us merely as means. We have developed many ways to preserve these norms. I do not mean to endorse or reject any of the practices I describe. I mention them only as a small catalogue of the ways people effectively preserve beliefs.

People often redefine any individual whom they plan to treat only as a means to an end or as having only limited value as either not alive or as not a person. Whether these judgments are good or ill, they permit people to continue believing in the infinite value of life and in ends-only morality. Examples include the belief that a fetus is not a person, the belief that an individual with no brain function is dead, or the belief that a person with no upper brain function is dead.¹⁵⁶

These same devices would protect beliefs in the infinite value of life and in ends-only morality if doctors used fetal tissue or organs from anencephalic infants for transplant or if they discarded embryos from IVF or maintained brain-dead pregnant women until their fetuses were born.¹⁵⁷ Observers might also focus on how these procedures create life, rather than on how they disrespect persons.

People might likewise come to view the transplant of fetal tissue or organs from anencephalic infants as they do organ donation when the patient has expressed no view—concluding that had the person considered the matter, that person would have consented and that therefore the

156. Calabresi and Bobbit have described these and a variety of other means available for maintaining beliefs. We mask practices that value life by using lotteries or by redescribing the group that fulfills the infinite value norm and then focusing on that group. CALABRESI & BOBBIT, *supra* note 30.

157. I obviously do not mean to suggest that we should therefore do all these things. I only suggest that modified-experience theories are not themselves reasons to avoid the practices.

family's consent is sufficient. Similarly, people might come to believe that embryos are not persons and therefore discarding them does not harm human life. This seems to be the accommodation most people have come to in understanding IUDs.

Finally, if maintaining brain-dead pregnant women is appropriate, people will no doubt conclude that having consented to the pregnancy, the woman would have consented to life support.¹⁵⁸

IV. SUBTLER CHANGES AND SLIPPERY SLOPES

I comment on two final topics: subtler versions of modified-experience arguments and slippery-slope arguments. Neither discussion is thorough. However, the arguments I have made offer some insights for future thinking on these topics.

A. SUBTLER CHANGES

My argument from precedent and my psychological account sometimes characterized (perhaps caricatured) modified-experience arguments as expansive. I would now like to comment on less dramatic forms of the arguments.

I interpreted the modified-experience arguments as suggesting that technologies would absolutely destroy certain sensibilities. Observers could *never* think of a child in other than money terms. Technologies would have the same effect on *everyone*. The infection was to affect *all* relationships. I interpreted the domino effect, for example, as preventing us from thinking of *any* other person in nondollar terms.

Such presentation was not wholly fair. I justify it only as a device to help consider the arguments in their starkest form and as a warning against support for such positions. What is to be said for more limited interpretations? Should we fear that some technologies will alter the way some people experience the world somewhat? Perhaps the changes could be cumulative over time, each step being undetectable.

This sort of argument is very likely true sometimes. Surely people do change in subtle ways in response to changes in social practice. The statement sounds like a truism. But trying to formulate social policy on the basis of such a truism is extraordinarily difficult. It certainly might be true, for example, that the existence of surrogacy will slightly impair

158. In fact, some women would not, either because of revulsion toward the life support or perhaps because they do not want to bring a child into the world if they will not be there to rear it.

some or many people's feelings toward and relationships with some or many children. But given the precedents and the psychological account offered above, such an effect might be so marginal that it should not count as a reason to hesitate over surrogacy.

Even if such subtle effects are likely, I think that we should not consider them in making decisions. First, the evidence creates a burden of persuasion to show why new technologies will strike observers as different from old and how they will have effects. For the same reasons the more dramatic claims are not likely to take effect, the more subtle effects are likely to be checked.

Second, the precedents are frequently so widespread and dramatic that to the extent subtler changes in our experience are likely, I am left thinking that they have already happened, and I wonder how relatively unobtrusive practices could marginally make much difference. For example, even conceding that knowledge of surrogacy could alter some people's perceptions of children sometimes, I still wonder how we can expect this harm to be significant in a world that already has paid adoptions, job markets, and all of the other precedents to surrogacy.

Third, there is a danger of overstating the likelihood of any modified-experience effect and its relative importance if we try to take account of such a possibility.¹⁵⁹ Fancy argument, like fancy medical techniques, often capture our imaginations and therefore our attention somewhat more than they ought.

In particular, focus on whether practices alter the sensibilities of observers can distract us from intellectually more pedestrian, but consequentially more likely and severe effects. In thinking about surrogacy, we must not neglect such questions as whether and how often surrogates will regret their decisions, whether children born of such arrangements will suffer psychologically from knowledge of their origins, whether prohibiting surrogacy will lead to severe black-market effects, whether but for surrogacy other children might be adopted, whether surrogacy really limits the human suffering accompanying infertility, and dozens of others that do not require inquiry into the sensibilities of observers.

Included in these concerns might be attitude-reinforcement worries. Perhaps prohibiting surrogacy could be part of a social movement aimed

159. It has been noted before that those who take arguments about altered sensibilities seriously seem unreasonably to weigh those concerns far more heavily than other harms and benefits. *See, e.g.,* FEINBERG, *supra* note 2, at 80-81 (criticizing William May for treating the benefits of reduced human suffering available through organ transplant as less important than concern for maintaining widespread human sensibilities about the human body).

at combatting the image of woman as procreative object.¹⁶⁰ However, even this argument must be viewed with some caution. It too has the potential to distract us because it is fancy. One must evaluate carefully whether the risks associated with prohibition are worth the gamble that prohibition might undermine bad attitudes and beliefs.

Modified-experience arguments can distract people from nonconsequentialist concerns. If we take seriously a prohibition on treating children as commodities, we should inquire whether surrogacy violates this norm and whether the norm is really absolute. But we need not make empirical inquiries into the sensibilities of observers to answer these questions.

Fourth, we should be especially reticent to consider broad modified-experience effects (sensibilities of observers) because, even if they are true, they probably focus our concern on those least in need of it. This inquiry tempts us to focus on the "interesting" harms of those who are sufficiently well-off to worry about their sensibilities. There is a real distributional mistake—an elitism—involved in asking whether we should prohibit surrogacy or prostitution, limiting options of women who might rightly see these as their best available opportunities, on the grounds that these activities might impair the ability of middle-class observers to find appropriate intimacy.¹⁶¹

Having made these arguments, let me nonetheless confess uncertainty. I write inevitably from a perspective—that of a privileged white man. Perhaps my arguments only show why *I* need not fear these technologies and what resources *I* have at my disposal to protect my own internal life from damage. What reason do I have to think these experiences generalizable?

I see no reason to think all people equally immune or protected from modified-experience effects. Many modified-experience claims made in the past have been expressed as general terms. At the very least I have pointed out a need for some theory about who is at risk. I suspect that users of technologies—participants—are most at risk and that we can

160. Cf. Radin, *supra* note 3 (discussing the necessity of refusing to accept the status quo morally as well as empirically).

161. Although this last problem does not argue against considering changes in the sensibilities of participants, it is my sense that the main attraction of modified-experience arguments disappears once they are limited to participants. We can inquire about many other harms and benefits to the participants without considering modified experiences, and, in any case, for most of them their consent might nullify modified-experience concerns. Radin makes a parallel point about elitism in connection with prostitution. See Radin, *supra* note 12, at 1917.

think about their interests clearly enough without modified experience theories. But perhaps there are particularly vulnerable observers.

Finally, by expressing skepticism that technologies create unfortunate attitudes and feelings, I do not mean to suggest that these feelings and attitudes are good or rare. Radin, Shapiro, and Davis are right that we are all worse off when we become preoccupied with viewing people in terms of their cost, their possibilities as resources, or the extent to which they fill our needs. Temptations to think and feel this way are everywhere and are yielded to all too often.

My disagreement is not in thinking that these are dangers. It is in thinking that these are dangers that are easily created or destroyed or even increased or decreased. The dangers of bad ways of thinking and feeling are always with us. Medical technologies might lead us to feel toward children as we do objects. But we easily do so without technologies. We now act against our children's interests and believe we love them unconditionally. We sometimes resist this temptation. The danger and the possibility of resisting will depend more on us than on what tools and technologies tempt us.

B. SLIPPERY SLOPES

Finally, I offer a few thoughts about slippery-slope arguments. Slippery-slope arguments say that if we do *A*, which might be otherwise unobjectionable, we will come to do *B*, which we can now agree is immoral or undesirable. Therefore, we should not do *A*. Each of the modified-experience arguments I discuss can become the premise for a slippery-slope argument by adding that the new attitude will lead us to act toward others as we act toward commodities or objects, ignoring their wills, desires, needs, and humanity.¹⁶²

Responses to this sort of argument, like my response to the modified-experience argument, often appeal to historical counterexample. In rejecting the argument that killing is contagious, Peter Singer stated: "Ancient Greeks . . . regularly killed or exposed infants, but appear to have been at least as scrupulous about taking the lives of their fellow citizens as medieval Christians or modern Americans."¹⁶³ A rejoinder

162. See, e.g., Jay A. Friedman, *Taking the Camel by the Nose: The Anencephalic as a Source for Pediatric Organ Transplants*, 90 COLUM. L. REV. 917, 970-77 (1990).

163. Peter Singer, *Unsanctifying Human Life*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 41, 59 (John Ladd ed., 1979).

sometimes offered also relies on history—the fact that Nazi atrocities were preceded by the arguably merciful killing of deformed infants.¹⁶⁴

There is no great mystery in the evidence that killing is sometimes but not always contagious. Violence can anesthetize us to its horrors. Some soldiers really do become numb to killing. But the same mechanisms that lead to numbness—denial of pain and the need to believe in the justice of the world—sometimes lead people to cope with violence by becoming numb to a small group who we define as different, while maintaining tender relations and sensibilities toward others. Just as we can commodify or objectify some things without transferring these feelings or attitudes, we can sometimes become numb to the suffering of some without becoming altogether numb. From this insight, we should conclude that the possibility of a slippery slope does not guarantee its force. We sometimes cope with suffering by defining the object of harm as separate rather than by becoming used to suffering generally.

The fact that we are sometimes so good at preserving our sensibilities by redefining our acts should be both comforting and frightening. We should be comforted because we can probably transplant fetal tissue without learning to be careless with or unconcerned about human life. But we should be frightened because we are able to fall into terrible acts without even the need of anesthetizing practice. We kept slaves without first preparing for the prospect with more benign acts. We are capable of cabining our respect and concern, both when it helps and when we have no excuse. Evil therefore always awaits us.¹⁶⁵ The abilities that permit us not to commodify, or to continue believing in the infinite value of life and the justice of the world, are the same abilities that permit us to believe that Blacks or Jews are not really humans when we find it convenient.¹⁶⁶ Our ability to believe distinctions and not to notice similarities serves us well enough when we hold somewhat self-fulfilling beliefs in noble ideals. It has served us ill as well. We have more to fear from

164. For a discussion of arguments and counterarguments based on the Nazi analogy, see LAMB, *supra* note 1, at 10-40. There is a notorious danger in offering historical evidence for a slippery slope: We confuse correlation with causation. That prostitution coexists with patriarchy does not show that selling sex causes patriarchy or that banning or ending prostitution would diminish the oppression of women.

165. HANNAH ARENDT, *EICHMAN IN JERUSALEM* (1963).

166. ROBERT S. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 420 (1986) ("The adaptive potential for doubling is integral to the human psyche . . . for a soldier in combat, for instance . . . who . . . undergo[es] a form of doubling in order to survive. Clearly the 'opposing self' can be life enhancing. But under certain conditions it can embrace evil with an extreme lack of restraint.").

being able to contain associations when we should not do so than from the possibility that associations and similarities will strike us too often.

Most of the time, whether we slide into immoral behavior seems to me unconnected to prior decisions that were themselves acceptable. Not every country that practiced euthanasia gave rise to Nazis, and countries that prohibit abortion, suicide, and euthanasia tolerate the most grotesque forms of torture. Although certain techniques can be used by those with power and evil intentions to anesthetize people, they are neither necessary nor sufficient for terrible acts. Perhaps we do better to focus directly on the immediate consequences of decisions or on nonconsequentialist concerns rather than on the effect the decisions will have on later decisions or on our own sensibilities.