



# Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation

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## Abstract

This article examines exploitation as a policy rationale for the prohibition of paid surrogacy and egg donation in Canada, focusing on claims of exploitation in parliamentary transcripts and proposed legislation. Its main focus is challenging three assumptions long used to substantiate the prohibition of commercial egg donation and surrogacy, namely: that marginalized women are being exploited; that payment and exploitation are necessarily linked; and that prohibitions on payment are the best means to prevent exploitation in assisted human reproduction. By examining these assumptions, this article assesses the legitimacy of prohibiting payment on the basis of perceived exploitation and suggests that, though much has been done to protect surrogates and donors, little is known about their real-life experiences with reproductive technologies, that the relationship between exploitation and payment is tenuous, and that it remains unclear that prohibiting payment is not doing more harm than good.

**Keywords:** exploitation, assisted human reproduction, egg donation, surrogacy, reproductive technologies, public policy, Canada

## Résumé

Cet article examine comment l'exploitation sert à justifier l'interdiction de rémunérer la gestion pour autrui et le don d'ovules au Canada, en portant une attention toute particulière aux allégations d'exploitation au sein des transcriptions parlementaires et des projets de loi. Il remet en question trois hypothèses qui ont depuis longtemps été utilisées afin de justifier l'interdiction de la gestion pour autrui commerciale et du commerce des dons d'ovules, à savoir que les femmes marginalisées sont exploitées, que la rémunération est liée nécessairement à l'exploitation et que la meilleure façon de prévenir l'exploitation liée à la procréation assistée est d'interdire la rémunération. En examinant ces suppositions, cet article évalue la légitimité d'une telle interdiction sur la base d'une exploitation présumée. Bien que plusieurs mesures aient été mises en place afin de protéger les mères porteuses et les donneuses, peu est connu à propos des expériences réelles avec les techniques de procréation assistée. Le lien entre l'exploitation et la

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rémunération demeure précaire et il reste à savoir si le fait d'interdire le paiement cause plus de mal que de bien.

**Mots clés :** exploitation, procréation assistée, don d'ovules, maternité de substitution, techniques de procréation, politique publique, Canada

The governance of women's bodies and behaviours in public policy has often been justified in the name of protecting women from harm. In Canada as elsewhere, sex work, pornography, and assisted reproduction have been regulated in ways that assume that legal restrictions against the commodification of sexual and reproductive labour are necessary in order to defend against the potential exploitation of vulnerable women and women's vulnerable bodies. These assumptions often exist whether or not there is relevant evidence of exploitation, and consequently, the regulation of these policy fields has often relied on the possibility of exploitation, rather than on the fact (or likelihood) of its occurrence.

In the field of assisted human reproduction (AHR), the potential exploitation of women has been a matter of concern at least since the advent of in vitro fertilization in the mid-1970s. Academic,<sup>1</sup> literary,<sup>2</sup> and media<sup>3</sup> commentators have long asserted that the propagation of reproductive technologies may lead to the reduction of women to "egg farms" and wombs, to vessels bought and sold for their capacity to breed.<sup>4</sup> These commentators have been concerned not only with the exploitation of women but also, following Julie Murphy, with the construction of women's bodies as "fertile fields to be farmed."<sup>5</sup> Their works have largely argued that particular practices (i.e., egg donation and surrogacy) are inherently problematic, but especially so when women are paid to participate.

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<sup>1</sup> Julie Murphy, "Egg Framing and Women's Future," in *Test-Tube Women*, edited by Rita Arditti, Renate Duelli Klein, and Shelley Minden (London, UK: Pandora, 1984), 68–75; Robyn Rowland, "Of Women Born, But for How Long? The Relationship of Women to the New Reproductive Technologies and the Issue of Choice," in *Made to Order: The Myth of Reproductive and Genetic Progress*, edited by Patricia Spallone and Deborah Lynn Steinberg, Athene Series (Oxford, UK: Pergamon, 1987), 77; Elaine Hoffman Baruch, "A Womb of His Own," in *Embryos, Ethics, and Women's Rights*, edited by Elaine Hoffman Baruch, Amadeo F. D'Adamo Jr. and Joni Seager (New York: Haworth Press, 1988), 136; Janice G. Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (New York: HarperCollins, 1993); Susan Sherwin, "Some Reflections on 'Surrogacy,'" in *Misconceptions: The Social Construction of Choice and the New Reproductive and Genetic Technologies*, edited by Gwynne Basen, Margrit Eichler, and Abby Lippman (Prescott, Ontario: Voyageur, 1994), 184.

<sup>2</sup> Margaret Atwood, *The Handmaid's Tale* (Toronto: McClelland and Stewart, 1985).

<sup>3</sup> Allan Hutchinson and Derek Morgan, "Rent-a-Womb: Society's Dilemma," *Globe and Mail*, December 11, 1984; Daniel Drolet, "Wombs for Rent: The Dilemma of Surrogate Motherhood," *Ottawa Citizen*, January 31, 1987; Derek Ferguson, "Ottawa May Ban Human Eggs Sale Minister Vows to End 'Exploitation' of Women in '95," *Toronto Star*, December 13, 1994, Metro section; Penni Mitchell, "The Selling of Human Eggs," *Winnipeg Free Press*, January 14, 1996, Editorial; Dennis Bueckert, "Plenty of Wombs for Rent: Surrogate Motherhood Phenomenon Growing in Canada, Advocates Say," *Winnipeg Free Press*, May 31, 1999, Metro section; Hilary Stead, "Guelph Woman Has Womb for Hire: [Final Edition]," *Expositor*, July 31, 1999, Life section.

<sup>4</sup> Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (New York: Harper and Row, 1985).

<sup>5</sup> Murphy, "Egg Framing and Women's Future," 68.

When attempts to govern assisted reproduction in Canada were made in the 1990s, the exploitation of women occupied an important place in the debate, and longstanding arguments about vulnerability and exploitation were well rehearsed. Critics, however, charged that prohibiting commercial egg donation<sup>6</sup> and surrogacy might limit women's autonomy by implying that women are capable of consent only when there are no economic considerations, and also that such prohibitions would mask non-economic exploitation.<sup>7</sup> From this view, a criminal ban on payment would also push surrogates and donors into underground arrangements, and would reinforce assumptions about women's devalued social role as reproductive resources obliged to give of their bodies and labour.

The law that was eventually passed—the 2004 *Assisted Human Reproduction Act* (AHRA)—banned commercial surrogacy and egg donation in part to protect against the exploitation of women.<sup>8</sup> Since the passage of the AHRA, there has been a series of changes to the *Act* resulting from a constitutional challenge that overturned many of its provisions,<sup>9</sup> the closure of the regulatory agency established to oversee its implantation,<sup>10</sup> and a number of significant amendments that emerged from a budget bill.<sup>11</sup> Though much has happened, however, little has changed in terms of the prohibitions on commercial egg donation and surrogacy. At the time of writing, and as was the case when the AHRA was passed, the reimbursement of expenditures to donors and surrogates can occur only in accordance with regulations to be written; without regulations, this reimbursement is not yet legal.<sup>12</sup>

<sup>6</sup> Throughout this paper, the term “egg donation” is used to describe the provision of eggs (oocytes) both for pay and when no money is exchanged. “Commercial egg donation” is used to indicate that the “donation” occurs for payment. “Altruistic egg donation” is used to identify arrangements where no money is exchanged. The use of the term “donation” follows popular parlance, though some scholars use “egg provision” to indicate that the language of “donors” and “donations” is often inaccurate, as many donors are, in fact, paid. See, for example, Jocelyn Downie and Françoise Baylis, “Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada,” *Journal of Law, Medicine & Ethics* 41, no. 1 (2013): 224–39.

<sup>7</sup> Alison Harvison Young and Angela Wasunna, “Wrestling with the Limits of the Law: Regulating Reproductive Technologies,” *Health Law Journal* 6 (1998): 239–77.

<sup>8</sup> Exploitation is not the only policy rationale used to legitimate the prohibition of commercial surrogacy and egg donation in Canada. The Government of Canada introduced the non-payment provisions of the *Assisted Human Reproduction Act* on the grounds that it would limit exploitation, and also limit the commodification of human life and reproductive capacity. Anne McLellan, [*Assisted Human Reproduction Act*], in Canada, Parliament, House of Commons, *Debates*, 37th Parl, 1st Sess, Vol 137, No 188 (21 May 2002) at 11523. Furthermore, Angela Campbell has argued that the use of criminal law to prohibit (rather than to merely regulate) matters such as payment for gamete donation and surrogacy served to identify the ethical importance of these matters to Canadians. Angela Campbell, “A Place for Criminal Law in the Regulation of Reproductive Technologies,” *Health Law Journal* 10 (2002): 96–98.

<sup>9</sup> Reference re *Assisted Human Reproduction Act*, 61 SCR 457 (Supreme Court of Canada 2010).

<sup>10</sup> Françoise Baylis, “The Demise of Assisted Human Reproduction Canada,” *Journal of Obstetrics and Gynaecology Canada* 34, no. 6 (2012): 511–13; Françoise Baylis and Jocelyn Downie, “The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts,” *Canadian Journal of Women and the Law* 25, no. 2 (2013): 183–201.

<sup>11</sup> Alana Cattapan and Sara Cohen, “The Devil We Know: The Implications of Bill C-38 for Assisted Human Reproduction in Canada,” *Journal of Obstetrics and Gynaecology Canada* 35, no. 7 (2013): 654–56.

<sup>12</sup> Downie and Baylis, “The Transnational Trade in Human Eggs,” 229. See also Françoise Baylis and Jocelyn Downie, “Wishing Doesn't Make It So,” *Impact Ethics* (blog), December 17, 2013, <http://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>; Françoise Baylis, Jocelyn Downie, and Dave Snow, “Fake It ‘Til You Make It: Policymaking and Assisted Human Reproduction in Canada,” *Journal of Obstetrics and Gynaecology Canada*, forthcoming 2014.

What remains is a legal and regulatory regime in which no payment to egg donors or surrogates is allowed, though reports suggest that commercial practices continue abroad and underground,<sup>13</sup> and there remains limited evidence to establish to what extent exploitative practices are taking place.<sup>14</sup>

This article explores the use of exploitation as a policy rationale for the prohibition of paid surrogacy and egg donation in Canada, paying particular attention to the evolution of claims of exploitation in proposed policy and relevant parliamentary debates. Surrogacy and egg donation are different approaches to building families, involving different outcomes and ethical concerns.<sup>15</sup> Still, on the long path to the passage of Canadian legislation on assisted human reproduction in 2004, these concerns came to be collectively understood as matters of third-party reproduction bound up with exploitation and commercialization.

After defining exploitation and outlining the limits of its use in public policy, this paper turns to the history of the concept of exploitation as it has been used to justify prohibitions on payment in the federal governance of assisted human reproduction (AHR) in Canada. Based on this history, it explores three assumptions used to substantiate the prohibition of commercial egg donation and surrogacy. The first assumption is that marginalized women are exploited in paid AHR arrangements, though there is little evidence to support this claim. The second assumption is that payment and exploitation are necessarily linked; however, this does not account for the possibility of coercion in seemingly altruistic arrangements. Further, given the prevalence of legal forms of exploitation that use women's bodies, it follows that exploitation alone is reason enough to limit payment.

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<sup>13</sup> Alison Motluk, "The Human Egg Trade: How Canada's Fertility Laws Are Failing Donors, Doctors, and Parents," *The Walrus*, 2010, walrusmagazine.com; Ubaka Ogbogu and Erin Nelson, "Trade in Human Eggs Not Unethical: Clear Rules Needed to Prevent Exploitation of Participants," *Edmonton Journal*, May 16, 2012, Final edition, Ideas section; Tom Blackwell, "Illegal Surrogacy; Rare Fertility Charges Expose Lax Oversight of Baby Making Industry," *National Post*, February 16, 2013, News section.

<sup>14</sup> Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science," *Ottawa Law Review* 43, no. 29 (2012).

<sup>15</sup> Egg donation is the practice of retrieving eggs from the ovaries of one woman for reproductive use by another. The process of egg retrieval takes place over the course of several weeks and involves a course of hormones that stimulates the ovaries, causing the maturation of more eggs than usual, followed by an invasive surgical retrieval of those eggs. While the short-term health concerns of egg donation are significant, the long-term risks of egg donation are largely unknown due to a lack of longitudinal research. Concerns about exploitation in commercial egg donation are thus often tied to the idea that women (most often young women, due to matters of egg quality) will be compelled to undertake significant (and unknown) physiological risks in exchange for pay. See for example, Vanessa Gruben, "Women as Patients, Not Spare Parts: Examining the Relationship Between the Physician and Women Egg Providers," *Canadian Journal of Women and the Law* 25, no. 2 (2013): 249–83. Surrogacy (i.e., gestational surrogacy) involves the implantation of an embryo into the uterus of a woman with the intention that she will not raise any resulting child and will, instead, cede guardianship to the intended social parent(s) at birth. Because the risks of implanting embryos, pregnancy, and childbirth are well known, understanding exploitation in surrogacy is different from egg donation, insofar as informed consent is not seen to be a primary matter of concern. Rather, concerns about exploitation in commercial surrogacy are bound up with the potential for bonding in gestation, and the idea that women's reproductive capacity as well as their behaviors in pregnancy may be governed through relevant surrogacy agreements. See for example, Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1995), 186.

The third assumption is that criminal prohibitions are the best means to prevent exploitative relationships in AHR, though such stringent restrictions may lead surrogates and egg donors to engage in dubious underground arrangements in order to be paid. By examining these assumptions, this article reassesses the “limits of the law”<sup>16</sup> regarding exploitation. It suggests that though much has been done to address the issue of exploitation of women in AHR, little is known about the real-life experiences of egg donors and surrogates, and that the relationship between exploitation and payment remains tenuous. Thus, it remains unclear whether prohibiting payment as a means of addressing exploitation is doing more good than harm.

### On Exploitation

Exploitation is a foundational concept in the governance of AHR. Scholarship on surrogacy arrangements written by feminists,<sup>17</sup> philosophers,<sup>18</sup> and legal scholars<sup>19</sup> in the 1980s and 1990s assessed the social, ethical, political, and legal challenges of assisted reproductive technologies, often finding that the exploitative potential of surrogacy was greater than any of the possible benefits. With the proliferation of this literature, a number of scholars examined the extent to which exploitation was being “overused and misused”<sup>20</sup> to assert that there was something inherently wrong with the practice.<sup>21</sup> These works collectively demonstrated that an overly flexible and underdeveloped notion of exploitation was deployed in scholarship condemning surrogacy and doing so without considering the meaning and potential applications of the concept.

Exploitation relies, first, on an understanding that the “exploiter” is using the person or thing being exploited. Exploitation is a relationship of utility in which one party benefits from the use of another, and though the results need not be negative for the exploited party—indeed, both parties can benefit—the exploiter must gain more from the relationship than the “exploitee.” Exploitation in these terms is consistent with economic and legal theorizations of exploitation, in which exploitation involves an exchange where what is paid is less than the value of the product or service acquired.<sup>22</sup>

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<sup>16</sup> Harvison Young and Wasunna, “Wrestling with the Limits of the Law: Regulating Reproductive Technologies.”

<sup>17</sup> Elizabeth S. Anderson, “Is Women’s Labor a Commodity,” *Philosophy and Public Affairs* 19 (1990); Corea, *The Mother Machine*, 213–45; Raymond, *Women as Wombs*.

<sup>18</sup> Peter Singer and Deane Wells, *The Reproductive Revolution* (New York: Oxford University Press, 1984); Debra Satz, “Markets in Women’s Reproductive Labor,” *Philosophy & Public Affairs* 21, no. 2 (April 1, 1992): 107–31.

<sup>19</sup> Alan Wertheimer, “Two Questions About Surrogacy and Exploitation,” *Philosophy & Public Affairs* 21, no. 3 (July 1, 1992): 211–39; John Lawrence Hill, “Exploitation,” *Cornell Law Review* 79 (1993–1994): 631–99; Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues*, Enlarged edition (Cambridge, MA: Harvard University Press, 1990).

<sup>20</sup> Hill, “Exploitation,” 699.

<sup>21</sup> Hill, “Exploitation”; Allen W. Wood, “Exploitation,” *Social Philosophy and Policy* 12, no. 2 (1995): 136–58; Wertheimer, “Two Questions About Surrogacy and Exploitation.”

<sup>22</sup> John Pierson, “Exploitation,” in *The New Fontana Dictionary of Modern Thought*, edited by Alan Bullock and Stephen Trombley (London, UK: HarperCollins, 2000).

Exploitation also requires that the relationship or exchange in question play on some vulnerability of the exploitee. The vulnerability may be solely economic, insofar as the exploiter(s) may have greater socioeconomic resources than the exploitee, but it may also involve other markers of identity, such as race, class, physiological or mental disability, sexual orientation, family or marital status, and age, that may put the exploitee in a position of sociocultural vulnerability or render them otherwise susceptible to harm.

The extent to which the unfair nature of the relationship is harmful to the exploitee is important in determining whether or not policy intervention is needed. While scholars such as Alan Wertheimer have argued that some exploitative relationships may be morally acceptable to the extent that they result in net benefits to the exploitee,<sup>23</sup> such arguments typically focus on individual conceptions of harm.<sup>24</sup> Other scholars have challenged this model, theorizing broader understandings of possible harm that include the cumulative social effects of exploitative relationships. For example, if surrogacy arrangements result in the commodification of childbearing and women's reproductive capacity, there may be harms incurred beyond the circumstances of individual arrangements. From this view, though some individual relationships of exploitation may be "relatively benign"<sup>25</sup> or even seemingly result in net benefits to the exploitee, the overall effect of condoning such relationships may have a detrimental effect on society, which must be taken into consideration in determining the occurrence of harm.

Unless there is some reason to see the exploitative relationship as necessarily harmful, then the existence, or the purported existence, of exploitation fails to merit policy intervention. The simple elements of exploitation articulated above—that is to say, use and vulnerability—are rife in our society, and not all are seen to necessitate policy intervention. Rather, a robust theorization of exploitation must consider not only use and vulnerability, but also whether the exploitee feels "forced or compelled to accept attractive offers that they otherwise would not accept and assume increased risk in their lives," as well as the social implications of allowing the exploitative relationships to continue.<sup>26</sup> Otherwise put, exploitation is part of the unequal exchanges of our everyday lives, but certain kinds of exploitative relationships are more problematic than others. The use of exploitation as a rationale for public policy must, then, be considered in relation to the view of the exploitee and to whether the harms being done (including cumulative social harms) are great enough to infringe on the exploitee's capacity to partake in the potential benefits. This consideration includes whether the harms being done are substantive enough in relation to the potential benefits to necessitate government intervention, whether viable alternatives exist, and finally, whether the potential interventions may offset the harms.

<sup>23</sup> Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1999).

<sup>24</sup> John A. Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction," *Southern California Law Review* 59 (1985–1986): 1023; Wertheimer, "Two Questions About Surrogacy and Exploitation."

<sup>25</sup> Heather Widdows, "Rejecting the Choice Paradigm: Rethinking the Ethical Framework in Prostitution and Egg Sale Debates," in *Gender, Agency, and Coercion*, edited by Sumi Madhok, Anne Phillips, and Kalpana Wilson (London, UK: Palgrave Macmillan, 2013), 167.

<sup>26</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 6th ed. (New York: Oxford University Press, 2009), 256.

## Exploitation in the Canadian Policy Debates on AHR

The use of exploitation as a policy rationale to govern AHR emerged in the Canadian context in relation to commercial surrogacy arrangements. As early as 1983, the Canadian media was engaged in discussions about the legitimacy of surrogacy,<sup>27</sup> and in the same year, the Canadian Medical Association urged physicians to be cautious about participating in the creation of surrogate pregnancies until the law was clarified.<sup>28</sup> At the same time, the Ontario Law Reform Commission (OLRC) was studying<sup>29</sup> the matter of assisted human reproduction, and in 1985, it issued an expansive two-volume report that advocated for limited compensation for both surrogates and gamete donors.<sup>30</sup>

There was divergence among the commissioners as to what compensation should include, be it simple reimbursement for medical expenses, or payment for lost income or emotional pain and suffering associated with giving up a child. Nevertheless, commissioners were generally opposed to an outright payment-for-services that might result in the exploitation of surrogate mothers, and they recommended that compensation (at the discretion of family court judges) be established on a case-by-case basis.<sup>31</sup> For egg donors, the Commission recommended compensation for reasonable expenses based on “time and inconvenience.”<sup>32</sup> Egg donors would be eligible for higher rates of compensation than sperm donors due to the invasive nature of egg retrieval, and although it did not advocate higher payments for “discomfort,”<sup>33</sup> the Commission stated that, due to the risk of needing long-term treatment to address the side effects of superovulation, higher payments for expenses incurred could be justified.<sup>34</sup> The report expressed concern about the vulnerabilities of women engaging in AHR as surrogates and egg donors, and while the OLRC was concerned with the potential commodification of human life through payment for surrogacy and egg donation, commissioners were confident that compensation, if regulated, would not be construed as payment, and that it would not necessarily result in exploitative arrangements.

<sup>27</sup> Marina Strauss, “Surrogate Birth Acceptable, Medical Ethics Expert Says,” *Globe and Mail*, May 21, 1983.

<sup>28</sup> Canadian Medical Association, *Proceedings of the 116th Annual Meeting, Including the Transactions of General Council* (1983), at 128, resolution 83-23; Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (Toronto: Ministry of the Attorney General, 1985), 221; “Surrogate Parenting and the Right to Life Debated,” *CMAJ: Canadian Medical Association Journal* 130 (January 1, 1984): 65; Sarah Jane Growe, “Radical Report’ on Surrogate Mothers,” *Toronto Star*, June 27, 1985, Life/Classified section; Sarah Jane Growe, “Surrogate Mothers: Legislators Haven’t Decided Whether They’re Humanitarians or Prostitutes,” *Toronto Star*, March 23, 1985, Life section; Hutchinson and Morgan, “Rent-a-Womb: Society’s Dilemma.”

<sup>29</sup> Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, 1.

<sup>30</sup> Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*.

<sup>31</sup> *Ibid.*, 231–35.

<sup>32</sup> *Ibid.*, 169.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

In the years following the OLRC's report, the sense of urgency around government intervention in AHR grew,<sup>35</sup> and by 1989, the Government of Canada called for a Royal Commission on New Reproductive Technologies to investigate the field and make relevant recommendations.<sup>36</sup> In 1993, when the Royal Commission released its report, it included chapters addressing egg donation and surrogacy, as well as much discussion of the problems associated with commercialization. Regarding surrogacy (or "commercial preconception arrangements"), the Royal Commission took a strong position against the practice, citing significant concerns about the "exploitative nature" of surrogacy arrangements.<sup>37</sup> Much of their reasoning in this regard was tied to the perceived socio-economic disparities between potential surrogates and intended parents based on a 1988 study by Margrit Eichler and Phebe Poole conducted for the Law Reform Commission of Canada.<sup>38</sup>

The Royal Commission also took a strong view on egg donation. It broadly recommended that egg donation be prohibited, except where women were already undergoing egg retrieval for their own fertility treatment or were undergoing medical procedures (i.e., chemotherapy) that might harm their fertility. According to the Royal Commission, ovarian stimulation and egg retrieval should not be performed on otherwise healthy women simply for the benefit of others, as the physiological risks were seen to be so significant that only women already at risk could consent to participating.<sup>39</sup> The Commission rejected altruistic donation to family members and to strangers on the grounds that the physiological risk and the risk of exploitation were too great to justify otherwise healthy women's participation.<sup>40</sup> Egg donation for pay was seen to be especially problematic due to the added elements of commercialization and economic exploitation at play.

The Royal Commission released its report in December 1993, and it was not until June 1995 that the federal government issued its response. The response, a voluntary moratorium on nine technologies that the Royal Commission viewed as particularly objectionable, included bans on payment for egg donation and

<sup>35</sup> Catherine Dunphy, "Surrogate Mothers 'Threat to Equality,'" *Toronto Star*, March 3, 1987, Final edition, Life section; Jackie Smith, "Surrogate Birth Laws Demanded," *Toronto Star*, January 12, 1987; Robert McKenzie, "Quebec Urged to Ban Surrogate Motherhood," *Toronto Star*, April 29, 1988; Margrit Eichler on behalf of the Steering Committee (Canadian Coalition for a Royal Commission on New Reproductive Technologies), "Letter to Coalition Supporters and Friends," letter, November 1988; Canadian Coalition for a Royal Commission on New Reproductive Technologies, "New Reproductive Technologies in Canada: Some Facts and Issues" (Canadian Coalition for a Royal Commission on New Reproductive Technologies, March 1988), Canadian Women's Movement Archives.

<sup>36</sup> Canada, "Speech from the Throne," 1989. See also, Canada, Order in Council No PC 1989-2150.

<sup>37</sup> 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), 670.

<sup>38</sup> *Ibid.* See also Eichler and Poole, *The Incidence of Preconception Contracts for the Production of Children Among Canadians: A Report Prepared for the Law Reform Commission of Canada*.

<sup>39</sup> Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, 592.

<sup>40</sup> *Ibid.*, 593-94.



surrogacy.<sup>41</sup> The voluntary nature of this moratorium, however, was widely criticized for not going far enough in seeking to prevent these activities,<sup>42</sup> and there were reports of refusals on the part of “researchers and clinicians” to adhere to the bans.<sup>43</sup> Within the year, the federal government introduced a bill (Bill C-47) to criminalize the practices included in the voluntary moratorium (as well as a few others) as part of a multistage legislative approach that, after consultation with the provinces, would include a pan-Canadian regulatory framework.<sup>44</sup> Bill C-47 included a preamble that identified the potential for the exploitation of women in the commercialization of human reproduction and the sale of reproductive materials, and it banned payment for gametes and surrogacy as well as the repayment of relevant expenses.<sup>45</sup> The issue of payment was intensely debated, but the point was rendered moot when Bill C-47 died on the Order Paper in the spring of 1997.

After more failed attempts at legislation, in 2001, then-health minister Allan Rock took the unusual step of presenting draft legislation to the Standing Committee on Health prior to its introduction in the House of Commons.<sup>46</sup> The draft legislation was closely scrutinized by members of the Standing Committee in consultation with a wide range of stakeholders, and in December 2001, the Standing Committee released a report on the draft legislation entitled *Assisted Human Reproduction: Building Families*.<sup>47</sup> *Building Families* largely reiterates the positions of the Royal Commission vis-à-vis payment for surrogacy and egg donation, namely that paid surrogacy should be criminalized because it “treats children as objects and treats the reproductive capacity of women as an economic activity.”<sup>48</sup> Non-commercial surrogacy was also objectionable to the Committee, but they recommended mere discouragement rather than prohibition in this regard.<sup>49</sup>

<sup>41</sup> Health Canada, “Health Minister Calls for Moratorium on Applying Nine Reproductive Technologies and Practices in Humans,” news release, July 27, 1995; Éric Montpetit, “Policy Networks, Federalism and Managerial Ideas: How ART Non-Decision in Canada Safeguards the Autonomy of the Medical Profession,” in *Comparative Biomedical Policy: Governing Assisted Reproductive Technologies*, edited by Ivar Bleiklie, Malcolm L. Goggin, and Christine Rothmayr, vol. 32, Routledge/ECPR Studies in European Political Science (London and New York: Routledge, 2004), 66–67.

<sup>42</sup> Edward Greenspon, “Ottawa Backs Off Test-Tube Issues: Marleau Prefers Voluntary Curb,” *Globe and Mail*, July 28, 1995; “Policy Experimentation in a Petri Dish: Health Minister Marleau Dithers on Curtailing Reproductive Technologies (Voluntary Moratorium on Nine Controversial Fertility Practices),” *Western Report*, August 14, 1995.

<sup>43</sup> Françoise Baylis and Matthew Herder, “Policy Design for Human Embryo Research in Canada: A History (Part 1 of 2),” *Journal of Bioethical Inquiry* 6, no. 1 (2009): 114; “Fertility Industry Defiant: Won’t Observe Ban on High-Tech Baby-Making Techniques,” *Hamilton Spectator*, July 28, 1995, Final edition.

<sup>44</sup> Health Canada, “Health Canada News Release: Human Reproductive and Genetic Technologies Act—Prohibited Practices (June 1996),” in *Governing Medically Assisted Human Reproduction*, edited by Lorna Weir (Toronto: Centre of Criminology, University of Toronto, 1997), 121–23; Health Canada, “Comprehensive National Policy on Management of New Reproductive and Genetic Technologies Proposed” (Health Canada, June 14, 1996).

<sup>45</sup> Bill C-47, *Human Reproductive and Genetic Technologies Act*, 2nd Sess, 35th Parl, 1996.

<sup>46</sup> Monique Hebert, Nancy Miller Chenier, and Sonya Norris, “Bill C-13: Assisted Human Reproduction Act (LS-434E),” 10 October 2002, revised 16 April 2003, 1, [http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills\\_ls.asp?lang=E&Parl=37&Ses=2&ls=C13](http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&Parl=37&Ses=2&ls=C13); Baylis and Herder, “Policy Design for Human Embryo Research in Canada,” 114; Montpetit, “Policy Networks, Federalism and Managerial Ideas,” 66.

<sup>47</sup> Standing Committee on Health, *Assisted Human Reproduction: Building Families* (Ottawa: House of Commons, December 2001).

<sup>48</sup> *Ibid.*, 12.

<sup>49</sup> *Ibid.*

As for egg donation, the Standing Committee opposed all payment, including reimbursement of expenses, though unlike the Royal Commission, it generally accepted altruistic egg donation.<sup>50</sup>

*Building Families* was tabled in December 2001, and in May of the following year, the *Assisted Human Reproduction Act* was introduced in the House of Commons. Though the *Act* generally follows the legislative scheme proposed by the Royal Commission and taken up in C-47, it takes neither the strong position against egg donation championed by the Royal Commission, nor the more discretionary approach originally advocated by the Ontario Law Reform Commission.<sup>51</sup> Instead, the *AHRA* bans payment for surrogacy (section 6) and egg donation (section 7) and permits both practices if done altruistically. Though it is not illegal under the *Act* to receive payment for surrogacy or egg donation, it is illegal to “pay consideration to a female person to be a surrogate mother” and to purchase eggs from a donor or “a person acting on behalf of a donor.”<sup>52</sup> The penalty for contravening the law is a fine of up to \$500,000, a jail sentence of up to ten years, or both.<sup>53</sup> Section 12 of the *AHRA* also includes provisions about the repayment of expenses to surrogates and egg donors in accordance with regulations to be developed. The bill failed to pass on two occasions; it was twice reintroduced, and it received Royal Assent in April 2004.

In the ten years since the *Act*'s passage, the status of the governance of AHR in Canada has changed significantly. Following a constitutional challenge to the regulatory provisions of the *Act*, the section of the *Act* that provided for potential compensation through regulation is no longer in force.<sup>54</sup> Given the tentative approach of the federal government (under Health Canada) in making regulations following the upheaval that the case wrought, it is uncertain when and whether regulations will come.

The history of the governance of AHR in Canada suggests, then, that there have been tenuous grounds for the ban on payment, at least in the name of exploitation. The presumption that if payment is banned, exploitation will be reduced, has been articulated and reiterated throughout the history of this policy and despite a lack of evidence of either the problematic nature of payment or the existence of exploitation. Furthermore, by connecting exploitation and payment, the bans on commercial surrogacy and egg donation fail to acknowledge the subtleties of consent, the many grey areas between commercial and altruistic participation, and the migration of women who want to act as egg donors and surrogates into paid underground arrangements in which an “aura of illegality”<sup>55</sup> pervades. Taken together, these critiques broadly correspond to the three underlying assumptions of the *AHRA*'s ban on payment that this paper studies.

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<sup>50</sup> Ibid., 13–14.

<sup>51</sup> Canada, *Assisted Human Reproduction Act* (SC, c 2, 2004).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Reference re *Assisted Human Reproduction Act*, 2010 SCC 61 457.

<sup>55</sup> Harvison Young and Wasunna, “Wrestling with the Limits of the Law: Regulating Reproductive Technologies,” 269.

## Assumption: Women Are Being Exploited or Are Likely To Be Exploited

The AHRA's prohibition on payment for surrogates and egg donors was part of every incarnation of public policy on assisted reproduction from the Royal Commission forward.<sup>56</sup> The prohibition was made partly on the grounds that the commercialization of human life and of women's reproductive capacity is inherently unethical.<sup>57</sup> However, it was also made on the grounds that both practices—surrogacy and egg donation—when commercialized, make women vulnerable to unfair exploitation through the exchange of money for their reproductive labour.<sup>58</sup>

When these concerns were expressed at the time of the Royal Commission and in relation to surrogacy, they were validated in reference to, as mentioned above, Eichler and Poole's 1988 study for the Law Reform Commission of Canada.<sup>59</sup> This landmark study involved identifying cases of surrogacy through information derived from a wide variety of sources (e.g., journalists, lawyers, social workers, judges) external to the arrangements and did not involve discussions with surrogates themselves. Drawing from approximately 118 identified cases of surrogacy involving Canadians, Eichler and Poole were able to perform an analysis of thirty-two cases from the files of a well-known American surrogacy lawyer, Noel Keane. The authors assessed the marital status, education levels, occupations, age, and religious affiliations of Keane's clients in cases involving Canadians. They found, for the most part, that intended parents were older, more educated, and more affluent than the surrogate mothers they commissioned.<sup>60</sup> For the Royal Commission, the disparities in socioeconomic location were reason enough to assume that exploitation was occurring.<sup>61</sup> The inequalities between intended parents and surrogates identified in Eichler and Poole's report, in conjunction with the testimony of some feminist organizations concerned about the potential exploitation of women, and particularly about already-marginalized women,<sup>62</sup> was sufficient for the Commission to assert that surrogates were, as a group, too vulnerable to participate in surrogacy arrangements, "no matter how willing they might be to participate, because they can never negotiate on equal footing with the other parties."<sup>63</sup>

However, despite the exploitation (or, at least, the potential exploitation) of donors and surrogates articulated again and again in the policy debates, Eichler and Poole's 1988 study is the only instance cited of Canadian-based research on potential exploitation of surrogates, not to mention of egg donors. Most often,

<sup>56</sup> Alana Cattapan, "Rhetoric and Reality: 'Protecting' Women in Canadian Public Policy on Assisted Human Reproduction," *Canadian Journal of Women and the Law* 25, no. 2 (2013): 210.

<sup>57</sup> Anne McLellan [Assisted Human Reproduction Act], in Canada, Parliament, House of Commons, *Debates*, 37th Parl, 1st Sess, Vol 137, No 188 (21 May 2002) at 11523. See also Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science," 45.

<sup>58</sup> *Ibid.*

<sup>59</sup> Eichler and Poole, *The Incidence of Preconception Contracts for the Production of Children Among Canadians: A Report Prepared for the Law Reform Commission of Canada*.

<sup>60</sup> *Ibid.*

<sup>61</sup> Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, 664–65.

<sup>62</sup> *Ibid.*, 673–74.

<sup>63</sup> *Ibid.*, 670.

Parliamentarians simply use the Royal Commission's citation of Eichler and Poole's work to declare that exploitation is occurring. For example, when Bill C-47 was tabled in 1996, the Liberal member of Parliament Andy Scott and then-secretary of state for the status of women Hedy Fry repeated the language of the Royal Commission regarding surrogates, stating that the socioeconomic disparities between surrogates and intended parents and the risks of egg donation were too great to allow women to participate "on equal footing" if pay were involved.<sup>64</sup> Five years later, in committee testimony on draft legislation (of the *AHRA*) considered by the Standing Committee on Health, the committee chair, Bonnie Brown, noted that the Standing Committee's report "leaned fairly heavily" on the Royal Commission's surrogacy work, which, again, was based largely on Eichler and Poole's early study.<sup>65</sup>

What is important here is that the early research on exploitation cited by the Royal Commission and repeated in the debates over Bill C-47 and the proposed *AHRA* is the only evidence of exploitation ever cited in the policy debates on AHR in Canada. No other statistics, anecdotes, or arguments beyond the hypothetical were offered, and though experts acknowledged this lack of evidence and suggested that the onus was on Parliament to demonstrate the imminence of harms, no evidence was provided. Other than Eichler and Poole's work on surrogacy, no empirical support was presented about claims of exploitation in egg donation, no egg donors ever testified before a parliamentary committee, and the one surrogate who did so stated that her experiences and those of the women she has worked with have not been exploitative.<sup>66</sup> Compensation was made criminal, largely, again, according to the unsubstantiated claim that exploitation was, if not rife, then imminent.

The landscape of research on exploitation in assisted human reproduction has changed, if only slightly, since the passage of the *AHRA*. There remains limited empirical research that addresses the Canadian context or, especially, commercial surrogacy. What research does exist suggests a discord between the legal approach to governing surrogacy in Canada and the real-life experiences of surrogates.<sup>67</sup> At the time of this writing, two relevant studies are available in Canada; both were conducted as master's theses, and each drew on the experiences of a sample of eight or fewer surrogates.<sup>68</sup> Also available is an important meta-analysis of empirical research on surrogacy, which includes one of the two Canadian studies; the

<sup>64</sup> Hedy Fry, [*Human Reproductive and Genetic Technologies Act*], in Canada, Parliament, House of Commons, *Debates*, 35th Parl, 2nd Sess, Vol 134, No 94 (31 October 1996) at 5946; Andy Scott, [*Human Reproductive and Genetic Technologies Act*], in Canada, Parliament, House of Commons, *Debates*, 35th Parl, 2nd Sess, Vol 134, No 94 (31 October 1996) at 5969.

<sup>65</sup> Canada, Parliament, Standing Committee on Health, *Evidence*, 1st Sess, 37th Parl, Meeting No 41 (2001), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041184&Language=E&Mode=2&Parl=37&Ses=1>.

<sup>66</sup> Canada, Parliament, House of Commons, Standing Committee on Health, *Assisted Human Reproduction: Building Families*.

<sup>67</sup> Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science."

<sup>68</sup> Ann Muriel Fisher, "A Narrative Inquiry: How Surrogate Mothers Make Meaning of the Gestational Surrogacy Experience" (master's thesis, University of Victoria, 2012); Shireen Kashmeri, "Unraveling Surrogacy in Ontario, Canada. An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004), Surrogacy Contracts, Parentage Laws, and Gay Fatherhood" (master's thesis, Concordia University, 2008).

analysis concludes that, based on empirical research studies in the United States and the United Kingdom, there are limited grounds for assuming that exploitation of Canadian surrogates is a cause for concern necessitating the prohibition of commercial surrogacy. Authors Karen Busby and Delaney Vun write that existing research “does not support concerns that they [surrogate mothers] are being exploited by these arrangements, that they cannot give meaningful consent to participating, or that the arrangements commodify women or children.”<sup>69</sup>

More scholarship exists on egg donation, especially regarding the circumstances of altruistic donors. Canadian studies have shown that in altruistic situations where donors and recipients are family members or close friends, donors and recipients are more likely to have a similar socioeconomic status, marital or familial situation, and level of education.<sup>70</sup> In their study of fifteen such altruistic donor-recipient relationships, Samantha Yee, Jason Hitkari, and Ellen Greenblatt reported that though these sorts of arrangements risk “manipulating family members to participate because of a differentiated power structure and undue family pressures,” none of the donors in the study reported feeling “pressured or obligated” to donate.<sup>71</sup> A smaller-scale narrative study of women donating eggs to their sisters at a Vancouver clinic reported similar results.<sup>72</sup>

Studies on commercial egg donation are harder to come by, at least in the Canadian context. No academic studies exist on the subject, though freelance journalist Alison Motluk has been engaged in multiyear research examining the experiences of eighteen altruistic and paid egg donors. In pursuing this work, Motluk has carefully identified among her research participants the presentation of what has been described as a rare side effect, ovarian hyperstimulation, and her research suggests that egg donors are not fully informed about the risks of donation and are not getting the kind of follow-up care that they need.<sup>73</sup> Her research further suggests that, paid or otherwise, egg donation is a riskier procedure than egg donors are led to believe, and that, as it is currently practiced in Canada, egg donation may be exploiting women’s healthy bodies.

Thus there remains, even after the passage of the *AHRA*, limited research on the exploitation of egg donors and surrogates in Canada. The existing scholarship suggests that while commercial surrogacy does not appear to be causing harm to individual women—though there is really too little research for this claim to bear scrutiny, and though there may in fact be cumulative social harms—egg donation, whether for pay or otherwise, poses health risks that need to be considered

<sup>69</sup> Karen Busby and Delaney Vun, “Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers,” *Canadian Journal of Family Law* 26 (2010): 80.

<sup>70</sup> Samantha Yee, Jason A. Hitkari, and Ellen M. Greenblatt, “A Follow-up Study of Women Who Donated Oocytes to Known Recipient Couples for Altruistic Reasons,” *Human Reproduction* 22, no. 7 (2007): 2040–50.

<sup>71</sup> *Ibid.*, 2047.

<sup>72</sup> Alanna Winter and Judith C. Daniluk, “A Gift From the Heart: The Experiences of Women Whose Egg Donations Helped Their Sisters Become Mothers,” *Journal of Counseling and Development* 82, no. 4 (Fall 2004): 483–95.

<sup>73</sup> Motluk, “The Human Egg Trade”; Alison Motluk, “Wanted: Egg Donor in Good Health,” *Sunday Edition*, CBC, February 19, 2012; Alison Motluk, “Is Egg Donation Dangerous?,” *Maisonneuve*, 2012; Alison Motluk, “Egg Donor Sues Doctor after Suffering Stroke; Could Not Walk; Accuses Clinic and Doctor of Negligence,” *National Post*, March 28, 2013, A5.

vis-à-vis claims of exploitation. The problem of basing legislation on the protection of vulnerable Canadians from the harms of exploitation is that, if the harms are unknown, they are not clearly harms at all.<sup>74</sup> Substantive empirical research that engages directly with donors and surrogates is needed in order to identify if and how exploitation is occurring.

### **Assumption: Exploitation is Contingent on Payment**

The second assumption on which the prohibition of compensation for surrogacy and egg donation is based is that exploitation is more likely to occur if payment is involved. This is best demonstrated in the example of egg donation, as arguments used to advocate for the prohibition of egg donation in Parliament relied on a discussion of commercialization.<sup>75</sup> Whereas the Royal Commission sought to prohibit egg donation (and especially paid egg donation) as a means both to protect women's health and prevent commercialization, Bill C-47 sought to protect women's health *through* the prevention of commercialization. The logic was that banning payment would mean that women would not undertake significant physiological risks under duress. When C-47 was tabled in the House of Commons, the parliamentary secretary to the minister of health, Joe Volpe, stated that an egg donor "will undergo invasive and painful medical interventions . . . [and] in exchange for the risk and burdens she will bear, she will go home probably about \$2,000 richer but she will have taken unknown risks with her own health and her own future fertility."<sup>76</sup>

The underlying assumption expressed by Volpe, and found in Bill C-47 and later, in the *AHRA*, is that the donor's exposure to the health risks associated with donation are troubling because money is involved. In short, the procedure is exploitative because, in exchange for financial compensation, she exposes herself to significant physiological risks. It is noteworthy, though, that the same donor could face those same physiological risks by legally, "altruistically" donating, though she would, in that case, receive no material benefits. This marked a departure from the arguments of the Royal Commission, which asserted that egg donation was inherently harmful but especially so when pay was involved. Bill C-47 thus involved a shift in the discussions bearing on AHR, from a broad assumption of the exploitative potential of reproductive technologies, to an understanding that exploitation occurs largely in commercial endeavours.

Prohibiting commercial egg donation and surrogacy while the same practices are legal when altruistic fails to address the possibility of coercion that exists in non-commercial arrangements. This possibility was articulated in the policy debates on Bill C-47 and, later, in the discussions of the *AHRA*. Indeed, though the

<sup>74</sup> Canada, Parliament, House of Commons, Standing Committee on Health, Sub-Committee on Bill C-47, *Human Reproductive and Genetic Technologies Act, Evidence*, 2nd Sess, 35th Parl, Meeting No 5 (1997), [http://www.parl.gc.ca/content/hoc/archives/committee/352/srta/evidence/05\\_97-03-20/srta-05-cover-e.html](http://www.parl.gc.ca/content/hoc/archives/committee/352/srta/evidence/05_97-03-20/srta-05-cover-e.html).

<sup>75</sup> For further discussion of how the surrogacy debate related to the *AHRA* addressed payment and exploitation together, see Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science," 46–48.

<sup>76</sup> Joe Volpe, [*Human Reproductive and Genetic Technologies Act*], in Canada, Parliament, House of Commons, *Debates*, 35th Parl, 2nd Sess, Vol 134, No 89 (23 October 1996) at 5614–15.

existing studies of intra-familial egg donation have indicated that these arrangements are often positive, egg donation and surrogacy arrangements involving family and friends have the potential to be particularly coercive or exploitative due to the heightened interpersonal stakes often involved.<sup>77</sup>

Whereas parliamentary debates on commercialization focused on egg donation, assessments of the coercive potential of intra-familial third-party reproduction have focused on surrogacy. In her research on the legality of “gift surrogacy” in the Canadian context, Rakhi Ruparelia has argued that the acceptance of altruistic surrogacy in Canadian law and society depends on a Western understanding of women’s agency that does not consider the constraints on women’s capacity to make choices about reproduction in an inherently patriarchal society.<sup>78</sup> She argues that the social expectation that women will serve as mothers and reproduce for their families, nations, and society, is based on an understanding that women are inherently altruistic, that a woman’s role is to become a mother, and that reproduction is so much a part of being a woman that women should expect no recompense.<sup>79</sup> Furthermore, Ruparelia notes that the possibility of coercion in intra-familial surrogacy may increase in cultural contexts characterized by strong patriarchal norms, and where women may be relegated to “vulnerable and relatively powerless positions within the family and society as a whole.”<sup>80</sup> Ruparelia suggests that a combination of gendered expectations and culturally imposed patriarchal norms may result in situations in which women are coerced into participating in surrogacy arrangements out of a sense of guilt and duty. She argues that the kinds of surrogacy arrangements most likely to be exploitative are those based on gendered and sociocultural vulnerabilities in which payment plays no part.

The assumption that payment must be present for exploitation to occur also fails to acknowledge the possibility that commercial arrangements may be consensual and non-exploitative. Prohibiting paid surrogacy and egg donation while allowing altruistic arrangements implies that women can consent to participate only when economic considerations are not in play. According to this model, women are ostensibly unable to make autonomous, well-informed choices about donating their eggs or being surrogates when financial compensation is involved, though they may consent when economic incentives are removed. Concerns about consent were articulated when the Standing Committee on Health debated Bill C-47, and again when draft legislation was discussed in 2001. Perhaps the strongest

<sup>77</sup> Alison Harvison Young, “New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses,” *Temple International and Comparative Law Journal* 12 (1998): 80; Roberta Lessor, “All in the Family: Social Processes in Ovarian Egg Donation Between Sisters,” *Sociology of Health & Illness* 15, no. 3 (1993): 393–413; Yee, Hitkari, and Greenblatt, “A Follow-up Study of Women Who Donated Oocytes to Known Recipient Couples for Altruistic Reasons.”

<sup>78</sup> Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act,” *Canadian Journal of Family Law* 23 (2007): 11–54.

<sup>79</sup> Harvison Young and Wasunna, “Wrestling with the Limits of the Law: Regulating Reproductive Technologies,” 269; Harvison Young, “New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses,” 80; Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act,” 30.

<sup>80</sup> Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act,” 14.

instance of the argument emerged in the testimony of Michael Vonn of the British Columbia Civil Liberties Association. Appearing before the Standing Committee in November 2001, Vonn asserted that

it is not appropriate for the state to constrain women's choices as to whether to enter into such agreements on the basis of whether we think the rationales for their choices are good or bad. In few other areas would we consider the inclusion of an economic rationale, as part of a decision-making process, so inappropriate that it ought to be subject to criminal sanctions . . .<sup>81</sup>

If commercial egg donation and surrogacy are seen as unethical because they put women in potentially exploitative relationships, commercialize their reproductive capacities, and (at least in the case of egg donation) expose them to undue physiological risk,<sup>82</sup> prohibiting payment is an insufficient and ineffective means of addressing these challenges. This is not to say that altruistic arrangements should be banned, but rather, that the logic of banning only commercial egg donation and surrogacy is based on a flawed understanding of payment and exploitation as intrinsically linked.

While claims of exploitation in commercial arrangements may be valid (though again, little research to this effect has been done), the desire to protect women from such exploitation is inconsistent with a society where ongoing and pervasive exploitation for economic gain widely occurs. This is particularly true for women, and especially for racialized women, whose well-documented marginalization and ghettoization in the paid labour force often results in exploitative arrangements. Non-standard and temporary labour arrangements, in which women are more likely than men to engage, are likely to have fewer minimum employment standards, lower pay, and less job security, factors associated with exploitative work environments.<sup>83</sup> The concern about exploitation in surrogacy and egg donation seems “hypocritical in a society that turns a blind eye to wholesale exploitation in other ways”<sup>84</sup> and particularly given the ongoing exploitation of women in the market economy.

Often, then, concerns about exploitation regarding commercial surrogacy and egg donation are concerns not about vulnerable woman, but rather about the commercialization of the maternal reproductive body. John Lawrence Hill, for instance, compares “a woman of limited prospects who enters into a surrogacy contract for ten thousand dollars” with the same woman “taking a job washing bathroom floors for the same effort at a similar wage”; in so doing, he draws attention to the broad social acceptability of economic exploitation in certain cases and particularly when reproductive capacity is involved.<sup>85</sup> The problem in the case of commercial

<sup>81</sup> Canada, Parliament, House of Commons, Standing Committee on Health, *Evidence*, 1st Sess, 37th Parl, Meeting No 44 (2001), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041199&Language=E&Mode=1&Parl=37&Ses=1>.

<sup>82</sup> Gruben, “Women as Patients, Not Spare Parts: Examining the Relationship Between the Physician and Women Egg Providers,” 256–62.

<sup>83</sup> Leah F. Vosko, “Rethinking Feminization: Gendered Precariousness in the Labour Market and the Crisis in Social Reproduction” (lecture presented at the Distinguished Robarts Lecture Series, Toronto, April 11, 2002), 46, [http://robarts.info.yorku.ca/files/lectures-pdf/rl\\_vosko.pdf](http://robarts.info.yorku.ca/files/lectures-pdf/rl_vosko.pdf).

<sup>84</sup> Allan C. Hutchinson, “Surrogate Motherhood: Why It Should Be Permitted,” *Globe and Mail*, July 12, 1985.

<sup>85</sup> Hill, “Exploitation,” 680.



surrogacy and egg donation is not economic disparity, or even economic exploitation. It is, rather, the perceived immorality of selling one's body, and especially one's reproductive capacity, for profit. Though banning paid surrogacy and egg donation may lead some women to other sites of economic exploitation—domestic work, for example—such exploitation is considered socially acceptable, because though the labour may be gendered, underpaid, and exploitative, women's sexual and reproductive capacity is not seen to be at issue.

Whether the link between payment and exploitation is seen in terms of women's inability to consent in already-coercive situations or situations where there may be a risk of exploitation, there is a conceptual inconsistency in prohibiting surrogacy and egg donation in commercial circumstances while allowing the same practices when they are done altruistically. Furthermore, even if women are being exploited, economic exploitation is a reality of contemporary society. Why are women seemingly unable to consent to the use of their bodies for their own economic benefit, particularly when, in many forms of labour, others are able to profit from the results of women's physical and reproductive work? If the goal of the prohibitions on payment is to protect the vulnerable from exploitation, AHR needs to be reimagined within a broader framework that considers the exploitative potential of intra-familial exploitation, the relationship between AHR and other forms of gendered labour, and a more expansive definition of consent.

### **Assumption: Exploitation Can Be Effectively Addressed through Prohibition**

The final assumption that underlies the ban on commercial surrogacy and egg donation is that in order to prevent exploitation, criminal sanctions are necessary. This assumption relies on the premise that commercial egg donation and surrogacy are either so offensive that they require control through criminal law or, relatedly, that penalties for contravening the law would deter forms of exploitation that a regulatory regime would not.

The decision to criminalize commercial surrogacy and egg donation was highly contentious in debates of Bill C-47 and consideration of the *AHRA*. The issue was addressed in testimony before the Standing Committee on Health in 1997, when C-47 was considered; critics of criminalization asserted that a legislative scheme so concerned with non-commercialization and non-exploitation that donors and surrogates could not be reimbursed would effectively push them abroad or into underground arrangements, where exploitation would be even more likely to occur.<sup>86</sup> When the draft version of the *AHRA* was debated in 2001, and later, when it was considered by the Senate Standing Committee on Social Affairs, Science and Technology, Parliamentarians and witnesses stated that the prohibitions were “excessive” and that Canadians would be better served by regulation of compensation rather than outright prohibition.<sup>87</sup>

<sup>86</sup> Canada, Parliament, House of Commons, Standing Committee on Health, *Evidence*, 1st Sess, 37th Parl, Meeting No 44 (2001), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041199&Language=E&Mode=1&Parl=37&Ses=1>.

<sup>87</sup> Health Canada, *Workshop on the Reimbursement of Expenditures for Egg and Sperm Donors* (Ottawa, 2004), <http://www.hc-sc.gc.ca/hl-vs/pubs/reprod/2005-donors-donneurs/index-eng.php>.

The issue of banning payment through criminal law has also been the subject of many scholarly interventions. Advocates of the use of criminal law have pointed to its importance as a means of establishing a uniform legislative scheme within a federal framework,<sup>88</sup> and to the relative flexibility of law in responding to changing sociopolitical realities.<sup>89</sup> Conversely, other legal scholars have argued that criminal law is “too blunt”<sup>90</sup> an instrument to regulate a field that so rapidly evolves, and that legal prohibitions would result either in donors and surrogates being forced into problematic underground arrangements or, alternatively, in intended parents seeking out commercial arrangements abroad.<sup>91</sup> These scholars, including Ruparelia, have contested the too-fine line being drawn between altruistic and commercial surrogacy and sought, instead, to establish regulations governing both.

Scholars opposed to criminal prohibition have also argued that, in controversial matters such as AHR, prohibition is largely ineffective. Citing prohibitions on abortion and alcohol use as examples, Alison Harvison Young and Angela Wasunna have suggested that in the context of morality policy,<sup>92</sup> prohibition may do more harm than good. Prohibition, from this view, pushes those engaged in ethically charged activities to pursue those activities outside legal frameworks, where they are likely to put themselves at greater risk of harm. It follows that, due to the risks of undergoing egg donation and the significant investment of time and effort that goes into surrogacy, many women will not participate if they are not paid and will, instead, engage in illegal commercial arrangements that provide compensation. In Canada, where enforcement of the *AHRA* has been sporadic at best,<sup>93</sup> there may be an expectation among surrogates, donors, clinics, and intended parents that even though the law criminalizes payment, payment can still occur with impunity.

<sup>88</sup> Sanjeev Anand, “Clones, Controversy, Confusion, and Criminal Law: A Reply to Professor Caulfield,” *Alberta Law Review* 40 (2002–2003): 493.

<sup>89</sup> Campbell, “A Place for Criminal Law in the Regulation of Reproductive Technologies.”

<sup>90</sup> Timothy Caulfield, “Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction,” *Alberta Law Review* 39 (2001–2002): 331.

<sup>91</sup> Timothy Caulfield, “Bill C-13 The Assisted Human Reproduction Act: Examining the Arguments Against a Regulatory Approach,” *Health Law Review* 11, no. 1 (2002): 20–25; Bernard Dickens, “Do Not Criminalize New Reproductive Technologies,” *Policy Options* 17 (1996): 11; Harvison Young and Wasunna, “Wrestling with the Limits of the Law: Regulating Reproductive Technologies”; Harvison Young, “New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses”; Alison Harvison Young, “Let’s Try Again...This Time with Feeling: Bill C-6 and New Reproductive Technologies,” *UBC Law Review* 38 (2005): 123–45.

<sup>92</sup> For more about the evolution of morality policy and AHR, especially concerning the effects and outcomes of judicial intervention, see Christine Rothmayr Allison and Audrey L’Espérance, “Morality Policies, Legal Mobilisation, and the Canadian Charter of Rights and Freedoms: Does Policy Determine Politics and Patterns of Judicialization?” (paper presented at the Annual Meeting of the American Political Science Association, Washington, DC, 2010); Dave Snow, “The Judicialization of Assisted Reproductive Technology Policy in Canada: Decentralization, Medicalization, and Mandatory Regulation,” *Canadian Journal of Law and Society* 27, no. 2 (2012): 169–88.

<sup>93</sup> Since its passage in 2004, the *Assisted Human Reproduction Act* has been implemented on one occasion. Leia Picard, the owner of Canadian Fertility Consultants, was charged in relation to brokering surrogacy and egg donation and was fined (in conjunction with her company) a total of \$60,000. Alison Motluk, “First Prosecution under Assisted Human Reproduction Act Ends in Conviction,” *CMAJ: Canadian Medical Association Journal* 186, no. 2 (February 4, 2014): E75–76, doi:10.1503/cmaj.109–4687.

## Conclusion

The assumptions that underlie exploitation as a rationale for the prohibition of payment for egg donation and surrogacy, then, are tenuous at best. There is only limited evidence to suggest that marginalized women are exploited in commercial AHR arrangements, and particularly in the Canadian context, or that they are more likely to be exploited when financial incentives are involved. Further, when payment is a factor, arrangements may be no more exploitative than other instances in which women exchange their labour for money. Finally, the assumption that prohibitions on payment will work to prevent exploitation fails to acknowledge that intended parents will still need donors and surrogates, and will still likely pay them for the services that they provide. If it is illegal to do so openly, payments and other arrangements may simply occur covertly and in risky, unregulated circumstances. Alternative strategies, such as improvements to and implementation of clinical guidelines, and legal frameworks that address the reality of surrogacy and gamete donation arrangements, may better serve the goals of preventing future exploitation and protecting women's health and well-being.<sup>94</sup>

The intersecting claims of exploitation, commercialization, and reproduction in relation to commercial egg donation and surrogacy in Canada serve to demonstrate how under-theorized and unsubstantiated assumptions of exploitation shape the governance of women's bodies and lives. Exploitation as a rationale for prohibitions on payment lacks teeth, as it cannot withstand empirical, theoretical, or practical challenges. Like other areas of public policy that impose restrictions on women's bodies and behaviours as a means of protecting women from harm—with or without evidence that harm is occurring—surrogacy and egg donation arrangements demand a more substantive consideration of exploitation than has yet been undertaken.

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<sup>94</sup> Gruben, "Women as Patients, Not Spare Parts: Examining the Relationship Between the Physician and Women Egg Providers," 279; Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere," *Canadian Journal of Women and the Law* 25, no. 2 (2013): 213–14.