Law's Suppositions about Surrogacy against the Backdrop of Social Science

ANGELA CAMPBELL*

This article critiques the legal and political discourse that has circulated around the issue of surrogate motherhood in Canada and Quebec. It demonstrates how law and policy debates and approaches in these jurisdictions are premised on distinct suppositions about surrogates' motivations and experiences. These suppositions are not, however, wholly reflected in empirical social science research that has recorded the narratives of surrogates throughout various western jurisdictions. Existing social science research demonstrates both the plurality of factors that prompt women to become surrogates, and the heterogeneity in their experiences. This diversity in surrogates' goals and outcomes stands in contrast to the monolithic image of the surrogate mother that legal and political conversations in Canada and Quebec offer. Such conversations present surrogates as being motivated primarily by financial gain and highly susceptible to coercion and manipulation by intending parents. Juxtaposing legal and political presumptions about surrogacy against the backdrop of empirical social science research illuminates how law and policy in Canada and Quebec rest on incomplete appreciations about surrogacy and about surrogate mothers.

Cet article critique le discours juridico-politique qui entoure la question de la maternité de substitution au Canada et au Québec. Il montre la manière dont les discussions et les approches dans ces ressorts reposent sur des hypothèses différentes en ce qui a trait aux motivations et à l'expérience respectives des mères porteuses. Ces hypothèses ne se retrouvent cependant pas complètement dans les recherches menées en sciences sociales, lesquelles ont consigné les récits de mères porteuses dans divers pays occidentaux. Les recherches existantes en sciences sociales témoignent de la pluralité des facteurs qui incitent les femmes à devenir mères porteuses et de l'hétérogénéité de leurs expériences. La diversité réelle de leurs buts et de ce qui en résulte contraste avec la vision monolithique de la mère porteuse qui se dégage des conversations juridiques et politiques au Canada et au Québec. Lors de ces conversations, les mères porteuses seraient principalement motivées par l'appât du gain et subiraient l'influence, par la coercition et la manipulation, des parents demandeurs. En replaçant les hypothèses juridiques et politiques dans le contexte des recherches empiriques en sciences sociales, on démontre la manière dont le droit et la politique au Canada et au Québec se fondent sur des appréciations incomplètes de la maternité de substitution et des mères porteuses.

* Associate Professor, Director of the Institute of Comparative Law, McGill University Faculty of Law. The author acknowledges research support received from The Foundation for Legal Research and from the McGill Faculty of Law's Research Office. She wishes to thank Stefanie Carsley and Robert Leckey for their insightful comments on earlier drafts of this paper. Stefanie Carsley also provided excellent and thorough research and editing assistance, and Bethany Hastie assisted with editing and finalizing this paper for publication.

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I. INTRODUCTION

While commonly associated with "new" reproductive technologies, surrogacy[1] is referenced in the Book of Genesis as an accepted practice for overcoming infertility.[2] It is a long-standing practice, but surrogacy's moral propriety and legal validity remain ambiguous in most societies. In response to both an apparent increase in surrogacy and a growing controversy over this practice in many societies, a surge in international comparative scholarship and literature on surrogacy issues has developed.[3] Legal uncertainty and resulting tensions continue to exist in Canada and internationally. Although in Canada a federal statute criminalizes payment for surrogacy or brokering surrogacy arrangements,[4] the provinces and territories have jurisdiction, as part of their general competence in matters of property and civil rights, to decide whether private surrogacy arrangements are enforceable. Most provincial and territorial jurisdictions are silent on this matter. Alberta, Nova Scotia and Newfoundland and Labrador have, however, set some parameters delineating when surrogacy agreements will lead to the legal recognition of parentage for those who contract with surrogates.[5] In contrast, Quebec rejects the enforceability of

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1 In this article, the term "surrogacy" refers both to "gestational" surrogacy (which involves conception through *in vitro* fertilization from third party gametes, with the surrogate having no genetic link to the child so conceived) and to "genetic" surrogacy (which involves the insemination of a surrogate's own ovum). Surrogacy arrangements, as referred to in this work, represent agreements through which a surrogate undertakes to provide gestational services, and possibly also her ova, to the individual(s) intending on becoming the child's parent(s). The latter are referred to here as the "intending parents."

2 See e.g. Genesis 16:1-16, where Hagar acted as a surrogate for Sarah. See also e.g. Genesis 30:1-43, where Bilhah conceived and bore a child for Rachel.

3 See e.g. Rachel Cook, Shelley Day Sclater & Felicity Kaganas, eds, *Surrogate Motherhood: International Perspectives* (Portland, Oregon: Hart Publishing, 2003).

4 *Assisted Human Reproduction Act*, SC 2004, c 2, s 6 [*AHRA*].

5 *Family Law Act*, SA 2003, c F-4.5, s 8.2; *Birth Registration Regulations*, NS Reg 390/2007; *Vital Statistics Act, 2009*, SNL 2009, c V-6.01, s 5(6). Note that Newfoundland and Labrador's *Child and Parental Benefits Regulations*, NLR 43/09, s 9 also suggests some recognition of parentage occurring through surrogacy arrangements.

all surrogacy agreements. This includes both commercial and altruistic surrogacy. While the former involves remuneration to the surrogate, the latter envisions no exchange of money, except possibly compensation for the surrogate's losses or expenses.[6]

This article does not weigh in on the ethics of surrogacy.[7] It also refrains from making explicit calls for law reform in Canada or Quebec.[8] Rather, this work explores whether the legal and political discourses in Canada and Quebec account for the rationales and lived experiences of surrogate mothers as reported in social science literature. Ultimately, it concludes that they do not. While the law and political debates present surrogate mothers as being motivated primarily by financial gain and susceptible to diverse risks, empirical research reveals a range of factors prompting women's choices to become surrogates and indicates that many surrogates experience positive outcomes by engaging in this practice.

Part II of this article discusses the choices and experiences of women who become surrogate mothers. It draws on social science research that has studied surrogates' motivations and experiences during their surrogate pregnancies and afterwards. Part III identifies how surrogates and the practice of surrogacy are imagined and presented in Canadian law and political discourse. Incorporated within this analysis is an examination of law and policy in Quebec—the sole Canadian province whose laws cast surrogacy as against public morals and policy. Law and policy on surrogacy are assessed through an analysis of relevant legislation, policy reports and political debates. In Part IV, social science literature is juxtaposed against legal and political discourse with a view to analyzing whether, and how well, legal representations of surrogacy capture the narratives offered by social science scholarship.

A. Current Canadian Feminist Scholarship on Surrogacy

This work positions itself within a recent surge of feminist writing on legal approaches to surrogacy in Canada and Quebec. Four noteworthy texts critique Parliament's and Quebec's rejections of surrogacy, while arriving at their respective conclusions from distinct paths.

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6 *Civil Code of Quebec*, SQ 1991, c 64, art 541 CCQ [CCQ].

7 The moral dilemma that surrogacy presents is considered elsewhere: see Anita L Allen, "Surrogacy, Slavery, and the Ownership of Life" (1990) 13:1 Harv JL & Pub Pol'y 139; David R Bromham, "Surrogacy: Ethical, Legal, and Social Aspects" (1995) 12:8 Journal of Assisted Reproduction and Genetics 509; Anton van Niekerk & Liezl van Zyl, "The Ethics of Surrogacy: Women's Reproductive Labour" (1995) 21:6 Journal of Medical Ethics 345.

8 *C.f.* Karen Busby & Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13 [Busby & Vun]; Louise Langevin, "Réponse jurisprudentielle à la pratique des mères porteuses au Québec; une difficile réconciliation" (2010) 26:1 Can J Fam L 171 [Langevin]; Marie-France Bureau & Édith Guilhermont, "Maternité, gestation et liberté: Réflexions sur la prohibition de la gestation pour autrui en droit Québécois" (2011) 4:2 McGill JL & Health 43 [Bureau & Guilhermont].

Busby & Vun rely on a substantial review of empirical research on surrogacy to critique conventional feminist presumptions and debates associated with this practice. They suggest that empirical scholarship should supersede feminist concerns about surrogacy's potential to capitalize on women's economic and social vulnerabilities and about surrogacy's ability to objectify and commodify women's reproductive capacity. Busby & Vun therefore call for the revisiting of Canadian federal prohibitive approaches to surrogacy, in favour of a new regime that regulates rather than prohibits the practice.[9]

Three other articles circumscribe their analyses to Quebec's legal response by assessing the province's statutory rejection of all contractual agreements for surrogacy on the basis that they contravene public order.[10] Langevin's moral stance on surrogacy is quite different from that of Busby & Vun. She contests the discourse of female equality and empowerment that some have linked to surrogacy and maintains that the practice will inevitably exploit women. Langevin nevertheless objects to the non-recognition of surrogacy agreements in Quebec, noting that the practice is ongoing and has been accepted by courts across Canada, including in Quebec despite the explicit terms of article 541 CCQ. She therefore recommends a strict regulatory framework that would allow for remunerated and unremunerated surrogacy. According to Langevin, this framework would recognize the value of women's work as surrogates.[11]

A more recent article similarly questions the viability of Quebec's legal approach to surrogacy contracts. Mirroring Langevin's work, Bureau & Guilhermont stress the persistence of such contracts and judicial acceptance of them in some cases, despite their ostensible nullity under the CCQ. Furthermore, like Busby & Vun, Bureau & Guilhermont rely on empirical research to argue that concerns about surrogacy's invidious nature are largely ideological and do not play out on the ground in Western social contexts. This work also considers the possible risk to children born through surrogacy, should the law refuse to recognize their filial connection to their intending parents. In view of these combined factors, Bureau & Guilhermont see broadened possibilities for permitting surrogacy in Quebec.[12]

A third text that centres on Quebec's legislative framework concentrates on determinations of filiation for children conceived through surrogacy arrangements.[13] In this work, Giroux explores recent decisions from the Court of Quebec on adoption applications submitted by one or more intending parents with the consent of the surrogate mother. As discussed in Part III, this jurisprudence is divided. One decision refused to allow the adoption in the face of Quebec's legislative view that

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9 Busby & Vun, *supra* note 8.

10 See *supra* note 6 and accompanying text.

11 Langevin, *supra* note 8 at 198.

12 Bureau & Guilhermont, *supra* note 8.

13 Michelle Giroux, "Le recours controversé à l'adoption pour établir la filiation de l'enfant né d'une mère porteuse : entre ordre public contractuel et intérêt de l'enfant" (2011) 70 R du B 509. [Giroux, *Le recours controversé*].

surrogacy contravenes public order, whereas other decisions have issued adoption orders on the basis of children's best interests. Giroux maintains that the latter approach is more compelling from a juridical standpoint.

The present article contributes to these debates in recent scholarship. Like the works of Busby & Vun, Langevin, Bureau & Guilhermont and Giroux, this article takes a critical view of current legislative approaches governing surrogacy from a feminist perspective. Having said this, the present work stands apart from these texts in three important respects.

First, each of these articles is concerned with one jurisdiction and legal tradition. While Busby & Vun are primarily concerned with the federal legal regime governing surrogacy, Langevin, Bureau & Guilhermont, along with Giroux, focus on Quebec. The present article, however, navigates debates on surrogacy trans-systemically, and resists concentrating on any single, isolated legal framework. As such, this article investigates assumptions and ideas about surrogacy that shape both Canadian federal and Quebec civil laws.

Second, Bureau & Guilhermont, Langevin and, most notably, Busby & Vun, rely on social science research to bolster their respective arguments. The present work similarly undertakes a review of literature that deploys an empirical methodology to illuminate the motivations and experiences of surrogates. However, as will be discussed in Part II, the body of social science literature referred to in this article is put to a unique purpose that does not characterize any other article on surrogacy in Canada or Quebec. In particular, this article builds on this literature to mount an analysis inspired by a law and society framework that studies assumptions about surrogacy reflected within legal and political discussions about the practice against the backdrop of the experiences of surrogates recorded by social scientists. As such, this article is not concerned with comparing this empirical work to feminist ethics,[14] nor is this empirical research invoked to explore questions about filiation and parentage in surrogacy contexts.[15] The point here is to demonstrate that legislators and policymakers have overlooked empirical research, and that a more careful account of this research would yield quite different public conversations about surrogacy than those which have unfolded to date.

Last, as noted above, recent work on surrogacy in Canada and Quebec seems to have the prompting or justification of law reform, or a particular judicial reading of current laws, as its ultimate aim. This article refrains from taking a blunt normative stance, and it does not direct federal or provincial lawmakers to revisit the law in this area. Instead, it offers insight into the way in which legal and political discussions about surrogacy at the federal and provincial levels, particularly in Quebec, fail to reflect the motivations and experiences of women who choose to become surrogates. Whether this observation offers a basis for legal reform will depend on the goal of our surrogacy laws. If such laws aim to mirror

14 *C.f.* Busby & Vun, *supra* note 8; Langevin, *supra* note 8.
15 *C.f.* Bureau & Guilhermont, *supra* note 8.

social realities, this article may substantiate their reform. In contrast, if these laws pursue some other objective—for example, protecting the integrity and dignity of children conceived by surrogacy, or communicating that the practice is morally flawed—the discussion here would not necessarily yield a call for amendments to existing surrogacy rules. This paper nonetheless makes a contribution to existing scholarship by illuminating how juridical understandings of surrogacy in Canada and Quebec overlook surrogates' experiential knowledge as recorded by empiricism, and by suggesting how legal approaches to, and appreciations of, surrogacy might be enriched by accounting for surrogates' lived experiences.

II. THE MOTIVATIONS AND EXPERIENCES OF SURROGATES

The discussion that follows sets out the motivations and experiences of surrogates as reflected in empirical research. Before engaging with these substantive issues, some qualifying remarks about this inquiry are required.

First, an obvious question is whether the motivations and lived realities of surrogates are generalizable and knowable. An effort to map out surrogates' experiences risks reducing the analysis to a lowest common denominator inquiry that searches for the most basic similarities among surrogates and overlooks factors that may cause them to experience surrogacy in distinct ways.

Second, social science literature based on empirical research about surrogacy is itself cognizant of its own limits. Various studies acknowledge that they do not permit the drawing of general conclusions given methodological constraints, such as small and self-selected participant groups and the possibility of surrogates' resistance to interviews or to reporting of adverse events due to surrogacy's social stigma.[16] Surrogates who participate in research may be only those with positive experiences; thus, these studies possibly offer a limited or skewed representation of the practice.[17] Finally, other researchers highlight how the framing of research or interview questions may affect participants' comments, suggesting that different experiences may be elicited by research that moves away from Western assumptions about motherhood.[18]

Third, a study of empirical findings about surrogacy may not yield a solid understanding of how surrogacy is intrinsically or "organically" experienced. Such work can nevertheless be helpful to understanding whether surrogacy, as practiced and lived, is reflected in current legal approaches to the practice in Canada, which is the central aim of this article. However, moving from this understanding to a claim

16 Olga van den Akker, "Genetic and Gestational Surrogate Mothers' Experience of Surrogacy" (2003) 21:2 Journal of Reproductive and Infant Psychology 145 [van den Akker, "Genetic"]; Hazel Baslington, "The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process" (2002) 7:1 Journal of Health Psychology 57 [Baslington]; Vasanti Jadva et al, "Surrogacy: the Experiences of Surrogate Mothers" (2003) 18:10 Human Reproduction 2196 [Jadva et al].

17 *Ibid*.

18 Elly Teman, "The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood" (2008) 67:7 Social Science and Medicine 1104.

that law should reflect current social patterns may fail to account for the converse phenomenon—namely, the effect that legal rules and law reform may have on how surrogacy is socially perceived and practiced.[19] This point is critical for understanding the reach and limits of what empirical evidence can offer socio-legal scholars and policy makers.

The foregoing points have yet to be identified or explored in scholarship that invokes social science research to critique Canadian federal and provincial responses to surrogacy. Although these observations may affect the weight a reader attributes to empirical research on surrogacy, they are not sufficient to discount, in an absolute way, the relevance of this research. Rather, like any methodology, empirical strategies have some drawbacks. This is especially the case when they seek to develop knowledge about "hidden populations,"[20] that is, about groups engaged in socially questionable, and possibly illegal, practices and lifestyles.[21] At the same time, available empirical work on surrogacy offers insight into the motivations and experiences of some surrogates. Such information can be helpful for critically assessing the law's approach to, and understanding of, surrogacy and the women who take up this practice.

As a final preliminary point, Busby & Vun's recent work on the regulation of surrogacy in Canada deserves mention again.[22] As previously noted, their article provides a thorough review of empirical research on women's experiences as surrogates, and relies on some of the same sources cited below. These sources retain their relevance and merit careful discussion in the present article as they are synthesized and weighted differently here than in Busby & Vun's work. Moreover, they are relied upon here for the distinct purpose of creating a platform for analyzing legal and political discussions about surrogacy.

A. Motivations of Surrogate Mothers

1. Psychological and Emotional Benefits

Surrogates frequently indicate that they are motivated by the prospect of benefiting psychologically and emotionally from surrogacy. Surrogates reference four distinct psychological motivators—each of which is discussed below: (1) altruism, (2) the belief that surrogacy will yield a sense of accomplishment, (3) enjoyment of pregnancy, and (4) the desire to restore a loss that the surrogate previously endured.

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19 Robert Leckey, "Law Reform, Lesbian Parenting, and the Reflective Claim" (2011) 20:3 Soc & Leg Stud 331. See also Alison Harvison Young & Angela Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 Health LJ 239 [Harvison Young & Wasunna] (this work considers how legal prohibitions of paid surrogacy can drive the practice underground or compel so-called surrogacy tourism).

20 Douglas D Heckathorn, "Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations" (1997) 44:2 Social Problems 174.

21 *C.f.* Angela Campbell, "Wives' Tales: Reflecting on Research in Bountiful" (2008) 23:1-2 CJLS 121; Guri Tyldum & Anette Brunovskis, "Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking" (2005) 43:1-2 International Migration 17 at 18.

22 Busby & Vun, *supra* note 8.

Women who attribute their interest in surrogacy to altruism commonly describe themselves as having a desire or calling to help childless couples experience parenthood.[23] This sense may be especially acute for surrogates who know infertile couples personally.[24] Surrogates may also frame their attraction to surrogacy with rights and equality language, noting, for example, a desire to help gay men have children without the complications and impediments of single or same-sex adoption.[25]

For some women, conceiving and carrying a baby for another may yield a sense of accomplishment.[26] In one study, a small number of participants reported anticipating a feeling of "self-fulfilment" from being a surrogate,[27] while other research indicates that surrogates may rationalize surrogacy on the basis of wanting to accomplish something that made them "feel good about themselves."[28] Researchers offer a couple of untested hypotheses as to why a woman would seek to boost her self-esteem by becoming a surrogate. For Ragoné, women may engage in surrogacy as a means of pushing and "transcend[ing] the limitations of their … roles as wives, mothers, and homemakers …" even when they see these roles as important and gratifying.[29] Kanefield's theory is that the practice can offer a woman a hope of some salvation from a "damaged sense of herself, perhaps linked to abandonment or abuse by a parent …."[30]

Empirical research also documents the inherent enjoyment of pregnancy as a reason some women choose to become surrogates.[31] These women referred to the desirability of being pregnant while knowing that that the responsibility of parenthood would not ensue.[32] This interest in pregnancy is linked to a sense some women have that they are more attractive and more feminine when pregnant, or that pregnancy garners favourable attention.[33]

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23 *Ibid* at 55-59; Denise Avery, "A Surrogate Replies," Letter to the Editor, *The Globe and Mail* (7 February 2002) A18; Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian *Assisted Human Reproduction Act*" (2007) 23:1 Can J Fam L 11 at 34 [Ruparelia]; Jadva et al, *supra* note 16 at 2199 (in one study, this desire to help the childless was identified by 91 percent of participants).

24 Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Boulder: Westview Press, 1994) at 60 [Ragoné, Conception].

25 Shireen Kashmeri, *Unraveling Surrogacy in Ontario, Canada: An Ethnographic Inquiry of the Influence of Canada's Assisted Human Reproduction Act (2004) on Surrogacy Contracts, Parentage Laws, and Gay Fatherhood* (MA Thesis, Concordia University, 2008) at 52 [unpublished] [Kashmeri].

26 Busby & Vun, *supra* note 8 at 57-58.

27 Jadva et al, *supra* note 16 at 2199.

28 van den Akker, "Genetic," *supra* note 16 at 150.

29 Helena Ragoné, "Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers" (1996) 23:2 American Ethnologist 352 at 357 [Ragoné, "Chasing"].

30 Linda Kanefield, "The Reparative Motive in Surrogate Mothers" (1999) 2:4 Adoption Quarterly 5 at 12 [Kanefield].

31 Jadva et al, *supra* note 16 at 2199.

32 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 in Britain" (1994) 12:3 Journal of Reproductive and Infant Psychology 189 at 192 [Blyth, "Interesting"].

33 Philip J Parker, "Motivation of Surrogate Mothers: Initial Findings" (1983) 140:1 American Journal of Psychiatry 117 at 118 [Parker].

Finally, the literature cites reparation for a prior loss as a possible motivation for surrogate motherhood. Surrogates who reported having this objective typically indicated that they wanted to make up for losses inflicted by previous miscarriages or abortions, or by the decision to place a child for adoption.[34] For instance, one participant in a study on surrogacy motivations stated: "I feel guilty about my second abortion. I unconsciously said if I can find a way to pay that back, I would."[35] Another participant in a different study similarly commented, "I had two abortions. I had twins [surrogate pregnancy] which made up for the two abortions I'd had."[36] This sentiment may be linked to a desire to acquire some control over a pregnancy. That is, while previously they may have lacked control or resources and thus needed to terminate their pregnancies or relinquish a child for adoption, in a surrogacy context one may sense a firmer grip on processes and outcomes.[37]

2. Financial Gain

As set out in Part III, legal arguments objecting to surrogacy, especially paid surrogacy, commonly point to its potential to commercialize or commodify children along with women's procreative capacity. This discourse focuses on surrogacy as an exchange of money for gestational services and, ultimately, for a child.[38] References to the commercial nature of surrogacy may suggest that surrogates are primarily motivated by opportunities for financial gain. Although most empirical research indicates that remuneration is rarely the sole or primary motivator for taking up surrogacy,[39] money may be combined with other factors, to which women often ascribe more importance, to explain the decision to become a surrogate.[40] Surrogates typically do not perceive the sum that they are paid as significant enough to incentivize this decision, and they note that remuneration alone could not offset the emotional and physical stress of a pregnancy. Several women in one study indicated, "There are many easier ways to earn some

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34 *Ibid* at 118; van den Akker, "Genetic," *supra* note 16 at 150; Kanefield, *supra* note 30 at 12.

35 Kanefield, *supra* note 30 at 11.

36 Melinda M Hohman & Christine B Hagan, "Satisfaction with Surrogate Mothering" (2001) 4:1 Journal of Human Behaviour in the Social Environment 61 at 77 [Hohman & Hagan].

37 Kanefield, *supra* note 30 at 11.

38 See Ragoné, "Chasing," *supra* note 29 at 354 (surrogacy may be altruistic, but possibly allowing for the compensation of the surrogate's losses or expenses, or remunerated, that is, integrating a payment beyond such expenses or losses. Remuneration in the early to mid-1990s was reported to be between USD $10 000 and $15 000, which, in today's dollars, is roughly $15 000 to $22 500). See also *Surrogate Mother Compensation: The Itemized Compensation Plan*, online: Information on Surrogacy <http://www.information-on-surrogacy.com/surrogate-mother-compensation.html>. This website on surrogacy indicates that compensation may run from USD $15 000 to $28 000, with additional fees for circumstances like the gestation of multiples, caesarean-sections or invasive medical procedures.

39 See Busby & Vun, *supra* note 8 at 55: "There is no empirical research supporting the assertion that women are becoming surrogate mothers because they are facing financial distress."

40 Parker, *supra* note 33 at 118.

money."[41] Others claimed that they would have acted as surrogates for free even if there was no money involved, or claimed that surrogacy is "not a job. It's compassion alone."[42]

While possibly not the sole or the most important motivator, money remains a relevant factor for many women who engage in commercial surrogacy. The possibility of being remunerated while being able, in most cases, to pursue one's current work or educational path and remain with one's own family can be an attraction. As a vivid example, some American military wives explain that they became surrogates as a viable way to supplement family income, given both the limited economic opportunities available on most military bases and their spouses' employment situation requiring frequent relocation.[43]

Even women who do not see financial benefit as a principal incentive for surrogacy can justify receiving money for this service. Payment can be viewed as a reward to the woman and her family for the inconvenience inflicted by pregnancy.[44] It can also be rationalized as reimbursement for the expenses, risks, discomfort, travel and lost earnings that may be associated with pregnancy.[45] In a Canadian empirical study of surrogacy, one surrogate likened her role to that of a childcare provider or babysitter by stating: "you would never take your kid to a sitter and expect her to watch them for free. Would you? Nobody does anything for free. You don't do things for free."[46] Money for surrogacy may also be perceived as a necessary element to allow women to fulfil an altruistic goal of "gifting" a child to another couple.[47] Finally, some women conceive of surrogacy as a job, allowing them to reconcile being paid while creating some emotional distance from their respective pregnancies.[48]

3. Family Pressures and Expectations

Most social science literature on surrogacy focuses on the two motivations set out above. A few studies, however, point to another possible reason for surrogate motherhood, which is largely neglected in research grounded in Western settings. Surrogacy may also occur as a result of family pressure on a woman to provide a child for relatives facing fertility challenges. Ruparelia's work is illustrative in this regard.[49] While her study focuses on South Asian families, she indicates that family

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41 Kanefield, *supra* note 30 at 10. See also Ragoné, "Chasing," *supra* note 29 at 354-55; Blyth, "Interesting," *supra* note 32 at 192.

42 Kanefield, *supra* note 30 at 10.

43 Bree Kessler, "Recruiting Wombs: Surrogates as the New Security Moms" (2009) 37:1-2 Women's Studies Quarterly 167.

44 Ragoné, "Chasing," *supra* note 29 at 354; Kashmeri, *supra* note 25 at 42.

45 Blyth, "Interesting," *supra* note 35 at 192; Kashmeri, *supra* note 32 at 43.

46 Kashmeri, *supra* note 25 at 42.

47 Hal B Levine, "Gestational Surrogacy: Nature and Culture in Kinship" (2003) 42:3 Ethnology 173 at 180-81; Ragoné, "Chasing," *supra* note 29 at 355.

48 Baslington, *supra* note 16; Ragoné, "Chasing," *supra* note 29 at 356.

49 Ruparelia, *supra* note 23.

coercion may explain surrogacy in a range of cultural contexts. Although it has been suggested that Ruparelia's findings do not materialize in Western settings,[50] the risk of intra-familial pressure cannot be discounted in discussions about the implications of surrogacy in Canada. Moreover, Ruparelia's work underscores that cases of altruistic or unremunerated surrogacy may be just as exploitative and morally problematic as some commercial surrogacy arrangements.[51]

Moralistic presumptions about altruistic and paid surrogacy raise crucial questions about why women would choose to become surrogates without monetary reward. For some, these suppositions are reflective of patriarchal expectations about what women should strive for and value. That is, a noble woman is one who desires and enthusiastically assumes the processes of gestation, childbirth and mothering, even for another. Where this expectation about maternity exists in a woman's family, it "may be so engulfing that, for all practical purposes, it exacts a reproductive donation from a female source."[52] Although possibilities for moral coercion of a surrogate may exist anytime she personally knows the intending parents prior to her pregnancy, these pressures may be most acute when a familial bond exists between them. Israeli legislation, for example, recognizes this and prohibits surrogacy contracts between blood-related parties, as a means to avoid potential pressure on surrogates and subsequent complications within families.[53]

B. Experiences of Surrogate Mothers

Quite apart from surrogates' motivations, scholarship on surrogacy also comments on their experiences. While motivations pertain to factors that may prompt a woman to engage in surrogacy, researchers have also recorded the experiences of surrogates after they have provided gestational services for another. Learning about these experiences can relay insight as to whether a surrogate's expectations about her involvement at the outset of this process match her reflections developed in hindsight. This inquiry is important for jurists, given that discussions in law and politics have offered different hypotheses both as to why a woman may want to be a surrogate as well as to her feelings about this experience.

1. Second-Guessing the Surrogacy Decision

As with birth mothers who relinquish children for adoption, there is perhaps a natural curiosity and worry about whether surrogates will have second thoughts after giving birth. One may question whether a woman can anticipate, prenatally,

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50 Busby & Vun, *supra* note 8 at 51.

51 Ruparelia, *supra* note 23.

52 Janice G Raymond, "Reproductive Gifts and Gift Giving: The Altruistic Woman" (1990) 20:6 Hastings Center Report 7 at 10.

53 Abraham Benshushan & Joseph G Schenker, "Legitimizing Surrogacy in Israel" (1997) 12:8 Human Reproduction 1832 at 1832.

her attachment to an infant. Some anxiety emerges as to whether a surrogate may feel regret or hesitation after birth, and thus refuse to fulfil her promise to deliver the child to the intending parents.[54]

While a woman may have misgivings about relinquishing a child she has carried for forty weeks, the notion of regret is one that should be treated prudently in legal and political analyses affecting feminist issues. Indeed, preoccupations with regret or possible emotional trauma may give a solid measure of undue political salience to claims that would otherwise be viewed as plainly sexist. Bare suggestions of women's hyper-sensitivity or of their inability to make up their minds or keep their word lose their paternalistic—if not misogynist—overtones when clothed with a narrative of protecting women from emotional injury arising from their own past choices.[55]

Aside from this moral caution, it seems that few surrogates actually have doubts about their decisions.[56] The physical "giving" of the child to the intending parents is a "happy event" for most surrogates and many would repeat the experience if given the chance.[57] Moreover, years after transferring a child to the intending parents, surrogates may well reflect fondly on the experience and consider it to have been rewarding. Such was the case for all surrogates in one study that followed up with fourteen women between five and ten years after their respective surrogacy experience.[58]

For some surrogates, however, the experience may be less fulfilling and positive. One study, based on research interviews with ten women who had been surrogates at least a decade earlier, indicated that many respondents expressed dissatisfaction with this experience.[59] They felt disappointed that the intending parents failed to remain in contact despite promises to do so.[60] Moreover, most admitted to fantasizing about being reunited with the child they carried as surrogates.[61] The quality of a surrogate's experiences and her sentiments about this process may be largely affected by the tenor of her relationship with the intending

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54 This was reported, for example, by some of the respondents in one study of intending parents' experiences with surrogacy. See Christine B Kleinpeter, "Surrogacy: The Parents' Story" (2002) 91:1 Psychological Reports 201. While it is difficult to discern from the literature the frequency of revocation of consent in either adoption or surrogacy contexts, the situation occasionally arises before the courts: see e.g. *Re British Columbia Birth Registration No 030279* (1990), 24 RFL (3d) 437 (BCSC) (adoption context); *W (HL) v T (JC)*, 2005 BCSC 1679, [2006] BCWLD 665 (surrogacy context).

55 Jeannie Suk, "The Trajectory of Trauma: Bodies and Minds of Abortion Discourse" (2010) 110:5 Colum L Rev 1193.

56 Jadva et al, *supra* note 16 at 2203.

57 Olga BA van den Akker, "Psychosocial Aspects of Surrogate Motherhood" (2007) 13:1 Human Reproduction Update 53 at 56.

58 Janice C Ciccarelli, *The Surrogate Mother: A Post-Birth Follow-up Study* (PhD Thesis, California School of Professional Psychology, 1997) [unpublished].

59 NE Reame, A Kalfoglou & HA Hanafin, "Long Term Outcomes of Surrogate Pregnancy: A Report of Surrogate Mothers' Satisfaction, Life Events and Moral Judgments Ten Years Later" (1998) 70:3 suppl 1 Fertility and Sterility S28.

60 *Ibid* at S28.

61 *Ibid* at S29.

parents.[62] In particular, a surrogate's satisfaction seems to be enhanced when she and the intending parents have shared expectations about their respective roles and responsibilities.[63] Other factors that may influence the surrogate's retrospective assessment of her experience include her motivation (with altruistic objectives appearing to bear a positive effect on the surrogacy experience); the method of fertilization (with surrogates seemingly more satisfied if pregnancy was achieved through *in vitro* fertilization rather than artificial insemination);[64] the health of the surrogate during pregnancy and delivery; and cultural disparities (with evidence suggesting that surrogates who move from other jurisdictions and who face linguistic and cultural barriers are at risk of having more negative experiences).[65]

A major question for jurists pertains to the law's treatment of a child when any party fails to follow through on a surrogacy arrangement. Attention has focused largely on the potential of the surrogate to renege on such agreements, but a recent dispute in British Columbia highlights the risk of intending parents having a change of heart.[66] How filiation and parentage will be traced in each case will depend, at the outset, on the law that applies in the given jurisdiction. However, this is just a starting point since most provinces do not have a clear framework governing surrogacy disputes.[67] Courts will thus be left to fill this gap, as they have in the past, when called upon to determine parentage in a surrogacy context.[68]

2. Exploitation or Coercion?

As will be discussed in Part III, concerns about the potential for surrogates to be taken advantage of, or even to be exploited and abused, by intending parents explains some of the legal hesitancy about surrogacy. Feared exploitation may be economic in nature, based on a supposition that the intending parents will typically be much more affluent than the surrogate and thus capable of dictating unfavourable terms to her.[69] Alternatively, exploitation may be cultural or social, as where a

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62 Busby & Vun, *supra* note 8 at 60.

63 Hohman & Hagan, *supra* note 36 at 69; Janice C Ciccarelli & Linda J Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy" (2005) 61:1 Journal of Social Issues 21 at 32 [Ciccarelli & Beckman].

64 This may be because *in vitro* fertilization (IVF) features the absence of a genetic connection between child and surrogate, which may facilitate the process of relinquishing the child for some surrogates and of explaining the decision to do so to family members. See Hohman & Hagan, *supra* note 36. It should be noted, though, that such a positive outlook on IVF is not universal among surrogates. See Blyth, "Interesting," *supra* note 32 at 193.

65 Hohman & Hagan, *supra* note 36 at 79.

66 Tom Blackwell, "Couple Urged Surrogate to Abort Fetus Due to Defect," *National Post* (6 October 2010) A1 [Blackwell].

67 For a discussion of the complexity of establishing the legal parent-child relationship flowing from surrogacy arrangements, both in jurisdictions where such agreements are recognized and where they are not, see Bureau & Guilhermont, *supra* note 8 at 60-63.

68 See e.g. *Rypkema v British Columbia*, 2003 BCSC 1784, 233 DLR (4th) 760; *WJQM v AMA*, 2011 SKQB 317, 339 DLR (4th) 759.

69 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 UT Fac L Rev 39 at 45 [Hnatiuk].

family member, especially one who is young or dependent, is pressured to provide assistance for infertile relatives.[70]

Research on surrogacy counters these concerns to some extent. Although intending parents will often have higher educational qualifications and socioeconomic statuses than their surrogates, this disparity does not necessarily translate into an uneven playing field.[71] Intending parents typically know that the surrogate represents a way—perhaps their only way—to have a child. This awareness may develop after years of attempting to conceive independently. The surrogate's bargaining power also might be enhanced by knowledge that she may refuse to transfer the child to the intending parents.[72] Moreover, most surrogates assert that their decision to engage in surrogacy was rooted in an informed choice, and was not induced by mistake or through manipulative or coercive behaviour on the part of the intending parents.[73] Surrogates' reported sense of empowerment may be partly attributable to screening measures used by some surrogacy agencies to prevent the exploitation of "poor, young, ethnic women."[74] Despite these assurances, surrogates may perceive themselves as disadvantaged through a reliance on promises regarding payment and post-delivery contact.[75] Surrogates may also sense a limitation on their freedom by virtue of contractual clauses that restrict behaviours and choices during pregnancy relating to, for example, the surrogate's physical activities, medical care and diet.[76] That being said, surrogates, especially those in Canada, may not see such terms as binding given the regulatory uncertainty surrounding surrogacy arrangements and the difficulty in monitoring their compliance.[77]

3. Emotional and Psychological Consequences

Current literature on surrogacy contains some, albeit limited, discussion of the sense of loss that a surrogate may experience. One study of thirty-four surrogates indicates that some women experience psychological challenges such as postpartum depression (PPD) immediately following delivery and "handover." In this study, these symptoms were characterized as "not severe" and as "tend[ing] to be short-lived, and to dissipate with time."[78] One should further question whether such PPD symptoms arose on account of surrogacy or were due to the experience of childbirth. Furthermore, as indicated above, emotions arising after surrogacy may depend on the surrogate's relationship with the intending parents; where the

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70 Ruparelia, *supra* note 26 at 35-45; Raymond, *supra* note 51.
71 Blyth, "Interesting," *supra* note 32.
72 Eric Blyth, "'Not a Primrose Path': Commissioning Parents' Experiences of Surrogacy Arrangements in Britain" (1995) 13:3 Journal of Reproductive and Infant Psychology 185 at 188-89.
73 van den Akker, "Genetic," *supra* note 16 at 146, 156.
74 Ciccarelli & Beckman, *supra* note 63 at 31.
75 Blyth, "Interesting," *supra* note 32 at 194.
76 Kashmeri, *supra* note 25 at 59-65.
77 *Ibid* at 67-70.
78 Jadva et al, *supra* note 16 at 2203.

surrogate does not know them or loses contact with them after delivery, this could adversely impact her psychological wellbeing.[79]

Additionally, one longitudinal study that followed twenty-three surrogates from the start of the surrogacy arrangement (i.e. pre-pregnancy) found that none reported PPD six months after relinquishment. Yet the authors of this study also acknowledged that their ultimate sample size was too small to draw generalizable conclusions about long-term wellbeing and thus called for further research in this area. They noted a need to assess whether a genetic connection between the surrogate and child produced through surrogacy can affect a surrogate's experience and psychological wellbeing post-relinquishment.[80]

III. LEGAL APPROACHES TO SURROGACY

Having considered social scientists' assessments of surrogates' motivations and experiences, this part analyzes the way in which legal and policy actors have evaluated and discussed surrogacy. It investigates policy analyses and legislative debates on surrogacy in Canada and, to a lesser extent, in Quebec. Ultimately, it seeks to detect how surrogates' motivations and experiences are imagined in these contexts.

A. Canadian Law and Policy

Canada's *Assisted Human Reproduction Act (AHRA)*, which received Royal Assent on March 29, 2004, was drafted in response to concerns raised about new reproductive technologies (NRTs) in the Royal Commission on New Reproductive Technologies' report *Proceed with Care*.[81] After four years of gathering information on activities related to assisted human reproduction in Canada, the Royal Commission recommended in its report that Parliament take action to ban a number of practices, including commercial surrogacy. The Commission found the latter practice offensive to human dignity in that it commodified children as well as women's reproductive capacity, and was potentially harmful "for families, for individual women and

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79 Ragoné, Conception *supra* note 24 at 79*ff*. An especially difficult example of how soured relations between surrogate and intending parents can affect outcomes for the surrogate is set out in Lisa Priest, "When Surrogacy Goes Bad," *The Globe and Mail* (4 February 2002) A1, which recounts the story of a surrogate who was unpaid in full by intending parents after the child produced through surrogacy was born with a congenital heart problem.

80 But see Hohman & Hagan, *supra* note 36 at 78-79, which suggests that surrogacy through IVF facilitates the process of surrogacy for the surrogate because of the absence of a genetic bond between surrogate and child.

81 Standing Committee on Health, *Assisted Human Reproduction: Building Families* (Ottawa: Public Works and Government Services Canada, 2001) [*Building Families*]; Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) (Chair: Patricia Baird) [*Proceed with Care*].

children, and for specific groups within society."[82] The Royal Commission pointed to the risk of undermining surrogates' autonomy and psychosocial health.[83] In addition, it noted the possible harms children may experience as a result of unclear or contentious filial connections, and as a result of self-perceptions of having been created in furtherance of surrogates' and surrogacy brokers' own goals rather than as ends in themselves.[84] In terms of social harm, the Royal Commission expressed concern that commercial surrogacy arrangements risk "diminishing the dignity of reproduction and undermining society's commitment to the inherent value of children."[85] Finally, the Royal Commission concluded that commercial surrogacy could lead to adversarial intra-familial relationships, and was thus a practice that should be rejected on public policy grounds.[86]

In response to these conclusions, a bill was introduced to address these matters, but died on the Order Paper in 1997.[87] In May 2001, Canada's Health Minister again presented draft legislation to the House of Commons Standing Committee on Health, which then submitted recommendations in December of that year. Bill C-56,[88] introduced in 2002 and later named Bill C-13,[89] passed second and third readings in the House of Commons in 2003.[90] In March 2004, the Senate of Canada adopted what was by then called Bill C-6, *An Act Respecting Assisted Human Reproduction and Related Research*.[91]

Legislative debates surrounding the development of the *AHRA*, and the text of the statute itself, illuminate two key objectives that drive law's treatment of surrogacy. The first objective is to protect Canadians from the harms of commercial surrogacy based on the understanding that it undermines the inherent, non-commercial value of human life and risks exploiting and harming surrogates and children. The second objective is that the state should support Canadians in their choices about how to build their families. These two objectives, though perhaps not entirely consistent with one another, are sought through the *AHRA*'s distinction between commercial and altruistic surrogacy. While section 6 of the *AHRA* bans payment for remunerated or commercial surrogacy, as well as for its arrangement,[92] it allows for unpaid agreements that provide reimbursement to the surrogate for

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82 *Ibid* at 683.
83 *Ibid* at 684-86.
84 *Ibid* at 675.
85 *Ibid* at 686.
86 *Ibid* at 687-88.
87 Bill C-47, *An Act respecting human reproductive technologies and commercial transactions relating to human reproduction*, 2nd Sess, 35th Parl, 1996 [Bill C-47].
88 Bill C-56, *An Act respecting assisted human reproduction*, 1st Sess, 37th Parl, 2002.
89 Bill C-13, *An Act respecting assisted human reproduction*, 2nd Sess, 37th Parl, 2002.
90 Second reading in the House of Commons took place on October 9, 2002. Third reading in the House of Commons took place on October 28, 2003.
91 Bill C-6, *An act respecting assisted human reproduction and related research*, 3rd Sess, 37th Parl, 2004 (assented to 29 March 2004).
92 See *AHRA*, *supra* note 4, s 6.

expenditures associated with the surrogacy.[93] Thus, although remunerated surrogacy contracts are punishable by a criminal sanction,[94] gratuitous arrangements are excluded from the ambit of section 6 of the *AHRA*.

Legislative discussions surrounding the implementation of the *AHRA* say little about what legislators believed to be the driving factors underlying a woman's decision to become a surrogate. A review of the debates over the proposed statute in the Canadian House of Commons suggests a concern that financial considerations alone motivate surrogacy. For example, former MP André Bachand suggested that remuneration should be prohibited in order to avoid enticing women to become surrogate mothers for monetary gain.[95] MP James Lunney reasoned that Parliament should ban paid surrogacy to prevent the exploitation of women and children, and to ensure that reproductive technologies protect both children's best interests and family stability.[96]

Law and policy discussions at the federal level have concentrated on the effects presumed to flow from this practice for women, children and society. As explored in the ensuing discussion, surrogates are cast as facing the following risks: (1) physical and psychological harm, (2) exploitation, (3) lack of informed consent and autonomy, and (4) commodification.

1. Physical and Psychological Harm

Comments about the risks to physical and psychological wellbeing abound in policy debates and legal discussions about surrogacy.[97] While these comments often refer to the risks to both surrogates and the children they deliver, the focus here is restricted to the former.

Concerns about women's health and wellbeing associated with surrogacy pertain to the invasive and potentially harmful physical effects of pregnancy and childbirth. Nevertheless, such concerns arise regardless of whether the form of surrogacy is commercial or altruistic.[98] Judgments in a recent Reference assessing the constitutionality of the *AHRA* point to the risks associated with the newness[99]

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93 *Ibid*, ss 12(1)(c), 12(3)(b) (which allow for the reimbursement of expenditures incurred by a surrogate in relation to her surrogacy and, under certain conditions, allow for work-related income losses. Such reimbursements must be made "in accordance with the regulations and a license," but this provision is not in force and no regulations have been promulgated as of the time of writing).

94 See *AHRA*, *supra* note 4, s 6.

95 *House of Commons Debates*, 37th Parl, 1st Sess, No 188 (21 May 2002) at 11540 (André Bachand) [*House of Commons Debates*].

96 *House of Commons Debates*, 37th Parl, 1st Sess, No 138 (4 February 2002) at 8638 (James Lunney).

97 Hnatiuk, *supra* note 69 at 45.

98 *Building Families*, *supra* note 81 at 5.

99 *Procureur Général du Québec v Procureur Général du Canada*, 2008 QCCA 1167 at para 38, [2008] RJQ 1551 [*Procureur Général du Québec*] (the Court of Appeal, summarizing the submission of the Attorney General of Canada, states: "[l]a procréation médicalement assistée … demeurait un domaine de science nouveau et comporterait plusieurs risques relatifs à la santé et à la sécurité des personnes impliquées …").

or possible misuse[100] of the reproductive technologies commonly associated with surrogacy—all of which have the potential to affect public health adversely.

An assessment of parliamentary debates on surrogacy further indicates a preoccupation with the harms that a woman may face as a consequence of becoming a surrogate. Comments by Members of Parliament allude to negative outcomes for surrogates and emphasize that surrogacy "forces" women to assume "the risks and burdens of assisted conception and then of pregnancy and birth."[101] According to one former MP, these harms can be magnified if the child becomes the subject of a dispute among the parties or is ultimately undesired "by the birth parents or the commissioning couple."[102] Other remarks suggest that a surrogate's own conjugal relationships and family dynamics may be affected by her involvement in this practice, causing the surrogate further distress.[103]

2. Exploitation

Linked to the notion of harm to surrogates is a fear that surrogacy, especially in its commercial form, engenders the exploitation of women. This appears to be a driving concern underpinning the *AHRA*'s development and implementation, given the frequency with which the point was raised in Parliamentary debates over this statute. Harvison Young & Wasunna's commentary on Bill C-47,[104] the legislation's precursor, suggests that legislative initiatives criminalizing practices like surrogacy were built on the assumption that this "would go some way toward preventing such exploitation."[105]

These points are consistent with literature warning of manipulation by intending parents, who generally are more affluent and educated than the surrogate.[106] One author stresses a potential for "gross exploitation of poor women who are willing to be used as breeders for rich couples."[107] This worry is also picked up in parliamentary debates. For instance, one MP indicated that surrogates are "often vulnerable because of the disparities in power and resources between themselves and those paying for their services."[108] Legislative debates on surrogacy thus emphasized that legislation should seek to prosecute those paying for or arranging surrogacy, rather than target the surrogates themselves.[109]

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100 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 62, [2010] 3 SCR 457 [*Reference re AHRA*].

101 *House of Commons Debates*, 35th Parl, 2nd Sess, No 089 (23 October 1996) at 5616 (Joseph Volpe) [*House of Commons Debates*].

102 *Ibid*.

103 *House of Commons Debates*, 37th Parl, 2nd Sess, No 048 (29 January 2003) at 2855 (Gurmant Grewal).

104 Bill C-47, *supra* note 87.

105 Harvison Young & Wasunna, *supra* note 19 at 268.

106 Hnatiuk, *supra* note 69 at 45.

107 Felicia Daunt, "Exploitation or Empowerment? Debating Surrogate Motherhood" (1991) 55:2 Sask L Rev 415 at 421 [Daunt].

108 *House of Commons Debates*, *supra* note 100 at 5617 (Joseph Volpe).

109 *Ibid*.

Susceptibility to pressure is seen as particularly acute for surrogates because of the nature and the timing of their decision-making. Surrogates are required to "give up" a child just after birth, which is often an emotionally charged moment. This situation can be likened to adoption; yet, while many adoption statutes accord birth mothers a certain period of time to change their minds about a decision to relinquish a child, such provisions are not normally included in surrogacy agreements.[110]

3. Lack of Informed Consent and Autonomy

A third concern reflected in law and policy discussions about surrogate motherhood relates to surrogates not making autonomous and informed decisions. Some of these discussions reflect a preoccupation with contractual terms that limit a surrogate's behaviour and choices. For example, agreements may require the surrogate to be treated by the intending parents' chosen physicians, to have an abortion in specific circumstances, or to surrender her rights to the child prior to conception.[111] Surrogates may also be presumed to be ill-informed, especially when they have not been advised by independent legal counsel.[112] Informed consent to a surrogacy agreement may be circumscribed by the fact that a surrogate cannot anticipate the psychological effects of this arrangement prior to becoming pregnant or giving birth.[113] For these reasons, some legislative members emphasized the importance of ensuring that any consent to surrogacy, even if altruistic, be accompanied by relevant information offered by lawyers, physicians or counselors.[114]

Despite such concerns about a surrogate's autonomy, the Royal Commission's report, *Proceed with Care*, argues that a surrogate's choices, even when informed, can be legitimately restricted by law.[115] That is, personal autonomy may be restricted if a decision concerns an activity that society views as incompatible with "respect for human dignity and the inalienability of the person."[116] Canadian policy discourse has thus stressed that while a surrogate's autonomy should be protected, it is not absolute and cannot allow her to make choices that harm others. In this respect, the Royal Commission cited the potential harms that surrogacy presents to surrogates, children and society in general.[117]

4. Commodification of Reproduction and Human Life

A last concern articulated in federal law and policy discussions regarding surrogacy relates to the perception that the practice results in the commodification of life and

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110 Daunt, *supra* note 106 at 421-24. See e.g. *Child and Family Services Act*, RSO 1990, c C-11, s 137(8); art 557 CCQ.

111 *Proceed with Care*, *supra* note 79 at 684. See also Blackwell, *supra* note 65, which provides an example of the controversial terms that such contracts might include.

112 *Proceed with Care*, *supra* note 79 at 685.

113 *Ibid*.

114 *House of Commons Debates*, 37th Parl, 2nd Sess, No 072 (18 March 2003) at 4351 (Hon Hedy Fry).

115 *Proceed with Care*, *supra* note 81 at 685.

116 *Ibid*.

117 *Ibid*.

procreation. Relevant discussions reference anxiety about surrogacy's potential to objectify and instrumentalize women's bodies and the act of reproduction, thereby injuring women's overall social status.[118]

As the following passages indicate, parliamentary debates regarding commodification have focused on commercial surrogacy. Specifically, debates take issue with the notion of a market in babies or reproductive materials and services:

> [T]here is something fundamentally offensive with the notion that the act of human reproduction can and should be commodified, that it can and should become a market service, that to compel somebody, through financial incentive, to bear someone else's child in a sense cheapens the invaluable act of motherhood upon which a price cannot be placed.[119]

> Canadians do not want a situation in which women can rent out their wombs, nor do they want women to be exploited because of their reproductive capacity. The legislation would not allow children to be the result of a profit making transaction.[120]

> We would certainly not want to live in a society where it would be possible to buy or sell gametes or ova as if they were mere commodities on the market. Nobody would want to live in such a society.... Thus, the main restrictions provided for in the bill are based on principles which are universally acknowledged and about which there is a consensus.[121]

Such sentiments resonate with concerns set out in *Proceed with Care* regarding the commodification of women's bodies and reproductive capacity.[122] This report further indicates that surrogacy risks broadening social harms by diminishing the dignity inherent in reproduction. In particular, this undermines children's intrinsic value and reinforces pejorative social attitudes about women and motherhood.[123] Such concerns about commercialized surrogacy were endorsed by certain justices of the Supreme Court of Canada in the *Reference re AHRA* decision.[124]

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118 Hnatiuk, *supra* note 68 at 45; Alison Harvison Young, "Let's Try Again ... This Time With Feeling: Bill C-6 and New Reproductive Technologies" (2005) 38:1 UBC L Rev 123 at 126-27; *Building Families*, *supra* note 81 at 1; *Proceed with Care*, *supra* note 81 at 683-89.

119 *House of Commons Debates*, 37th Parl, 2nd Sess, No 078 (26 March 2003) at 4728 (Jason Kenney).

120 *House of Commons Debates*, *supra* note 94 at 11523 (Hon Anne McLellan).

121 *Ibid* at 11532 (Réal Ménard).

122 *Proceed with Care*, *supra* note 81 at 683-89.

123 *Ibid* at 686.

124 *Reference re AHRA*, *supra* note 100.

In her reasons, Chief Justice McLachlin noted that limits on surrogacy are a valid means of preventing the commodification of reproduction[125] and of addressing a genuine "public health evil."[126] For Justices LeBel and Deschamps, however, the commodification concern is the "real purpose" of the *AHRA*'s surrogacy prohibition since the legislation criminalizes the practice only when remunerated, leaving any "public health evil" associated with surrogacy unaddressed when the practice is undertaken gratuitously.[127]

B. Quebec Law and Policy

The Province of Quebec articulates a clear rejection of surrogacy, stating at article 541 CCQ that "[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null."[128] This language differs slightly from the provision's original phrasing, in place from 1994 to 2002, which read as follows: "[p]rocreation or gestation agreements on behalf of another person are absolutely null."[129] The reference in both versions of the provision to *absolute* nullity communicates a view of surrogacy as violating public order and as injurious to a general social interest, rather than a private concern.[130] Characterizing such contracts as "absolutely null" further conveys a legislative perception of the contract as having an illegal object.[131] In the surrogacy context, the intolerance is also based on a belief that certain objects or services, particularly those involving the human body, are simply not subject to commercialization.[132]

The justifications underlying article 541 have not been discussed extensively in legislative or academic commentary. National Assembly debates that discuss article 541 do not comment on the perceived motivations and experiences of surrogates. For instance, a debate on assisted procreation from September 1991 shows legislators primarily concerned with the legal implications of surrogacy agreements. Special attention in this debate is given to issues concerning the filiation and alimentary support of children conceived through surrogacy. The following passage suggests that, at least in 1991, children were perceived as rendered vulnerable by surrogacy:[133]

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125 *Ibid* at paras 110-12.
126 *Ibid* at para 62.
127 *Ibid* at para 172.
128 Art 541 CCQ.
129 Art 541 CCQ, as amended by *Projet de loi no. 84 – Loi instituant l'union civile et établissant de nouvelles règles de filiation*, 2d Sess, 36th Leg, Quebec, 2002, cl 27.
130 Pierre-Gabriel Jobin with the collaboration of Nathalie Vézina, *Baudouin et Jobin: Les obligations*, 6th ed (Cowansville, Que: Yvon Blais, 2005) at 416 [Jobin].
131 *Ibid* at 423.
132 Michelle Giroux, "L'encadrement de la maternité de substitution au Québec et la protection de l'intérêt de l'enfant" (1997) 28 RGD 535 at 537 [Giroux, *L'encadrement*].
133 Quebec, National Assembly, *Journal des débats*, 34th Leg, 1st Sess, No 7 (5 September 1991) at 243-81 [*Journal des débats*].

> M. Rémillard: L'objectif est noble parce que, quand on regarde ça, c'est évident que l'enfant qui naît d'une mère porteuse…
> M. Holden: II n'a pas beaucoup de droits.
> M. Rémillard: …et qui voit ses droits diminués parce qu'il est né d'une mère porteuse. Il y a quelque chose là qui fait réfléchir, qui touche.[134]

Within this debate, M. Rémillard further alluded to the experiences of the surrogate herself, indicating a perceived risk that her reproductive capacity would be sold or commodified through surrogacy: "[e]t dans ce cas-là, ce que nous voulons faire respecter comme principe, c'est qu'on ne peut pas vendre son corps pour la gestation, pour faire un enfant. C'est ça le principe comme tel."[135] This concern regarding commodification is the focus of a recent report issued by a provincial ethics committee, which maintains that article 541 should be preserved given the risks that surrogacy poses to women's dignity through the commercialization of their bodies. This committee also suggests that surrogacy has the potential to undermine female autonomy and cause harm to women physically and psychologically.[136]

Academic commentary on the policy rationale underlying the nullity of surrogacy contracts in Quebec is sparse. Giroux, however, maintains that Quebec's legislative response to surrogacy is anchored to concerns about the commercialization and objectification of women and children. The policy also aims to protect women against exploitation, and is concerned with the general interests of society.[137]

IV. LAW AND POLICY AGAINST THE BACKDROP OF SOCIAL SCIENCE

A. Incongruence between Social Science Research and Law and Policy on Surrogacy

Juxtaposing ideas about surrogacy emerging in Canadian legal and political discourse against social science literature illuminates incongruences between the ways in which surrogates are represented in each setting. Four principal divisions can be identified.

First, law and policy debates about surrogacy have not revealed a distinct interest in the rationales driving a woman's decision to become a surrogate. While social scientists have studied surrogates' various motivations and experiences, jurists, policymakers and political actors have focused almost exclusively on the perceived consequences of surrogacy for these women. Moreover, the sparse

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134 *Ibid* at 272.
135 *Ibid* at 268.
136 Quebec, Commission de l'éthique de la science et de la technologie, *Éthique et procréation assistée: des orientations pour le don de gamètes et d'embryons, la gestation pour autrui et le diagnostic préimplantatoire* (Quebec: Commission de l'éthique de la science et de la technologie, 2009) at 80.
137 Giroux, *L'encadrement*, *supra* note 132 at 536.

allusions to motivations for surrogacy in legislative debates centre on the issue of payment, given the focus in those debates on commodification and the potential risk of exploiting economically dependent women.[138] This is the case even though Parliament heard testimony about the experiences and motivations of surrogates through the Proceedings of the Standing Senate Committee.[139] Such evidence included attestations by surrogates who spoke to being prompted to engage in surrogacy "primarily out of love and generosity and not for financial gain."[140]

Second, the texture and nuance of surrogates' varied experiences, brought to light by social science research, fails to emerge in law and policy discussions. Instead, these debates suggest that outcomes for surrogates are almost uniformly negative. Moreover, law and policy analyses are laden with the language of risk. Women who become surrogates are, in the eyes of legislators and policy actors, in danger of being physically and psychologically harmed, exploited, undermined and commodified. Since the emphasis on adverse outcomes is primarily hypothesized, it is difficult to find any serious engagement with academic research to support these presumptions. Even political actors who question the criminalization of surrogacy do not refer to scholarly authority. The following MP's statement is illustrative:

> What great public interest are we threatening with this process? The parents receive a healthy child and the student makes it through university with financial assistance. What great public interest does this threaten and what makes it serious enough to criminalize it? Someone needs to help me find that public interest because I do not know what it is.[141]

While demonstrating openness to surrogacy these remarks perpetuate a monolithic understanding of surrogates as motivated primarily by financial gain.

Third, law and policy discussions offer little insight into surrogacy's possible beneficial outcomes. Distinct from the financial gain that worries those who oppose remunerated surrogacy, surrogates may take up this practice for altruistic reasons such as helping an individual or couple desiring a child. A surrogate may also be prompted by enjoyment of pregnancy, by a desire to address personal psychological challenges that she believes are surmountable through surrogacy, or by a sense of accomplishment that she expects this practice to yield.[142] Debate about whether these are valid reasons for becoming a surrogate evades the point that none of these motivations are recognized or contemplated in legal and political discussions.

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138 See discussion *supra* notes 104-105 and 114-122.

139 *House of Commons Debates*, *supra* note 94 at 11540 (André Bachand).

140 *Ibid*.

141 *House of Commons Debates*, 37th Parl, 1st Sess, No 191 (24 May 2002) at 11728 (Brian Fitzpatrick).

142 See prior discussion on altruism under part II.A.1 above.

A fourth and final incongruence that emerges through a comparison of law and policy discussions with social science research on surrogacy relates to the perception of commercial versus altruistic surrogacy. Many Canadian federal legislators have contested paid surrogacy by citing the risks of commodification of human life. It is assumed that a clear distinction can be drawn between altruistic and remunerated strands of surrogacy: while the former is an act of laudable generosity, the latter is something that threatens harm to women and others.[143] However, a couple of points merit attention. The first is whether the altruism/commerce dichotomy is an accurate measure for assessing surrogacy's exploitative potential. As previously discussed, altruistic surrogacy may result from family or community pressures on women to give birth for others. The fact that a woman is unpaid may only add insult to injury, and may not dignify or redeem the surrogacy arrangement in question. Moreover, the risks associated with reproductive technologies commonly used in surrogacy persist irrespective of whether an agreement is for payment. These risks are noted in the judgments of both the Quebec Court of Appeal and the Supreme Court of Canada on the constitutionality of the *AHRA*.[144] Second, distinguishing paid surrogacy from gratuitous surrogacy that allows for reimbursed expenses may prove challenging. For many, the idea of paying a lump sum for the acts of pregnancy and delivery or for a child seems morally problematic. However, if a surrogate is to be fairly compensated for the inconvenience, lost opportunities, and out-of-pocket expenses associated with pregnancy—especially one with complications—her "compensation" may start to total amounts that could be viewed as objectionable if characterized as a direct payment for her reproductive services. The point here is not to engage in a substantive discussion as to what reasonable compensation for surrogacy may be, but to underscore the ambiguity of the distinction between altruistic and paid surrogacy, and to suggest that one is not necessarily morally superior to the other. These observations do not surface within Canadian legislative and policy discussions pertaining to surrogacy.

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143 In this respect, it is instructive to contrast *Adoption — 09184*, 2009 QCCQ 9058, [2009] RJQ 2694 [*Adoption – 09184*] with *Adoption — 091*, 2009 QCCQ 628, [2009] RJQ 445 [*Adoption – 091*], two cases that reach opposite conclusions regarding the potential effects of surrogacy in Quebec. The former judgment, involving a gratuitous arrangement between relatives, casts the act as highly generous and altruistic. Therefore, the court in the former case allowed the surrogacy arrangement to take shape through a special consent adoption (although private adoption in Quebec is generally unaccepted, article 555 CCQ allows for birth parents to give consent to adopt their child by particular family members only. This includes, "an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative … [and] the spouse … of the father or mother …"). However, the court in the latter case, which involved a paid arrangement between persons at arm's length, viewed the surrogacy more suspiciously and critically. The court there held that a special consent adoption could not be used to circumvent the prohibition against surrogacy in Quebec.

144 See *Procureur Général du Québec*, *supra* note 99 and *Reference re AHRA*, *supra* note 100.

B. Law and Policy Approaches that Recognize Surrogates' Motivations and Experiences

The normative weight attributable to the disjuncture between the social science research on surrogacy and the way that the practice is characterized in law and political discourse is debatable. Evidence that the practice is not as exploitative or undignified for women as legislators and policy makers have presumed may serve as a basis for advocating for the decriminalization of paid surrogacy. Alternatively, it is possible to maintain that the social science data on surrogate motherhood should bear a minimal normative effect; as noted by one former MP, laws on surrogacy have aims beyond the protection of women, such as the protection of children's interests.[145]

This article does not argue that the social science evidence on surrogates' motivations and experiences justifies an overhaul of legal approaches to surrogacy in Canada or in any province or territory. However, social science research has a clear relevance to law and policy discussions on this topic, and it is disconcerting that, to date, it has not come to the fore in legal and political debates. Lawmakers will rarely have expertise in social science research methods and thus cannot be expected to evaluate the breadth and calibre of empirical research on all matters they are called upon to debate and legislate. Nevertheless, relevant research illuminating the experiences of individuals directly affected by a controversial social practice should not be ignored by actors charged with debating, crafting and evaluating laws regulating that practice. Such research can facilitate the creation and implementation of robust and responsive juridical frameworks that account for a plurality of lived realities.

Moreover, where legislation claims, as it does in the surrogacy context, to be geared toward the protection of marginalized social members from exploitation, empirical research can be critical for ensuring that such protection is in fact required. If such protection is necessary, empirical research can further guarantee that the legal instruments deployed are appropriately tailored to this end. Too often, law's efforts at protecting presumably vulnerable women have yielded impacts that have harmed rather than helped them.[146] Solid empirical research can serve to avoid such an occurrence in the surrogacy setting.

Finally, it is worth mentioning that social science research is relevant both to the project of law's creation and to its ongoing review and assessment by legal and social actors. Thus, as each of us—lawyers, judges, legislators, activists, students and scholars—is called upon to evaluate the ongoing meaning, efficacy and justice

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145 *House of Commons Debates*, *supra* note 101 at 5627 (John Murphy). See also *Journal des débats*, *supra* note 133 at 243-81 (Gil Rémillard).

146 For an example of this phenomenon unfolding in the context of domestic violence, see e.g. Anne McGillivray and Brenda Comaskey, *Black Eyes All the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999).

of legal rules, empirical research can both complicate and enrich our analyses, prompting a more probative investigation into law's reach and effects.

As such, this paper maintains that law and policy discussions should honestly, fully and robustly reflect the way that surrogates' goals and experiences have been recorded by academic research across disciplines. The bulk of this research has been developed outside of Canada, and it is possible that a surrogate's experiences are determined, at least in part, by the regulatory approach to surrogacy in her jurisdiction. At the same time, this scholarship illuminates some of the human dimensions of surrogacy that may take shape regardless of the applicable legal regime, and is thus worthy of careful consideration in Canada. Taking surrogacy research seriously means recognizing both its promise and its limits. This requires acknowledging that the presumed harms to women currently driving law and policy approaches to surrogacy are not generalized or universal. This also demands recognition of the potential gains that some women consider themselves able to access through surrogacy.

As previously noted, however, current scholarship does not unequivocally suggest that surrogacy is positive or benign to women. Becoming a surrogate carries a number of important risks to a woman's physical and psychological wellbeing. The practice also carries some important potential pitfalls for the intending parents; an individual or couple who arrange to have a child through surrogacy is easily imaginable as the more vulnerable party to a surrogacy agreement.[147] The risks that attend any of these parties do not disappear simply by outlawing payment for surrogacy, as the *AHRA* suggests. Care must be taken to equalize, to the extent possible, the bargaining power of the parties even when the surrogate is providing services out of apparent generosity or when her co-contractor is a family member. This can be achieved through various measures such as the provision of skilled and independent legal advice as well as through psychosocial counseling.[148]

The work of crafting the parameters of a regime that recognizes and regulates surrogacy falls to legislators and policymakers, at both federal and provincial/territorial levels. In undertaking this task, these actors must wrestle with the moral ambiguity and social challenges associated with surrogacy. Moreover, their work should recognize and integrate knowledge about surrogates' experiences deriving from social science research—a matter that has, until now, been overlooked in legal and policy analyses.

A final comment should be directed to the special case of Quebec and article 541. As noted, this provision renders surrogacy agreements void as against public order. Thus, surrogacy arrangements are, at least in theory, unenforceable in any situation. Even if they wanted to, legislators could not impose safeguards to ensure

147 See Judith Lachapelle, "Fausses mères porteuses, mais vraies fraudeuses," *La Presse* (27 novembre 2009) A2.

148 See generally Busby & Vun, *supra* note 8, which offers helpful suggestions for law and policy that would reduce opportunities for surrogate coercion.

that surrogacy agreements do not exacerbate parties' pre-existing vulnerabilities and result in unfair outcomes. Instead, Quebec's legal status quo communicates the state's refusal to approve of surrogacy under any circumstances.

Nevertheless, surrogacy occurs in Quebec, and with considerable judicial approbation. Several recent judgments of the Court of Quebec allowed for adoptions by intending parents of children conceived pursuant to surrogacy agreements.[149] These were uncontested cases where the parties were forthright with the court as to their surrogacy plans. The judges were unwilling to undermine what they saw as the good faith intentions of the adults or the best interests of the children concerned. Although this happened through the channel of a special consent adoption[150] rather than through a direct registration by the intending parent on the act of birth, the Court effectively endorsed the surrogacy arrangements in the face of article 541. These cases stand in contrast to one judgment decided in the same year involving a comparable surrogacy situation, yet where the same court refused to order the adoption by special consent.[151]

In these circumstances, one wonders whether a rejection of surrogacy arrangements remains embedded in the legal and cultural ethos of Quebec civil law. Law and policy discussions in the province must reckon with these emerging and somewhat inconsistent cases and recognize the existence of surrogacy in the province. In light of this, legislators and policymakers must further consider whether surrogacy's current treatment in Quebec is reasonable.[152] In so doing, their analyses could be enriched by acknowledging the social science scholarship centred on the motivations and experiences of surrogates.

V. CONCLUSION

This article contributes to the growing feminist legal scholarship on surrogacy in Canada and Quebec. It argues that legal and political discussions of surrogacy in Canada and Quebec do not reflect the multidimensional goals and experiences of women who act as surrogates. Empirical research, as shown here, illustrates the diverse rationales that women may have for becoming surrogates, and indicates that most women are neither physically nor psychologically harmed through the process. This scholarship also counters the presumption that surrogates bear a weaker bargaining status *vis-à-vis* intending parents and are thus unequivocally susceptible to coercion and exploitation.

Law and policy discussions of surrogacy have not, however, grappled with these research findings. Debates leading up to the implementation of the *AHRA*

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149 See e.g. *Adoption – 09184*, *supra* note 143; *Adoption – 09367*, 2009 QCCQ 16815, [2010] RDF 387. For a fuller discussion on relevant cases in Quebec see Giroux, *Le recours controversé* supra note 13.

150 See *Adoption – 09184*, *supra* note 143 for a discussion on article 555 CCQ.

151 *Adoption – 091*, *supra* note 143.

152 See Langevin, *supra* note 8.

in 2004 present a monolithic image of surrogates, which focuses almost exclusively on presumptions about their physical, social and economic vulnerabilities. These debates also suggest that a surrogate's sole motivation is financial gain. The end result has been a federal statute that rejects payment for surrogacy and is effectively silent on the regulation of unremunerated agreements.[153] In Quebec, a focus on surrogacy's assumed potential to commodify children and women's reproductive capacity has served to justify the rejection of the practice, regardless of whether it is altruistic or commercial in nature.

This article does not argue that law must always aim to mirror current social realities; in some cases, law has a viable role in communicating social aspirations or values. In light of this, the present work does not, in contrast to other recent feminist scholarship on surrogacy in Canada and Quebec, suggest the urgency or unavoidability of law reform in the realm of surrogacy. Rather, it demonstrates how law and policy conversations are out of step with those unfolding among empirical researchers. Based on this, it imagines the shape that a law and policy approach, which meaningfully grapples with the recorded goals and experiences of surrogates, would take. Whether such an approach is the right or the best method for addressing surrogacy will depend on the objectives of the legal regime in place. If the goal of legislators is to communicate a normative vision of surrogacy—even one that may not match social patterns—current approaches may be unassailable. If, however, the aim is to recognize and respond to the interests of surrogates, current legal approaches must be revisited to take into account relevant social science research. In either case, law and policy discussions would undoubtedly be enriched by drawing on the work of social scientists to develop a fuller understanding of surrogates' rationales and experiences.

153 See *AHRA*, *supra* note 4 (section 12, which would regulate the reimbursement of expenditures associated with surrogacy, is not in force).