

Empirical Research on Surrogacy and its Implications for Law Reform
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The decision to prohibit commercial surrogacy in Canada was influenced by concerns that surrogate mothers could not give informed consent, surrogate arrangements were inherently exploitative nature of the arrangements and such arrangements would dangers of commodify human life. However empirical research on the experiences of surrogate mothers and commissioning parents shows that these concerns may be unfounded. This presentation will consider how this research should influence reforms to Canadian surrogacy laws and policies.

1. Introduction

- a. The paper is titled *Revisiting The Handmaid's Tale* after Margaret Atwood's brilliant 1985 book about a society where fertile women are forced to be surrogates for powerful men and their wives. The book along with the 1987 case commonly known as *Baby M* where an American woman who became pregnant following a surrogacy agreement lost custody of her daughter to her biological father.
- b. Both Atwood's book and the *Baby M* case served as very powerful cautionary tales of women who could be forced into exploitative and dehumanizing surrogacy arrangements. Both narratives influenced the course of public debate in Canada and elsewhere.

2. Canadian Situation

- a. In the late 1990s, the Canadian government established a Royal Commission to explore how Canada should respond to new reproductive technologies. This commission in an analysis that reflected western feminist thinking--recommended prohibiting all forms of surrogacy. Three rationales were given for this recommendation:
 - i. Impossibility of consent
 - ii. Potential for exploitation
 - iii. Payment commodifies women's bodies and amounts to the sale of children.

In 2004, after many bills and much debate, the federal government passed the *AHRA*. The surrogacy 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.

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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.

(section 12 not yet proclaimed in force.)

- b. Yet, in spite of this law, surrogacy is not uncommon in Canada and it persists in many places in the world in spite of prohibitions.
- c. Provincial governments or courts have been forced to respond by creating family law regimes to recognize the children born in these relationships. Add recent Sask case
- d. Traditional v. gestational
 - i. I should also mention that in the 1980s and early 1990s almost in almost all surrogacies, the surrogate mother was also the biological or genetic mother.
 - ii. By 1994 surrogacies were evenly divided between traditional surrogacy and gestational surrogacy and in 2004 only 5 % were traditional. With the very significantly improved techniques for in vitro fertilization, almost no surrogate mothers in the US now are also the genetic mothers. Eggs either come from the commissioning mother or from an egg donor.
 - iii. The fact that the surrogate mother is not the genetic mother has had a significant impact on law reform in the US.

3. Structure of my review of the empirical research

- a. As part of my research, I tried to find every empirical study published in a peer-reviewed academic journal in English on the experiences of surrogate mothers and other aspects of surrogate arrangements in the last two decades. I found more 40 such studies. A variety of methodologies are used including qualitative interviews, clinical file reviews and psychological testing.
- b. I could only find one study in Canada. Because surrogacy is illegal in Canada, it is not surprising that this study was conducted using a methodology called CMC or Acomputer mediated communication@ in order to fully protect confidentiality. One respondent in this study stated:

4. Social, Racial and Psychological Characteristics

- a. On vulnerabilities. Fear that they will have little education; racial and class discrimination.

b. Characteristics

- i. Economic: most have, at least, high school, modest family incomes,
- ii. Ethnicity and race. Most are white, cross ethnic.
- iii. Marital status. Most are married or in stable relationships. No empirical research but there are numerous media stories about the wives of men serving in the American military are becoming surrogates. Easy way to make money while their husbands are away.
- iv. Psychological profile
 1. standardized psychological tests have consistently found that surrogate mothers are well within normal ranges.
 2. they tend to be more likely than the general pop to be self sufficient; independent thinkers; non-conforming extraverts. They are self aware; stable and optimistic.

5. Capacity to consent

- a. Concerns on capacity to consent
Bread . Cannot know how she will feel.
- b. **Emotional Attachment of Surrogate Mother**
 - i. Concern that separating mothers and children would cause trauma and injury.
- c. What did the women say and what else did the research show?
 - i. Again the research shows that concerns about prenatal bonding and emotional instability post-partum are unfounded.
 - ii. One study that reviewed the medical files of 98 surrogate mothers at one British clinic concluded that all of the mothers had a confident psychological framework regarding pregnancy and birth@.
 - iii. 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 a child. Instead surrogate mothers generally report positive experiences with the commissioning couple, and many maintained contact with them.@ Jadva

6. Motivations

- a. On feminist concerns
 - i. Surrogacy is a form of violence against women and while a surrogate mother might consent@ to the arrangement, she has little self-determination if she cannot find sustaining and dignified work and resorts to surrogacy as a final economic resort.@ (Raymond, 1993)

- ii. Surrogacy as reproductive prostitution and the practice is a form of slavery. (Overall, 1993)
- iii. A...tolerating 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. (Allen, 1991)
- b. Financial
 - i. no financial distress.
 - ii. Reasonably convenient way to make money while raising small children. A motivator but not the main motivator.
- c. Other motivations.
 - i. Desire to help. Motivation for 91 in one study.
 - ii. Two sets on motivations. Read the quotes.
 - 1. social justice
 - 2. do something different
 - iii. Consistent finding that the idea of being a surrogate comes from the woman herself.
 - iv. Enjoy being pregnant

7. Relationship with commissioning parents

- a. on what the fear is
- b. SLIDE: what does the research show?
 - i. Quality of the relationship with the commissioning parents most NB factor in determining women's satisfaction with the process.
 - ii. Most report harmonious relationships
 - iii. Almost no litigation
 - iv. Being clear about expectations is very important. Read .
 - v. Feeling before and during the pregnancy: able to separate and how the transition is handled. Overwhelming majority do not regret their decision.

8. Objectives of a regulatory regime

- a. My reading of the AHR Act and the decision leaves significant room for provinces to regulate surrogacy arrangements; short of permitting payment for either time or expenses. But, with the exception of Quebec—which prohibits surrogacy arrangements—to the best of my knowledge, no province or regulatory body, like a College, has promulgated guidelines. In the absence of guidelines, it is free for all.
- b. Two overriding objectives:
 - i. To ensure that women contemplating surrogacy have the informed ability to make that decision.
 - ii. To ensure that they have the capacity to be able to resist the pressure to participate in surrogacy or to be controlled by others during the

pregnancy.

- c. Informed consent
 - i. Already gave birth and have completed their families. Know the risks.
 - ii. Confident that they can do it
 - iii. Ensure that money is not the overarching reason.
- d. Screening and counseling
 - i. No history of post natal depression or fragile personalit
 - ii. Watch for family pressure to participate
 - iii. Financial wherewithal. No financial distress and capacity to pay.
- e. Independent legal advice
 - i. Pregnancy, delivery and after birth
 - ii. Medical issues, fetal reduction, disability, conduct, diet, insurance, place of birth, exchange, parentage and contact.
 - iii. Precision on compensation and expenses—once these regimes are in place
- f. Statutory provisions on personal autonomy and privacy
- g. State-insured health care. (Military wives because of coverage.)
- h. More uniformity on birth registration.
- i. International protocols

9. Closing Jadva et al (2003)

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 a child. Instead surrogate mothers generally report positive experiences with the commissioning couple, and many maintained contact with them.