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## REVISITING *THE HANDMAID'S TALE*: FEMINIST THEORY MEETS EMPIRICAL RESEARCH ON SURROGATE MOTHERS

Karen Busby and Delaney Vun\*

*Abstract:* After briefly reviewing laws on surrogate motherhood in Canada, the United States, and Britain, the authors consider nearly 40 empirical research studies on the characteristics and experiences of women who have been surrogate mothers. Empiricism meets feminist theory as we revisit arguments against surrogacy arrangements, including the inability to give informed consent, the inherently exploitative nature of the arrangements, and the dangers of commodification. In light of our observations based on the empirical research, we argue that it may be time to review Canadian surrogacy laws.

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\*\* This article was completed in September 2009 and reflects the law and the research as of that date.

## INTRODUCTION

Margaret Atwood's powerful 1985 novel, *The Handmaid's Tale*, speculates about a near future in Gilead (formerly the United States), a country ruled by a puritanical theocracy. Most adults are infertile because of pollution, radiation and disease. According to the Biblical story, the original Gilead is the place where, according to the Biblical story, Joseph and the four women (two wives and two slaves) with whom he had children settled. Fertile women in the modern Gilead are forced to be "handmaids", the term used in one translation to describe Joseph's slaves, who had been impregnated by powerful men. The children of these unions were raised as the offspring of that man and his wife. Other Biblically-based Gileadean pro-natalist laws make it a capital offence to engage in non-reproductive sex or to have an abortion, unless the fetus evidences a disability. In Atwood's novel, a handmaid narrates her story onto audiotapes because women are forbidden to read or write. Personal voice and oral history have long been used by marginalized people to make some sense of their predicament. Many feminist scholars understand *The Handmaid's Tale* to be a novel about the exploitative, dehumanizing elements of surrogate motherhood.<sup>1</sup>

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<sup>1</sup> Richard F. Storrow, "The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception" (2005) 12 Tex. Wesleyan L. Rev. 189, citing, for example, Helene Michie & Naomi R. Cahn, "Confinements and Fertility and Infertility in Contemporary Culture" (1997) and Linda Myrsiades, "Law, Medicine, and the Sex Slave in Margaret Atwood's *The Handmaid's Tale*" in Kostas Myrsiades & Linda Myrsiades, eds., *Undisciplining Literature: Literature, Law and Culture* (New York: Peter Lang New York, 1999). Storrow's article also has an interesting review of Egyptian and Muslim law related to surrogacy arrangements.

In early 1986, American Mary Beth Whitehead gave birth to a child conceived by artificial insemination, using her egg and the commissioning father's sperm. She had signed a surrogacy contract to give up all parental rights and she was to receive \$10,000 as compensation. Shortly after the birth, she determined that she could not give up the child and a lawsuit, *In the Matter of Baby M*,<sup>2</sup> ensued between the two genetic parents. At the trial in 1987, her fitness as a parent was questioned on rather dubious criteria. Experts criticized her choice of stuffed teddy bears as toys and how she played "patty cake" with M. They also stated that she had a narcissistic personality and used her dyed hair to support their diagnosis.<sup>3</sup> The court, after finding that there was a binding contract, ordered the termination of Whitehead's parental rights, gave custody to the commissioning father, and permitted him and his wife to immediately adopt the child. On appeal in 1988, the court held the contract was void. The appeal court stated that a surrogate mother could not give meaningful consent to relinquish a child until after the child was born and that it is illegal to pay someone to be a surrogate or to sell a baby. Therefore, the court rescinded the adoption. Using the "best interests of the child" test, it held that the commissioning father should have custody (finding that his home was more stable

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<sup>2</sup> *In the Matter of Baby M*. 217 N.J. Super 313 (Ch. Div. 1987) rev'd 109 N.J. 396 (1988).

<sup>3</sup> More than 100 prominent feminists, including Betty Freidan, Meryl Streep, Gloria Steinem and Phyllis Chesler, signed a statement titled "By these standards we are all unfit mothers", criticizing the expert evidence presented on Whitehead's mothering skills. See also Iver Peterson, "Fitness Test for Baby M's Mother Unfair, Feminists Say", *The New York Times* (20 March 1987), online: The New York Times <http://www.nytimes.com/1987/03/20/nyregion/fitness-test-for-baby-m-s-mother-unfair-feminists-say.html> and Phyllis Chesler, *The Sacred Bond: The Legacy of the Baby M Case* (New York: Times Books, 1988).

and financially secure) and the surrogate mother should have visitation rights. The *Baby M* case ignited a firestorm of public and academic debates on the ethics of commercial surrogacy arrangements. Feminists were almost uniformly supportive of the surrogate mother. *The Handmaid's Tale* and the *Baby M* case both served as influential cautionary tales of women in imaginary and real regimes that forced them to become, as described by one of Atwood's characters, "sacred vessels, ambulatory chalices",<sup>4</sup> or, in other words, surrogate mothers.

The Canadian government formed the Royal Commission on New Reproductive Technologies ("RCNRT") in 1989 and reported in 1993. It recommended prohibiting all surrogacy arrangements on pain of significant criminal sanctions, asserting that women could not give true consent to relinquish parental rights and that the practice exploited vulnerable women and would commodify women and children.<sup>5</sup> The RCNRT's analysis reflected most popular and academic feminist thinking in Canada and the United States<sup>6</sup> in

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<sup>4</sup> Margaret Atwood, *The Handmaid's Tale* (Toronto: Random House, 1986) at 196.

<sup>5</sup> Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 2 (Ottawa: Minister of Government Services Canada, 1993) [RCNRT] at, for example, xxxii, 15, 22, 52, 107, 199, and Recommendations 199-205.

<sup>6</sup> Canadian feminists who opposed surrogacy included Christine Overall, see *Human Reproduction: Principles, Practices and Policies* (Toronto: Oxford University Press, 1993) [Overall, "Human Reproduction"] and *Ethics and Human Reproduction: A Feminist Analysis* (Allen & Unwin: Boston, 1987) [Overall, "A Feminist Analysis"]; Somer Brodribb, see "Off the Pedestal and Onto the Block", (1986) 1 Canadian Journal of Women and the Law/Review "Femmes et Droit" 407; Michele Landsberg, see "Baby M decision backing an inhumane practice" *Globe and Mail* (4 April 1987) A2; Margrit Eichler, see "Reflections on the 'Temporary Use of Normally Functioning Uteri'" in Gwen Basen, Margrit Eichler, & Abby

the 1980s and early 1990s. For example, Christine Overall, an influential feminist ethicist, questioned whether the choice to enter a surrogate contract could be a free one and postulated that it is impossible for a surrogate to be fully informed of the full potential of the traumas they could experience upon surrender of the child. She asserted that surrogate mothers “often have little education, little or no income, and very little personal security” and are therefore ripe for exploitation. She described the practice as “reproductive prostitution”<sup>7</sup> and stated that “the argument here is not that selling babies leads, via the slippery slope, to slavery; the claim is that the practice is

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Lippman, eds., *Misconceptions: The Social Construction of Choice and New Reproductive and Genetic Technologies* (Hull, Quebec: Voyager, 1993); Diana Majury, see “Pre-Conception Contracts: Giving the Mother an Option” in Simon Rosenfeld & Peter Findlay, eds., *Debating Canada's Future: Views from the Left* (Toronto: James Lorimer & Co., 1991); and Susan Sherwin, see “Some Reflections on ‘Surrogacy’” in Basen, Eichler, & Lippman. American feminists opposing surrogacy included: Mary Lyndon Shanley, see “‘Surrogate Mothering’ and Women’s Freedom: A Critique of Contracts for Human Reproduction” (1993) 18 *Signs* 618; Martha Field, see *Surrogate Motherhood: The Legal and Human Issues* (Cambridge: Harvard University Press, 1988); Janice Raymond, see *Women As Wombs: Reproductive Technologies and the Battle Over Women’s Freedom* (San Francisco: Harper Collins, 1993); Chesler, *supra* note 3; Barbara Katz Rothman, see *Recreating Motherhood, Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton, 1989); Anita L. Allen, see “The Socio-Economic Struggle for Equality: The Black Surrogate Mother” (1991) *Harvard Blackletter J.* 17; Gena Corea, see *The Mother Machine: Reproductive Technologies From Artificial Insemination to Artificial Wombs* (New York: Harper & Row, 1985); and see Linda & Whiteford and Mary L. Poland, eds., *New Approaches to Human Reproduction: Social and Ethical Dimensions* (Boulder, CO: Westview Press, 1989). (Most of the authors in this text illustrate this point).

<sup>7</sup> Overall, “A Feminist Analysis”, *supra* note 6, at 1 and 116-118.

slavery” and she concluded that even if a regulatory regime protects the rights of surrogate mothers it “is incompatible with the vision of women as equal, autonomous, and valued members of this culture”.<sup>8</sup> Early in the debate, few feminist voices asserted that women should have the autonomy to make the choice to be a surrogate mother.<sup>9</sup> Once it became apparent that prohibition coupled with criminal sanctions was the path likely to be taken in Canada, some noted the dangers of criminalizing the behaviour of marginalized groups.<sup>10</sup>

Attitudinal surveys also indicated that there was little public support for surrogacy in Canada and elsewhere in the 1990s. Vijaya Krishnan’s 1994 survey of more than 5,300 Canadian women of reproductive age found that, while 24 percent of those surveyed approved of commercial surrogacy, 42 percent strongly disapproved. S.J. Genius *et al.* found in a 1993 survey of 455 Edmontonians that 85 percent were

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<sup>8</sup> Overall, “Human Reproduction”, *supra* note 6, at 124 and 131.

<sup>9</sup> One early proponent of autonomy and choice was Carmel Shalev, see *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989).

<sup>10</sup> The National Association of Women and the Law (NAWL), while stressing that it did not “condone” surrogacy, submitted to a Parliamentary Committee in April 1997 that criminal approaches were too heavy handed. See the evidence of Diana Majury and Diana Ginn, on behalf of NAWL, online: <[http://www.parl.gc.ca/35/Archives/committees352/srta/evidence/07\\_97-04-10/srta07\\_blk101.html](http://www.parl.gc.ca/35/Archives/committees352/srta/evidence/07_97-04-10/srta07_blk101.html)>. See also, Majury, *supra* note 6, Mariana Valverde & Lorna Weir, “Regulating New Reproductive and Genetic Technologies: A Feminist View of Recent Canadian Government Initiatives” (1997) 23 *Feminist Studies* 418, and Alison Harvison Young & Angela Wasunna, “Wrestling with the Limits of the Law: Regulating New Reproductive Technologies” (1998) 6 *Health Law J.* 239.

opposed to surrogacy if commissioning mothers used surrogacy simply to avoid the inconvenience of pregnancy.<sup>11</sup>

Despite the cautionary tales, early feminist thinking and public opinion and a 2004 criminal law in Canada prohibiting commercial surrogacy (discussed below), surrogacy arrangements have persisted as a method of family formation and seem to be here to stay. Reliable statistics on how many surrogacy arrangements are entered into are not available, but the web sites of American and British surrogacy organizations boast of making hundreds of connections and that at least 25,000 babies have been born to surrogate mothers in the United States alone.<sup>12</sup> The growing reproductive tourism

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<sup>11</sup> Vajaya Krishnan, "Attitudes toward surrogate motherhood in Canada" (1994) 15 *Health Care for Women International* 333 and S.J. Genius, S.K. Chang, & S.K. Genius, "Public Attitudes in Edmonton toward assisted human reproduction" (1993) 150 *Canadian Medical Association Journal* 701. See also Aimee Poote & Olga van den Akker, "British women's attitudes to surrogacy" (2009) 24 *Human Reproduction* 139 and G. Wiess, "Public Attitudes about Surrogate Motherhood" (1992) 6 *Michigan Sociological Review* 15.

<sup>12</sup> For example, Lim Ai Lee, reports that "[a]ccording to reports quoting industry experts, over 1,000 surrogate births took place in the United States last year, and it is believed the number has increased since the recession, as more cash-strapped women turn to surrogacy to ease their financial burden": "Surrogacy way to survive the hard times" *The [Malaysia] Star* (June 29, 2009), online: Star <http://thestar.com.my/columnists/story.asp?file=/2009/6/27/columnists/state%20side/4187899&sec=stateside>. It is not clear whether this figure include situations where the parties concluded arrangements without any third party assistance. Elly Teman, acknowledges that accurate estimates are impossible because so many informal arrangements take place and she reports that, at least, 25,000 children have been born by surrogates in the United States: "The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood" (2008) 67 *Social Science & Medicine* 1104. Childlessness Overcome Through Surrogacy (COTS) (a British organization celebrated its 600<sup>th</sup> birth in

industry in India is worth more than \$450 million (US).<sup>13</sup> Hardly a week goes by without the tabloids featuring a celebrity holding a child borne of a surrogate mother or television programs about the practice.<sup>14</sup> On-line surrogacy organizations connecting would-be surrogate mothers with commissioning parents are numerous and ads offering or seeking commercial surrogacy services are easy-to-find (albeit now illegal) in Canada.<sup>15</sup> Further, the British Medical

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2007) reports that most people who enter surrogacy arrangements do not get legal assistance. In jurisdictions where there are prohibitions on commercial surrogacy, there is evidence of “do it yourself” arrangements: COTS online: <[http://www.surrogacy.org.uk/About\\_COTS.htm](http://www.surrogacy.org.uk/About_COTS.htm)>. A 2007 *McLean's Magazine* story also evidences a DIY attitude in Canada. See Jessica Webb, “Gay man seeks perfect woman: Surrogate mothers find a new niche market: single gay men” *McLeans* (May 21, 2007), online: Rogers Digital Media Publishing <<http://www.fertilitylaw.ca/articles/macleans-01.pdf>>.

- <sup>13</sup> Usha Rengachary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India”, (2008) 39 *Cumb. L.Rev.* 15.
- <sup>14</sup> For example, in June 2009, *People Magazine* featured the story “Sarah Jessica Parker and Matthew Broderick have twins”, online: <<http://www.people.com/people/article/0,,20275425,00.html>>. The babies were born “with the generous help of a surrogate”. The TV series “Lie to Me” repeated “Depraved Heart”, a story about women who killed herself after giving birth as a surrogate and the BBC aired the documentary “Addicted to Surrogacy”. Susan Merkens and Tim Appleton argue that the media portrays surrogacy in a negative light, see *Surrogate Motherhood and the Politics of Reproduction* (Berkeley: University of California Press, 2007) and “Surrogacy” (2001) II *Current Opinion in Obstetrics and Gynecology* 256, respectively.
- <sup>15</sup> See Tom Blackwell, “The impotency of Canada’s fertility laws” *National Post* (February 13, 2009), online: National Post: <<http://www.nationalpost.com/m/story.html?id=128838>> (accessed July 4, 2009). See CBC, “Paid Surrogacy Driven Underground in Canada”, online CBC <[www.cbc.ca/health/story/2007/05/01/](http://www.cbc.ca/health/story/2007/05/01/)>

Association recently changed its position on surrogacy arrangements. In the mid-1980s it maintained that it was unethical for a doctor to be involved in surrogacy; by the late 1990s, it accepted it as inevitable<sup>16</sup>

The next section of this paper briefly reviews surrogacy laws in Canada, the United States, and Britain. These three jurisdictions are the focus of this paper because commissioning parents in these countries are actively engaged in making surrogacy arrangements with surrogate mothers, either within their own countries or in other countries. We then consider recent research on the characteristics and experiences of women who have agreed to be surrogates. In this review, which is the main focus of the paper, empiricism will meet feminist theory as we revisit arguments against surrogacy, including the inability to give informed consent, the inherently exploitative nature of the arrangements and the dangers of commodification. Anecdotal research, both popular and theoretical, is available, as is research based on more rigorous

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surrogates-pay.html>. See also Shireen Kashmeri, *Unravelling Surrogacy in Ontario, Canada. An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004), Surrogacy Contracts, Parentage Laws and Gay Fatherhood* (M.A. Thesis, Concordia University Department of Sociology and Anthropology 2008) [unpublished] at 46. Kashmeri looks at Canadian lawyers who were informants. She confirms that Canadians are traveling to the United States to engage surrogate mothers and that American commissioning parents will make arrangements with Canadian surrogates to take advantage of the Canadian health care system and the lower cost of engaging surrogate mothers. See also Mary Gazze, "Canada: Destination for Infertile Couples" *Globe & Mail* (June 26, 2007), A12.

<sup>16</sup> Olga B.A. van den Akker, "Psychosocial aspects of surrogate motherhood" (2007) 13 *Human Reproduction Update* 53 [van den Akker, "Psychosocial aspects"].

empirical methodologies to study the experiences of surrogate mothers. As will be described more fully, the “empirical data [consistently] offers little support for widely expressed concerns about contractual parenting being emotionally damaging or exploitative for surrogate mothers, children or intended/social parents”.<sup>17</sup> Vasanti Jadva and her research team concluded, based on interviews with 34 British women who have been surrogate mothers, that

Overall, surrogacy appears to be a positive experience for surrogate mothers. Women who decide to embark on surrogacy often have completed a family of their own and feel that they wish to help a couple who would not otherwise be able to become parents. The present study lends little support to the commonly held expectation that surrogate mothers will experience psychological problems following the birth of the child. Instead, surrogate mothers often reported a feeling of self-worth. In addition, surrogate mothers generally reported positive experiences with the commissioning couple, and many maintained contact with them and the child.<sup>18</sup>

A challenge to the federal *Assisted Human Reproduction Act* (“*AHRA*”) (which prohibits paying a woman to be a surrogate mother) on federalism grounds was argued

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<sup>17</sup> Janice C. Ciccarelli & Linda J. Beckman, “Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy” (2005) 61 *Journal of Social Issues* 21.

<sup>18</sup> Vasanti Jadva, Clare Murray, Emma Lycett, Fiona MacCallum, & Susan Golombok, “Surrogacy: The Experience of Surrogate Mothers” (2003) 18 *Human Reproduction* 2196.

before the Supreme Court of Canada in April, 2009 (the case started on reference by the Quebec government, before Quebec courts and they were joined by the governments of Alberta, Saskatchewan and New Brunswick before the Supreme Court of Canada). Both lower courts declared many sections of the *AHRA* unconstitutional.<sup>19</sup> If the lower court decisions are upheld, the remaining sections of the *AHRA* will not make sense on their own and both the federal government and provincial governments will need to reconsider surrogacy and other assisted human reproduction laws. Given this possibility, and in light of the research on surrogate mothers' experiences, it is timely to review Canadian laws relating to surrogacy arrangements. We will briefly undertake such a review in the last section of the paper.

In this paper we refer to agreements between surrogate mothers and commissioning parents as “surrogacy arrangements” unless the context requires otherwise. This usage reflects the fact that it is unlikely that strict contract law principles would apply if the agreements unravelled. Juliet Guichon asserts that,

[t]he use of “contract” incorrectly implies that commercial law would govern in a disputed case, when in fact family law would apply.

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<sup>19</sup> *Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, L.R.Q. ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, L.C. 2004, ch. 2 (Dans l'affaire du)*, 2008 QCCA 1167, 298 D.L.R. (4th) 712. The current challenge is on federalism grounds only. It has been argued that aspects of the *AHRA* violate the *Charter*. See Dana Hnatiuk, “Proceeding with Insufficient Care: A Comment on the Susceptibility of the Assisted Human Reproduction Act to Challenge Under Section 7 of the *Charter*” (2007) 65 U.T. Fac. L.R. 39.

Moreover the word “contract” wrongly suggests that the deal can be enforced by law, even though no Canadian province has done so. Contract law is an essential tool of commerce and regards a deal as a deal. It assumes that people are autonomous, rational, self-interested and equal. However, family law accepts that people are interdependent, capable of irrationality, self-giving and vulnerable. Family law focuses on the body, emotions, and changing intentions; it ... places the needs of children first – irrespective of shifting adult intentions.<sup>20</sup>

### **SURROGACY LAWS IN CANADA, THE UNITED STATES, AND BRITAIN**

#### **Canada**

The federal *Assisted Human Reproduction Act* was passed in 2004 by the Canadian federal government after a 17 year public debate that included the RCNRT, eight different bills, and numerous Parliamentary and Senate hearings.<sup>21</sup> It reflects the advice received from the RCNRT and early feminist thinking. Section 6 creates various criminal offences, including the offence of paying or offering to pay a woman to

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<sup>20</sup> Juliet Guichon, “The body, emotions and intentions: challenges of preconception arrangements for health care providers” (2007) 176 *Canadian Medical Association Journal* 479; see also Robert Leckey, “Contracting Claims and Family Law Feuds” (2007) 57 *Univ. of Toronto L.J.* 1.

<sup>21</sup> See Jean Haase, “Canada: The Long Road to Regulation” in Eric Blyth and Ruth Landau, eds., *Third Party Assisted Conception Across Cultures: Social, Legal and Ethical Perspective* (United Kingdom: Jessica Kingsley Publishers Ltd, 2004) 55.

be a surrogate mother. Section 12 provides that surrogates and others can be reimbursed for expenses as set out in regulations. However, s. 12 has not yet been proclaimed in force and therefore no regulations enabling surrogacy have been passed.<sup>22</sup> Section 12 (but not s. 6) is under challenge before the Supreme Court of Canada. The intent of these provisions is to prohibit commercial, but not gratuitous, surrogacy. Anyone participating in a commercial surrogacy arrangement risks a

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<sup>22</sup> S.C. 2004 c. 2. The provisions are as follows:

6. (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

(2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.

(3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

(4) No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age.

(5) This section does not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother.

...

12. (1) No person shall, except in accordance with the regulations and a licence,

(a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum;

(b) reimburse any person for an expenditure incurred in the maintenance or transport of an *in vitro* embryo; or

(c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

fine of up to \$500,000 or 10 years imprisonment. As the federal government's only jurisdiction for passing an assisted reproduction law is the criminal law power, the statute must in its intent and effect proscribe criminal behaviour by imposing penal sanctions (the RCNRT asserted that the "national concern" branch of the federal "peace, order and good government" power provided the primary jurisdictional basis for federal regulation of new reproductive technologies, the federal government did not try to justify the *AHRA* on the basis of this doctrine before the Supreme Court of Canada<sup>23</sup>). The federal government does not have the jurisdiction to regulate activities which are simply undesirable. According to Angela Cameron,

as an overall policy goal, the [*AHRA*] seeks to prevent the commercialization or commodification of 'life'. This includes buying or selling any of the 'raw ingredients' for making a baby, babies themselves through gestational contracts. ... This goal is reflected throughout the Act by variously prohibiting and regulating activities such as surrogacy and the sale of sperm and eggs.<sup>24</sup>

The *AHRA* defines a "surrogate mother" as a woman who carries a fetus conceived by assisted reproduction and

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<sup>23</sup> See RCNRT *supra* note 6 at 19-22. The "national concern" doctrine permits the federal government to assume jurisdiction if the subject matter has a "singleness, distinctiveness and indivisibility that clearly distinguishes it from a matter of provincial concern and a scale of impact on provincial jurisdiction that is compatible with the fundamental distribution of legislation power under the Constitution": *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401 at 432.

<sup>24</sup> Angela Cameron, "Regulating the Queer Family: The *Assisted Human Reproduction Act*" (2008) 24 Can J. Fam. L. 101 at para. 11.

derived from the genes of a donor or donors with the intention of surrendering the child at birth to the donor or another person. Therefore, it applies to both traditional surrogacy (where the surrogate mother is also the genetic mother) and gestational surrogacy (where she is not). While most surrogate mothers until the late-1980s would have been impregnated by assisted insemination and therefore are the genetic mothers of the children, by 1994, about 50 percent of surrogacies involved the implantation of an embryo created using the genetic materials of others. This figure climbed to 95 percent by 2003.<sup>25</sup> Obviously, gestational surrogacy can only be achieved in a clinic setting and most Canadian clinics will require that the parties enter into some kind of an agreement before they will perform the procedure.

While the *AHRA* came into force in 2004, the regime is, quite simply, not effective. The board charged with preparing regulations that would give effect to most aspects of the licensing regime has not finalized any recommendations. Thus, regulations regarding matters such as reimbursement of surrogacy-related expenses and operating standards for fertility clinics (on matters such as the number of permissible IVF implants, participant screening, records maintenance, requirement for independent legal advice) have not been developed. The statutorily-mandated date for a five year review of the *AHRA* has come and gone without any hint of the

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<sup>25</sup> Heléna Ragoné “Of Likeness and Difference: How Race is Being Transformed by Gestational Surrogacy” in Heléna Ragoné & France Winddance Twine, eds., *Ideologies and Technologies of Motherhood: Race, Class, Nationalism* [New York: Routledge, 2000] [Ragoné, “Of Likeness and Difference”] and David P. Hamilton, “She’s Having Our Baby: Surrogacy is on the Rise as In Vitro Improves” *The Wall Street Journal* (4 February 2003), online: *The Wall Street Journal* <<http://online.wsj.com/article/SB1044305510652776944.html?mod=googlewsj>>.

review. This inaction together with the federalism challenge has created a situation where the law regulating reproductive technologies is uncertain, at best. Surrogate mothers, commissioning parents, donors, and healthcare and other service providers who participate in making any assisted human reproduction arrangements are operating in the shadows of the law especially if any money changes hands. It appears that no surrogacy-related charges have been laid under the *AHRA*. However, Toronto lawyer Sherry Levitan, who has been working on surrogacy-related files since 1994, says that “trying to work within the current legislation is like walking through a fog”.<sup>26</sup>

Provinces have jurisdiction over broad areas that are implicated by surrogacy arrangements including the regulation of professions, licensing of businesses, regulation of contracts and parenting issues including birth registration, adoption and custody and access (except in a divorce situation). All provinces and territories have laws stating that custody and access decisions should be made using the “best interests of the child” test and they prohibit, in effect, buying children through adoption.<sup>27</sup> As discussed in more detail below, only Quebec, Nova Scotia, Alberta and Newfoundland and Labrador have statutes specifically concerning surrogacy arrangements. Courts in Ontario, British Columbia and Manitoba have established precedents on birth registration. In 1985, the Ontario Law Reform Commission recommended that commercial surrogacy contracts be statutorily regulated (before

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<sup>26</sup> See “Surrogacy in Canada,” online: Sherry Levitan <[www.fertilitylaw.ca/surrogacy.shtml](http://www.fertilitylaw.ca/surrogacy.shtml)>.

<sup>27</sup> See, for example, *The [Manitoba] Adoption Act*, C.C.S.M. c. A2, s. 3 (the best interests test) and s. 120(1) prohibiting the commercialization of adoptions.

the *Baby M* case changed the political landscape), but those recommendations were not followed.<sup>28</sup>

Article 541 of the *Quebec Civil Code* (“Code”) provides that “any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely void.”<sup>29</sup> In June 2009, *An Act respecting clinical and research activities relating to assisted procreation* was passed by the Quebec National Assembly (although it is not yet in force).<sup>30</sup> Under the new *Act* any assisted procreation activities, which include both assisted inseminations and embryo implants, must be carried out at a centre licensed under the act and in accordance with any regulations. The *Act* is silent on surrogacy. In *X, sub. nom Adoption -091*, a Quebec court was asked to permit a commissioning mother to adopt a child born in 2008 to a surrogate mother. The line on the birth registration for the mother’s name had been left blank and the commissioning father was named as the father. The application was not opposed by the surrogate mother. The commissioning parents had agreed to pay the surrogate mother \$20,000 for “inconvenience and expenses” [trans]. The court held that in the face of the *Code*’s description of such agreements as “absolutely void” [trans] the commissioning mother could not be permitted to adopt the child. It stated that “the child does not have the right to a maternal affiliation at any price. To give effect to the father’s consent to the adoption of his child would

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<sup>28</sup> Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (Toronto: Ministry of the Attorney General, 1985).

<sup>29</sup> *Civil Code*, 1991, c. 64, online at: <[http://www2.publications.duquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CQ/CCQ\\_A.html](http://www2.publications.duquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CQ/CCQ_A.html)>.

<sup>30</sup> S.Q. 2009, C. 30, online at: <http://www.assnat.qc.ca/eng/39/legislature1/Projets-loi/Publics/09-a026-san.htm>.

for the agency, in the circumstances, require wilful blindness and confirm that the ends justify the means” [trans].<sup>31</sup>

Nova Scotia regulations provide that where a surrogacy arrangement was made prior to conception, the surrogate mother did not intend to parent the child and if one of the intended parents has a genetic link to the child, the birth registration can be amended on court order to remove the surrogate mother from the registration and to register the intended parents as the parents.<sup>32</sup> The regulation does not expressly require the surrogate mother’s post-delivery consent to the order or even that she be given notice that an order is being sought. Alberta legislation provides that if a child is a product of the donor’s genetic material and the “gestational carrier” consents, on application “the court shall make an order declaring the genetic donor to be the sole mother of the child”.<sup>33</sup> The gestational carrier must, after the child’s birth, consent to the application. Consent given prior to birth, as formalized in a gestational carrier agreement, may not be used as evidence of consent post-birth. Newfoundland and Labrador surrogacy legislation<sup>34</sup> provides that the registrar general can register the “intended parents” of a child “born through a surrogacy arrangement” if an adoption order or a declaratory order regarding parentage has been made by a court. These orders may be sought before the child is born and the consent of the surrogate mother is not expressly required. None of the legislative regimes in the common law provinces expressly

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<sup>31</sup> 2009 QCCQ 628 para 77-78.

<sup>32</sup> [Nova Scotia] *Birth Registration Regulation* N.S. Reg. 390/2007.

<sup>33</sup> *Family Law Act*, S.A. 2003 c.F-4.5, s. 12.

<sup>34</sup> *Vital Statistics Act*, S.N.L. 2009, c. V-6.01, s. 5 read together with the *Adoption Act*, S.N.L. 1999, c.A-2.1, s. 25 and the *Children’s Law Act*, R.S.N.L. 1990, c. C-13, s. 6.

consider what happens if the surrogate mother does not consent to the order.

Case law in British Columbia, coupled with a policy drafted by the Vital Statistics department, permits commissioning parents (even where they do not have a genetic connection to the fetus) to apply prior to birth for an order regarding birth registration.<sup>35</sup> The British Columbia Superior Court held in the *B.A.N* case (at paragraph 15) that it "... has the power in equity to grant the [pre-birth] declaration of parentage sought. However, this power must be exercised in accordance with equitable principles, judicially and only where necessary." Courts in Ontario developed a "roadmap" for procedures to be used to issue post-birth orders, declaring commissioning parents to be the parents of a child born to a surrogate mother and for declaring that neither the surrogate mother nor her husband are the child's parents.<sup>36</sup> A Manitoba court held that it did not have the jurisdiction to order a pre-birth parentage declaration in a surrogacy situation.<sup>37</sup>

There is only one reported Canadian case, *H.L.W. and T.H.W. v. J.C.T and J.T.*,<sup>38</sup> involving a custodial contest between a surrogate mother (and her husband) and commissioning parents. In that case, a dispute arose shortly before birth over what expenses would be paid and, after the child was born, another dispute arose over what kind of

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<sup>35</sup> *Rypkema v. British Columbia*, 2003 BCSC 1784, [2003] B.C.J. No. 2721 and *B.A.N. v. J.H.*, 2008 BCSC 808, 294 D.L.R. (4th) 564.

<sup>36</sup> *J.R. v. L.H.* [2002] O.J. #3998 (Ont. S.C.) and *M.D. v. L.L.* 2008 CanLII 9374 (Ont.S.C.). The roadmap reference is in para. 29 of the *J.R.* decision.

<sup>37</sup> *J.C. v. Vital Statistics*, 2000 MBQB 173.

<sup>38</sup> 2005 BCSC 1679, 144 A.C.W.S. (3d) 680.

relationship the surrogate mother and her family would have with the child (note that this agreement was made before making payments to a surrogate mother was prohibited by the *AHRA*). When these disputes continued unresolved, the surrogate mother and her husband sought custody of the child. The court held that the commissioning parents should retain custody pending trial and denied access to the surrogate mother. No trial decision is reported. The other Canadian cases which focus on surrogacy arrangements involve birth registrations, parentage declarations, or access disputes between commissioning parents.<sup>39</sup>

### The United States

The American federal government has not passed laws related to the enforceability of surrogacy arrangements. Elizabeth Scott found that in the immediate post-*Baby M* period, state law makers moved to prohibit or severely restrict surrogacy arrangements. However, since 2000, surrogacy is seen as a service provided by surrogate mothers and regulators focus on the pragmatic objective of reducing procedural and substantive uncertainty about parental status.<sup>40</sup> She notes that this trend

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<sup>39</sup> See, for example, *Rypkema* and *B.A.N.*, *supra* note 35; *J.C. v. Vital Statistics*, *supra* note 37 and *M.D. v. L.L.* *supra* note 36. *S.W.H. v. D.J.R.*, [2009] A.B.Q.B. 438 involves an access dispute over a six year old child who was conceived by a woman who agreed to act as a surrogate for the male plaintiff and his male partner. The surrogate mother remained very involved in the girl's life and conceived another child with the same man, whom she was raising with her female partner. When the gay couple broke up, the genetic parents of the girl attempted, unsuccessfully, to deny the social father access to the girl.

<sup>40</sup> Elizabeth Scott, "Surrogacy and the Politics of Commodification", *Journal of Law and Contemporary Problems* [forthcoming]. For a more detailed comparative analysis of American state laws, see Judith F. Daar, *Reproductive Technologies and the Law* (Newark, New Jersey: LexisNexus Matthew Bender, 2006) and Pamela Laufer-

can be seen in statute law, bills introduced and reforms to the uniform law prototype, all which are increasingly supporting the enforcement of surrogacy contracts.<sup>41</sup> For example, Florida and Utah<sup>42</sup> have passed laws that specifically allow for commercial gestational surrogacy and deny any parental rights to surrogate mothers. Arkansas law provides for an unconditional presumption of validity of both gestational and traditional surrogacy contracts.<sup>43</sup> Some states, such as Illinois,<sup>44</sup> provide for pre-birth registration and require that birth certificates be issued in the name of genetic parents. Others, such as Texas and Nevada,<sup>45</sup> will only enforce surrogacy contracts if the commissioning parents are heterosexual and married to each other, and therefore, restrict participation in such arrangements by married same-sex partners, common law partners, and single people.<sup>46</sup> In 2009, Georgia became the first state to pass an embryo adoption law, albeit this act may be more about securing fetal rights as part of

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Ukeles, "Gestation: Work for Hire of the Essence of Motherhood? A Comparative Legal Analysis" (2003) 19 Duke J. Gender L. & P'y 91.

<sup>41</sup> Scott, *ibid.* manuscript version at 16-17. Daar, *ibid* at 473-477 makes the same observation.

<sup>42</sup> FLA.STAT. 742.11-15; FLA.STAT. 63.212 (2002); UTAH CODE ANN. 78-45g-801(3) (2005).

<sup>43</sup> ARK.CODE ANN.9-10-201 (2002).

<sup>44</sup> See Scott *supra* note 41, manuscript version at 18; 750 ILL.COMP.STAT. 45/6 (2002).

<sup>45</sup> TEX.FAM.CODE 160.754; TEX FAM.CODE 160.762; NEV. REV.STAT.ANN. 126.045 (2001).

<sup>46</sup> See Judith Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms" (2008) 23 Berk. J. Gender Law & Justice 18.

a pro-life strategy than about securing early certainty regarding the enforcement of surrogacy arrangements.<sup>47</sup>

According to Pamela Laufer-Ukeles, a number of state laws render surrogacy arrangements unenforceable and rely on the “best interests” test to determine custody and access.<sup>48</sup> However, she notes that these statutes were enacted before gestational surrogacy was a viable alternative and it is unclear whether the statutes apply to both traditional and gestational surrogacies. Only a small number of jurisdictions, including Michigan, New York, and the District of Columbia,<sup>49</sup> continue to prohibit surrogacy contracts using penal sanctions although, as in Canada, there do not appear to have been any prosecutions to date.

About 20 American states have not passed legislation dealing with surrogacy, so judge-made law remains determinative.<sup>50</sup> Laufer-Ukeles provides an extensive review of many, if not all, reported surrogacy-related decisions of American courts. She notes that American courts have consistently held that traditional surrogacy arrangements (where the surrogate mother is also the genetic mother) are either invalid and unenforceable or at least voidable and therefore, as in the *Baby M* case, rely on the “best interests of the child” test. However, relying on arguments related to intent

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<sup>47</sup> Ga. Code Ann. 19-8-40 (2009). See also David Becker, “Georgia Passes Nation’s First Embryo Adoption Law” *The Voice* (4 April 2009), online: The Voice Magazine <<http://www.thevoicemagazine.com/georgia-passes-nation's-first-embryo-adoption-law-20090404525.html>> (accessed July 4, 2009).

<sup>48</sup> Laufer-Ukeles *supra* note 40 at 103.

<sup>49</sup> MCLS 722.851-861 (2002); NY Dom. Rel. 122 (2001); D.C. Code 16-401, 402 (2002).

<sup>50</sup> This information is gleaned from a table provided by Daar, *supra* note 47 at 465-470.

or genetics, they have also consistently held that gestational surrogacy arrangements (where the surrogate mother is not the genetic mother) are different. Laufer-Ukeles also notes that “all U.S. courts ultimately favor the intended parents in gestational surrogate motherhood arrangements”.<sup>51</sup>

With one exception,<sup>52</sup> the early American cases involving disputes between surrogate mothers and the commissioning parents were decided in the 1980s. It appears that the commissioning parents were awarded custody in all of these cases, although in some cases, including *Baby M*, the surrogate mother was granted access. Litigation in the last 20 years concerning surrogacy is not between surrogate mothers and the commissioning parents; rather it arose either when the commissioning parents experienced difficulties registering the child as their own or where relationships fell apart and issues arose over parentage, custody, access and support. Given estimates that at least 1000 surrogacy arrangements are entered into annually in the United States,<sup>53</sup> the lack of litigation is remarkable.

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<sup>51</sup> *Ibid.* note 40 at 103.

<sup>52</sup> *Anna J. v. Mark C.* 286 Cal Rptr. 369 (Ct.App. 1991) *aff'd sub nom. Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert denied*, 510 U.S. 874 (1993) decided on appeal in 1993, is the only post-1980s case. Here, the court found in favour of a genetic mother and justified cutting off access to the surrogate mother by finding that the surrogacy contract (which had stated that all ties would be cut) ought to be enforced. For an analysis of this case, see Roxanne Mykitiuk, “Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Human Reproduction Technologies” (2001) 39 *Osgoode Hall L.J.* 771.

<sup>53</sup> Lee, *supra* note 12. See also the other references in that note.

### Britain

The *Surrogacy Arrangements Act* (1985) together with the *Human Fertilization and Embryology Act* (1990) prohibit commercial surrogacy arrangements and the use of for-profit agents but permit reimbursement for reasonable expenses to surrogate mothers.<sup>54</sup> Intermediaries can be charged with criminal offences; sanctions for surrogate mothers and commissioning parents lie in the refusal to grant a parental order. Most would-be surrogate mothers and commissioning parents do not use a lawyer to draft contracts.<sup>55</sup> There are no media or other reports of criminal prosecutions against agencies since these two acts were passed.

While surrogacy contracts are not binding, it appears that there have only been a handful of cases (discussed below) related to post-delivery custodial arrangements. Surrogate mothers (irrespective of whether they have a genetic connection to the child) must be named on the birth certificate. Genetic fathers may be named on the birth certificate or they can enter into parental responsibility agreements with the surrogate mother upon the birth of the child. Six weeks after the birth, married genetic commissioning parents, with the consent of the surrogate mother, can apply for a “parental order” which, once granted, will give them full, permanent and exclusive parental rights.<sup>56</sup> Single people, common law heterosexual couples, and same sex couples who participate in

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<sup>54</sup> 1985, c. 49 and 1990, c. 37. See Myriam Hunter-Henin, “Surrogacy: Is there Room for a New Liberty Between the French Prohibitive Position and the English Ambivalence?” (2008) II *Law and Bioethics* 329.

<sup>55</sup> “Solicitors”, *Childlessness Overcome Through Surrogacy*, online: COTS <<http://www.surrogacy.org.uk/SolicitorsMap.htm>>.

<sup>56</sup> *Adoption and Children’s Act* (U.K.), 2002, c.38 (formerly the *Children’s Act* (U.K.), 1989, c. 41).

surrogacy arrangements as commissioning parents must apply for an adoption order.

Britain had one very high profile case, in 1985, where a child welfare agency apprehended a child upon hearing that Kim Cotton, her surrogate mother, who had been paid £6500, was about to surrender her to the commissioning parents. Seven days later a court held that the baby should go to the commissioning parents. While there was no dispute between the participants to the arrangements, the Baby Cotton case generated significant public controversy over baby-selling and resulted in quick passage of the *Surrogacy Arrangements Act*. Cotton went on to found the largest British agency that matched potential surrogate mothers and commissioning parents.<sup>57</sup>

There are three reported English cases<sup>58</sup> involving disputes between surrogate mothers and the commissioning parents. In the two earlier cases, custody was awarded to the parent who had had custody of the children since birth. In one case this was the surrogate mother and in the other it was the commissioning parents. In the 2008 case, the surrogate mother had twice deceived the commissioning parents, telling them that she had miscarried when, in fact, she gave birth to the children and was raising them together with her husband. On an interim basis, the two children were made wards of the court, with the six year old staying with the surrogate mother and her husband and the 18 month old moving into the home of the commissioning parents. No final decision has been

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<sup>57</sup> For the surrogate mother's account, see Kim Cotton & Denise Winn, *Baby Cotton: for love and money* (London: Dorling Kindersley, 1985).

<sup>58</sup> *Re: P (Minors) (Wardship:Surrogacy)*, [1987] 2 FLR 421; *Re: MW (Adoption:Surrogacy)*, [1995] 2 FLR 759; *Re: P (Surrogacy: Residence)*, [2008] 1 FLR 177.

reported. All other reported decisions relating to surrogacy addressed legal parentage or payment issues.

### **COMPARISON AND SUMMARY OF CANADIAN, AMERICAN, AND BRITISH SURROGACY LAWS**

Canada, many American states, and Britain take different legal approaches to surrogacy arrangements and issues relating to parentage. Canada prohibits any payments (including, in the absence of regulations, even expenses) to a surrogate mother or third parties and expensive, sometimes prolonged judicial proceedings are required in most provinces after the birth of the child to finalize parentage. American states have various laws, but only a few place criminal sanctions on payments of both expenses and fees to surrogate mothers. The trend is toward expedited pre-birth determination of parentage by civil servants especially for heterosexual married couples. Britain permits payment of reasonable expenses (but not fees) to surrogate mothers and has an expedited post-birth parentage-registration regime for married couples that still require judicial involvement. Unmarried people must apply for an adoption order. What is common between the three countries is that it appears no prosecutions for fee payments (even though such payments are made in Canada and Britain) or exploitative behaviour. Further, there has been almost no litigation in any of these countries in the last two decades between surrogate mothers and commissioning parents on any issues related to the surrogacy arrangements, such as conduct during pregnancy or parentage, custody, or access regarding the child after birth. This observation could indicate relative satisfaction with the arrangements or an inability to contest them for financial reasons, fear of repercussions, or recognition that the commissioning parents are likely to be the successful litigants.

### FEMINIST THEORY MEETS EMPIRICISM

Three inter-related rationales are given for prohibiting commercial surrogacy arrangements: a surrogate mother cannot give meaningful consent prior to delivery and therefore the contracts could be unconscionable; the potential for exploitation of surrogate mothers is so significant that the contracts must be unenforceable and discouraged; and, the payment of money for reproductive services commodifies women and children and is, therefore, contrary to human dignity. The RCNRT was deeply influenced by all three of these arguments.

In this part of the paper, the factual underpinnings of the RCNRT's theoretical concerns will be tested against the empirical research by academic researchers on the experiences of surrogate mothers and other aspects of surrogate arrangements conducted in the last two decades. Anecdotal and popular accounts are also referenced but they are not relied upon to support conclusions unless a more rigorous methodology also supports the conclusion. Many of the nearly 40 empirical studies we reviewed in this paper are interview-based qualitative studies involving surrogate mothers and, therefore, the voices of those most directly impacted can be heard. Other methodologies, such as standard form psychological testing and clinical or agency file reviews, are also used. All of the empirical studies cited in this paper are peer-reviewed and all but one<sup>59</sup> are published in academic journals or by academic presses. To give some context for each study reviewed, the date, jurisdiction, methodology, and sample size is noted in the text of this paper. However, it is

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<sup>59</sup> The exception is Kashmeri, *supra* note 15 is a thesis written for a Masters of Arts (Anthropology) and it has not (yet) been published by an academic publisher.

well beyond the scope of this paper to review and critique the methodologies used in each study or to suggest research gaps. Readers interested in that information may find Ciccarelli and Beckman's research useful as it provides more technical information on 27 empirical studies published between 1983 and 2003, including a dense four page table, that sets jurisdiction, sample size, data collection methods, variables, and limitations.<sup>60</sup>

Most of the research considered in this paper was conducted in the United States or Britain. Shireen Kashmeri's 2004 ethnographic study is the only Canadian empirical study on participants' experiences.<sup>61</sup> The only other Canadian empirical studies relating to surrogacy focus on public attitudes towards surrogacy arrangements, referred to earlier.<sup>62</sup> Kashmeri notes that it was difficult to find Canadian surrogate mothers who were willing to speak on the record, although she has, with their permission, been able to carry on dialogue within on-line communities, also known as computer-mediated-communication. One surrogate mother who agreed to be interviewed in-person for Kashmeri's study stated that

Canadian surrogates don't want to talk because they are being paid. If they talk, there'll be a record of them somewhere and they're afraid that it'll get back to the couple that's paying them. Because they could end up in prison. Most of them have signed a contract saying that they won't talk to anyone. I remember when a couple tried to throw that into my contract and I

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<sup>60</sup> Ciccarelli & Beckman, *supra* note 17 at 25-28.

<sup>61</sup> Kashmeri, *supra* note 15.

<sup>62</sup> Krishnan, *supra* note 11 and Genuis, *supra* note 11.

was pretty quick with that – you ain't going to gag me.<sup>63</sup>

However, as American and British legal regimes and the social and economic status of women in these two countries are comparable to legal regimes and the status of women in Canada, it is probably safe to extrapolate these results to Canada.

### **Social, Racial, and Psychological Characteristics of Surrogate Mothers**

Rakhi Ruparelia argued “the existence of power hierarchies, even subtle ones, and the obligations that arise from close-knit family structures, make it difficult for women to refuse a request to be a gift surrogate”.<sup>64</sup> Many feminists, including Overall, Diana Majury, and Mary Lyndon Shanley, have suggested that payment for commercial surrogacy will take advantage of economic, physical, and emotional vulnerabilities of women and they note the potential for exploitation of poor, young, single, ethnic minority women.<sup>65</sup> Anita Allen asserted that “minority women increasingly will be sought to serve as “mother machines” for embryos of middle and upper-class clients. It's a new, virulent, form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a “breeder class”.<sup>66</sup> Gena Corea described the arrangements as creating a “female

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<sup>63</sup> Kashmeri, *supra* note 15 at 18.

<sup>64</sup> Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act” (2007) 23 Can. J. Fam. L. 11 at para. 43.

<sup>65</sup> Overall, “Human Reproduction;” Overall, “A Feminist Analysis;” Majury and Shanley, *supra* note 6.

<sup>66</sup> Allen, *supra* note 6 (at page 7 of the on-line version).

breeding caste”<sup>67</sup> and Barbara Katz Rothman predicted that gestational surrogacy would lead to a situation in which

[p]oor, uneducated third world women and women of color from the United States and elsewhere, with fewer economic alternatives, can be hired more cheaply. They can also be controlled more tightly. With a legally supported surrogate motherhood contract and with the new [IVF] technology the marketing possibilities are endless—and terrifying. Just as Perdue and Holly Farms advertise their chickens based on superior breeding and feeding, the baby brokers could begin to advertise their babies: brand-name, state-of-the art babies produced from the “finest” of genetic materials and an all-natural, vitamin-enriched diet.<sup>68</sup>

However, studies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their late 20-early 30s.<sup>69</sup> Surrogate mothers have varying degrees of

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<sup>67</sup> Gena Corea, “Testimony before the California Judiciary Committee,” April 5, 1988, cited in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Indianapolis: Indiana University Press, 1988) 325.

<sup>68</sup> *Supra* note 6 at 237.

<sup>69</sup> See, for example, Janice C. Ciccarelli, *The surrogate mother: A post-birth follow-up* (Ph.D. Dissertation, California School of Professional Psychology 1997 [The Surrogate Mother]; Hazel Baslington, “The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process” (2002) 7 *Journal of Health Psychology* 57; I. Schmulker & Betsy Aigen, “The terror of surrogate motherhood: Fantasies, realities and viable legislation” in J. Offerman-Zuckerberg, ed., *Gender in Transition: A New Frontier* (New York; Plenum, 1989) 235; Jadva *et al. supra* note

education. For example, 11 of 17 American surrogate mothers in Melinda Hohman and Christine Hagan's 2001 study had some college education. Of the 50 American surrogate mothers in Joan Einwohner's 1989 study, most had completed high school, many had gone on to college, a few had graduate degrees and one had three masters degrees. Eric Blyth's 1993 study of British surrogate mothers shows lower education rates for these women than the American studies: 14 out of the 19 women interviewed had left school before the age of 17.

Beckman and Ciccarelli conclude from their review of American empirical studies that "surrogate mothers' family incomes are most often modest (as opposed to low) and they are from working class backgrounds".<sup>70</sup> Based on a subjective assessment of the material standards within their homes, Blyth determined that three of the 19 British surrogate mothers interviewed for his study lived in "financially straitened circumstances".<sup>71</sup> One woman in his study said that most

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19: Joan Einwohner, "Who becomes a surrogate: Personality Characteristics" in J. Offerman-Zuckerberg, *supra* this note, 123); Christine Kleinpeter & Melinda Hohman, "Surrogate motherhood: personality traits and satisfaction with service providers" (2000) 87 *Psychological Reports* 135; Melinda Hohman & Christine Hagan, "Satisfaction with Surrogate Mothering: A Relational Model" (2001) 4 *Journal of Human Behavior in the Social Environment* 61; Heléna Ragoné, *Surrogate Motherhood: Conception at the Heart* (Boulder, CO: Westview Press, 1994) [Ragoné, *Surrogate Motherhood*]; Olga van den Akker, "A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy" (2005) 26 *Journal of Psychosomatic Obstetrics and Gynecology* 277 [van den Akker, "Longitudinal comparison"].

<sup>70</sup> Ciccarelli & Beckman, *supra* note 17 at 31 come to this conclusion based on a review of the empirical studies.

<sup>71</sup> Eric Blyth, "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life.'" Interviews with

surrogate mothers she knew were in receipt of income support. However, as Blyth interviewed 50 percent of the known surrogate mothers in Britain at that time (1993) and none were in receipt of assistance, this report seems unlikely. No other study has reported that women in receipt of income assistance had become surrogate mothers and many agencies connecting would-be surrogate mothers with commissioning parents will not take women on assistance. Importantly, no empirical study reviewed for this paper indicates that any surrogate mothers became involved with surrogacy because they were experiencing financial distress.

Almost all commissioning parents were married; surrogate mothers, however, were less likely to be married or partnered. Timothy Appleton reports, for example, that only 68 percent of the 140 surrogate mothers in his study were married or partnered.<sup>72</sup> Not surprisingly, given the high costs of surrogacy and the fact that they do not usually have children yet, the commissioning parents were older, more educated and had higher incomes than the surrogate mothers and their partners.<sup>73</sup> Olga van den Akker states that “no negative effects of this socioeconomic inequity have been reported”.<sup>74</sup>

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surrogate mothers in Britain” (1994) 12 *Journal of Reproductive and Infant Psychology* 189 [Blyth, “Interesting”].

<sup>72</sup> Timothy Appleton, “Emotional Aspects of Surrogacy: A Case for Effective Counselling and Support” in Rachel Cook, Shelley Day Sclater, & Felicity Kaganas, eds., *Surrogate Motherhood: International Perspectives* (Oxford: Hart Publishing, 2003) 199 [Appleton, “Emotional Aspects”].

<sup>73</sup> See, for example, Jadva *et al.*, *supra* note 18 (note that the commissioning parents paired with the surrogate women who were interviewed for this study were themselves interviewed in Fiona MacCallum, Emma Lycett, Clare Murray, Vasanti Jadva, Susan Golombok, “Surrogacy: The experiences of commissioning couples” (2003) 18 *Human Reproduction* 1334); van den Akker, “Psychological trait and state characteristics, social support and

Janice Ciccarelli and Linda Beckman, after surveying the empirical literature, conclude that “women of color are greatly under-represented as surrogate mothers”.<sup>75</sup> With one exception, all surrogate mothers in the reported cases are white and in the one case where a self-described, half-Black woman was the surrogate mother, the commissioning mother was described as “Philippina”.<sup>76</sup> The only exception is Heléna Ragoné. She notes that all participants in her 1994 study were Euro-American, but that this figure changed for her 2000 study on gestational surrogacy. Thirty percent of the surrogate mothers and commissioning parents in the later study were not from the same racial, ethnic and cultural backgrounds.<sup>77</sup> However, she suggests that it is just as likely for a Euro-American woman to carry a child for a non-Euro-American couple as for the reverse to occur. She heard that some participants prefer not to be matched with someone who shares

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attitudes to the surrogate pregnancy and baby” (2007) 22 *Human Reproduction* 2287 [van den Akker, “Psychological trait”]; van den Akker, “Longitudinal comparison,” *supra* note 70; Baslington, *supra* note 70; Timothy Appleton, “Emotional Aspects” *ibid.*; Eric Blyth, “‘Not a primrose path’: Commissioning parents’ experiences of surrogacy arrangements in Britain” (1995) 13 *Journal of Reproductive and Infant Psychology* 185 [Blyth, “Primrose”] and Christine Kleinpeter, Tamara Lee Boyer & Mary Ellen Kinney, “Parents’ Evaluation of a California-Based Surrogacy Program” (2006) 13 *J.of Human Behavior in the Social Environment* 1.

<sup>74</sup> van den Akker, “Psychosocial aspects”, *supra* note 16 at 57.

<sup>75</sup> Ciccarelli & Beckman, *supra* note 17 at 31. They also provide a table setting out the characteristics of surrogate mothers who were studied and note when this information is available, the surrogate mother’s ethnicity. The participants are almost always described as white or Caucasian.

<sup>76</sup> *Johnson v. Calvert*, *supra* note 52.

<sup>77</sup> Ragoné, “Of Likeness and Difference”, *supra* note 25.

their race or ethnicity because they believe that it would be less likely that the surrogate mother will feel a strong connection to a child who is different from her. As one surrogate mother said, “I haven’t [thought of the child as mine], because she is not mine, she never has been. For one thing, she is totally Japanese. It was a little hard for me. In a way she will always be my Japanese girl, but she is theirs”.<sup>78</sup>

Some researchers have used standardized psychological tests to assess surrogate mothers. They have concluded that surrogate mothers are within normal ranges on these tests.<sup>79</sup> Surrogate mothers are more likely than the general population to be self-sufficient, independent thinkers, and nonconformists and, therefore, they are less affected by social proscriptions and sanctions than other women.<sup>80</sup> Christine Kleinpeter and Melissa Hohman found that the 17 American surrogate mothers in their study scored much higher on the extroversion factor than other women.<sup>81</sup> This factor indicates a person who is sociable, assertive, active, energetic, and optimistic. On the basis of these psychological tests, Einwohner concludes that surrogate mothers are intelligent,

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<sup>78</sup> *Ibid.* at 66.

<sup>79</sup> See Einwohner, *supra* note 69; Andrea Mechanick Braverman & Stephen Corson, “Characteristics of participants in a gestational carrier program” (1992) 9 *Journal of Assisted Reproduction and Genetics* 353; Darrell Franks, “Psychiatric Evaluation of women in a surrogate mother program” (1981) 138 *American Journal of Psychiatry* 1378; van den Akker, “Genetic and gestational surrogate mothers' experience of surrogacy” (2003) 21:2 *Journal of Reproductive and Infant Psychology* 145 [van den Akker, “Experience of surrogacy”]; Jadva *et al.*, *supra* note 18; Kleinpeter & Hohman, *supra* note 69; and Hohman & Hagan, *supra* note 69. For a summary of these studies see Teman, *supra* note 12.

<sup>80</sup> Hohman & Hagan, *supra* note 69 at 80-81.

<sup>81</sup> Kleinpeter & Hohman, *supra* note 69 at 957.

self-aware, stable adults who are down to earth, practical, and decent people who are optimistic and not worriers.<sup>82</sup>

Ragoné notes that screening and selection procedures in the United States are stringent because surrogacy is commercial and subject to more professional regulation.<sup>83</sup> However, a 1999 British study on organizational selection and assessment of the psychological health of potential surrogate mothers found that “psychosocial assessment was minimally addressed by all organizations and no fixed procedures for assessment and selection were employed”.<sup>84</sup> Since that report, others British studies have recommended screening protocols for both surrogate mothers and commissioning parents.<sup>85</sup>

Many theorists have stated that a potential surrogate cannot make a rational choice when she signs the contract, because the emotional volatility of pregnancy and the instability of woman’s embodiment may cause her to change her mind during pregnancy.<sup>86</sup> The RCNRT concluded that the

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<sup>82</sup> Einwohner, *supra* note 69 at 126.

<sup>83</sup> Ragoné, *supra* notes 25 & 69.

<sup>84</sup> Olga van den Akker, “Organizational selection and assessment of women entering a surrogacy agreement in the UK” (1999) 14 *Human Reproduction* 262 [van den Akker, “Organizational selection”].

<sup>85</sup> For example, see Peter Brinsden, Tim C. Appleton, Elizabeth Murray, Mohammed Hussein, Fidelis Akagbosu, & Samuel Marcus, “Treatment by in vitro fertilization with surrogacy: experience of one British centre” (2000) 320 *BMJ* 924; Judy Parkinson, Cuong Tran, Tih Tan, Jeffrey Nelson, Joel Batzofin, & Paulo Serafini, “Perinatal outcome after in-vitro fertilization-surrogacy” (1999) 14 *Human Reproduction* 671; Timothy Appleton, “Surrogacy” (2002) *ESHRE Monographs: Guidelines for Counselling in Infertility* 37 and Peter Brinsden, “Clinical Aspects of IVF Surrogacy in Britian” in Cook *et al.*, *supra* note 72.

<sup>86</sup> See Shalev, *supra* note 9 for a literature review.

physical and hormonal changes of pregnancy may “affect her thoughts and feelings about what she is doing and the foetus she is carrying, [and] these effects cannot be predicted precisely before pregnancy begins”.<sup>87</sup> Almost all surrogate mothers in every study reviewed had already had children and had completed their families.<sup>88</sup> Clinics and agencies report that they will only agree to work with women who have given birth because this status increases the chances of a successful pregnancy and delivery and means that the women have a more realistic perception of what it would mean for them to surrender a child.<sup>89</sup>

A study by Judith Parkinson *et al.* of 98 British surrogate mothers involved a review of their medical files and interviews with them, commissioning parents, and doctors after the child’s birth. All surrogate mothers had already given birth to two or three children before entering surrogacy arrangements. This study concluded that the surrogate mothers had “a confident psychological framework regarding pregnancy and birth”.<sup>90</sup> In one of the few longitudinal studies on surrogacy arrangements, van den Akker interviewed 22 British surrogate mothers before conception and then again six months post-delivery. She concluded that

[s]urrogate mothers were highly confident from the start about the surrogacy process and about

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<sup>87</sup> RCNRT, *supra* note 5 at 675.

<sup>88</sup> Jadvá *et al.*, *supra* note 18; Blyth, “Interesting” *supra* note 71; R. J. Edelmann, “Surrogacy: the psychological issues” (2004) 22 12 *Journal of Reproductive and Infant Psychology* 123.

<sup>89</sup> See, for example, Parkinson *et al.*, Brinsden & Brinsden *et al.*, *supra* note 85.

<sup>90</sup> Parkinson *et al.*, *ibid.*

the health and well-being of the surrogate baby ... many knew that they could do this emotionally, and were convinced that they would succeed, demonstrating self-efficacy at the start (when one would have expected them to have some doubts), and six months post relinquishment.<sup>91</sup>

As will be discussed, most surrogate mothers reported good relationships with commissioning parents and that they had few difficulties, if any, with relinquishing the child. Most women interviewed by researchers had been a surrogate mother only once, although many said that they would do it again.<sup>92</sup> For example, of the 19 women interviewed for Blyth's study only five women said that they would not do it again. Of these five, age was a factor for one; two had already done it twice (and that was enough) and two reported that they regretted the decision to become involved in surrogacy and would not do it again. In most studies only a small number of women had been a surrogate twice and no one had entered more than two such arrangements. The number of women who had been surrogate mothers more than once was somewhat higher in the Blyth study and in Hazel Basilington's study of British surrogate mothers, where six of 19 and three of the 14 women, respectively, were pregnant as a surrogate mother for a second time. One woman in each study was expecting her third child conceived in this way.

One consistent finding in the empirical research is that the idea of becoming a surrogate mother started with the

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<sup>91</sup> van den Akker, "Longitudinal comparison", *supra* note 69.

<sup>92</sup> See, for example, Ciccarelli & Beckman, Hohman & Hagan, Kleinpeter & Hohman, and Ragoné, *Surrogate Motherhood*, *supra* note 69.

women themselves;<sup>93</sup> there was no evidence in any study indicating that women were being pressured or coerced into becoming surrogate mothers. After one literature review, Christine Kerian concluded that “women’s motivations for becoming surrogates are legitimate and thoroughly thought out”.<sup>94</sup> An interview-based study of 17 American women concluded that “far from being ‘used’ or exploited as has been suggested, the participants in this study appeared to be very clear that this is what they wanted to do, often despite negative responses from those around them”.<sup>95</sup>

None of the American studies and only a few of the British studies comment on the relationship between the surrogate mothers and the commissioning parents prior to their discussions concerning surrogacy. Where this factor is noted, one study found that all or almost all parties were strangers to each other, but others have noted that between 20 percent and 50 percent of the surrogate mothers were friends or family members of the commissioning parents.<sup>96</sup> None of these studies give support to the theory that women are being coerced by family members to participate in either gratuitous or commercial surrogacy arrangements.

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<sup>93</sup> See, for example, Blyth, “Interesting” *supra* note 71 at 192.

<sup>94</sup> Christine Kerian, “Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?” (1997) 12 *Wis. Women’s L. J.* 113 at 157.

<sup>95</sup> Hohman & Hogan, *supra* note 69 at 80-81.

<sup>96</sup> Blyth, “Primrose”, *supra* note 73; Parkinson *et al.*, *supra* note 85 identified 20 percent of surrogates as family or friends; Appleton, “Emotional,” *supra* note 72 identified almost 50 percent as family and friends; MacCallum *et al.*, *supra* note 73 identified 69 percent as strangers; 17 percent as family and 14 percent as friends and Brinsden *et al.* *supra* note 86 identified 37 percent as family or friends.

Rakhi Ruparelia<sup>97</sup> argues that some women living in western countries who are members of some sub-cultures (such as those with South Asian roots) may not have a real choice but to agree to be a surrogate for a family member. This concern is heightened where women are financially dependent on their families, live with cultural norms that demand passivity and self-sacrifice, and are subject to powerful patriarchal norms. Ruparelia's analysis relies on anecdotes and most of the stories concern participants living in India. However, the empirical research on surrogate mothers in Britain and the United States (which, like Canada, have significant newcomer populations and established South Asian sub-cultures) indicates that few racial minority women are involved in surrogacy in the two countries and, in studies where ethnicity is identified, none of the surrogate mothers are identified as South Asian. No empirical study has suggested that any women in these two countries are being coerced by others into becoming surrogates, or even doing it at the suggestion of others. Rather, the research shows that the impetus to become a surrogate most frequently comes from the woman herself. We must acknowledge, however, that we are not aware of any empirical study that focuses specifically on the experiences of surrogate mothers who are also members of particular ethnic or racial sub-cultures within western countries. Further, as will be discussed, anecdotal research is emerging which shows that women in some countries, particularly in India, are being exploited by surrogacy contracts.

The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement. Nor

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<sup>97</sup> Ruparelia, *supra* note 64.

does it support the view that surrogate mothers are naively taking on a task unaware of the emotional and physical risks it might entail. Rather, the empirical research establishes that surrogate mothers are mature, experienced, stable, self-aware, and extroverted non-conformists who make the initial decision that surrogacy is something that they want to do.

### **Financial Motivation to be Surrogate Mothers**

Many express concern that women with few other choices will become surrogates out of economic need. Janice Raymond describes surrogacy as a form of violence against women and states that a surrogate mother might “consent” to the arrangement, but “she has little self-determination if she cannot find sustaining and dignified work and resorts to surrogacy as a final economic resort”.<sup>98</sup> As noted earlier, Overall described surrogacy as “reproductive prostitution” and Martha Field feared that a “breeder class” would emerge, and Lyndon Shanley called it “consensual slavery”. Allen asserted that

[t]olerating practices that convert women’s wombs and children into valuable market commodities threatens to deny them respect as equals. Commercial surrogacy encourages society to think of economically and socially vulnerable women as at its disposal for a price. Segments of the public will draw the obvious parallels to slavery and prostitution<sup>99</sup>

For others, as evidenced by the massive public outcry in Britain against the surrogate mother’s acceptance of money in the

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<sup>98</sup> *Supra* note 6 at xix-xx and 103. See also Allen *supra* note 6 at 7 (of the online version).

<sup>99</sup> Allen *ibid.*

*Baby Cotton* case, the fear is the surrogate mother's greed. The Waller Committee in Australia stated that "whatever terms are employed ... [surrogacy] is the buying and selling of a baby ... The buying and selling of children has been condemned and proscribed for generations".<sup>100</sup> Rothman stated that "the baby has become a commodity, something a woman can produce and sell"<sup>101</sup> and she fears that "if we allowed babies to be sold, some people would be under great pressure to sell their babies".<sup>102</sup>

Elly Teman notes in her research survey that "nearly every study of surrogates' motivations attempts to determine sufficient financial distress in the surrogate's life that might provide a reason for her need to turn to this desperate measure."<sup>103</sup> She goes on to observe that almost every study ends up concluding that money was rarely the sole and infrequently even the primary reason for entering the arrangement. Ciccarelli reports that "contrary to popular beliefs about money as the prime motive, surrogate mothers overwhelmingly report that they choose to bear children for others primarily out of altruistic concerns. Although financial reasons may be present, only a handful of women mentioned money as their main motivator".<sup>104</sup> As already noted, none of the studies reveal any women agreeing to become surrogate mothers because they were experiencing financial distress.

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<sup>100</sup> Australia, Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Report on the Disposition of embryos provided by in vitro fertilization* (Melbourne: State of Victoria, 1984) at 52.

<sup>101</sup> Barbara Katz Rothman, "On Surrogacy: Constructing Social Policy" in J. Offerman-Zuckerberg, *supra* note 69, 227 at 229.

<sup>102</sup> Rothman, *supra* note 6 at 234.

<sup>103</sup> Elly Teman, *supra* note 12 at 1107.

<sup>104</sup> Ciccarelli, *supra* note 70 at 30.

Many studies reveal that those women who indicated that money was one motivating factor also said that “it was a reasonably convenient way of combining the responsibility of looking after young children with the wish or need to earn money”.<sup>105</sup> Blyth notes that there was,

... virtually unanimity [among the 19 participants of his study] that it was unrealistic to expect surrogate mothers to carry a pregnancy and hand over a baby (or babies) to the commissioning parents without reimbursement of expenses at least, in recognition of their time (e.g. loss of earnings), inconvenience, discomfort and the risks to which they were exposed, and the additional costs incurred.<sup>106</sup>

Financial motivations were more strongly expressed in two early studies than in later studies. The 1989 Einwohner study of 50 American surrogate mothers found that 40 percent of them said that money was the main (but not sole) motivator.<sup>107</sup> Baslington’s research was based on in-depth interviews conducted in 1992-93 with 19 British women who were members of a surrogate mothers’ self-help group. Members encouraged each other to view the surrogacy arrangement as a job incorporating payment. As one woman said in answer to the question “what do you think about the association of surrogacy with money”?

If you’re being paid for your time, it’s like a contract and it severs it completely at the end because it is a job done and you’re paid for it

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<sup>105</sup> See, for example, Hohman & Hagan, *supra* note 69.

<sup>106</sup> Blyth, “Interesting” *supra* note 71 at 192.

<sup>107</sup> Einwohner, *supra* note 69.

and that's the end of it. And so if you think like that, I think it's, it balances everything up and it's like a goal to go towards if you see it.<sup>108</sup>

In light of this group encouragement, it is not surprising that 11 of the 19 women in this study said that money was a motivator and that for four women, payment was the sole reason.<sup>109</sup> However, several women also reported that they were surprised to find, after joining the group, that they might be reimbursed, as they had not originally had any expectation of payment.

There is no empirical research supporting the assertion that women are becoming surrogate mothers because they are facing financial distress. Most women report that money is rarely the sole or even the prime motive for participating. It is hardly surprising that many women who are surrogates believe that they should be reimbursed for their expertise, time, inconvenience, and discomfort. Surrogates like other service providers, such as health care workers, firefighters, and foster parents, are engaged in pursuits that involve physical risk and discomfort, significant emotional involvement and continued engagement (such as being "on call"). They often have altruistic motives for doing what they do and yet they still expect to be paid even if every hour is not accounted for.

### **Non-pecuniary Motivations for Surrogacy**

The desire to help a childless couple was the prime motive given for agreeing to be a surrogate mother. For example, Jadvá *et al.* report that 91 percent of the women in their study

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<sup>108</sup> Baslington, *supra* note 69 at 64.

<sup>109</sup> *Ibid.* at 63. Note: while this study was not published until 2002, the data was collected in 1992-3.

reported this as their prime motivation.<sup>110</sup> One surrogate mother in Kashmeri's study stated that

DH [dear husband] and I have completed our family but I was disappointed at never having the opportunity to be pregnant again. At the same time, I was becoming increasingly disillusioned with, what I feel are, the social injustices of gay rights. Yes, gay celebrities are able to adopt but for the average joe/josephine, most states have slammed the door on gay parental rights. With surrogacy, I can help create a family for a person who otherwise would have no way of fulfilling their dream or parenthood, AND experience pregnancy again for myself ... well, I only needed to know where to sign up!<sup>111</sup>

Some researchers noted that several donors saw their donative acts not so much as altruistic gifts but as projects of the self. Rhonda Shaw, who interviewed 14 New Zealander women, observed that,

[t]he reasons donors give for donating gametes or reproductive services are pro-social in orientation. Although gift language was not always foregrounded in the narratives of the women I interviewed, many of my interviewees saw their donations as symbolizing acts of human connection and solidarity in accordance

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<sup>110</sup> Jadva *et al.*, *supra* note 18. See also, for example, Mechanick Braverman & Corson, *supra* note 79; Edlmann, *supra* note 89; Blyth, "Interesting" *supra* note 71; Hohman & Hagan, *supra* note 69; Heléna Ragoné, "The Gift of Life: Surrogate Motherhood, Gamete Donations and the Construction of Altruism" in Cook *et al.*, *supra* note 72 at 209.

<sup>111</sup> Kashmeri, *supra* note 15 at 59.

with approaches to ethics that stress women's capacity for relatedness. The range of reasons my interviewees offered included empathy for other women who want to have children, being generous and wanting to help someone else, and familial love, obligation or responsibility.<sup>112</sup>

Others noted that the ability to be a surrogate gave them a sense of uniqueness and accomplishment, enhanced their self-esteem or allowed them to take special action. Ragoné's interviewees often described it as a "vocation or calling".<sup>113</sup> Andrea Mechanick Braverman and Stephen Corson found (based on pre-conception psychological testing and interviews and follow-up after conception and delivery) that potential surrogate mothers have a strong need to be important and believe that by participating in surrogacy, they could make a unique and singular contribution. As they had found pregnancy to be pleasurable, they felt they had skills to contribute to this arrangement.<sup>114</sup> Kashmeri observes that "some accounts of surrogates keenly show that they live with these arrangements on their own terms and with a certain sense of empowerment".<sup>115</sup> One of Blyth respondent's stated, "I'm not a mathematician or anything like that, I'm not a world class model, I'm just normal. And I didn't want to be normal. I

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<sup>112</sup> Rhonda Shaw, "Rethinking Reproductive Gifts as Body Projects" (2008) 42 *Sociology* 11 at 18. She conducted in-depth interviews with 14 women in New Zealand about their experiences of egg donation and surrogate pregnancy. Only four women in her study had been surrogates. Shaw defines (at 24) "pro-social" as "actively sociable behaviours and practices that contribute to binding people and groups together".

<sup>113</sup> Ragoné, *supra* note 69 at 55.

<sup>114</sup> Mechanick Braverman & Corson, *supra* note 79 at 356. See also Ragoné, *supra* note 69 at 59

<sup>115</sup> Kashmeri, *supra* note 15 at 11.

wanted to be interesting, I wanted to be able to say “I’ve done something interesting with my life”.<sup>116</sup>

Many surrogate mothers (including nine of 19 in one study) reported that they enjoyed being pregnant and wanted to experience pregnancy again, but they did not want to raise more children.<sup>117</sup> One woman said,

[i]t’s given me the chance to experience a pregnancy and a birth when I’m in control, not the doctors. ...I know what I’m doing this time and I’m not going to allow things to be done to me that were done to me in my previous pregnancy ... One of the things that attracted me to surrogacy [was] the opportunity to have a pregnancy and birth without the responsibility of having a child to bring up after it.<sup>118</sup>

A few women in some studies were motivated by what could be called “reparative concerns”. Hohman and Hagan interviewed one woman who said that she had a child who had received an organ from an organ transplant. One way of giving thanks for the donation, she reasoned, was to be a surrogate mother. Some of the surrogate mothers in Philip Parker’s and in Linda Kanefield’s research related their motives to having

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<sup>116</sup> Blyth, “Interesting”, *supra* note 71 at 192.

<sup>117</sup> *Ibid.* See also Ciccarelli & Beckman, *supra* note 17; Hohman & Hagan, *supra* note 69; Kashmeri, *supra* note 15; Ragoné, *Surrogate Motherhood*, *supra* note 69 at 61-62; Jadva *et al.*, *supra* note 18; Hal Levine, “Gestational Surrogacy: Nature and Culture in Kinship” (2003) 42 *Ethnology* 173; Appleton, “Emotional,” *supra* note 72 at 204.

<sup>118</sup> Blyth, “Interesting”, *supra* note 71 at 192.

had an abortion, to having given up of a child for adoption, and to the untimely loss of a family member.<sup>119</sup>

Women engaged as surrogate mothers do not see themselves as passive participants in degrading, exploitative work or as selfless, childbearing vessels. On the contrary, many surrogates become involved because they want to help someone else to experience the joy of raising children, they truly enjoy being pregnant and want to experience pregnancy again without the obligation to raise the child, and they want to do something special, unique or unusual.

### **The Relationship Between Surrogate Mothers and the Commissioning Parents**

Some have argued that surrogacy contracts heavily regulate the surrogate mother's body and her conduct, including mobility, medication, diet and the ability to decide whether to terminate the pregnancy. This process threatens to take control away from her and place it in the hands of the commissioning parents or agencies. Gena Corea testified before the California Assembly Judiciary Committee in 1988 that one man in "... the surrogacy business ... intends to keep the inseminated women under constant surveillance by his private detectives throughout the nine months of their pregnancies. [The man said] that: 'If we're going to do the job 100 percent, we're going to have to keep tabs on the women'".<sup>120</sup> All of the rationales given for prohibiting commercial surrogacy are engaged by these possibilities: such contracts are antithetical to personal autonomy and therefore are unconscionable; they are ripe with the potential for exploitation; and they seem to commodify

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<sup>119</sup> Philip. J. Parker, "Motivation of surrogate mothers: initial findings" (1983) 140 *American Journal of Psychiatry* 117 and Linda Kanefield, "The Reparative Motive in Surrogate Mothers" (1999) 2 *Adoption Quarterly* 5.

<sup>120</sup> Corea, *supra* note 67 at 327.

women as reproductive vessels. Corea predicted that legitimating surrogacy would lead to “breeding brothels”.<sup>121</sup>

The empirical research repeatedly shows that the quality of the surrogate mother’s relationship with the commissioning parent(s) during the pregnancy and after the birth largely determines the surrogate mother’s satisfaction with her experience.<sup>122</sup> For example, Ragoné<sup>123</sup> interviewed women who had been involved in surrogacy arrangements that had been facilitated by one of six agencies in the United States. Five agencies encouraged open relationships between surrogate mothers and commissioning parents, and one agency did not. Some surrogate mothers in the closed program experienced a great sense of loss after relinquishing the baby. However, none of the surrogate mothers who were encouraged by the other five agencies to have a relationship with the commissioning parents expressed sadness or grief about parting with the baby. Five of the 17 surrogate mothers interviewed by Hohman and Hagan were in an arrangement with commissioning parents who lived in another country. Surrogate mothers expressed satisfaction when personal relationships developed in these situations, even though they were limited to a few visits or some telephone contact. However, there were difficulties when the commissioning parents did little to acknowledge the surrogate mother or where the participants had different cultural expectations, especially around birth practices.

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<sup>121</sup> *Ibid.* at 327.

<sup>122</sup> Hohman & Hagen, *supra* note 69; Ciccarelli, *supra* note 69; Baslington, *supra* note 69; Jadvá *et al.*, *supra* note 18; Nancy Reame, Andrea Kalfoglu, & Hilary Hanafin “Long-term outcomes of surrogate pregnancy: A Report on Surrogate mother’s satisfaction, life event and moral judgments ten years later” (1998) 70 *Fertility and Sterility* S28 as referred to in Kleinpeter *et al.* *supra* note 73.

<sup>123</sup> Ragoné, *Surrogate Motherhood*, *supra* note 69 at 79. See also Ragoné, “Of Likeness and difference”, *supra* note 25.

Jadva *et al.* reported that of 34 British surrogate mothers interviewed for their study, 97 percent had harmonious relationships with the commissioning parents at the beginning and end of the pregnancy.<sup>124</sup> The one woman who had a difficult time with the commissioning parents at the beginning of the relationship reported that the issues were resolved before birth and that (at the time of the interview, which was at least one year later) they still had a good relationship. No surrogate mother reported that her relationship was characterized by major conflict or hostility. This degree of harmoniousness is somewhat surprising given that they also reported that the commissioning mothers were “very involved” in the pregnancy in 83 percent of the cases and “moderately involved” in the rest (These results are surprising given, for example, van den Akker’s finding in a 2007 study of twenty commissioning mothers in Britain that commissioning mothers’ “psychological responses during pregnancy were vigilant and slightly more anxious toward the end when the fetus was visible, viable and nearly born and relinquished to them”<sup>125</sup>). The commissioning parents for 19 of 34 surrogate mothers interviewed for the Jadva *et al.* study were the interviewees for the Fiona MacCallum *et al.* research.<sup>126</sup> They found a high degree of correlation between the commissioning parents and the surrogate mothers’ responses, notably on issues such as expectations during the pregnancy and the quality of the relationship that developed as the pregnancy progressed, which were generally highly positive.

Remarkably, the findings in the Jadva *et al.* study are consistent with the findings in most other research.<sup>127</sup>

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<sup>124</sup> Jadva *et al.*, *supra* note 18.

<sup>125</sup> van den Akker, [Psychological traits] *supra* note 69.

<sup>126</sup> MacCallum *et al.*, *supra* note 73.

<sup>127</sup> van den Akker, “Experience of Surrogacy”, *supra* note 79; Kleinpeter & Hohman, *supra* note 69 and Baslington, *supra* note 69.

Basilington's found that for four of 14 surrogate mothers the relationship with the couple was difficult (a figure that is higher than most) could have been prompted by the question, which was "what was the most difficult part of the process for you"? The difficulty for one woman in Basilington's study arose when the commissioning mother was diagnosed with a fatal disease and the commissioning father expressed doubts about being able to care for a dying wife and a newborn. This situation induced severe anxiety in the surrogate mother, as she did not want to raise another child. When the commissioning mother's diagnosis was changed and she was quickly treated, the surrogate mother's anxiety ended and the baby was happily relinquished. A 1998 study on women who had been surrogate mothers ten years earlier reported that half of the surrogates reported a negative relationship with the commissioning parents and a feeling that they were not appreciated.<sup>128</sup>

Hohman and Hagan note that all of the 17 American surrogate mothers they interviewed "indicated that being treated with respect, honor and care [by the commissioning parents] were of utmost importance to them. All felt that they were doing something unique, and wanted the immensity of this to be appreciated".<sup>129</sup> They found that problems arise when the motives and expectations of surrogate mothers and the commissioning parents do not match. For example, some surrogate mothers felt used when they expected to have ongoing social contact after the birth with the commissioning parents but this did not happen.

Surrogate mothers are more likely to be happy with the arrangement if they can exercise control before conception and

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<sup>128</sup> Reame *et al.*, *supra* note 122. Unfortunately, we were not able to obtain a copy of Reame's paper, but given that its findings are quite different from most studies, we felt that it was important to mention the findings as reported by Kleinpeter *et al. supra* note 73.

<sup>129</sup> Hohman & Hagan, *supra* note 69 at 81.

if all parties have a shared understanding of how the process will unfold. The research demonstrated that many surrogate mothers are active agents in their choice of commissioning parents.<sup>130</sup> van den Akker<sup>131</sup> interviewed 29 women who were seeking surrogates. Eight of the potential commissioning mothers had been interviewed by two potential surrogate mothers; three by three; and one by four. Most parties interviewed by McCallum *et al.* met through an agency that had already pre-screened both the surrogate mothers and the commissioning parents. On average, the parties (although usually the commissioning father was not there) met six times before the first attempt to conceive and 17 weeks passed between the first meeting and the first attempt.<sup>132</sup> One surrogate mother interviewed by Hohman and Hagan said that she was not happy with her relationship with the commissioning parents during her first surrogacy pregnancy. In spite of this, she still entered into another surrogacy arrangement, but the second time around she carefully interviewed the couples to ensure that they had similar ideas about the relationship.

Kashmeri interviewed three Canadian lawyers involved in discussions between the parties to surrogacy arrangements. These discussions dealt with parties' expectations regarding medical issues (including abortion and multi-fetal reduction), sharing information during the pregnancy, conduct and diet during pregnancy, disability and life insurance (in the event that something happened to the surrogate mother during the

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<sup>130</sup> See for example, Kleinpeter *et al.*, *supra* note 73.

<sup>131</sup> van den Akker, "Experience of Surrogacy", *supra* note 79.

<sup>132</sup> McCallum *et al.*. See also Appleton, "Emotional", *supra* note 72, for his observations on reasons why a potential surrogate mother decided not to enter into arrangement with potential commissioning parent(s) after meeting with them.

pregnancy), the payment of expenses (including childcare), income replacement, details on turning over the child after birth, parentage and post-birth contact. However, Canadian law is clear that the pregnant woman alone is responsible for making health care decisions during a pregnancy. The common law views the fetus as part of the woman's body. Attempts by fathers or the state to interfere with a woman's autonomy on the ground that others have an interest in her pregnancy have been rebuffed by courts in the last two decades. Therefore, it is unlikely that Canadian courts would enforce surrogacy arrangements concerning pre-natal conduct either.<sup>133</sup> Under Canadian law, a surrogate mother could not voluntarily surrender her autonomy to make medical decisions and the commissioning parent(s) cannot exercise any real power to control her conduct during the pregnancy. Like any competent adult, a surrogate mother also retains the right to confidentiality, including the ability to revoke her consent to third party information disclosure. Good practice requires that health care providers should not care for both a surrogate mother and a commissioning mother where *in vitro* fertilization is being used.<sup>134</sup>

Kashmeri observed from her interactions with surrogate mothers, commissioning parents and lawyers that they knew and understood that most elements of their relationship were not amenable to contractual regulation, such as conduct during the pregnancy and contact after delivery.<sup>135</sup> Therefore, the extra-legal aspects of the relationship were

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<sup>133</sup> See *Daigle v. Tremblay*, [1989] 2 S.C.R. 530; *G.(D.F) v. Winnipeg Child and Family Services*, [1997] 3 S.C.R. 925 and *Dobson v. Dobson* [1999] 2 S.C.R. 753.

<sup>134</sup> Dan R. Reilly, "Surrogate pregnancy: a guide for Canadian prenatal health care providers" (2007) 176 *Canadian Medical Association Journal* 433.

<sup>135</sup> Kashmeri, *supra* note 15 at 64.

extremely important. Her research notes that good communication, strong ties, and a high level of trust between surrogate mothers and commissioning parents are necessary for the relationship to work.<sup>136</sup>

Kashmeri's research, which included active participation in on-line support groups for surrogate mothers, found that many surrogacy negotiations in Canada are conducted without the benefit of legal or other professional advice. As a result, the parties may fail to discuss important issues. Some potential surrogate mothers attempted to gather advice on negotiation and other topics from on-line discussion groups. Blyth found that solicitors were the professional group most likely to receive criticism from participants because of their lack of knowledge of and experience with surrogacy arrangements.

The immediate consequences of the failure or inability to get sound advice can be quite detrimental to the surrogate mother. While writing this piece in mid-2009, we heard of a Canadian woman who was about to deliver twins for a couple from a European country.<sup>137</sup> An agency in X province connected them, but the surrogate mother who lived in Y province never actually met with anyone from the agency or with the commissioning parents, although it was planned that she would meet them just prior to the delivery. She was to be paid \$15,000 plus expenses and seemed unaware that such an agreement was illegal in Canada. The commissioning parents may have sought a Canadian surrogate mother because the costs are about one-half of what they would be in the United

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<sup>136</sup> *Ibid.* at chapter IV.

<sup>137</sup> The surrogate mother contacted a friend just days before birth in the hope that she might be able to give her some information on surrogacy laws and the friend, in turn, who knew of our research, contacted one of the authors. The surrogate mother's story is told in this paper with her permission.

States (where a surrogate is usually paid \$20,000-30,000 (plus expenses)) and British law would not permit the commissioning mother's name to be on the birth certificate immediately after the birth. As well, the medical expenses related to the pregnancy and the delivery would be picked up by the Canadian state rather than the couple (Most private health care plans in the United States require separate coverage for surrogate pregnancies). Surprisingly, a fertility clinic in her home city, successfully implanted three embryos in her and when all three successfully implanted, she was told (it is not clear by whom) that selective reduction to twins was "necessary".

The surrogate mother was told at the last minute that the delivery "must" take place in Z province, because the commissioning parents had learned that this jurisdiction would issue the original birth registration in the commissioning parent's names rather than in her name. She then became afraid that the medical bills related to her delivery might be billed to her directly when she returned to her home province. Those bills would far exceed what she was getting paid to be a surrogate and, of course, they would only come in after the commissioning couple and the twins had left the country. Only then, now holed up and alone with her children in an hotel in a strange city and about to deliver, did she finally try to get some advice on what her liability for the medical expenses would be. If she had been able to get proper advice before conception, issues like the number of implants, selective reduction, place of birth and payment of expenses (including use of a trust account) could have been properly dealt with. In the fog of surrogacy law in Canada, such scenarios are likely to continue, making women like her ripe for exploitation.

The empirical research shows that surrogate mothers can be active agents in determining whether they will work with a commissioning couple. Often they want and expect commissioning parents (especially the commissioning mother)

to be involved during the pregnancy. None of the studies support the conclusion that surrogate mothers lose their personal autonomy during the pregnancy; rather, they report harmonious relationships with commissioning parents. Provided that they have access to appropriate support and advice, there is little evidence to suggest that surrogate mothers lack the ability to negotiate expectations and maintain appropriate boundaries with commissioning parents, thereby avoiding exploitation and commodification of themselves and the child during the pregnancy. However, if they cannot, or are hesitant to, get this information-and their ability to do so is exacerbated by the state of Canadian law rather than facilitated by it-anecdotal evidence demonstrates that how surrogate mothers can be exploited.

### **The Emotions of the Surrogate Mother During and After Pregnancy**

Phyllis Chesler asserted that separating women from their biological infants would cause trauma and injury to both the mother and the child.<sup>138</sup> Allen believed that “there are risks inherent in surrogacy arrangements. These risks centrally include the emotional devastation experienced by surrogates who are compelled to give up the children that they have agreed to bear for others”.<sup>139</sup> The British Medical Association and others feared that because a surrogate mother cannot predict the full extent of the maternal bond, she may face unanticipated emotional risks when faced with the decision to give up a child.<sup>140</sup> The *Baby M* decision voided the contract

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<sup>138</sup> Chesler, *supra* note 3.

<sup>139</sup> Allen, *supra* note 6 at 17.

<sup>140</sup> British Medical Association, *Surrogacy: Ethical Considerations – Report of the Working Party on Human Infertility Services* (London: British Medical Association, 1990). See also Overall, “Human Reproduction”, *supra* note 6.

between the surrogate mother and the commissioning father on the ground that no woman could consent to relinquishment prior to the birth of a child.<sup>141</sup> Others were concerned that the physical and hormonal changes and emotional volatility of pregnancy might impact a surrogate mother's feelings towards the pregnancy.<sup>142</sup> The RCNRT stated that if the surrogate mother "succeeds in denying her emotional responses during this profound experience, she is dehumanized in the process".<sup>143</sup> Therefore, at best, women should not be encouraged to relinquish children and, at the very least, voluntary informed consent is simply not possible until sometime after the birth of a child.<sup>144</sup>

The empirical research, however, does not support the concerns about pre-natal maternal bonding or emotional instability during pregnancy. van den Akker's 2007 study of 61 British surrogate mothers reported that anxiety was not high during the pregnancy among surrogate mothers and "detachment is reported early and maintained throughout the pregnancy, with little post-variation post-delivery".<sup>145</sup> She also found that surrogate mothers had "consistent mid range scores on attitudes towards the pregnancy" which is "likely to reflect

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<sup>141</sup> *Supra* note 2.

<sup>142</sup> See Shalev, *supra* note 9 for a literature review.

<sup>143</sup> RCNRT, *supra* note 5 at 685.

<sup>144</sup> Anita Allen argues that surrogate mothers have an inalienable constitutional right to a post-natal opportunity to change their mind about relinquishing parental rights: "Privacy, Surrogacy and the Baby M Case" (1988) 76 *Geo.L.J.* 1759.

<sup>145</sup> van den Akker, "Psychological trait", *supra* note 74; S. Fischer & I. Gillman, in "Surrogate motherhood: attachment, attitudes and social support" (1991) 54 *Psychiatry* 13; Blyth, [Interesting] *supra* note 71 [1994]; and, van den Akker *supra* note 79 [Experiences of Surrogacy] also report the finding from their interviews with surrogate mothers that they are less attached to the fetus.

their continued attempts to dissociate meaning to the pregnancy in an attempt to remain detached from it”.<sup>146</sup> In contrast, she found that the commissioning mothers “appear to be healthy, inquisitive and to show concerns coupled with positive feelings toward the fetus which are likely to reflect an attempt to form a bond or attachment to the fetus.”<sup>147</sup> Other studies show that most surrogate mothers did not think of the fetus as theirs; they considered it to be for the commissioning parents from the beginning of the process and demonstrated lower attachment during pregnancy than other pregnant women.<sup>148</sup> One out of 14 American women in Ciccarelli’s 1997 study felt that she had bonded with the child and two others identified strong mothering instincts, but 11 of 14 stated that they did not feel any attachment. One woman stated that “I almost felt guilty for not feeling bad about giving up the baby”<sup>149</sup> and even the three women who felt attached to the baby were not reluctant to relinquish the child. Baslington found that “a strong psychological component was evident in the conscious effort by surrogate mothers to think of the surrogacy arrangement as being a job with payment and not to think of the baby as theirs”.<sup>150</sup> Ragoné concluded from her interviews with surrogate mothers that “it is the ability or strength to be able to separate oneself from the pregnancy/child that surrogates consider a prerequisite of surrogate motherhood”.<sup>151</sup>

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<sup>146</sup> van den Akker, “Psychological trait”, *supra* note 74.

<sup>147</sup> *Ibid.*

<sup>148</sup> Edelmann, *supra* note 88 at 130; Fischer & Gillman *supra* note 145. See also, Kristy Stevens & Emma Dally, *Surrogate Mother: One Woman's Story* (London: Century Publishing, 1985).

<sup>149</sup> Ciccarelli, *supra* note 69 at 56.

<sup>150</sup> Baslington, *supra* note 69 at 67.

<sup>151</sup> Ragoné, *Surrogate Motherhood*, *supra* note 69 at 78.

Hohman and Hagan found that how the actual delivery and transition was handled by the commissioning parents was an important determinant of satisfaction with the process.<sup>152</sup> The research reports that for almost all surrogate mothers, relinquishment was a happy event that contributed to an increased sense of self-worth and self-confidence.<sup>153</sup> Speaking about their feelings after the birth, many surrogate mothers commented on the joy of the moment when the child was handed to the commissioning parents. One surrogate mother stated that

[the best part] was giving [the commissioning parents] a daughter. It is a humbling experience. When I gave [the baby] to [the commissioning mother] she stated, "I'm holding my dream. Not many people get to do that in their lifetime". And that to me summed it all up, I'd given her dream.<sup>154</sup>

Few women regretted participating in surrogacy or experienced distress on giving up the child after birth. Three of the 19 women in Baslington's study stated that they felt some attachment to the child after birth. However, these feelings were transitory for two of the women and, notably, both experienced good relationships with the commissioning parents. While one woman continued to feel distress two and a half years after the birth, her distress was not over losing the

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<sup>152</sup> Hohman & Hagan, *supra* note 69 at 81.

<sup>153</sup> van den Akker, "Psychological Trait," *supra* note 74; Baslington, *supra* note 69; Blyth, "Interesting", *supra* note 71 ; Jadvá *et al.*, *supra* note 18; Ragoné, *supra* note 25, Kleinpeter & Hohman, *supra* note 69; Teman, *supra* note 12 van den Akker, "Experience of surrogacy", *supra* note 80.

<sup>154</sup> Blyth, "Interesting", *supra* note 71 at 192.

child. Rather it was because the commissioning father was disrespectful during the pregnancy and the birth, that she doubted his suitability for parenthood, and her requests for photographs and other information were ignored. No studies reported any surrogate mothers who reached clinical levels of depression after relinquishing the child.

Jadva *et al.* found that “all of the [34] women [who were interviewed at least one year after relinquishing the child] were happy with the decision reached about when to hand over the baby and none has experienced any doubts or difficulties whilst handing over the baby”.<sup>155</sup> Thirty-two percent of the surrogate mothers reported that they had had some difficulties in the weeks following the handover. At the time of the interview, two women still had some difficulties, with 94 percent expressing none at all. These findings are consistent with those of Ciccarelli who interviewed women five to 10 years after serving as surrogates. The women interviewed said that they were “quite satisfied” with their experiences.<sup>156</sup> Other longitudinal studies also showed that positive attitudes remained stable over time.<sup>157</sup> Teman concluded, following a review of the research, that “almost all of the studies ... find, in the end, that the overwhelming majority of surrogates do not regret their decision and they even express feelings of pride and accomplishment”.<sup>158</sup>

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<sup>155</sup> Jadva *et al.*, *supra* note 18 at 200.

<sup>156</sup> Ciccarelli, *supra* note 69.

<sup>157</sup> van den Akker, “Psychological trait”, *supra* note 73; van den Akker, “Psychosocial aspects”, *supra* note 16; Elly Teman, *The birth of a mother: mythologies of surrogate motherhood in Israel* (PhD. Dissertation, The Hebrew University of Jerusalem Department of Sociology and Anthropology, 2006) as cited in Teman, *supra* note 12 at 1104 and in *Birthing a Mother: A Surrogate's Body and the Pregnant Self* (University of California Press, forthcoming February 2010).

<sup>158</sup> Teman, *supra* note 12 at 1109.

As noted earlier, the most significant factor in determining satisfaction is the relationship with the commissioning parents during and after the pregnancy. The research<sup>159</sup> consistently shows that it is closeness with the couple, not with the child, that is important. Blyth reports that many surrogate mothers wanted some contact because they believed that it would be better for the child to have a loose connection to them.<sup>160</sup> Jadvá *et al.* reported that 18 percent of the parties agreed prior to conception that the surrogate mother would have no continuing involvement with the child after the pregnancy. All others would have some kind of involvement. 94 percent of the surrogate mothers were happy with the level of contact they had.

Surrogate mothers rarely refused to relinquish a child after birth. Only two such refusals were noted in the interview-based studies (Blyth and Baslington) reviewed for this paper. The surrogate mother in the Baslington study had previously relinquished a child without any difficulties but she refused to relinquish the second child to different commissioning parents because she had strong doubt about the father's suitability for parenthood. In 1999, van den Akker surveyed five clinics and two agencies in Britain on the rate of refusals to relinquish by the surrogate mother or refusal to accept by the commissioning parent(s). Only one establishment reported any refusals to relinquish.<sup>161</sup> As noted earlier, there have been almost no reported decisions in the last 20 years in Canada, the United States, or Britain involving a dispute between surrogate

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<sup>159</sup> Ciccarelli, *supra* note 69; Ragoné, *Surrogate Motherhood*, *supra* note 69 at 79; Jadvá *et al.*, *supra* note 18, and Hohman & Hagan, *supra* note 69.

<sup>160</sup> Blyth. "Interesting", *supra* note 71 at 194.

<sup>161</sup> van den Akker, "Organizational selection", *supra* note 84. The article does not indicate how many refusals there were.

mothers and the commissioning parents.<sup>162</sup> The professional team at a large clinic in England reported that they “encountered no serious clinical, ethical or legal problems in nine years”.<sup>163</sup> Internet research failed to reveal any media accounts in the last two decades of refusals to relinquish or other disputes between parties to surrogacy arrangements other than those already described. There are no reports of commissioning parents refusing to accept a child, in any of the empirical research reviewed for this paper, although there are some accounts in other sources, such as the *Baby Manji* case in India, which will be referred to later.

The empirical research demonstrates that surrogate mothers are not subject to emotional volatility during pregnancy and that they do not become pre-natally attached to the fetus. Very few women express distress and when they do, the distress is related to the relationship with the commissioning parents, not over relinquishing the child. Only in very few cases do surrogate mothers refuse to give up the child. The lack of regret and distress expressed by women who choose to be surrogates indicates that they make their decisions with informed consent, an understanding of what the surrogacy arrangement requires and a confidence that they can carry through with their initial decision to participate in surrogacy.

### **The Health of Outcomes for Surrogate Mothers**

Few studies by social scientists discuss the short- or long-term health implications for the surrogate mother as a consequence of the pregnancy or delivery; when they do, the information on the medical issues is not detailed. Most researchers ask open-ended questions about negative aspects of

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<sup>162</sup> See the text accompanying notes 22 to 59.

<sup>163</sup> Brinsden *et al.*, *supra* note 85.

or regrets about participating in a surrogacy arrangement. In most studies, the surrogate mothers did not report physical effects in response to this question. An exception to this was that three of 17 surrogate mothers in the Hohman and Hagan study talked about their difficult births. However, all three said that they were happy with the decision to be surrogate mothers and, while relationships with the commissioning parents were positive, they regretted having difficult births and, therefore, would not be entering into another surrogacy arrangement.<sup>164</sup>

We reviewed a handful of studies by researchers based in the medical sciences and they also show that the short- and long-term health implications for surrogate mothers are not heightened.<sup>165</sup> Dan Reilly notes

[t]he literature regarding the medical risks associated with surrogate pregnancy is limited to a few case series. It remains to be determined if the obstetric risks are the same as those for any other pregnancy derived by in vitro fertilization with the same number of fetuses. Most case series report no increase in adverse events related to surrogate pregnancy.<sup>166</sup>

Parkinson *et al.* reported that all 95 surrogate mothers in their study were healthy at the beginning of the process and, noting that they had all given birth to at least two children already, found that the incidence of commonly experienced health problems during their previous pregnancies was low (van den Akker made the same observation<sup>167</sup>). Interestingly, surrogate

<sup>164</sup> Hohman & Hagan, *supra* note 69.

<sup>165</sup> Parkinson *et al.*, *supra* note 85; Brinsden *et al.*, *supra* note 85; Appleton, "Emotional", *supra* note 72; and Reilly, *supra* note 134.

<sup>166</sup> Reilly, *ibid.* at 484-485.

<sup>167</sup> van den Akker, "Longitudinal comparison", *supra* note 69.

mothers were three times more likely to be on bed rest for pre-term labour than other pregnant women with the same condition. This difference might suggest that surrogate mothers are given the resources, including income replacement and childcare, to take optimum care of themselves during the pregnancy. One surrogate mother, out of 95, had a difficult birth that resulted in a caesarean hysterectomy, but otherwise no one was reported in any study to have experienced a pregnancy or birth that resulted in serious short-term or significant long-term health effects.

Parkinson *et al.* also found that five of 95 British surrogate mothers experienced “mild transient postpartum ‘maternal blues’, but that no cases of documented neurotic postpartum depression occurred in IVF-surrogates”.<sup>168</sup> This finding is consistent with other studies. For example, none of the women in the Jadva *et al.* study ever had a score above the cut-off indicated for clinical depression. This includes the two of the 34 surrogate mothers who were still expressing difficulty with the decision to relinquish the child one year after birth. Surprisingly, 20 percent (of the 61) surrogate mothers in van den Akker’s longitudinal study self-reported post-natal depression in their previous pregnancies in an interview held after they had decided to enter a surrogacy arrangement, but before becoming pregnant. Van den Akker comments that “clearly counseling and screening was not sufficiently adequate”.<sup>169</sup> However, at a second interview, held six months after delivery, none of the surrogate mothers reported post-natal depression.

The decision to become pregnant, either to give birth to a child that one will raise or to give to someone else to raise,

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<sup>168</sup> Parkinson *et al.*, *supra* note 85 at 674.

<sup>169</sup> van den Akker, “Longitudinal comparison”, *supra* note 69 at 281.

carries with it an acceptance of emotional and physical risks. Because almost all the women who have been surrogate mothers had given birth prior to making this decision, they already had a good idea of what the specific risks were for them. It is not surprising, therefore, that surrogate mothers report few complications during the pregnancy, delivery and post-delivery. While risk cannot be avoided altogether, the risks can be minimized if potential surrogate mothers have access to good screening for mental and physical issues prior to conception and the resources to take good care of themselves during the pregnancy.

### **The Expectations of Children in Surrogate Arrangements**

It has been argued that surrogacy may be bad for children because they may be angry at the women who abandoned them or that commissioning parents may be over-protective of the children or have unrealistic expectations if they have had to pay a high price for them.<sup>170</sup> Concerns were expressed that commissioning parents would refuse to accept the child, or to pay the surrogate mother, if the child was disabled. The RCNRT stated that “preconception arrangements will alter society’s understanding of parenthood, family and parental responsibilities, reducing parenthood to a transaction ... with the child as the product of the deal”.<sup>171</sup>

A 2004 literature review concludes that there are “few, if any, psychological differences between children conceived by [assisted reproductive technologies] and those conceived naturally with regard to emotions, behaviour, the presence of psychological disorders or their perceptions of the quality of

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<sup>170</sup> Linda Burns, “An exploratory study of perceptions of parenting after infertility” (1990) 8 Family Systems Medicine 177.

<sup>171</sup> Royal Commission on New Reproductive Technologies, *supra* note 5.

family relationships”.<sup>172</sup> In a 2006 study, Sandra Golombok *et al.* studied the relationship between the children and their families at the time of the child’s third birthday. Sixty-seven families with a child conceived through heterosexual intercourse between the parents were compared with 34 surrogacy families, 41 assisted insemination families and 41 oocyte donation families. They found higher levels of warmth and interaction between the assisted reproduction families than in other families. They concluded that “it appears that the absence of a genetic and/or gestational link between parents and their child does not have a negative impact on parent-child relationships or the psychological well-being of mother, father or children at age 3”.<sup>173</sup>

Guichon refers to on-line blogs where some now-adult offspring of surrogacy arrangements are expressing unhappiness because they perceive that they were rejected or abandoned by their surrogate mother.<sup>174</sup> On the other hand, as soon as she turned 18, Baby M initiated legal proceedings to allow her commissioning mother to adopt her and to terminate any legal rights her surrogate mother might have had. She stated that she was happy with her family.<sup>175</sup> No empirical

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<sup>172</sup> Edelmann, *supra* note 88 at 134.

<sup>173</sup> Sandra Golombok, Clare Murray, Vasanti Jadv, Emma Lycett, Fiona MacCallum, & J. Rust., “Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at the age of 3” (2006) 21 *Human Reproduction* 1918. See also van den Akker, “Psychological trait”, *supra* note 73.

<sup>174</sup> Guichon, *supra* note 20.

<sup>175</sup> “Now It’s Melissa’s Time,” *New Jersey Monthly* (6 March 2007), online: *New Jersey Monthly* <<http://web.archive.org/web/20070526004403/http://www.njmonthly.com/issues/2007/03-Mar/babym.htm>>.

studies have been conducted on the experiences of now-adult children born of surrogacy arrangements.

van den Akker states that “to date, the author is not aware of any disabled surrogate births, but this is a possibility in the future”.<sup>176</sup> Based on a survey of seven clinics and agencies involved in surrogacy, she also reports that no commissioning parents have refused to take a child.<sup>177</sup> The Parkinson *et al.* review (which included a review of the medical files of 95 surrogate mothers and included birth details) mentions that there was testing for fetal anomalies but is silent on whether there were any abortions. However, there were five multi-fetal reductions where three sets of quads and two sets of triplets were each reduced to twins. There were no fetal reductions during the last three years of a nine year study period (1989-97), because the clinic reduced the number of embryos it would implant. This review notes that four children of the 128 born had minor disabilities: two with cysts, one with a cleft palate, and one with duodenal atresia. As noted earlier, no study reviewed for this paper indicated that any commissioning parents had rejected the children born to a surrogate mother.

While the empirical research is limited, it does not support the theory that commissioning parents will be over-protective of their children or have unrealistic expectations of them. There is no evidence of commissioning parents rejecting children who do not meet their expectations. Changing societal norms on what it means to be a parent are not inherently undesirable. Indeed these norms have been altered significantly in the last 50 years to meet new social conditions. Canadian laws do not require that parents have a genetic connection to a child to be legally recognized as a parent.

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<sup>176</sup> van den Akker, “Psychosocial aspects”, *supra* note 16.

<sup>177</sup> van den Akker, “Organizational selection”, *supra* note 84.

Adoptions have always been accepted in Canada and anonymous sperm donor assistance has been used by heterosexual couples for half a century; these methods of family formation are now more widely available to single people and same-sex couples. More recently, other non-genetic parent-child relationships have been recognized, such as *de facto* parenting and birth registrations in the name of two women or more than two people as parents where this arrangement is consistent with the intention of the registrants at the time of conception. It is hard to follow the argument that pre-conception agreements reduce parenthood to a transaction. That “transaction” is but the first step to becoming a parent, with most of the work of “family and parental responsibilities” yet to come. Thus, neither altered social understandings nor the fact of a transaction are convincing arguments against surrogacy arrangements.

### **The Motivations of Commissioning Parents**

Some are concerned that commercial surrogacy commodifies women’s reproductive capacities because it allows wealthy women to buy their way out of the burden of having to be pregnant. The influential Warnock Report in England (1984) and other reports<sup>178</sup> voiced strong concerns that women would seek surrogacy mothers for convenience. Health Canada stated in a consultation paper on permissible expenses for surrogates that

... the commercialization of the human reproductive capacity is not in keeping with

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<sup>178</sup> Mary Warnock, *Report of the Committee of Inquiry into Human Fertilization and Embryology* Cmnd 9314 (London, HMSO, 1984). See also Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilization and Embryology* (Oxford: Basil Blackwell, 1985), and Field, *supra* note 6.

Canadian values. Canadians feel strongly that human life is a gift that should not be bought and sold, or treated like a consumer commodity. A guiding principle of the *AHR Act* is to prevent trade in the reproductive capabilities of women and men.<sup>179</sup>

The British Medical Association<sup>180</sup> and *Human Fertilization and Embryology Act* both stress that surrogate mothers should only be available when the commissioning mother cannot carry or it is highly undesirable for her to carry a fetus to term. The research demonstrates that there is no evidence that commissioning mothers are seeking surrogacy to avoid the inconvenience, physical effects or career impacts of their own pregnancy.<sup>181</sup> Rather, it shows that all commissioning mothers were infertile, unable to carry a fetus to term, or had a serious medical conditions that makes pregnancy dangerous for them.

#### **SUMMARY OF THE RELATIONSHIP BETWEEN FEMINIST THEORY AND EMPIRICAL RESEARCH**

The empirical research focusing on surrogate mothers in Britain and the United States does not support concerns that they are being exploited by these arrangements, that they cannot give meaningful consent to participating, or that the arrangements commodify women or children. Money is a motivator for some participants, but for most, the decision to participate comes out of a desire to help a childless couple, to do something unusual or to make a unique contribution. Of course, there are women disappointed by the process and there

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<sup>179</sup> Health Canada, "Reimbursement of Expenses under the Assisted Human Reproduction Act: Public Consultation Paper" (no date), online at: [www.hc-sc.gc.ca](http://www.hc-sc.gc.ca).

<sup>180</sup> British Medical Association, *supra* note 140.

<sup>181</sup> Edelman, *supra* note 88 at 127.

are situations in which women are treated poorly by agencies or commissioning parents. But, overwhelmingly, the research demonstrates that the women who become surrogate mothers go into the process on their own initiative, with a strong sense of what it is that they are committing to and that they rarely regret having been a surrogate mother. They have satisfying relationships with the commissioning parents during the pregnancy and after the delivery. Situations in the last two decades where surrogate mothers refuse to relinquish children are extremely rare, as are situations where commissioning parents refuse to accept them. Limited research indicates that the children born of these arrangements are doing well.

Problems arise when women do not have access to information and advice before making the decision to participate in a surrogacy arrangement and when they cannot engage as active agents in the choice of commissioning parents. While the research is limited, this situation may be exacerbated in Canada where the state of surrogacy law inhibits women who are considering becoming involved in surrogacy from getting the information that they need. Commercial surrogacy arrangements are being made in Canada between both Canadian residents and non-residents in spite of the prohibition and, all signs indicate that the practice of using surrogacy arrangements will continue to grow. In light of these findings, Canadian governments should replace a criminal prohibition against commercial surrogacy arrangements with a regulatory regime that minimizes the potential for the exploitation and commodification of surrogates and children.

### **SURROGACY ARRANGMENTS ACROSS BORDERS**

While it is beyond the scope of this paper to discuss it in detail, we must note that there is some anecdotal evidence that Canadian residents are commissioning women in other countries, notably India and the United States, to be surrogate mothers because it is easier or cheaper to find surrogate

mothers in those countries. As well, Canadian commissioning parents engage American women as surrogates (and pay commercial rate fees) but arrange for the women to come to Canada to give birth, thereby saving on medical expenses and avoiding issues related to citizenship and the immediate need for a passport for the child. In spite of the criminal prohibition on commercial surrogacy, non-Canadians have commissioned Canadian surrogate mothers, perhaps because they know that the law is not being enforced here and to save on medical expenses.<sup>182</sup>

Surrogacy contracts in India are virtually unregulated. Media accounts and some journalists<sup>183</sup> suggest that Indian women are being exploited and abused, including being subject to severe constraints on liberty during the pregnancy. Some women are only paid after they give birth and only if the commissioning parents agree to accept the child. According to some accounts, children have been rejected by commissioning parents, who can renege on these contracts with impunity. Nolan for instance, reports,

“[t]hese surrogate mothers are just being kept there like baby factories”, said Nandita Rao, a lawyer pushing for regulation of the fertility industry. “The women are just sitting there producing a child with no rights to that child and

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<sup>182</sup> See Kashmeri *supra* note 15; Gazze *supra* note 15, and the text accompanying note 137.

<sup>183</sup> See Stephanie Nolan, “Desperate Mothers Fuel India’s Baby Factories” *Globe and Mail* (13 February 2009). See also Sarmishta Subramanian, “Wombs for Rent” *Macleans’s* (2 July 2007), online: [Macleans.ca](http://Macleans.ca) <[www.macleans.ca/article.jsp?content=20070702\\_107062\\_107062](http://www.macleans.ca/article.jsp?content=20070702_107062_107062)>. Rengachary Smerdon, *supra* note 13 and Ruparelia, *supra* note 64.

no rights on their health--the contract says that if you don't produce the child, you don't get the money—so they go on with the pregnancy no matter what [the risk] and there is no maximum number of times they can do this. In India, which is so fiercely patriarchal, many are using their daughters as baby-churning factories”.<sup>184</sup>

Since the early 2000s, India has actively developed its medical tourism industry. The reproductive portion of this market is valued at over \$450 million (U.S.) per year and is expected to increase.<sup>185</sup> In 2005, the Indian Council for Medical Research (ICMR) published the non-binding “National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India”. These guidelines, amongst other regulations, support commercial surrogacy, permit gestational surrogacy only and state that the birth certificate should be in the genetic parents’ names.<sup>186</sup> ICMR released a draft of the *Assisted Reproductive Technologies (Regulation) Bill* (2008) for public comment and it received first reading in December, 2008.<sup>187</sup> This bill was influenced by the *Baby Manji* (2008) case where a child born to a surrogate mother was left in legal limbo when her genetic parents divorced before her birth.<sup>188</sup> The commissioning father wanted

<sup>184</sup> Nolan, *ibid.*, and Subramanian, *ibid.*

<sup>185</sup> Rengachary Smerdon, *supra* note 13 at 24.

<sup>186</sup> Indian Council for Medical Research, “National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India”, available online: Indian Council for Medical Research <[http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm)>.

<sup>187</sup> Rengachary Smerdon, *supra* note 13 at 42.

<sup>188</sup> The reasons for decision in *Baby Manji Yamada v. India* (2008) (Sup. Ct. India) are available at: <http://blog.indiansurrogacylaw.com/tag/surrogate-mother-contract/>

to adopt but Indian law would not allow a single father to adopt. Neither the surrogate mother nor the commissioning mother wanted the child. The father could not take the baby home to Japan because the Japanese embassy said she needed Indian travel documents because she was born in India. However, in India, a child's travel documents are linked to the mother so the baby had none. Eventually, the paternal grandmother adopted the child. She was finally issued a "certificate of identity" (which are given to people who are stateless or cannot get passports from their home country) which allowed the father to apply for a Japanese visa to bring the child to Japan.<sup>189</sup>

The 2008 bill, as with the guidelines, only regulates gestational surrogacy and prohibits surrogate mothers from having a genetic link to the child.<sup>190</sup> Among other things, this bill makes surrogacy agreements enforceable contracts in which the surrogate mother renounces all parental rights; it requires surrogate mothers are required to be between the ages of 21 and 45 and participating women are limited to a maximum of three pregnancies. The commissioning parents' names would be on the birth certificate from the time of birth and the child would be considered their child even if they divorce. They would be required to pay all the surrogate's costs, have proof that they can take the child out of India and appoint a local guardian to care for the surrogate.<sup>191</sup>

Given the heightened potential for exploitation of surrogate mothers involved in international surrogacy arrangements, consideration should be given to prohibiting

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<sup>189</sup> "Japan gate-pass for baby Manji" *The Telegraph* (17 October 2008), online: The Telegraph <[http://www.telegraphindia.com/1081018/jsp/nation/story\\_9984517.jsp](http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp)>.

<sup>190</sup> *Supra* note 187 at 17-18.

<sup>191</sup> *Ibid.* at 42-43.

Canadian residents from engaging non-resident surrogate mothers and possibly prohibiting non-residents from engaging resident surrogate mothers unless Canada has entered into reciprocal protocols with these countries.

### **THE REGULATORY REGIME ON SURROGACY IN CANADA – WHAT IT SHOULD LOOK LIKE**

The federal government's authority to enact the *AHRA* can only be founded in the criminal law power. Otherwise, its jurisdiction to make laws related to surrogacy must be ancillary to another power, such as the citizenship of a child born to surrogacy participants where one of them is not a Canadian resident. The criminal law power requires that, in purpose and effect, the law prohibits highly undesirable activities and attaches penal consequences to those who engage in such activities. Perforce, it is a blunt instrument that is not well suited to the governance of complex human interactions. Canadian law prohibits parties to a surrogacy arrangement or any third parties from exchanging any money unless it is for payment of expenses, as set out in the regulations. As no regulations have been made in the five years since the act passed, even the payment of expenses could attract criminal liability. Nonetheless, Canadian residents are making surrogacy arrangements. The empirical evidence in Britain and the United States indicates that the participants' experiences, motives, personal characteristics, circumstances, and ability to develop relationships—and not whether money changes hands—are the determinants of satisfaction with surrogacy arrangements. It also establishes that most participants are satisfied with the process. By failing to accommodate the highly individualistic and inter-personal nature of surrogacy arrangements, the current criminal law regime simultaneously denies women personal autonomy and exacerbates the potential for their exploitation.

The primary goal of a legal regime governing surrogacy arrangements must be to ensure both that women have the ability to make an informed decision to become a surrogate mother and the power to exercise that capacity properly, including the ability to resist pressure to participate in surrogacy or be controlled by others during the pregnancy. Only the provinces have the comprehensive ability to pass laws that can take into account the complexity of surrogacy arrangements and therefore the federal *AHRA* should be replaced, or at least supplemented, by<sup>192</sup> provincial regulatory regimes. As the needs of (potential) surrogate mothers are the same regardless of the kind of surrogacy, the regime should govern traditional, gestational, commercial and gratuitous surrogacy arrangements and include any arrangement where either the surrogate mother or the commissioning parent(s) are Canadian residents.

A regulatory regime must ensure that all parties interested in participating in surrogacy are screened for physical, financial, and emotional vulnerabilities before any other steps are taken. In order to have sufficient knowledge of the physical and emotional risks they face during a pregnancy and after birth, only women who have given birth (following low risk pregnancies and deliveries), have completed their families, and are confident of their ability to be a surrogate

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<sup>192</sup> The *AHRA* permits provinces to pass laws concerning assisted human reproduction as long as those laws are not inconsistent with federal policy. Under the heading “Equivalency Agreements”, s. 68.1 provides that “the Governor in Council may, by order, declare that any or all of sections 10 to 16 ... and any corresponding regulations do not apply in a province ... if the Minister and the government of that province agree in writing that there are laws of the province in force that are equivalent to those sections and the corresponding provisions in the regulations”. Therefore, the suggestions contained in this section of the paper, with the exception of a permissive stance on commercial surrogacy, could be enacted by provinces without repeal of the federal law.

mother should participate. Women whose sole reason for participating is to overcome financial hardship or those who live with serious mental health issues, such as a history of post-natal depression or fragile personalities, should not be accepted as surrogate mothers, because the potential for exploitation or other adverse consequences is too significant. The interest in participating in surrogacy usually comes from the potential surrogate mother herself. Screeners need to be alert to the possibility that a woman might be under pressure from others to participate and, especially where the initial idea did not come from the potential surrogate mother, they should take special care to determine if there is pressure on her to participate. Commissioning parents should be screened to ensure that they have the financial wherewithal to participate in a surrogacy arrangement and, where a couple is involved, to ensure that both members are in agreement that surrogacy is something that they want to try. The reasons for seeking surrogacy should be explored as surrogacy simply for their convenience should not be encouraged. While there is no evidence to support the concern that surrogacy will lead to baby-selling, the screener could also determine if this was, in fact, the commissioning parents' intention. If the commissioning parents are friends or family of the potential surrogate mother, they may also provide information to screeners on whether she is being pressured to participate.

The empirical evidence clearly establishes that formal and informal pre-conception relationships building between the potential surrogate mothers and commissioning parents are key to the success of the arrangements. All parties should receive separate advice and counselling on issues that might arise during the pregnancy, delivery, and after the birth, including medical issues, conduct and diet, insurance, compensation, expenses, place of birth, exchange of the child, parentage, and post-birth contact. The objective of such counselling include discussing specific anxieties, facilitating decision-making, and ensuring that issues are identified and resolved at an early

stage.<sup>193</sup> Only after the relationship is established are the parties ready to come to specific mutual understandings about how the process should unfold if the surrogate mother becomes pregnant. As most surrogate pregnancies are achieved at fertility clinics, the clinics could be required to ensure that parties are screened and have received separate and independent and then joint counselling and advice on formulating their arrangement before attempting any fertilization or implantation procedures.

The Canadian Bar Association has recommended that the expense of obtaining legal advice should be a compensatable expense for surrogate mothers and they should be encouraged to obtain independent legal advice prior to entering into any form of a surrogacy contract.<sup>194</sup> Lawyers are also well placed to handle financial aspects of the arrangements, particularly if trust funds are created from which to pay compensation and expenses. Care must be taken to ensure against creating an erroneous impression that surrogacy arrangement frameworks may be more contract-like and therefore enforceable if they are prepared by lawyers.

Independent legal advice is not a substitute for screening or separate and joint counselling. The pre-conception process involves not only identifying potentially contentious issues, but also requires more skill in counselling and relationship building than most lawyers have. The parties are likely to be best served by an agency that provides screening, facilitates pre-conception relationship building, and assists in issue identification and decision-making.

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<sup>193</sup> Edelman, *supra* note 88.

<sup>194</sup> Canadian Bar Association, "Reimbursement of Expenditures under the *Assisted Human Reproduction Act*" (September 2007).

While the surrogate mother's personal autonomy during the pregnancy is well protected by the common law, it might be instructive to the parties and others involved in the pregnancy, such as health care workers, to set this out explicitly in statute law and to require that certain standard terms be replicated in all surrogacy arrangement frameworks. Statutory terms protecting the surrogate mother's autonomy could include the surrogate mother's sole ability to make medical decisions, protection of personal privacy, the ability to withdraw information waivers, and the unenforceability of terms concerning diet and conduct. Consideration should be given to having minimum rates of compensation for surrogacy (including partial payments in the event of a miscarriage), unless the arrangement is intended to be gratuitous, and the mandatory use of trust accounts to ensure that funds are available and that compensation and expenses are paid in a timely way. As well, consideration should also be given to whether the surrogate mother should have the right to reverse her decision to relinquish the child within a short period after giving birth regardless of the nature of the surrogacy or that she cannot be asked to sign a relinquishment immediately after birth. Such provisions are common in adoption statutes.<sup>195</sup> While almost no surrogate mothers have refused to relinquish, such a provision may help to ensure that her autonomy is fully protected, that she is well treated during the pregnancy, and that her consent is meaningfully given.

State-insured health care for Canadian residents has resulted in non-Canadian residents seeking Canadian surrogate mothers because this allows them to avoid having to pay

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<sup>195</sup> See, for example, The American Medical Association, "Opinion E-2.18 Surrogate Mothers" (1994) (which recommends a right to reverse consent) and *The [Manitoba] Adoption Act, supra* note 27 s.16 which provides that no one can give consent or solicit consent to an adoption until at least 48 hours after the time of the birth of the child.

medical expenses related to the pregnancy, delivery, and perinatal care. Commissioning parents sometimes, perhaps often, seek Canadian surrogate mothers instead of Americans because surrogacy medical insurance in the United States costs in excess of \$25,000 (for a singleton) and \$40,000 (for twins). While it would appear these expenses must be paid for under provincial healthcare regimes because the services are being provided directly to Canadian residents, serious consideration should be given to requiring non-resident commissioning parents to pay such costs. This burden seems unreasonable for Canadian taxpayers to assume. As such expenses could easily exceed \$50,000, this issue demands attention, especially as many surrogate pregnancies result in the pre-term birth of twins.

Only four provinces have specific laws concerning registration of births to surrogate mothers or on parentage; none have clear statutory procedural laws to expedite the process. Therefore, the birth will probably be registered in the surrogate mother's name alone or together with either the name of her husband (who is presumptively the father) or in the name of the commissioning father. The commissioning parent(s) then adopt the child or seek a parentage declaration. As noted earlier, birth registration, parentage and adoption issues currently are decided by Canadian judges in most jurisdictions on an *ad hoc* basis.<sup>196</sup> In the United States and Canada this situation leads to a kind of forum shopping whereby commissioning parents seek to have the children born in a favourable jurisdiction (for example, Ohio, where by statute only genetic parents are named on a birth certificate) or, at least one with a more established and expedited process (for example, British Columbia, which permits pre-birth motions regarding birth registrations). Surrogate mothers are being

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<sup>196</sup> See the text accompanying notes 28-40.

asked to relocate just before they give birth. This situation can tear surrogate mothers from their families and other supports, such as established relationships with health care providers at the time when they are most needed. Birth registration and parentage laws (including procedural laws) should be clarified across Canada.

Surrogate mothers will be best protected if the laws of the province where they usually reside irrevocably govern both parentage and the contract-like aspects of the surrogacy arrangement. This would discourage forum shopping and help ensure that she gives birth at home. Birth registration laws of the place where the birth occurs obviously apply to registration, although the federal government should clarify the citizenship status of children born when either the surrogate mother or the commissioning parents are not residents of Canada.

Canada has reciprocal arrangements with many countries concerning international adoptions to ensure that Canadians are not involved in baby-selling and other exploitative practices. It also has laws with extra-territorial effect, such as laws prohibiting Canadian residents from engaging in exploitative sexual activities with minors while abroad. There is evidence, albeit limited, that surrogate mothers in some countries are at significant risk of being exploited. Consideration should be given to barring Canadian residents from entering surrogacy arrangements with non-residents, either as potential surrogate mothers or commissioning parent(s), unless Canada has established a reciprocal arrangement with the non-residents' countries. This end can be accomplished, as it now is with laws relating to international adoptions, through criminal law sanctions and laws related to citizenship and residency status for children born to surrogate mothers where the commissioning parents are Canadian residents. The form of reciprocal arrangements could be similar to those used to regulate and facilitate international

adoptions<sup>197</sup> and would ensure that all surrogacy arrangements protect surrogate mothers' autonomy and ability to consent, set standards regarding compensation and expenses and regularize birth registration, parentage and citizenship.

### CONCLUSION

The stories told by American and British women who have agreed to be surrogate mothers are quite different from the cautionary tale told by Atwood's handmaid and they indicate that the experience of Marybeth Whitehead, the surrogate mother in the *Baby M* case, is the exception not the norm. The empirical research demonstrates that concerns that commercial surrogacy will lead to commodification and exploitation and that women cannot give meaningful consent to such arrangements, have not been realized in those countries. Because participation in surrogacy in Canada is a criminal offense, the stories of Canadian participants are, like the stories of Atwood's handmaids, only told in the whispers of mediated forums or confidential conversations. The empirical research supports the view that women in Canada should not be denied the right to exercise agency over their own bodies, in particular their reproductive autonomy, but rather they should be legally able to enter into surrogacy arrangements with commissioning parents.

Laws regulating surrogacy arrangements will be more effective than an outright or partial ban on surrogacy in ensuring that women who agree to act as either gratuitous or commercial surrogate mothers are not exploited. Additionally, by having a home-made solution, we may reduce our

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<sup>197</sup> See, for example, *Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoptions* (Hague Conference on Private International Law) which was entered into force in Canada in 1996 and subsequently adopted by all provincial and territorial governments.

contribution to the exploitation of women in other countries, where the social and economic status of women is not comparable to that of most Canadian women and the statutory regulatory regime is less likely to control exploitative practices.

