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From Commission to Conception:

Commercial Surrogacy and Morality Policy in Canada

by

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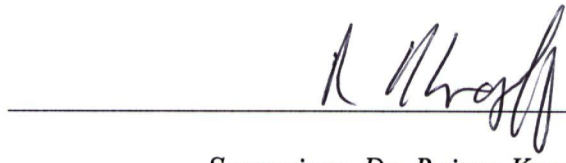
The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "From Commission to Conception: Commercial Surrogacy and Morality Policy in Canada" submitted by Dave Snow in partial fulfillment of the requirements of the degree of Master of Arts.



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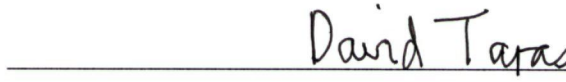

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ABSTRACT

This thesis examines the commercial surrogacy prohibition contained in the 2004 *Assisted Human Reproduction Act*, arguing that the prohibition represents the kind of "morality policy" that has become increasingly prominent in postmaterialist times. Like other morality policies such as abortion and same-sex marriage, commercial surrogacy involves conflicts of first principle between "liberals" and "collectivists." As the politics of morality often moves from the legislature to the courtroom, this thesis explores whether commercial surrogacy may lead to an institutional clash between the legislatures and the courts. While the federal government's prohibition falls clearly to the "collectivist" side of the debate, the Supreme Court of Canada's jurisprudence on cognate moral issues – reproductive autonomy and the recognition of non-traditional families – has slowly embraced the "liberal" perspective and rejected collectivist arguments. A clash could be on its way.

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I could not agree more. Thank you all so much.

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CHAPTER ONE: INTRODUCTION

In recent generations, much of the western world has undergone a revolution in reproductive technology. Reproductive procedures such as *in vitro* fertilization, embryonic cloning, and surrogate motherhood – previously the stuff of science fiction – have become commonplace (Fukuyama 2002, 5). While these technologies provide scientific development and reproductive opportunities for the infertile, they also have the potential to exploit women, commodify children, and devalue human life (Anderson 2000; Shanley 2007). Because new reproductive technologies (NRTs) challenge the understanding of humanity underpinning western conceptions of rights, scholars have stressed the importance of effective public policy in this area (Fukuyama 2002; Habermas 2003). Yet there is little agreement concerning which technologies and procedures should be permitted, regulated, and prohibited.

Canada's chief policy in this area, the *Assisted Human Reproduction Act* (AHRA), received royal assent in 2004. Although some describe the legislation as a delicate political compromise (Downie, Llewellyn and Baylis 2005; Jones and Salter 2007), judicial challenges to the constitutionality of the AHRA have been threatened on the basis that the Act violates both the federal division of powers and the *Canadian Charter of Rights and Freedoms*. On the federalism front, the Quebec government has challenged many of the regulations on the grounds that they are related to health, a provincial jurisdiction. The challenge was successful at the Quebec Court of Appeal, and is on appeal to the Supreme Court of Canada (*Reference re Constitutional Validity of Sections 8 to 19, 40 to 43, 60, 61 and 68 of the Assisted Human Reproduction Act* 2008).

With respect to the *Charter*, scholars and interest groups have suggested the criminal prohibitions in the AHRA may violate Canadians' rights, characterizing the Act as overly punitive and unenforceable (Rasmussen 2004; Harvison-Young 2005; Caulfield and Bubela 2007; Hnatiuk 2007). This is especially true of perhaps the most controversial element in the legislation, the criminal prohibition on commercial surrogacy – payment to a surrogate mother for carrying a child. In other words, a novel policy conflict about NRTs may involve the still relatively novel institutional interaction between Canadian legislatures and courts, and a clash between these two institutions concerning the constitutionality of the commercial surrogacy prohibition could be on its way. How likely is such a clash? That is the question addressed by this thesis.

In addressing this question, it is useful to situate Canada's debates about commercial surrogacy in some wider currents of modern politics. The policy conflict concerning commercial surrogacy is representative of two interrelated developments in contemporary politics: the increasing prominence in the postmaterialist age of an intensely polarized "morality politics," and the increasing engagement of courts as major players in these moral controversies. Appreciating these twin developments sheds considerable light on the inter-institutional dimensions of Canada's politics of commercial surrogacy.

Morality Politics & Judicial Power

Why such intense controversy about the payment of surrogate mothers? What is it about the commercial surrogacy prohibition that leads certain groups to argue so vehemently that the law is illegitimate? The answer, at least in part, is that the

commercial surrogacy prohibition represents a morality policy – a legal sanction of right and wrong that validates a particular set of fundamental values (Mooney 2001b, 3). Unlike economic policy, morality policy attempts to regulate social conduct. Like other morality policies such as abortion and same-sex marriage, commercial surrogacy evokes considerable dispute between divergent groups as to whether the conduct ought to be regulated. On one hand, liberal individualists – stressing freedom of contract, the equalization of status differences, and the expansion of reproductive autonomy – believe that commercial surrogacy should be permitted. On the other hand, collectivists – viewing moral conduct and traditional social institutions as fundamental to social order – believe payment for surrogacy should be prohibited. These contrary perspectives are derived from incompatible first principles concerning the proper structure of social life, the family, and human reproduction (Smith and Tatalovich 2003, 52-58). Western democracies have experienced a growth in the salience of morality policy, not just because of the moral implications of new technologies affecting such sensitive realms as reproduction, but more generally because of postmaterialist value change (Mooney 2001a; Smith and Tatalovich 2003; Tatalovich and Daynes 2005).

Accompanying this postmaterialist growth of morality politics has been a change in the institutional policymaking framework, brought about by the global expansion of judicial power that comes in the wake of new bills of rights (Tate and Vallinder 1995; Shapiro and Sweet 2002; Ginsburg 2003; Sweet 2004). Such rights documents have particular relevance for morality politics, and interest groups focused on morality policy often use judicial power through rights-based litigation strategies (Brodie 2002; Smith and Tatalovich 2003; Manfredi 2004). The postmaterialist age is thus characterized not

just by the growth of morality politics, but by the potential that such politics will involve the inter-institutional interaction between legislatures and courts. Such interaction between legislatures and courts on morally contentious legislation has been particularly prominent in Canada since the introduction of the *Charter* in 1982. The Supreme Court of Canada has ruled on many of Canada's most contentious morality policies, including abortion, same-sex marriage, and pornography. It would not be an exaggeration to say that most of Canada's morality policies have received some input from the Supreme Court, and that the most prominent Supreme Court decisions involve morality policy. Commercial surrogacy could soon be added to the list.

For many observers, the different characteristics of legislatures and courts mean that the two institutions will often find themselves at odds on morality policy issues. Some argue that legislatures are institutionally more inclined toward compromises on such issues than are courts (Glendon 1991; Knopff 1999; Morton 1999). Moreover, comparative evidence suggests that courts tend to promote legal change by "asserting individual rights and liberties against traditional social values" in two-sided moral conflicts (Tatalovich and Daynes 2005, xxvii). Applied to commercial surrogacy, these perspectives predict an inter-institutional clash, as hoped for by opponents of Canada's commercial surrogacy policy. This thesis concerns the likelihood of this outcome.

Inter-Institutional Conflict: Parliament vs. the Supreme Court of Canada

There are, in fact, strong reasons for thinking that such a clash is on its way. On the one hand, although the overall legislation on new reproductive technologies does represent the classic legislative "compromise," its component on commercial surrogacy

leans strongly toward the "collectivist" pole of the debate. The principles underpinning the commercial surrogacy prohibition – as articulated in the *Royal Commission on New Reproductive Technologies*, parliamentary committees, and the legislation itself – stress the importance of avoiding commodification of human life, preventing exploitation of women, and avoiding "social harms" based on changing conceptions of parenthood. Reproductive autonomy and acceptance of "non-traditional" family arrangements – staples of the liberal individualist approach – are given less weight. As a morality policy, Canada's ban on commercial surrogacy has a strong collectivist orientation.

In taking its commercial surrogacy stance, Parliament finds itself in potential opposition not just to various interest groups and affected individuals, but also to the evolving position of the Supreme Court of Canada, the other major player in the realm of morality policy. In cases concerning moral issues similar to commercial surrogacy – reproductive autonomy and the recognition of non-traditional families – the Supreme Court has gradually embraced the liberal perspective while dismissing collectivist considerations. By rejecting "natural" procreation and arguments made on behalf of the unborn, the Court's stance on morality policy is squarely at odds with the collectivist reasons underpinning the commercial surrogacy ban in the *Assisted Human Reproduction Act*. While the ban on commercial surrogacy falls at one side of the moral continuum, the Supreme Court of Canada's jurisprudence on cognate moral issues falls at the other. Given the propensity for contentious morality policies to make their way to the Supreme Court, a clash could be on its way.

Method and Structure of Thesis

This research project traces the development of commercial surrogacy as a morality policy, using institutional theories to understand and anticipate its past and future development in Canada. While there is some literature concerning the constitutionality of Canada's commercial surrogacy prohibition (Harvison-Young 2005; Hnatiuk 2007), it fails to consider the legislation in the context of the Supreme Court's jurisprudence on cognate moral issues. This project contributes to this literature by situating the prohibition's constitutionality within the secondary literature on morality policy in western democracies (Mooney 2001a; Smith and Tatalovich 2003; Tatalovich and Daynes 2005). It examines the development of Canada's *Assisted Human Reproduction Act* by looking at primary government documents, including the Royal Commission on New Reproductive Technologies, various legislative drafts, and the final version of the bill itself. After considering the institutional factors that lead morality policy to play out in the Canadian courts, this project canvasses existing Supreme Court jurisprudence dealing with similarly contentious morality policies. The central argument is that the commercial surrogacy prohibition in the *Assisted Human Reproduction Act* stands in direct contrast to the Supreme Court's jurisprudence on similar morality policies.

Some may dispute the importance of such an inference, arguing that existing judicial doctrine has a minimal effect on subsequent Supreme Court decisions. "Attitudinal" theorists suggest that high court justices make judgments based on their policy preferences, and that institutional constraints such as judicial doctrine are of minimal importance (Segal and Spaeth 1993; Ostberg and Wetstein 2007). Drawing on

other neoinstitutional scholars (Cushman 1998; Richards and Kritzer 2002; Baier 2006), this project goes beyond attitudinal studies of Supreme Court jurisprudence, arguing that judicial doctrine is an important constraining factor in judicial decision-making, and that existing doctrine is broadly suggestive of how the court may rule in the future. While many factors constrain judicial decision-making, including attitudinal preferences, the Court's doctrine on similar moral issues suggests a strong divergence from the principles underpinning the surrogacy prohibition.

The thesis unfolds in five stages. Chapter 2 looks at the historical evolution of NRT policy in Canada, from the *Royal Commission on New Reproductive Technologies* to the *Assisted Human Reproduction Act*, focusing especially on the commercial surrogacy prohibition. Chapter 3 reviews the literature on morality policy in western democracies, looking at the role of the judiciary in adjudicating moral conflict in Canada. Chapter 4 examines the moral, ethical and legal arguments concerning the prohibition of commercial surrogacy, arguing that Canada's commercial surrogacy prohibition stems from collectivist considerations. After discussing the theoretical importance of judicial doctrine, Chapter 5 looks at Supreme Court jurisprudence on two issues – reproductive autonomy and the recognition of non-traditional families – that are closely related to the surrogacy controversy, and in which the Supreme Court has gradually adopted a liberal approach to morality policy concerning reproduction and the "traditional" family. Chapter 6 offers a conclusion, discussing the implications of these developments for further study.

CHAPTER TWO: HISTORY OF NEW REPRODUCTIVE TECHNOLOGY POLICY IN CANADA

Following the 1978 birth of Louise Brown, the world's first "test tube" baby conceived using *in vitro* fertilization, there was widespread concern about the implications of new reproductive technologies. In Canada, a collection of feminist academics and women's health organizations began lobbying the federal government to initiate a large-scale policy discussion on these technologies (Montpetit 2004; Jones and Salter 2007). As a response, in 1989 Prime Minister Brian Mulroney announced the creation of the Royal Commission on New Reproductive Technologies, which was given a mandate to "inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest" (Canada 1993, 2). With women's groups, religious groups, legal organizations, medical organizations, and disability organizations either concerned or excited about the prospect of these new technologies, procedures, and practices, Mulroney sidestepped the issue. By referring the subject to a panel of nonpartisan experts, he was able to temporarily depoliticize new reproductive technologies. Moreover, by giving the Commission a sweeping mandate, he was able to postpone creating public policy on such a divisive issue. In fact, it would be four years before the Royal Commission would report.

The Royal Commission

After consultation with over 15,000 Canadians, the Commission published its final report, *Proceed with Care*, in 1993. The report comprised 1,275 pages, two volumes, and contained 293 recommendations. Using a framework that stressed an "ethic of care," the Commission identified eight principles to determine whether new reproductive technologies should be allowed: individual autonomy, equality, respect for human life and dignity, protection of the vulnerable, non-commercialization of reproduction, appropriate use of resources, accountability, and achieving balance between individual and collective interests (Canada 1993, 53). The report began by making three general, overarching recommendations: setting boundaries for prohibited technologies; regulating permissible activities; and creating permanent mechanisms in order "to provide a flexible and continuing response to issues concerning new reproductive technologies as they evolve" (Canada 1993, 1049).

The recommendations attempted to find a middle ground by providing a flexible response to emerging technologies, while using the criminal law to prevent the use of potentially harmful technologies. Stressing the principle of "non-commercialization of reproduction," the Commission recommended criminalizing the buying, selling, and exchange of eggs, sperm, zygotes, fetal tissue, and embryos. The Commission also recommended criminalizing commercial surrogacy and preventing third parties from acting as intermediaries to facilitate such arrangements.[1] It suggested that various other technologies, such as prenatal diagnosis and assisted insemination, be subject to oversight

[1] The Commission also recommended criminalizing sex selection for non-medical purposes, germ-line genetic alteration, ectogenesis, cloning of human embryos, creation of animal-human hybrids, retrieval of sperm or eggs from fetuses or cadavers for fertilization, and research involving the maturation of sperm and eggs outside the human body. For more information, see Canada (1993, 915-917, 942, 1022); Harvison-Young (2005, 131).

and licensing by a National Reproductive Technologies Commission (NRTC). Because of the criminal sanctions, the Royal Commission was criticized for developing an overly restrictive set of public policy descriptions (Healy 1995; Ariss 1996; Harvison-Young 2005).

In spite of the Commission's strong recommendations, the creation of a comprehensive framework to deal with reproductive technologies was not immediately forthcoming. The first attempt at creating reproductive technology legislation was Bill C-47, *the Human Reproductive and Genetic Technologies Act*, introduced by the federal government in 1996, seven years after the Commission was established and three years after it reported. The Bill adopted several prohibitions wholesale from the Royal Commission, including prohibiting commercial surrogacy. However, the Bill said nothing about regulated activities or the establishment of a national commission. Beginning with the preamble that the Parliament of Canada was "gravely concerned" about threats to human dignity, health, and safety, the Act was criticized for being hostile to reproductive technologies. Notably, the Act made no mention of individual rights (such as reproductive rights), and "essentially ignored the *Charter*" (Harvison-Young 2005, 128). After an election was called in 1997, Bill C-47 died on the order paper.

The *Assisted Human Reproduction Act*: A Long Gestation

In 2001, 12 years after the Royal Commission was originally established, Minister of Health Alan Rock introduced new draft legislation on reproductive technologies in an attempt to consult a variety of stakeholders. Following several hearings, the House of Commons Standing Committee on Health released a report on the draft legislation with

its own recommendations in December 2001, entitled *Assisted Human Reproduction: Building Families* (Canada 2001, also known as the "Brown Report"). Following the report's recommendations, Bill C-56, *An Act Respecting Assisted Human Reproduction*, was introduced. The Act was far more comprehensive than Bill C-47, containing both prohibitions and regulations. It adopted the same commercial surrogacy prohibitions as the previous bill, with the additional provision that no one may enter a surrogacy contract with someone under the age of 18. After the Bill once again died on the order paper, Bill C-13, the *An Act respecting assisted human reproductive technologies*, an exact replication of Bill C-56, was introduced in October 2002. Although the Act passed all three readings in the House of Commons, an election was called before the Act passed third reading in the Senate. Like the two bills before it, Bill C-13 died on the order paper.

In February 2004, Bill C-6, *An Act Respecting Human Reproduction and Related Research*, was introduced in the House of Commons. It was a replication of Bill C-13, with the exception of small changes that had been made by the Senate. The legislation received Royal Assent on March 29, 2004, and most sections of the Act (including surrogacy provisions) came into force on April 22, 2004. Almost 15 years after the Royal Commission was established, Canada finally had legislation with respect to new reproductive technologies: the *Assisted Human Reproduction Act*.

There can be little doubt that the Royal Commission had a significant influence on the *Assisted Human Reproduction Act* (AHRA). The AHRA in its final form adopted many of the recommendations set out in the Commission's final report (Harvison-Young 2005, 132). The Act prohibits several activities, including the creation of animal-human hybrids, human cloning, embryonic sex selection, and commercial surrogacy. Those who

violate the terms of these activities are subject to criminal sanctions.[2] The AHRA also contains provisions for "controlled" activities, such as *in vitro* fertilization and sperm donation, which are permitted but subject to state regulation. Much like the National Reproductive Technologies Commission was intended to do, Assisted Human Reproduction Canada (AHRC) administers the regulatory framework and enforces prohibitions.[3] All three of the Royal Commission's overarching recommendations – regulations, prohibitions, and the creation of a permanent agency to respond to developing technologies – were realized in the legislation.

To be sure, the *Assisted Human Reproduction Act* did not please every stakeholder. Harvison-Young criticizes the criminal prohibitions as overly restrictive, potentially even a violation of individual rights, saying they reflect a "culture of control" on the part of policy-makers (2005, 134). Others claim the prohibitions on embryonic cloning and compensation for sperm donation may violate the *Charter* (Caulfield and Bubela 2007; Hnatiuk 2007). Yet there is little doubt that the Act as a whole represents a compromise. In their study of the Canadian reproductive technology policy-making process, Jones and Salter (2007) found that most stakeholders involved in the AHRA's creation considered the Act in its final form a compromise. Other scholars point out that the Act reached a middle ground on contentious policies, such as stem cell research

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[2] In addition to the surrogacy prohibition, listed elsewhere, the AHRA prohibits the following acts: creating a human clone; transplanting a human clone into a human being; creating an embryo for purposes other than assisted human reproduction; creating an embryo from part of another embryo or fetus; maintaining an embryo outside a woman's body after 14 days of development; sex selection except to diagnose a sex-linked disorder; germ line genetic manipulation; using human reproductive material into a non-human life form for creating a human being; buying, selling, or exchanging human reproductive material (including sperm, eggs, and embryos); and the creation of chimeras or animal-human hybrids (see Harvison-Young 2005, 131-132).

[3] The Board of Governors for AHRC was announced in 2007. However, given the 2008 Quebec Court of Appeal case that struck down many of the Act's regulations, *Reference re Constitutional Validity of Sections 8 to 19, 40 to 43, 60, 61 and 68 of the Assisted Human Reproduction Act* (2008), the regulatory function of AHRC remains in question.

(Downie, Llewellyn and Baylis 2005; Burns 2007). Although critical of the criminal sanctions, Harvison-Young maintains that the Act is "greatly improved" insofar as its regulatory framework "reflects a much greater respect for a range of view on emergent technologies and their actual technologies" than previous legislative attempts (2005, 125). Like other Canadian legislative attempts to deal with two-sided morality policy, the AHRA as whole lands somewhere in the "moderate middle" between moral extremes (see Banfield and Knopff 2009).

Criminalizing Commercial Surrogacy

What is true of the Act as a whole may not, however, be quite as true of each of its component parts. While the Act's most controversial part, its ban on commercial surrogacy, does contain some compromises, it is seen by many as leaning heavily toward one end of the policy continuum.

Technically speaking, surrogacy is neither a reproductive technology nor a medical condition. It is a private social arrangement in which a woman (the "surrogate") conceives and bears a child to be raised by someone else (the "commissioning parents"). However, surrogacy is often considered in discussions of reproductive technologies, because the availability of surrogacy as a reproductive option has been made possible by new reproductive technologies such as *in vitro* fertilization.

Surrogacy can be either "traditional" or "gestational." In traditional surrogacy (also called "complete" surrogacy), the surrogate mother is impregnated with another man's semen, becomes pregnant and gives birth. In gestational surrogacy, an embryo is created – often, but not always, from the commissioning parents' egg and sperm – and

implanted into the surrogate, who becomes pregnant and gives birth. In traditional surrogacy, the surrogate mother has a genetic relationship to the child; in gestational surrogacy, she does not (Canada 1993, 662; Reilly 2007, 483; Shanley 2007, 103-104).

In both traditional and gestational surrogacy, the commissioning parents reach an agreement with the surrogate mother to transfer custody and parental rights before the child is conceived.[4] Surrogacy contracts (also referred to as "preconception arrangements") can be either "commercial" or "altruistic." In a commercial surrogacy arrangement, the surrogate is given compensation for her gestational services. Compensation may also be paid to a broker or third party for facilitating the agreement. In an altruistic surrogacy arrangement, there are no fees and no brokers. An altruistic surrogate chooses to carry the child for reasons other than financial gain (Reilly 2007, 483). It is important to note that whether the surrogacy is traditional or gestational has no bearing on whether there will be compensation. Both traditional and gestational surrogacy can be either commercial or altruistic.

There are moral, religious, and philosophical arguments against all forms of surrogacy, yet ethicists differ in terms of what types of surrogacy arrangements should be permitted. Some argue that the practice should be banned altogether, as has been done in Sweden, Austria and the Australian state of Queensland. Many Canadian opponents of surrogacy adopted this line of argument during preliminary consultations (Canada 1993, 661-689; Markens 2007, 23-25). The Royal Commission on New Reproductive

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[4] The admissibility of surrogacy contracts varies by provincial jurisdiction in Canada, and is largely determined by the facts of the case in provincial family court. Article 541 of the Quebec Civil Code states that surrogacy arrangements are null and have no official standing. No other province has legislation for non-compensatory surrogacy contracts (Reilly 2007, 484; *Re: Assisted Human Reproduction Act* 2007, para. 30).

Technologies took a similar stance, although it did not recommend criminal sanctions against altruistic surrogates, for fear of compounding their vulnerability:

> We do not believe such arrangements should be undertaken, sanctioned, or encouraged. The motivation might be sincere and generous but the arrangement still results in the commodification of a child and the reproductive process. Even if no money is involved, no one should have the right to make a "gift" of another human being; this is offensive to the human dignity of the child. (1993, 689)

Others would permit gestational but not traditional surrogacy, while still others (Shanley 2007) would allow altruistic surrogacy but prohibit commercial surrogacy. Finally, there are those such as Shalev (1989) and McLachlan and Swales (2000) who argue that all forms of surrogacy should be permitted.

Saying nothing about the distinction between traditional and gestational surrogacy, Canadian law draws a sharp line between altruistic and commercial surrogacy, allowing the former but criminalizing the latter. Section 6(1) of the *Assisted Human Reproduction Act* states: "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." The offence is punishable by up to a $500,000 fine and 10 years in prison (Canada 2004). Although the law does not criminalize the actions of the surrogate mother, it prohibits commissioning parents from purchasing such services, which effectively prohibits surrogates from providing their reproductive services for commercial gain (Hnatiuk 2007, 56). In addition to criminalizing payment for surrogacy, the AHRA also bans payment to third-party brokers, payment for advertising surrogacy, and counseling anyone under the age of 21 to become a surrogate.

While taking a hard line on commercial surrogacy, Canada's position represents an overall compromise on surrogacy policy for two reasons. First, unlike other

jurisdictions such as Austria and Sweden, Canada allows altruistic surrogacy. The decision to allow altruistic surrogacy ran counter to the wishes of several interest groups involved in the legislative consultation. As Abby Lippman (a former member of the federal Advisory Committee on New Reproductive Technologies) notes:

> As far as I'm concerned, "altruistic" surrogacy can easily be quite coercive... I have a hard time separating paid from unpaid as a result. I was not happy with the way the Bill handles surrogacy but I realized there would be need for it to be a compromise. And so I agreed to live with it, with the distinction it made between paid and altruistic surrogacy. (quoted in Jones and Salter 2007, 13)

Second, the AHRA differs from previous legislative attempts by allowing minimal reimbursement. Section 12(3) of the AHRA allows commissioning parents to reimburse the surrogate for the loss of work-related income during pregnancy, but only if a doctor certifies that continuing to work will pose a risk to the health of the surrogate or the fetus. If a doctor issues a certification, the commissioning couple must obtain a license in accordance with (as yet unspecified) regulations. Thus, Canada's current law stands as a compromise on surrogacy more generally.

It is worth noting that the future of Canada's *surrogacy* regulations is currently in doubt. Assisted Human Reproduction Canada, the federal agency responsible for creating regulations, has been slow in its formation, and has not yet created the licensing regulations mentioned in section 12 of the AHRA (Blackwell 2009). Moreover, in 2008 the Quebec Court of Appeal struck down many of the regulations in the *Assisted Human Reproduction Act* on the basis that they were related to health, a provincial jurisdiction (*Reference re Constitutional Validity of Sections 8 to 19, 40 to 43, 60, 61 and 68 of the Assisted Human Reproduction Act* 2008). The decision, which is on appeal to the Supreme Court of Canada, did not challenge the constitutionality of the criminalization of

commercial surrogacy. However, the Court did strike down section 12 of the AHRA, which contained the provision for licenses related to reimbursement of surrogates for work-related loss of income. With the regulations struck down, surrogacy law in Canada currently stands as follows: altruistic surrogacy is permitted, and all forms of commercial surrogacy are criminally prohibited.

Conclusion

Fifteen years after Prime Minister Mulroney struck the Royal Commission, Canada finally had legislation regarding new reproductive technologies, in the form of the 2004 *Assisted Human Reproduction Act*. The AHRA, one of the most comprehensive reproductive technology schemes in the world, contains a wide array of regulations and prohibitions, covering everything from surrogacy to human cloning to the creation of animal-human hybrids. In order to succeed in passing legislation concerning such delicate moral issues as the sanctity of life and reproductive capacity, the AHRA contained many compromises.

In the end, compromising on new reproductive technologies more generally often meant combining permissive regulations for some technologies with strict prohibitions for others. As a result, the AHRA has been viewed as overly restrictive on particular technologies and procedures. Commercial surrogacy is a case in point. Although the law compromises on surrogacy more generally by allowing altruistic surrogacy and (initially) permitting compensation for the loss of some work-related income, this was done by taking a hard line on commercial surrogacy in the form of a criminal prohibition. As subsequent chapters demonstrate, this hard line has its roots in a "collectivist" conception

of morality. Chapter 3 explores the growth of morality policy in western democracies, a phenomenon that tends to lead to the judicialization of politics. As we shall see, commercial surrogacy clearly represents a two-sided moral controversy.

CHAPTER THREE: MORALITY POLICY IN CANADA

In order to understand morality policy and its influence on political behaviour, it is necessary to look at the relationship between public policy and politics. In 1964, Theodore J. Lowi published a seminal article concerning this relationship. Starting from the premise that all state-imposed policies were coercive, Lowi sought to categorize state policy into groups. He developed three categories of coercion: distributive policy (e.g., government subsidies), regulatory policy (e.g., government controls on business), and redistributive policy (e.g., government welfare programs) (Lowi 1964).[5] Crucially, Lowi held that each type of policy constitutes a real arena of power, developing its own distinct political structure over time. Thus Lowi came to his famous formulation that public policy shapes the political process: "for every type of policy there is likely to be a distinctive type of political relationship" (Lowi 1964, 688).

For Lowi, the three major categories of public policies were "historically as well as functionally distinct" (Lowi 1964, 689). Distributive policies, which up until roughly 1890 were the dominant public policy type in the United States, involve the allocation of government funding to large numbers of recipients, such as highway construction money or research grants to universities (Lowi 1964, 690; Smith and Tatalovich 2003, 21). Distributive policies "are characterized by the ease with which they can be disaggregated and dispensed unit by small unit, each unit more or less in isolation from other units and from any general rule... in many instances of distributive policy, the deprived cannot as a

[5] He later added a fourth category, constituent policy, which concerns government rules about structures of authority (Lowi 1972). This fourth category, added to specify the likelihood of coercion, has been criticized for adding a troublesome and cumbersome element to an neatly contained scheme (Kellow 1988). Moreover, as described in subsequent sections, the addition of "morality policy" as a fourth policy type largely built off Lowi's three categories, rather than his four categories.

class be identified" (Lowi 1964, 690). This form of policy leads to a non-conflictual form of politics. Rather than sharp disagreement between warring constituencies, the politics of distribution tends to create "log-rolling" coalitions and "mutual non-interference" (Lowi 1964, 691-693). Because government coercion with distributive policies is so remote, the politics associated with distributive policies are characterized by reduced conflict. When distributive policies are paramount, non-ideological division becomes the norm. Institutionally-speaking, Lowi found distributive politics played out in Congress, with Congressional committees playing a particularly important role (1964, 693). This was the "distinctive type of political relationship" that came to characterize this "type of policy."

Like distributive policies, regulatory policies – government controls on business, usually aimed at groups or classes of targets – are specific and individual in their impact. However, unlike distributive policies, they do not result in disaggregation: "in the short run the regulatory decision involves a direct choice as to who will be indulged and who deprived" (Lowi 1964, 690-691). While distributive policies produce outcomes so individualized that they reduce conflict, regulatory policies tend to affect different groups along sectoral lines. Thus, the politics of regulation is distinctly pluralist, because regulatory policy allows for "direct confrontations of indulged and deprived" (Lowi 1964, 695). Due to the shifting interests involved in governing coalitions, the political process is less stable and more prone to conflict. Because of the shifting coalitions, Lowi found that decision-making tended to "pass from administrative agencies and Congressional committees to Congress [more generally], the place where uncertainties in the policy process have always been settled" (1964, 699). Thus, as in the case of

distributive policy, he concludes that regulatory politics were determined in Congress, but not as much in congressional committees. While committee members (particularly committee chairs) wield political power in the realm of distributive politics, regulatory politics is determined by shifting coalitions of individual congressional representatives.

Finally, redistributive policy involves the redistribution of wealth between different economic classes, usually in the form of progressive taxation and subsidized welfare programs (Smith and Tatalovich 2003, 21). Unlike regulatory policy, where the categories of interest involve economic *sectors*, redistributive policy deals with categories of social *classes*. The result is a type of politics that is fundamentally elitist: "Issues that involve redistribution cut closer than any others along class lines and activate interests in what are roughly class terms... [i]n redistribution, there will never be more than two sides and the sides are clear, stable, and consistent" (Lowi 1964, 707, 711). The political determinants of redistributive policy typically involve elite-driven peak associations, such as chambers of commerce and national labour unions.

Thus Lowi's tripartite distinction was clear: distributive policies, because of their disaggregated nature, result in reduced political conflict; regulatory policies result unstable conflict along sectoral lines, as pluralists would expect; and redistributive policies, producing a clear divide between economic classes, result in stable elite-driven conflict. For Lowi, the type of politics largely depended on the type of policy – or, as he put it, "policy determines politics" (Lowi 1972, 299).

Although Lowi's categorization concerned the United States, political scientists soon used it to describe comparative politics more generally by analyzing other western democracies (see Smith 1982). Yet the three categories did not sufficiently explain all

political behaviour. James B. Christoph's (1962) study of capital punishment in the United Kingdom pointed to a new type of policy issue, one that dealt with high levels of moral and emotional content. Capital punishment, as well as similar issues like abortion, homosexuality, and birth control, showed a pattern of policymaking that dealt with "deep-seated moral codes" (Christoph 1962, 153; see also Smith and Tatalovich 2003, 13). Throughout the 1960s and 1970s, other scholars similarly noted the rise of an entirely new form of policy, and with it, as Lowi's theory would predict, a new form of politics. As Lowi himself later explained, these new policies did not fit comfortably into his public policy categories (Lowi 2005, xii). T. Alexander Smith argued that these policies required their own category, and added the "emotive symbolic" policy type to Lowi's original typology. Emotive symbolic policy, also known as morality policy,[6] generates strong emotional support for deeply held values, but unlike Lowi's other three types of public policy, the values sought were essentially non-economic (Smith 1975, 90).

This chapter explores the new kind of morality policies and correspondingly new political relationship that Lowi and others began to recognize, arguing that understanding "morality policy" provides the context for understanding the politics of commercial surrogacy. The chapter first explains the distinctive nature of morality politics, particularly those involving two-sided conflicts. Next, the chapter probes the postmaterialist basis for the growth of morality politics as well as its characteristic opposition of liberal individualist and collectivist visions. Finally, the chapter sets out the

[6] There is no uniform terminology for this type of policy, which has been referred to as "emotive symbolic" (Smith 1975), "social regulatory policy" (Tatalovich and Daynes 2005), and "morality policy" (Mooney 2001b; Studlar 2001). For simplicity, this paper refers to these types of policies as "morality policy."

distinctive form of politics that has emerged in parallel and that has come to be the "distinctive type of political relationship" for morality policy.

Defining Morality Policy

Because moral issues involve a "controversial issue of first principle," morality policies are "legal sanctions of right and wrong" that validate a particular set of fundamental values (Mooney 2001b, 3). Studlar defines morality policy as follows:

> Its debate is framed in terms of fundamental rights and values, often stemming from religious imperatives, by competing promotional groups whose members have little or no direct economic interest in the outcome. Advocates invest considerable emotional capital in the values that they want their society and government to promote or protect. These issues are nontechnical in the sense that they do not require specialized expertise to hold an 'informed' opinion. For these reasons, most morality policy issues also have relatively high public visibility. (2001, 39; see also Mooney and Lee 1995; Haider-Markel and Meier 1996)

Morality policy thus concerns contrary sets of values derived from first principles of primary identity – especially race, gender, sexuality, and religion (Mooney 2001b, 4). These principles are non-negotiable, presented as self-evident truths that cannot be resolved by mere argument (Black 1974, 23; see also Bowers 1984, xxiii). Where economic regulatory policy views individual conduct in instrumental terms arising "largely out of concern for conduct deemed good or bad *only in its consequences*," morality policy "regulates conduct deemed *good or bad in itself*" (Lowi 2005, xx, emphasis in original).

Crucially, the most politically salient morality policies are "two-sided," involving competing moral positions about which "at least a significant minority of citizens has a fundamental, first-principled conflict with the values embodied in any morality policy"

(Mooney 2001b, 4). Whereas "one-sided" moral issues, such as drunk driving and murder, arouse disagreement only about the best way of achieving a universally supported moral principle or goal, two-sided moral controversies involve considerable dispute over whether the regulated conduct is itself good or bad (Smith and Tatalovich 2003, 16). Although there is no universally agreed-upon list of morality policies, abortion, homosexuality, capital punishment, pornography, and euthanasia are most commonly used as examples (see Smith and Tatalovich 2003; Tatalovich and Daynes 2005).[7] As discussed later, legal sanctions related to new reproductive technologies – in particular, the criminalization of commercial surrogacy – fit this definition, and should qualify as morality policy.

Part of the definitional difficulty stems from the fact that the policy/politics distinction is not as clear as in Lowi's original formulation. In Lowi's terms, morality policies seem similar to "regulatory" policy – for example, abortion and pornography policies typically involve rules of individual conduct with criminal sanctions. As opposed to economic policy, however, "what is being regulated is not an economic transaction but a social relationship" (Tatalovich and Daynes 2005, xxv). As a result, the politics of morality policy looks more like the politics of redistributive policy than regulatory policy. Meier (1994) claims morality policies should be considered redistributive, not regulatory, insofar as they attempt to redistribute values (246-247). However, the redistribution of values is not an easy task, because governments cannot redistribute values in the same sense that they can forcibly redistribute wealth (Smith and Tatalovich

[7] To this list Studlar adds the general categories of gambling, alcohol/drugs, religious education/Sunday observance, animal rights, divorce, women's rights, ethnic/racial minority rights, and gun control (2001, 46). No list can include all possible examples, and certain policies are more or less prominent in different countries due to historical accidents, mores, and cultural differences (for example, see Spitzer 2005 on gun control in the USA).

2003, 15). For these reasons, scholars such as Smith and Tatalovich argue that morality policy deserved its own policy category.

It is widely agreed that morality policies have gained increased political importance in western democracies (Mooney 2001a; Smith and Tatalovich 2003; Tatalovich and Daynes 2005). As Mooney notes, "To understand policymaking at the turn of the millennium (at least in the United states and other Western democracies)... one must understand the politics of morality policy" (Mooney 2001b, 5). The advent of postmaterialism helps us understand the growth of morality politics, especially when one focuses on one of the characteristic postmaterialist divisions: the clash between liberal individualism and collectivism.

Postmaterialism and the Conflict between Liberal and Collectivist Morality

Much of the growth in the political importance of morality policy in western democracies stems from value change associated with material prosperity and growing demands for equality. Inglehart argues that citizens in advanced liberal democracies have gradually moved from values concerning material goods to "postmaterial" values, which are "part of the broader syndrome of orientations involving motivation to work, political outlook, attitudes toward the environment and nuclear power, the role of religion in people's lives, the likelihood of getting married or having children, an attitude toward the role of women, homosexuality, divorce, abortion, and numerous other topics" (Inglehart 1990, 423). The structural change affecting these democracies since the Second World War – "historically unprecedented levels of material affluence, education, communication, mobility, and the displacement of the manufacturing and agricultural

sectors of the economy by the new service sector" – has produced significant value change in the postmaterial direction (Morton and Knopff 2000, 78).

Because postmaterialists tend to support a cleaner environment, equal status for women and minority groups, greater democratization, and "a more permissive morality, particularly as affecting familial and sexual issues" (Lipset 1985, 196), the value shift has coincided with a rise in the salience of morality policies. As citizens become postmaterialist in their value orientation, the state is faced with growing demands for civil and political liberties, gender equality, responsive government, and quality of life issues in general (Inglehart and Welzel 2005, 3). As a result, in postmaterialist democracies, non-economic social issues gain salience.

Several studies demonstrate that Canadians have become more postmaterialist in their value orientation in recent generations (see Nevitte 1996; Inglehart and Welzel 2005). However, even in western democracies, postmaterial values are not held universally, as various social groups wish to retain traditional social structures. Weakening social hierarchies and growing status demands lead to a division between those who wish to preserve the collectivist social structures and those who wish to dismantle those structures. Moral conflicts in postmaterial societies frequently involve disputes between liberal individualism on the one hand, and collectivism on the other. These competing worldviews emerge from a fundamental disagreement regarding the sources of "moral truth" (Hunter 1991, 43).

On the one hand, the growth of postmaterialism leads to "liberal" conceptions of society. Liberal individualism "involves seeing the individual as primary, as more 'real' or fundamental than human society and its institutions and structures. It also involves

attaching a higher moral value to the individual than to society or to any collective group" (Arblaster 1984, 15). From the liberal point of view, there are very few reasons for the state to regulate behavior based on norms and values: "moral and social deviance can barely be defined" (Douglas 1978, 10). By stressing property rights, freedom of contract, and an opportunity to transact free from political and social coercion, liberal individualism contains a hostility toward hierarchical institutions and seeks the equalization of status differences (Smith and Tatalovich 2003, 55, 214).

Collectivism, on the other hand, seeks to preserve traditional social institutions. Collectivists see moral codes of conduct as essential to social order. Therefore, it is necessary for the state to draw clear lines between legal and illegal, right and wrong, appropriate and inappropriate (Smith and Tatalovich 2003, 58). Smith and Tatalovich define collectivism as follows:

> [A]ll parts of organizational, or social, life must be related to the collective. This relationship implies a division of functions, specialization, respect for expertise and social roles, deference to authority, and a sacrificial ethic by which the individual is deemed less important than the welfare of the whole group, organization, or community. (2003, 52)

The assumptions of collectivists, stemming from centuries of tradition, are incompatible with postmaterialist values. Liberal individualists seek to eliminate (or equalize) status inequalities; collectivists wish to maintain traditional social structures for the good of the community.

In sum, morality policies pit two irreconcilable conceptions of society against each other: liberal individualism and collectivism. These two different worldviews "provoke deep conflict between divergent constituencies and interest groups" (Smith and

Tatalovich 2003, 16; see also Meier 1994). But if policy determines politics, as Lowi hypothesized, what is the impact of morality policy on politics?

The Politics of Morality

As Lowi describes in the introductory chapter to Tatalovich and Daynes' comparative study of morality policy, the observed political behaviour associated with morality policy is "more ideological, more moral, more directly derived from fundamental values, more intense, less utilitarian, more polarized and less prone to compromise" than politics concerning economic policies (Lowi 2005, xiii). As a result, interest groups concerned with morality policies "refused to join what most of us consider mainstream political processes, insisting instead on trying to convey political issues into moral polarities, claims into rights, legislation into litigation, grays into blacks and whites, and campaigns into causes and crusades" (Lowi 2005, xiv).

In particular, turning "claims into rights" and "legislation into litigation" moves morality policy out of the traditional political sphere and into the courts. This litigious strategy has been facilitated by the growth of judicial power that has paralleled the growth of morality politics in the latter half of the twentieth century. As Tate and Valliner (1995) note, since the Second World War, there has been a "global expansion of judicial power." This expansion stemmed from constitutional drafting efforts in postwar Europe and beyond, which focused on the enunciation of basic individual rights and the establishment of constitutional courts to protect these rights. Across the world, the principle of parliamentary supremacy faded as courts gained lawmaking power through judicial review (Ginsburg 2003, 2-3; see also Sweet 2004). At the same time, a growing

rights consciousness contributed to a "rights revolution" in many countries, through which organized support for rights litigation sustained judicial attention to civil liberties. When supported by sympathetic judges, this "support structure for legal mobilization" contributed to the growth of judicial power, particularly when accompanied by a bill of rights (Epp 1998, 197-201). Though the origins of the rights revolution are "complex and multidimensional," the shift to postmaterial values and increasing media coverage of "battles for enhanced rights" have been contributing factors (Sauvageau, Schneiderman and Taras 2006, 14-15). The growth of judicial power thus stems not just from the constitutional entrenchment of rights, but also from litigation-orientated groups – often pursuing change in morality policy – pushing for a rights consciousness.

In a country with both an entrenched bill of rights and a support structure for legal mobilization, attempts at policy change through the courts evolve in path dependent ways, as the social processes linking litigation and judicial lawmaking produce increasing returns (Shapiro and Sweet 2002, 112). Since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, many Canadian interest groups have recognized these increasing returns and developed litigation strategies as a means of affecting public policy change (Brodie 2002; Smith and Tatalovich 2003; Manfredi 2004). Consequently, morality policy and judicial power have reinforced one another. Because morality policy concerns core values based on non-negotiable first principles, there is a tendency for the rhetoric surrounding moral issues to be framed in terms of absolute rights (Lowi 2005, xiv). Where high courts are deemed (correctly or incorrectly) as the primary safeguard of individual rights, groups pursuing a change in morality policy find the courtroom a viable venue for producing policy change. Smith and Tatalovich go so far as to suggest that the

legislative arena may no longer be the preferred institutional venue for resolving morality policy, as opponents of the moral status quo bring their battle to the courts (Smith and Tatalovich 2003, 20, 131-132).

The tendency to move morality politics into the courtroom is promoted not only by the relevant interest groups but also by governments themselves. In the interest of blame avoidance, political leaders often mitigate conflict through "privatization" – the movement of a policy issue to the centre of government, including ministries, government commissions,[8] and courts (Schattschneider 1960; Smith and Tatalovich 2003, 95). In their study of five western democracies (including Canada), Smith and Tatalovich found that four factors tend to facilitate the privatization of morality policy: the presence of a parliamentary system; a political system where the executive defines the legislative agenda; a single party government; and the existence of judicial review of the Constitution (Smith and Tatalovich 2003, 112; see also Outshoorn 1996). Since the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982, all four of these factors have been present in Canada. Thus it is hardly surprising that Smith and Tatalovich found high levels of elite dominance – particularly but not exclusively judicial dominance, most often involving the Supreme Court of Canada – of morality policy in Canada (Smith and Tatalovich 2003, 231). Political leaders are happy to defer to the courts, in order to avoid making "tough, painful decisions and unsatisfying compromises, especially on issues where feelings run deep and essential rights are at stake" (Sauvageau, Schneiderman and Taras 2006, 22; see also Glendon 1989, 569).

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[8] Prime Minister Mulroney's creation of the Royal Commission on New Reproductive Technologies was a quintessential privatization tactic, as it temporarily shelved a controversial moral issue.

Equally important is the fact that the Canadian Parliament often allows Supreme Court decisions to remain as the "policy status quo." With respect to morality policies such as prisoner voting (*Sauvé v. Canada (Chief Electoral Officer)* 2002) and abortion (*R. v. Morgentaler* 1988), the judicial decision now represents the current policy framework. In spite of many legitimate ways in which Parliament can respond, including invoking section 33 of the *Charter* (the notwithstanding clause), Canadian parliamentary procedures and institutional rules, combined with the "procedural high ground" of a Supreme Court decision, tend to favour a judicial status quo (Flanagan 1997, 53; see Hogg and Bushell 1997; Morton 1999; Hogg, Thornton and Wright 2007; Manfredi 2007 for a discussion of policymakers' ability to respond to unfavourable judicial decisions).

Morton and Knopff suggest that such legislative paralysis is "institutional in character," particularly when an issue "cross-cuts" party caucuses:

> [L]egislative non-response in the face of judicial activism is the normal response in certain circumstances. When the issue at play cross-cuts and divides a government caucus, the political incentive structure invites government leaders to abdicate responsibility to the courts, perhaps even more so in a parliamentary than in a presidential system. (2000, 166)

As the parliamentary politics surrounding abortion and same-sex marriage in Canada demonstrates, morality policy is especially prone to cross-cut and divide both government and opposition caucuses (Morton 1992; Lang 2005). Montpetit argues that the same principle applies to new reproductive technologies, noting that the governing Liberal Party's documents offered "no indication of preferred policy direction" on NRTs during the creation of the AHRA (2004, 79).

By enhancing the ability of the judiciary to rule on the constitutionality of public policy, offering political leaders an opportunity for blame avoidance, and providing

alterative strategies for interest groups, the existence of the *Charter* has often left the courts to determine morality policy. Looking back on Lowi's formulation that each policy type develops its own political structure over time (1964, 688-689), the politics of morality appears to involve an increasing reliance on the courtroom, particularly in Canada.

Conclusion

Morality policy has gained prominence in western democracies largely because of postmaterial value change. It involves polarized debate that pits liberal individualists against collectivists, with both sides holding positions that are hostile to compromise. Because of the characteristics of morality policy, elected officials often avoid taking a stand on the policy directly. In post-*Charter* Canada, where judicial power has grown, this frequently allows the issue to play out in the courts. As a result, the Supreme Court of Canada has had significant input on several morality policies, including abortion, prisoner voting, and Sunday shopping. The adoption of the *Charter*, combined with the growth of postmaterialist values and Canada's federal-heavy morality policy, make the Supreme Court of Canada a very active player in terms of morality policy. The politics of morality policy often finds its way to the courtroom and, in the Canadian context, the most contentious morality policies usually go to the Supreme Court of Canada. This is likely to happen with Canada's prohibition of commercial surrogacy, which has all the characteristics of a two-sided morality issue, as the next chapter shows.

CHAPTER FOUR: COMMERCIAL SURROGACY AND MORAL CONTROVERSIES

Because it deals with delicate issues concerning reproductive choice and the beginning of human life, the *Assisted Human Reproduction Act* contains many two-sided moral controversies. Human cloning, the creation of embryos of research purposes, and sex selection often evoke strong feelings related to fundamental values such as the sanctity of life, reproduction, and the traditional family (Caulfield 2004; Long 2006; Caulfield and Bubela 2007; King 2007). Stem cell research pits proponents of scientific research against social conservatives. Donor anonymity, which the Act permits, also pits conflicting rights of privacy versus the right of children to know their biological origin (Somerville 2007a).

Yet perhaps the most controversial element of the Act is the prohibition on commercial surrogacy. By criminalizing payment to surrogates, the *Assisted Human Reproduction Act* has provoked the ire of many interest groups, scholars, and affected individuals. Commercial surrogacy has all the characteristics of other morality policies in western democracies. Certainly it evokes intense ideological polarization. As Canada's *Royal Commission on New Reproductive Technologies* pointed out, opinions about surrogacy arrangements are "based on fundamentally different convictions about human nature and about how the world works or ought to work; therefore, assessments of the actual or potential implications of preconception arrangements for women, for children, for couples, and for our evolution as a society also differ" (Canada 1993, 683). Like

abortion, physician-assisted suicide, and same-sex marriage, those who feel strongly about payment for surrogacy are unlikely to change their mind.

The literature on commercial surrogacy reveals two starkly different ethical perspectives. Those who argue the state should permit payment for surrogacy typically adopt a classical "liberal" position, stressing the values of liberty, consent, and free choice (Shanley 2007, 6). From this perspective, the prohibition of commercial surrogacy infringes on freedom of contract and personal autonomy, and constitutes undue state intrusion into women's reproductive sphere. Like other reproductive issues, liberals are skeptical of state prohibition for "moral" reasons. This perspective falls largely into the category of liberal individualism described in Chapter 3 (see Smith and Tatalovich 2003). By contrast, opponents of commercial surrogacy adopt a "collectivist" perspective. They see payment for surrogacy as an unethical commodification of women's reproductive activities, and the moral equivalent of selling children. From this perspective, commercial surrogacy is inherently exploitive, creating harmful social attitudes and failing to account for the best interests of the child. Opponents of commercial surrogacy argue that liberal market principles of free choice and consent do not sufficiently address the social implications of reproductive technologies; the state therefore has a legitimate role in prohibiting surrogacy transactions to foster preferable parental norms and avoid "social harms." Much of the opposition to commercial surrogacy is in line with the collectivism described in Chapter 3, which rejects new familial and parental relationships for fear of the creation of "social harms." This chapter examines the two sides of this polarized debate in some detail, showing that the "collectivists" largely won in the legislative arena. Whether their victory will survive judicial intervention is the subject of Chapter 5.

Commercial Surrogacy's Opponents: Collectivism

The moral opposition to commercial surrogacy tends to come from the same heterogeneous group that opposes new reproductive technologies in general: religious organizations, social conservatives, opponents of new technologies, and people on the left concerned about a "new" eugenics (see Fukuyama 2002, 183). During Canada's *Royal Commission on New Reproductive Technologies*, a mix of religious and feminist organizations, groups that don't always see eye-to-eye on public policy issues, teamed up to voice their opposition to commercial surrogacy (Canada 1993, 670-683). Although this group is diverse, there is nevertheless a common recognition that the state has a perfectly legitimate role to play in preventing commodification in order to preserve human dignity and prevent social harms, however defined.

As the Royal Commission summarized, opponents of surrogacy argue that "personal autonomy is not a value that trumps all others, and society may see fit to place limits of the exercise of free choice when the choice concerns an activity that society regards as fundamentally incompatible with values such as respect for human dignity and the inalienability of the person" (Canada 1993, 685). When it comes to individual choice and freedom of contract on one hand, and the preservation of collectivist values and relations on the other, opponents of commercial surrogacy support state intrusion on the former to preserve the latter. This manifests itself in three inter-related concerns about commercial surrogacy: the commodification of human life, the exploitation of women, and the creation of harmful social values.

Commodification of Human Life

Perhaps the most prominent argument against commercial surrogacy concerns the "commodification" of human life by applying market norms to the sphere of human reproduction. Anti-commodification arguments adopt a Kantian deontological logic, claiming that the commercial surrogacy arrangements treat human beings as objects of use rather than subjects worthy of respect. Liberal market mechanisms are inappropriate for governing spheres of life, such as human reproduction, that should not be commodified (Anderson 2000, 25). Elizabeth Anderson argues the moral justifications for banning commercial surrogacy are similar to justifications for prohibiting slavery:

> [B]oth pregnancy contracts and slave contracts wrongly treat someone's inalienable rights as if they were freely alienable. Pregnancy contracts treat the mother's inalienable right to love her child, and to express that love by asserting a claim to custody in its own best interests, as if it were alienable in a market transaction. (Anderson 2000, 23)

Just as the state should not permit human beings to willingly sell themselves into slavery, opponents of commercial surrogacy stress that the state should not view individual autonomy as the ability to sign away inalienable reproductive rights.

Opponents of commercial surrogacy also argue the practice treats children as commodities to be purchased and sold. Contracts based on market mechanisms typically involve a product sold for an agreed-upon price. However, "[t]he most perplexing problem in treating pregnancy contracts like other employment contracts is that the 'product' is another human being who did not exist at the time the agreement was struck" (Shanley 2007, 110). Surrogacy contracts move "away from regarding parental rights over children as trusts, to be allocated in the best interests of the child, toward regarding parental rights as like freely alienable property rights, to be allocated at the will of the

parents... [i]f this isn't literally selling a child, it is selling the child out" (Anderson 2000, 20).

In this vein, Margaret Somerville claims surrogacy is part of a broader trend connected to new reproductive technologies, in which children are produced through reproduction, rather than created through procreation. Commercial surrogacy fosters social attitudes that view children in instrumental terms; children move from being unique subjects to desirable objects or products (Somerville 2007a, 181). Commercial surrogacy thus puts both the parent-child relationship and the moral nature of child-bearing at risk of being commodified (Ber 2000; Reilly 2007, 483). As such, opponents justify criminal prohibition as a way to prevent harmful social arrangements.

Exploitation of Women

Although "commodification" is a major concern for opponents of commercial surrogacy, it is not the only concern. Feminists in particular often raise related questions concerning the "exploitation" of vulnerable women and their reproductive capacities. While feminists are do not share a unified position on commercial surrogacy (or reproductive technologies more generally),[9] many Canadian feminist groups continue to oppose commercial surrogacy because of its potential for exploiting women.

[9] If there was ever a need to demonstrate that feminism is by no means a unified ideology, commercial surrogacy shows some proof. Some of commercial surrogacy's strongest proponents *and* opponents are feminist organizations. Scala, Montpetit and Fortier (2005) note that, in the buildup to the creation of the *Assisted Human Reproduction Act*, the National Advisory Council on the Status of Women (NAC) took a restrictive stance against surrogacy. This stance reflected the position that commercial surrogacy exploits vulnerable women, in particular the poor and disabled. However, other women's groups, particularly those with strong links to the abortion rights movement, would not accept any restrictions on reproductive autonomy. In the end, after consultation with grassroots, the NAC ultimately based its position on women's reproductive rights (Scala, Montpetit and Fortier 2005, 595).

The reasoning behind "exploitation" involves two related arguments. First, commercial surrogacy is exploitive because it involves rich commissioning parents paying for the reproductive services of poor surrogates. In this vein, Shanley supports banning commercial surrogacy because it enables economically secure men and women to buy the procreative labor and custodial rights of vulnerable women (2007, 116). North American empirical studies give evidence to support the hypothesis that commissioning parents have much higher socioeconomic standing than the surrogates they employ (Canada 1993, 670). In this sense, commercial surrogacy has been compared to prostitution, as poor women with no other prospects for work are induced into surrogacy for financial gain (Ber 2000; Ruparelia 2007, 36). For opponents concerned with exploitation, a prohibition is the best way to stop poor women from selling their reproductive services.

Second, commercial surrogacy is said to exploit women by obscuring the unique bond between mother and child that occurs during pregnancy. The application of market norms to women's reproductive labour reduces women to mere "objects of use" (Anderson 1990, 92). Treating pregnancy – a unique form of women's labour – as "just another kind of commercial production process… violates the precious emotional ties which the mother may rightly and properly establish with her 'product,' the child" (Anderson 1990, 82). The problem is particularly acute with traditional surrogacy agreements, where the surrogate receives compensation for producing a baby with whom she shares a genetic relation. Yet critics of commercial surrogacy argue the line between traditional and gestational surrogacy is not so clear. Treating traditional and gestational surrogacy as fundamentally different processes underestimates the psychological and

physical bonding that takes place between mother and child during gestation, regardless of genetic linkage (Shanley 2007, 112). By treating gestational services as a simple product, the practice "ignores the fact that the work of pregnancy involves women's emotional, physical and sexual experiences and understandings of themselves as women" (Pateman 1988, 216). Critics thus claim commercial surrogacy exploits women not only because of its negative impact on disadvantaged women, but also because it wrongly equates gestational services with a product.

Social Harms

Opponents of commercial surrogacy, including those concerned about commodification and exploitation, share the concern that commercial surrogacy creates negative "social harms." Opposition to surrogacy, particularly from social and religious conservatives, is often "tied to concerns over and debates about the future of the family (its form, its members' obligations, and even its existence) and to the state's role in protecting families" (Markens 2007, 78). Social and religious conservatives argue that surrogacy creates social harms by denigrating procreation and therefore harming children (Somerville 2006, 38). Yet feminists concerned with the exploitation of women also adopt the terminology of "social harms": Maureen McTeer claims that surrogacy and other new reproductive technologies harm society's basic institutions, morality, and social cohesion (1995, 901). Whether they are arguing from conservative or feminist perspectives, commercial surrogacy's opponents are concerned about the negative social externalities associated with commercializing reproductive services and childbearing.

Criminal prohibition is seen as a reasonable alternative to the creation of new, harmful norms related to parenthood and mothering.

Canada's *Royal Commission on New Reproductive Technologies*, which recommended prohibiting commercial surrogacy, articulated the Canadian concern about evolving social norms. In particular, it focused on what it saw as a problematic evolution in parent/child relationships:

> We heard many concerns that preconception arrangements will alter society's understanding of parenthood, family and parental responsibilities, reducing parenthood to a transaction – a deal depending solely on the will of the adults who make it – with the child as the product of the deal. (Canada 1993, 678)

The Royal Commission also expressed trepidation over the evolving role of the family. Because surrogacy arrangements increase the likelihood for multiple parents by separating the genetic, gestational, and social roles of parenthood, the Royal Commission stressed that multiple parenthood "can have a significant impact on a child's personal and emotional development and sense of identity," and was therefore undesirable (1993, 678).

Opposition to commercial surrogacy thus comes from proponents of collectivism. Not surprisingly, social and religious conservatives, groups commonly associated with collectivism, are opposed to commercial surrogacy. Their concerns about parenthood and evolving family roles reflect the "sacrificial ethic," whereby "the individual is deemed less important than the welfare of the whole group" (Smith and Tatalovich 2003, 52). However, their alliance with certain feminist organizations initially seems curious. Feminists are often opposed to traditional social roles, and have frequently made the case for liberal individualism, not collectivism, in litigation before the Supreme Court of Canada on issues such as abortion (Manfredi 2004). Indeed, as the next section

demonstrates, not all feminists are opposed to commercial surrogacy. Yet opposition to traditional social roles does not always translate into unbridled support for all new social roles. While feminist organizations may feel women's reproductive autonomy is important, the evolution of women's roles to "paid breeder" is seen as a worrying prospect capable of devaluing women and reducing them to mere objects of use (Capron and Radin 1990, 62). Thus the role of certain feminist organizations in promoting collectivism, though perhaps unordinary, represents the preference of certain imperfect social roles to future social roles that could be far more detrimental to women.

Commercial Surrogacy's Proponents: Liberal Individualism

In contrast to those opposed to commercial surrogacy, those in favour of allowing compensation tend to provide a view grounded in liberal and individualist notions of legal rights emphasizing free choice, personal autonomy, and self-fulfillment (Reilly 2007, 483). This liberal perspective gives particular importance to the freedom of individuals to enter into contracts, and the freedom, particularly but not exclusively of women, to exercise autonomy with respect to one's reproductive capacities. Those who feel commercial surrogacy should be permitted rely on three primary arguments: the right to enter contract, the recognition of pregnancy as a real economic contribution to family life, and the right to reproductive autonomy. All three underscore the liberal commitment to individual choice, and all three are consistent with liberal individualism.

The Right to Enter Contract

The right to freely enter contracts mainly concerns the right of the surrogate. As Shanley notes, proponents of commercial surrogacy "assume not only that gestation of a fetus is work that is analogous to other forms of wage labor, but also that selling one's labor for a wage is a manifestation of individual freedom" (Shanley 2007, 109). The conscious decision of the surrogate to enter into a contract using her womb for reproductive purposes should be respected: "If autonomy is understood as the deliberate exercise of choice with respect to the individual's reproductive capacity, the point at which the parties' intentions should be established is before conception" (Shalev 1989, 103). The fact that the default statutory position of most nations (and of Canada before 2004) involved no regulation of surrogacy "can be construed as allowing recourse to the general rules of contract law, the legal machinery by which, broadly speaking, the performance of services by some members of the community for others is carried out" (Shalev 1989, 99). So long as contracts are characterized as the sale of reproductive services rather than sale of a child, liberal principles suggest these contracts should be legitimate.

Although such a contract limits the surrogate's autonomy during the period of pregnancy, this is fully consistent with individual freedom to enter into contracts: "Part of our freedom is the authority, sometimes in unpredicted and even unpredictable ways, voluntarily to limit, our autonomy" (McLachlan and Swales 2000, 8). Proponents also reject arguments concerning the "commodification" of women's reproductive services as being intrinsically harmful to human dignity (McLachlan and Swales 2000, 9). As the Alberta Advisory Council on Women's Issues argued during the Royal Commission's

public hearings, "a women has the right to make the decision if she chooses to be a surrogate" (cited in Canada 1993, 680).

Rejection of Women's Labour as Merely Domestic

The second argument in favour of commercial surrogacy concerns gender stereotypes and the recognition of compensation for domestic labour. Some feminist scholars argue that banning payment for surrogacy perpetuates gender stereotypes about women's labour, and treats the act of reproduction "as it has traditionally treated women's domestic labour – as unpaid, noneconomic acts of love and nurturing rather than as work and real economic contributions to family life" (Shanley 1995, 160-161).

From this perspective, viewing gestational services as economic labour empowers women. Accepting payment for surrogacy poses a serious challenge to fundamental notions in "patriarchal ideology" inherent in the concept of traditional families (Shalev 1989, 166). The introduction of market transactions into the reproductive sphere, made possible by new reproductive technologies, increases the ability of women to act as moral agents in their own right:

> The surrogate mother conceives intentionally; she bears a child outside the bounds of marriage; she refutes openly the nexus of biological and social motherhood; and she claims a right to participate in the market economy in this regard. She implies that we women, as human beings, are capable of exercising reason with respect to reproduction and of sharing our birth power with those less fortunate than we. (Shalev 1989, 165-166)

By allowing women more control over the process of reproduction, proponents stress that commercial surrogacy also enhances women's autonomy. Viewing women's domestic labour as an economic contribution, like recognizing the right to freely enter contracts,

enhances the understanding of women as autonomous moral agents, capable of rational decision-making.

Reproductive Autonomy and Procreative Liberty

In addition to infringing on the freedom to enter into contracts and devaluing women's labour, proponents of commercial surrogacy claim that prohibiting payment for surrogacy constitutes a state intrusion into the sphere of women's reproductive autonomy. Permitting commercial surrogacy recognizes a woman's authority to make decisions regarding her reproductive capacity, whereas banning the practice reinforces sexual inequality by implying that "women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity" (Shalev 1989, 94, 11). Because a surrogacy contract respects a woman's autonomy and freedom of choice, proponents reject charges of exploitation.

Like other arguments in favour of commercial surrogacy, "reproductive autonomy" stresses the limited state and the primacy of the individual. Feminists concerned with reproductive autonomy oppose any state intrusion into a woman's reproductive sphere, often alluding to feminists' hard-fought battle to expand abortion rights. In Canada, women's groups and activists involved with the pro-choice movement refused to accept any restrictions on a women's right to choose what to do with her reproductive capacity. As the Canadian Research Institute for the Advancement of Women (CRIAW) argued before the Royal Commission in 1990, "[E]ven if we believe that women's bodies are threatened by new reproductive technologies, we recognize also that it's up to individual women to exercise their proper choice" (cited in Scala,

Montpetit and Fortier 2005, 592). To ban surrogacy would "reactivate and reinforce the state's power to define what constitutes legitimate and illegitimate reproduction" (Shalev 1989, 94). As with arguments focusing on freedom of contract, those who would allow payment for surrogacy prefer individual choice to paternalistic, state-enforced "social norms."

In *Children of Choice* (1994), John Robertson spells out the logical implications of reproductive autonomy, asserting that "control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life" (34). In so doing, he moves beyond women's reproductive autonomy to the concept of "procreative liberty," defined as "the freedom to decide whether or not to have offspring" (1994, 4). In this formulation, individuals (both male and female) have a fundamental right to reproduce as well as a right to choose not to reproduce (encompassing a right to abortion), and the state must not infringe on this right. As Harris argues, "[t]he state must show good and sufficient reason to curtail a fundamental liberty, which in the case of procreation, must amount to a 'high probability of major harm to potential children'. Otherwise procreative liberty is nothing but state permission" (Harris 2000, 32, partially citing Harris 1998, chs. 1 and 2).

Because most women will not act as surrogates without compensation, those who believe in procreative liberty argue that prohibiting payment for surrogacy eliminates a very real reproductive possibility for the infertile. Proponents of this view, including several Canadian disability rights organizations, claim that to deny such services is effectively to deny the infertile procreative liberty (Canada 1993, 680; Harris 2000, 33). While "procreative liberty" goes beyond the reproductive services of women to the

procreative desire of parents, it shares with the "liberal" perspective the notion of individual liberty, and is generally hostile to any state intrusion on this liberty.

Rejection of Collectivist Arguments

Proponents of commercial surrogacy reject all three "collectivist" defenses of prohibition. In rejecting the "exploitation of women" arguments, proponents stress the autonomy of those women to make their own decisions. Moreover, they argue that denying poor women the ability to engage in surrogacy for financial gain not only ignores the larger social issues concerning their economic vulnerability – it also smacks of paternalism (see Ruparelia 2007, 49). Proponents of commercial surrogacy further reject the claim that commercial surrogacy "commodifies" human life, stressing that women receive payment for their gestational services, not for the sale of the child. Since children are not property, "the question of buying and selling them does not arise" (McLachlan and Swales 2000, 3-4).

The gulf between proponents and opponents of commercial surrogacy is clearest, however, with respect to "social harms." Those who contend commercial surrogacy creates social harms move beyond a utilitarian conception of physical harm, suggesting that negative externalities associated with allowing payment for surrogacy extend "beyond users and providers to the community as a whole" (McTeer 1995, 889). Opponents of commercial surrogacy appeal to a greater "common good" – whether in the form of traditional families or preferred reproductive relationships – rather than utilitarian concerns about individual self-fulfillment. By focusing on collectivist concerns, those who posit "social harms" explicitly reject utilitarianism.

Not surprisingly, proponents of commercial surrogacy take the opposite route, demanding proof of harm to individuals. Alastair V. Campbell, an opponent of commercial surrogacy, nonetheless describes the allure of the liberal critique eloquently:

> Defenders of the liberal view of autonomy shift the burden of proof the other way [away from parental duty]. In the style of John Stuart Mill, they demand clear evidence of harm (to child or to surrogate mother) before we are entitled to interfere in the liberty of commissioning couples and surrogate mothers to trade parental options. (Campbell 2000, 36)

The difficulty for collectivist opponents of surrogacy is that, in contrast to proving tangible physical harm, descriptions of social harm tend to be more abstract and difficult to prove empirically. This is particularly true when the arguments are prospective – that is, they foresee potential future harm to society. Along these lines, Gostin contends there is no evidence suggesting that children born in surrogacy arrangements have less fulfilling lives than other children, and there is little data to support the philosophical concerns that commodification undermines the fabric of society (Gostin 1990, x-xi; see also McLachlan and Swales 2000, 4). In a similar vein to those critical of opposition to same-sex marriage, proponents of commercial surrogacy refuse to allow a preference for "traditional" social arrangements to dictate public policy.

Conclusion: Commercial Surrogacy as a Morality Policy

Going back to Studlar's definition of morality policy (2001, 39; see Chapter 3), it is clear that commercial surrogacy fits into this categorization. Commercial surrogacy is framed in terms of fundamental rights (for opponents, the rights of children; for proponents, the rights of women and the infertile) and competing values. Although proponents want surrogates to be paid, it is not primarily an economic issue with a

constituency that would receive benefits. Neither opponents nor proponents have a direct economic interest in the outcome. Like abortion, commercial surrogacy "divides people into two seemingly irreconcilable camps – those who sponsor family values and the rights of the unborn versus those who champion women's individual rights and choice" (Strickland 2005, 3). Like gay rights, commercial surrogacy concerns "highly personal notions of sexual intimacy and morality" (Ellis 2005, 121). And like many morality policies, it involves a dispute between two identifiable groups over "social harms" connected to the evolution of the traditional family.

Although opponents and proponents of commercial surrogacy are by no means homogenous groups, they are separated by the relative weight they give to individual liberty and the role of the state in fostering optimal social and familial relationships. "Liberal" proponents of commercial surrogacy stress a commitment to liberal conceptions of rights, predicated on the rational ability of individuals to make autonomous decisions. By contrast, "collectivist" opponents of commercial surrogacy share the perspective that liberal individualism must not govern the sphere of human reproduction. Both sides recognize that all surrogacy arrangements challenge traditional norms of kinship, parenthood, and social values. While those opposed to commercial surrogacy typically argue against changing social norms concerning reproduction, these transformations are accepted, and often advocated, by those defending surrogacy (Markens 2007, 78). These fundamentally different worldviews leave little room for compromise; the philosophical and moral arguments are grounded in starkly different primary values. The two distinct camps – "liberals" in favour of commercial surrogacy,

and "collectivists" who wish to prohibit the practice – fall neatly into the same camps commonly associated with morality policy.

With all morality policies, creating moderate public policy that attempts to include the diverse views of the broader public is a difficult task. The commercial surrogacy prohibition sheds light on this issue. Although the final version of the *Assisted Human Reproduction Act* represents a modified compromise, it did so by combining permissive regulations for some technologies with strict criminal prohibitions for others. As a result, Canada's commercial surrogacy prohibition falls to the collectivist side of the moral debate. The Royal Commission on New Reproductive Technologies was concerned about social harms produced by commercial surrogacy, and cautioned against reducing parenthood and parental responsibilities to a transaction (Canada 1993, 678). The House of Commons' 2001 Brown Report also adopted collectivist arguments, making reference to exploitation and commodification:

> It is contrary to our thinking to treat human beings or human material as commodities that can be regarded in terms of their economic value rather than their intrinsic worth... commercial surrogacy treats children as objects and treats the reproductive capacity of women as an economic activity (Canada 2001, 6, 12).

The collectivist concerns of both the Royal Commission and the Brown Report are reflected in the language of the *Assisted Human Reproduction Act*, which states: "[T]rade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition" (Canada 2004, 2f).

The decision to criminalize commercial surrogacy was in keeping with "collectivist" opposition to the law. From the Royal Commission to the *Assisted Human*

Reproduction Act, policymakers were most receptive to collectivist arguments concerning the prevention of commodification, exploitation, and "social harms." By contrast, liberal concerns about reproductive autonomy and individual liberty were secondary. Although the AHRA as a whole may be a compromise, the decision to criminalize commercial surrogacy falls to the "collectivist" pole of the ethical debate.

As is to be expected with morality policy, the final result left many groups unhappy with the law. With respect to commercial surrogacy in particular, various interest groups and commentators have criticized the criminal prohibition, with some even claiming it violates the *Charter*. The next chapter discusses these arguments in greater detail, examining the likelihood and possible outcome of a Supreme Court decision.

CHAPTER FIVE: MORALITY POLICY IN THE SUPREME COURT OF CANADA

Smith and Tatalovich (2003) argue that Canadian political institutions facilitate the depolitization of morality policy through the "privatization" of conflict, by moving a contentious policy issue to the centre of government. The Royal Commission on New Reproductive Technologies was a quintessential depolitization tactic, and many (if not most) of the Commission's recommendations are reflected in the current legislation (Hnatiuk 2007). As with other morality policies in Canada, the initial response from government was to depoliticize, postpone, and avoid the issue.

In addition to appointing a government commission, another way in which a government can "privatize" moral conflict is by letting an issue play out through the courts – whether by asking about the constitutionality of proposed legislation through a "reference procedure," not appealing adverse rulings, funding interest groups opposed to the policy status quo, or effectively abdicating responsibility for morality policy to the courts (see Smith and Tatalovich 2003, 137-138). Moreover, when morality policy does come before the Court in the form of a *Charter* challenge, political leaders can (and often do) opt not to challenge the Court's decision, and with it the new policy status quo (Morton 1999, 26; Morton and Knopff 2000; Brodie 2002; Hiebert 2002; see also Chapter 3). Because interest groups have been receptive to this alternative policy route, using litigation as a strategy for affecting long-term policy change (Epp 1996; Hein 2000; Manfredi 2004), there is some suggestion that groups opposed to the commercial

surrogacy prohibition may indeed take their fight to the courts. Is such a court challenge likely? And if it is, would it be successful?

This chapter focuses on the possibility that Canada's commercial surrogacy prohibition could be subject to a successful *Charter* challenge. First, it discusses the likelihood of interest group litigation with respect to commercial surrogacy, arguing that there are many reasons to suspect that interest groups may take their battle to the courts. Second, this chapter examines the importance of doctrine as an independent variable in judicial decision-making, arguing that studying Supreme Court jurisprudence on cognate moral issues is necessary in order to understand the future of the surrogacy prohibition. Finally, this chapter analyzes Supreme Court jurisprudence concerning two issues: women's reproductive autonomy and the recognition of non-traditional families. Both sets of cases deal with issues of parenting, the family, and individual autonomy that pit liberal individualism against collectivism. The jurisprudence demonstrates a Supreme Court that has gradually shifted to a far more "liberal" conception of rights on moral issues concerning reproduction and the traditional family. This has relevance for Canada's commercial surrogacy prohibition, which deals with very similar issues. While Canada's commercial surrogacy prohibition follows "collectivist" arguments in order to justify a ban, Canada's highest court – a major player in the realm of morality policy – has been far more receptive to "liberal" arguments, particularly when it comes to the *Charter*.

The Prospect of a *Charter* Challenge

There are two important aspects for the prospects of a *Charter* challenge to the *Assisted Human Reproduction Act*. First, a case must arise, giving someone legal standing to raise the constitutionality of certain provisions – in this case, the commercial surrogacy prohibition. For this to occur, there needs to be the existence of criminal activity, which leads to prosecution. Second, to endure the long legal battle that will inevitably result, interest groups must be prepared to support the *Charter* challenge. This section examines the likelihood of these two components.

The criminal prohibition of commercial surrogacy has met serious opposition from many commentators, organizations, and affected individuals. In spite of the strong prohibition, there is little evidence of a public consensus favouring criminalization in the *Assisted Human Reproduction Act* (Caulfield and Chapman 2005). A poll commissioned in 2002 suggests that a majority of Canadians are actually in favour of allowing compensation for surrogacy (Greenaway 2002). Other concerns relate to the practical implications of the prohibition. For example, some claim the prohibition may simply drive commercial surrogacy underground, or send wealthy couples to the United States (Harvison-Young 2005, 142; Hnatiuk 2007, 54). Because "altruistic" surrogates are in short supply and infertile individuals are willing but unable to pay for surrogates, infertile Canadians have already engaged in payment for surrogacy, both legally in the United States, and illegally in Canada (Stolte 2005; Somerville 2007b; Ryan 2008).

Many news reports indicate that the infertile and same-sex couples view the prohibition as a barrier to their ability to reproduce, and surrogate mothers believe they

deserve some compensation for their efforts (French 2005; Penny 2007). Citing an investigative report by Kelly Ryan, the *National Post* describes the current situation:

> Desperate childless couples and the young women interested in helping them simply cross the border to the United States, where the market for reproductive tissue remains legal. A black market has grown up at home, with buyers and sellers lying to clinics about not having exchanged cash, and in many cases shoppers purchase human ova in the United States and bring them back to have them surgically implanted in Canada by uneasy doctors who don't quite know whether they are breaking the law. (National Post 2007)

Thus, there is certainly evidence that Canadians are breaking the law. One recent report discusses Canadian would-be surrogates and commissioning parents openly discussing compensation on online forums (Blackwell 2009). In a recent decision before a Quebec family court concerning the legal parenthood of a child born through surrogacy, a Quebec couple openly admitted to paying $20,000 to a surrogate (Hamilton 2009).

In order to create a *Charter* case, however, the Canadian authorities need to be prosecuting criminal acts. As yet, there is little evidence that this is occurring. However, Assisted Human Reproduction Canada, the body charged with prosecution, is not yet fully functioning. Its Board of Governors was appointed only in September of 2007, and there are many reports saying the agency is still at its early stages of development (Baird 2005; Galloway 2006; Greenaway 2006; Canada 2007), and one suggesting that complaints of legal violations are being directed to the RCMP (Blackwell 2009). A lack of prosecution, at this early stage at least, is probably due more to novelty than to an unwillingness to press charges. Since section 59 of the AHRA expressly allows provincial governments to join in prosecution in conjunction with the Agency, couples openly advertising payment for surrogates could very well be prosecuted in the future.

In addition to frustrated individuals, several organizations have spoken out against the prohibition on commercial surrogacy. Roger Pierson of the Canadian Fertility and Andrology Society says the law effectively discriminates against infertile couples, and that it has "criminalized acts of what people might call compassion" (French 2005). Beverly Hanck, Executive Director of the Infertility Awareness Association of Canada (IAAC), claims the prohibition has effectively eliminated avenues of treatment, driving desperate couples underground to the black market (Ryan 2008).

It should come as no surprise that the fertility industry is opposed to restrictions on new reproductive technologies; the American fertility industry, which operates in absence of any national regulations, is a $3 billion per year business (Spar 2006). But the fertility industry is not alone in opposing the prohibition. Other organizations without an economic stake in the outcome are opposed to strict reproductive technology laws. Gay-rights advocates have in the past expressed an interest in reforming Canada's laws concerning reproduction, which they argue often discriminate against same-sex couples, by definition incapable of "natural" procreation. There are already discussions of a well-organized consortium consisting of gay rights advocates, scientists, and fertility organizations who want to make the AHRA less restrictive (Somerville 2007b).

There are several reasons that those opposed to the prohibition on commercial surrogacy may attempt to achieve policy change through *Charter* litigation. First, as described in Chapter 3, change to Canadian morality policy tends to happen in the courts, rather than Parliament. Legislators have little appetite for consciously opening up such contentious legislation, and whatever the real-world importance of new reproductive technologies, they hardly sit at the top of Canada's legislative agenda. Second, the 2008

re-election of the Conservative Party of Canada does not bode well for those wishing to end the prohibition. Members of the Canadian Alliance and Progressive Conservative Party, the two parties that merged into the Conservative Party of Canada, were amongst those most in favour of criminal prohibitions in the AHRA (Canada 2001; Caulfield and Bubela 2007). Third, Quebec's successful constitutional challenge of regulatory dimensions of the AHRA on federalism grounds (*Reference re Constitutional Validity of Sections 8 to 19, 40 to 43, 60, 61 and 68 of the Assisted Human Reproduction Act* 2008; see Chapter 2) may embolden interest groups to affect similar change with respect to the Act's criminal prohibitions.

Finally, several interest groups opposed to the commercial surrogacy prohibition – gay rights, disability rights, and some feminist organizations – have considerable experience affecting policy change through *Charter* litigation (Brodie 2002; Manfredi 2004). "Repeat player" litigants, defined as interest groups engaged in systematic reform litigation, are most likely to pursue strategies for public policy change through the courts (Galanter 1974). Typically, those with extensive organizational resources, diffuse financial support, and long time horizons see litigation as a useful strategy for achieving public policy change (Manfredi 2002, 330). There is some evidence that this is already happening, though not yet with the *Assisted Human Reproduction Act*. In *Doe v. Canada (Attorney General)* (2007), which unsuccessfully challenged an exemption for assisted conception that excluded gay men in the Ontario Court of Appeal, both the Foundation for Equal Families and Egale Canada (two gay rights organizations) provided third-party intervener factums. Although this effort was unsuccessful, there have been other successes. For example, in *Cameron v. Nova Scotia* (1999) the Nova Scotia Court of

Appeal held that infertility constitutes a disability, leading some to believe that this could have implications for the commercial surrogacy prohibition (Hnatiuk 2007).

Thus there exists some suggestion that a *Charter* argument could be used to contest the commercial surrogacy prohibition. Citizens are breaking the law, there are suggestions that the RCMP is looking into the criminal activity, and interest groups with a history of *Charter* litigation are opposed to the prohibition. Whether such a challenge would be successful depends on a variety of factors, including the circumstances of the case, public opinion, the composition of the justices, the strength of arguments put forward by litigants and the interests representing them, and judicial doctrine. The next section describes the importance of doctrine as an independent variable in Supreme Court decision-making, suggesting that an understanding of judicial doctrine is useful in order to understand how the Court will decide future cases.

Judicial Doctrine and Institutional Constraints

It is unclear whether the Supreme Court, over time, has been sympathetic to one set of ideological or moral principles over another. Scholars on the right (Morton and Knopff 2000; Brodie 2002) and the left (Petter and Hutchinson 1989; Mandel 1992; Petter 2007) have criticized the Court for its ideological approach to *Charter* jurisprudence. Because the Court has consistently been attacked for being too activist *and* too deferential, too liberal *and* too collectivist, the way the Court will decide in any case is by no means preordained. Even with morality policy, the Court has not always ruled in favour of one moral principle over another (see Chapter 3). Thus, no court case is predetermined. This variation in judicial positions and outcomes is grist for the mill of

"attitudinal" theories of judicial decision-making. According to these theories, high court judges are driven almost solely by their attitudes and personal policy preferences, and their primary goal is simply to approximate these preferences in every decision; precedents, including the precedential weight of existing legal doctrines, impose few if any constraints (Rohde and Spaeth 1976, 72; Segal and Spaeth 1996, 973; see also Pritchett 1941; Schubert 1965; Segal and Spaeth 1993). In Canada, attitudinal scholars argue that several factors – including political independence and tenured appointments until the age of 75 – allow Supreme Court of Canada justices to vote according to their own attitudes and values without having to fear for their political future (Ostberg and Wetstein 2007, 33-34; see also Songer and Johnson 2007).

Particularly in the United States, attitudinal scholars have largely succeeded in moving the study of high court decision-making away from the formalistic assumption that judges "find" law based on objective principles, and toward the consideration that "ideological and political considerations drive decision making" (Gillman 2001, 466). As Ostberg and Wetstein note, these behavioural studies have "gone a long way toward debunking the pervasive myth that judges simply rely on legal texts, precedents, the intent of the framers of the Constitution and the toolbox of law school training to guide their judgments and written opinions" (2007, 5-6). Because post-*Charter* research suggests increasing attitudinal conflict between Supreme Court justices, the authors go as far as saying that in Canada, "attitudinal behaviour continues to operate unabated in the [Supreme] Court today" (2007, 6).

At its extreme, the attitudinal model of judicial decision-making denies that existing legal doctrine and precedent impose any significant constraints on judicial

preferences. From this perspective, understanding why Supreme Court justices decide the way they do is nothing more than examining their personal preferences. Applied to a challenge of Canada's commercial surrogacy prohibitions, this perspective implies that a successful challenge depends on nothing more than whether or not the Supreme Court justices approve of the practice. If this is true, the attempt of this study (and especially this chapter) to use evolving Supreme Court doctrine to assess the likely outcomes of a Charter challenge to Canada's surrogacy prohibition is a waste of time. To predict the outcome of a future case, one would need to know the views of the particular judges hearing the case; since one cannot know who those judges would be, prediction would seem impossible.

Since attitudinalism, at least in its more extreme version, denies the very premise of this study – that it makes sense to assess the prospects of particular jurisprudential outcomes – the study can continue only if extreme attitudinalism is mistaken. That is precisely the claim of neoinstitutional scholars, who contend that the attitudinal approach is far too simplistic. Neoinstitutionalists do not deny that attitudes and personal policy preferences affect judicial decision-making. Rather, they stress that those attitudes are tempered by distinctive institutional norms, constraints, and customs, including legal theories and principles (Kahn 1999, 175). As Richards and Kritzer note:

> Advocates of the attitudinal model point out that the justices create the law that guides their own decision making, so the law is itself a reflection of the justices' attitudes... If the adherents of a pure attitudinal model wish to reduce law to nothing more than attitudes formally stated, the attitudinal model becomes tautological; attitudes drive decisions because every decision is made on the basis of attitudes. Our position is that attitudes influence the development of law, but law can also affect the decisions of the Court, and these effects are not purely attitudinal. (2002, 306-307)

This study relies on the neoinstitutionalist correction of attitudinal theory.

Although high court justices have the freedom to make policy choices, neoinstitutionalism holds that they must nonetheless abide by institutional structures that define the Court's role and range of action. In this vein, James Gibson has described judicial decision-making is "function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (1991, 256). This conception "reflects the fundamental insight of neoinstitutionalism: Political actors create institutions based on their policy goals, but those institutions then structure and constrain the behavior of the very political actors who created them" (Richards and Kritzer 2002, 307).

By recognizing legal institutions as independent forces affecting judicial decision-making, neoinstitutional scholars contend that factors other than attitude alone affect potential judgment. Such factors include "the circumstances of the case, the climate of opinion at the time the case is heard, [and] the strength of presentation by those at the bar in a particular case" (Baier 2006, 26). But perhaps the most important (and tangible) constraining factor is judicial doctrine, defined as "a set of standards, maxims, tests, and approaches to the interpretation of the law that is used to regularize law's application and make it more routine and predictable" (Baier 2006, 14). Because doctrine is enforceable by the courts, "[i]t is, in fact, law... doctrine is largely [the] distillation of ideas and approaches into what amounts to a series of techniques and rules for dealing with *new fact situations*" (Baier 2006, 13, emphasis added). In order to understand how a high court will deal with "new fact situations," it is important to conceptualize doctrine as an independent variable, capable of scholarly isolation and study, that shapes and influences judicial decision-making (Baier 2006, 28). To suggest otherwise, as Ostberg and Wetstein

do by claiming behavioural attitudes operate "unabated" in the Supreme Court of Canada, would be to "reduce constitutional jurisprudence to a political football, to relegate law to the status of dependent variable, [and] to deny that judges deciding cases experience legal ideas as constraints on their own political preference" (Cushman 1998, 41).

Certainly, neoinstitutional scholars do not claim that judges never stray from established doctrine, that judicial attitudes are irrelevant, or that doctrine can explain all judicial outcomes. As Baier notes, "[judicial] predispositions are one variable, doctrine another." Doctrine is worth studying "not because it holds all the right answers but because it is a formative force on the answers, a force that gains its legitimacy from tradition and formal methods" (2006, 26, 24). In his study of federalism in the United States, Australia, and Canada, Baier supports this contention with empirical evidence that doctrine is a "formative force in the way judges settle division-of-powers disputes" (2006, 157). Barry Cushman has come to similar conclusions in his study of the United States Supreme Court during the New Deal period, as has Elizabeth Bussiere when surveying the Warren Court in the 1950s and 1960s (Cushman 1998; Bussiere 1999). These studies suggest that, in order to understand how a Court might rule on a given issue, it is worthwhile to study previous doctrine, as the next part of this chapter proposes to do.

If doctrine is worthy of study as an independent variable, which doctrine should we examine? This thesis is not the first study to deal with the constitutionality of the commercial surrogacy prohibition as a "new fact situation" that could come before the Supreme Court. Dana Hnatiuk (2007) has previously argued that the commercial surrogacy prohibition in the *Assisted Human Reproduction Act* may not withstand a

Charter challenge. Characterizing the ban as "overbroad," and "arbitrary," Hnatiuk provides several arguments that bring the constitutionality of several criminal prohibitions in the AHRA into question. In particular, she uses previous Supreme Court doctrine to speculate that the surrogacy prohibition could violate section 7 (life, liberty, and security of the person) by infringing on the reproductive autonomy of the surrogate and preventing access for the infertile. In addition, Harvison-Young (2005) suggests the law might also infringe section 15 (equality) by discriminating against the infertile. Hnatiuk in particular provides a host of constitutional arguments explaining why the prohibition would likely violate the *Charter* and not pass the "reasonable limits" analysis of section 1.[10]

While these authors raise important concerns, their analysis is incomplete. Citing judicial precedent ranging from administrative delay (*Blencoe v. British Columbia*) to the public monopoly on health insurance (*Chaoulli v. Quebec*), for example, Hnatiuk does not situate the surrogacy prohibition within *Charter* jurisprudence dealing with cognate moral and legal issues. The question of constitutionality should not rest on whether wide and disparate *Charter* jurisprudence *could* be used to overturn the surrogacy prohibition. Rather, a proper focus on doctrine should relate to whether arguments justifying the prohibition are consistent with the jurisprudence on the social issues concerning similar morality policies. This thesis goes further than Hnatiuk and Harvison-Young by examining the jurisprudence on issues more relevant to the reasons behind the surrogacy prohibition: reproductive autonomy and the recognition of non-traditional families. As

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[10] Section 1 of the *Charter* reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In practice, most impugned provisions violate the right in question. The constitutionality is then determined through a section 1 analysis, which determines whether the limitation of the right is justifiable.

Chapter 4 demonstrates, commercial surrogacy divides people into two camps largely similar to those involved with the debate over abortion and, by extension, reproductive autonomy: liberals concerned with individual rights and choice, and collectivists sponsoring "traditional" family values and the rights of the unborn (see also Strickland 2005, 3). These two camps are similar to those involved in the recognition of non-traditional families and gay rights, which involves debates over sexual intimacy and personal morality (Ellis 2005, 121). Finally, like reproductive autonomy and the recognition of non-traditional families, commercial surrogacy's opponents largely adopt the terminology of intangible "social harms."

The rest of the chapter examines these two sets of cases, exploring judicial decision-making partially as a function of path dependence, with the expectation that decisions made during policy initiation will influence future policies (see Pierson 2000). Shapiro and Sweet note:

> Legal institutions are path dependent to the extent that how litigation and judicial rule-making proceeds, in any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of the law have been sequenced and resolved. (Shapiro and Sweet 2002, 113)

Thus, judicial doctrine often evolves in path dependent ways. As Knopff argues, "one of the forces that propels policy change is the unfolding of the logic inherent in existing policy or in the rhetoric used to justify it" (Knopff 1986, 574). Following this logic, the rest of the chapter examines whether the Supreme Court of Canada has come to an overarching constitutional doctrine on issues concerning reproduction and the recognition of non-traditional families. How has the Supreme Court of Canada approached important social policies that involve broadly similar arguments about familial obligations,

reproduction, and social institutions?

Embracing Liberal Individualism in Family Disputes

In their study of morality policy in America, Tatalovich and Daynes predict that courts will promote legal change in morality policy by "asserting individual rights and liberties against traditional social values" (Tatalovich and Daynes 2005, xxvii). The Canadian experience suggests that this has mostly, though not always, been the case. Since the adoption of the *Charter*, groups advocating liberal individualism have been more inclined to litigate, and to win, than those advocating collectivism (Hein 2000, 16; Morton and Knopff 2000, 59; see also Brodie 2002; Manfredi 2004). These groups have been particularly successful before the Supreme Court of Canada. When ruling on morality policies such as abortion (*R. v. Morgentaler*), prisoner voting (*Sauvé v. Canada*), and Sunday shopping (*R. v. Big M Drug Mart Ltd.*), to name a few, the Supreme Court has rejected collectivism in favour of liberal individualism. However, the liberal perspective has not won out in every moral controversy before the courts. The Supreme Court of Canada's collectivist ruling against physician-assisted suicide in *Rodriguez v. British Columbia* (1993) flies in the face of postmaterialist values. Also, in *R. v. Keegstra* (1990), the Court upheld a provision banning hate speech. Thus, the Court has no clear "doctrine" when it comes to morality policy. But, on issues of cognate importance to commercial surrogacy, how has the Court ruled?

Since the introduction of the *Charter*, the Supreme Court of Canada has grappled with outlining the scope of liberty and equality rights with respect to parenthood and the family. Lessard argues that the Court's jurisprudence has been "deeply divided in its

approach to the relationship between individual rights protections and family relationships" (2002, 215). Using two parental rights cases as examples,[11] Lessard argues that the Supreme Court has had difficulty overcoming a tension between what she calls "liberal" and "conservative" interpretations of liberty:

> [W]ithin the liberal paradigm, the individual experience of liberty is *prior to* and *in opposition to* the public sphere of government; within the conservative paradigm, individual liberty rights are *textured by the history and patterns of state responsibility* within an organic social order... the key points of divergence in classical liberal and conservative approaches to liberty are rooted in rival conceptions of society which, in turn, generate conceptions of the individual, the family and the public order which are in direct tension with each other. (2002, 237, emphasis in original)

The "rival conceptions of society" are, broadly speaking, the same as the liberal and collectivist ethical arguments concerning commercial surrogacy. While the collectivist perspective articulated in Chapter 4 is arguably more encompassing (by virtue of incorporating feminist perspectives on the exploitation), the similarities between Lessard's "conservative" perspective and the "collectivist" view of surrogacy are nonetheless strikingly similar.

With respect to parental liberty, Lessard claims the Supreme Court has oscillated between the liberal and collectivist[12] paradigms. On the "liberal" side, parental liberty cases stress individual privacy. In the words of former Justice Gérard La Forest, section 7 of the *Charter* offers parents the right to "an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference" (*Godbout v. Longueuil* 1997, para. 66). Under the liberal paradigm, state-sanctioned hierarchies based on natural order and history are given little weight. By contrast, the

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[11] Lessard discusses *R. v. Jones* [1986] 2 S.C.R. 284 and *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] S.C.R. 315.

[12] Because of their similarity, this chapter uses "collectivist" rather than "conservative" when describing Lessard's terminology.

collectivist paradigm gives importance to the social context of individual rights claims, and therefore a collectivist interpretation of liberty is "tempered by the political significance of community bonds... autonomy is understood in terms of the capacity to forge and pursue responsibilities and relationships within a set of socially sanctified institutions" (2002, 230). From this perspective, a law preventing "social harms" such as the dissolution of family bonds and the moral nature of childbearing is likely to be seen as a permissible, even necessary, constraint on individual liberty.

Lessard claims the Supreme Court has successfully, if awkwardly, crafted a conception of parental liberty that incorporates liberal hostility to the state with collectivist family values (2002, 246). By tracing the evolution from *B. (R.)* to *Jones*, she perceives a "neoconservative synthesis" that fuses traditional family norms with classical liberal rights protection (2002, 255). However, a closer inspection of Supreme Court doctrine suggests that, if such a synthesis ever existed, the Court has gradually abandoned it in favour of a "liberal" conception of liberty. In particular, in two areas of law very important to the debate over surrogacy – reproductive autonomy and the recognition of non-traditional families – the Court has over time become less willing to accept collectivist arguments based on the value of organic social institutions, and more willing to accept an expansive, liberal definition of individual autonomy.

The following section demonstrates how the Supreme Court's definition of liberty, in the context of social values and family norms, has slowly evolved towards an almost uniform acceptance of the "liberal" view. Tatalovich and Daynes' argument that courts will assert change in morality policy by promoting individual rights and liberties above traditional social values (2005, xxvii) is largely correct when it comes to Canada.

With respect to reproduction and the traditional family, the Supreme Court of Canada has been a successful venue for proponents of liberal individualism.

From *Eve* to *Dobson*: The Expansion of Reproductive Autonomy

The Royal Commission, the Brown Report, and all four drafts of Canada's assisted human reproduction legislation favoured a criminal ban for commercial surrogacy. From this perspective, preventing the commodification of children and the exploitation of women is more important than potentially limiting women's reproductive autonomy. However, this approach is at odds with the Supreme Court of Canada's jurisprudence on similar moral issues. In six cases since 1986, the Supreme Court of Canada has used both common law and the *Charter* to gradually expand women's reproductive autonomy. While early cases certainly manifested some collectivist perspectives, those have gradually and significantly declined. This section will describe the evolution of "reproductive autonomy" in post-*Charter* Supreme Court jurisprudence, demonstrating how the Court's conception of reproductive autonomy stands in stark contrast to the arguments underpinning the current commercial surrogacy prohibition.

E. (Mrs.) v. Eve (1986)

The first important post-*Charter* Supreme Court case concerning reproductive autonomy, *E. (Mrs.) v. Eve* (1986), displayed an early collectivism in Supreme Court jurisprudence. In *Eve*, the Court held that the state could not involuntarily sterilize a mentally disabled woman at her mother's request. Writing for the Court, Justice La Forest would not allow involuntary sterilization because it "removes from a person the

great privilege of giving birth, and is for practical purposes irreversible," (para. 79). However, while stressing the *privilege* of procreation, La Forest rejected the respondent's section 7 *Charter*[13] claim of "a fundamental right to bear children" (para. 96). The assertion of "fundamental right to procreative choice" went "beyond the kind of protection s. 7 was intended to afford" (para. 96). This emphasis on procreation and reproductive autonomy as a *privilege*, as opposed to a right, was a considerable limitation that would become less prominent in subsequent cases dealing with reproductive autonomy.

R. v. Morgentaler (1988)

The next case to deal squarely with reproductive autonomy was *R. v. Morgentaler* (1998). In this famous case, Dr. Henry Morgentaler maintained that the Canadian law restricting abortion was a violation of the section 7 *Charter* right to "life, liberty, and security of the person." In a 5-2 decision, a majority of the Court struck down Canada's abortion law for being overly restrictive. Though many media reports (and current conventional wisdom) suggest that the *Morgentaler* decision conferred a right to abortion, a majority of the Court defined reproductive autonomy in a way that was actually quite limited (Morton 1992). As Manfredi notes, "the seven members of [the Court] produced four separate reasons for the judgment ranging from support for the status quo... to nullification based on a broad interpretation of liberty" (Manfredi 2004, 66). While five justices found the abortion law unconstitutional, they did so for different reasons.

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[13] Section 7 of the *Charter* reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Only one member of the Court (Justice Wilson) declared a constitutional right to abortion, while the other four members of the majority only found procedural violations of the *Charter* (Morton 1992, 246). In dissent, Justice McIntyre (speaking for himself and Justice La Forest) stressed that the scope of section 7 should be limited: "The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the *Charter* or any other section" (*Morgentaler*, para. 191). Justice Dickson, writing for himself and Chief Justice Lamer, claimed it was "neither necessary nor wise" to explore whether section 7 of the *Charter* "is a wide-ranging right to control one's own life and to promote one's individual autonomy," focusing instead of the procedural unfairness of the law (paras. 8-9). Justice Beetz, writing for himself and Justice Estey, took an even narrower approach in striking down the law. Only because the bureaucratic regulations posed additional risks to women's health was the law "manifestly unfair" (para. 68). Six of the seven justices, therefore, did not endorse an expansive view of reproductive autonomy.

However, Justice Bertha Wilson's interpretation of section 7 would ultimately steal the headlines and influence later doctrine on reproductive autonomy (Morton 1992, 233). Justice Wilson argued, "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives" (para. 238). For Justice Wilson, reproductive autonomy lay at the heart of women's dignity: "the right to reproduce or not to reproduce... is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being" (para. 240). This left no doubt as to whether section 7 granted women a right to terminate a pregnancy, at least at the early stages. In contrast to the other

justices, who focused on procedural violations (or found no violation at all), Wilson claimed the *Charter* erects "an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence" (para. 224). Wilson's characterization of individual liberty was classically "liberal," in the sense that liberty "is prior to and in opposition to the public sphere of government" (Lessard 2002, 237). Though this was only the opinion of one justice, it would have reverberations in subsequent decisions.

Tremblay v. Daigle (1989)

One year later, the Supreme Court of Canada heard *Tremblay v. Daigle* (1989). The case concerned whether Jean-Guy Tremblay could order an injunction preventing his ex-girlfriend, Chantal Daigle, from having an abortion. The central question was whether a fetus was meant to be included within the term "human being" in the *Quebec Charter of Human Rights and Freedoms*.[14] Overturning the Quebec Court of Appeal decision, the Court based its reasoning on the strict legal definition of "human being." They unanimously held that "[a] foetus is not included within the term 'human being' in the Quebec *Charter* and, therefore, does not enjoy the right to life" (3). Because "recognition of fetal rights would greatly constrain women's decision-making autonomy in the context of pregnancy" (Manfredi 2004, 74), the decision not to grant the fetus legal personhood necessarily meant an expansion of women's reproductive autonomy. Feminist groups in particular lauded the Court's decision for these reasons (see Morton 1992; Rodgers

[14] The *Quebec Charter of Human Rights and Freedoms* is a statutory bill of rights that applies only to the province of Quebec. It guarantees a set of civil liberties and overrides inconsistent statutes. Although it has lost much of its importance since the introduction of the *Canadian Charter of Rights and Freedoms* in 1982, it remains in effect (Hogg 2001, 637-638). It has been referred to in several Supreme Court of Canada cases such as *Daigle* and *Chaoulli v. Quebec* (2005).

2006).

R. v. Sullivan (1991)

In *R. v. Sullivan* (1991), the Court once again dealt with legal personhood. In *Sullivan*, two midwives were charged with criminal negligence causing bodily harm to a pregnant mother, and causing death to the child during childbirth. Unlike *Daigle*, which asked whether a fetus has legal personhood while still inside the mother, *Sullivan* dealt with the legal status of the fetus when coming through the birth canal. Justice McLachlin (as she then was), writing for the majority, argued that even in the birth canal, the fetus was not legally a person (18). Although the Court did not go as far as Justice L'Heureux-Dubé's concurring approach, which would have recognized any harm to the fetus at this stage as harm to the mother, *Sullivan* nevertheless expanded reproductive autonomy by further rejecting fetal personhood.

Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997)

The next reproductive autonomy case, *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* (1997), concerned whether Winnipeg Child and Family Services could act as a *parens patriae* (a legal guardian) in order to detain a pregnant woman until the birth of her child. The mother, D.F.G., was addicted to solvents, and her addiction had left her two previous children permanently disabled. However, in order to allow a *parens patriae* on behalf of the unborn child, the Court would have to legally recognize the fetus. Therefore, the Court was faced squarely with whether to maintain the common law "born alive" rule, which does not recognize the fetus until it is "born, alive

and viable" (para. 11).

Writing for the majority, Justice McLachlin upheld the "born alive" rule, claiming the state could not issue a *parens patriae* because the fetus did not possess legal personhood. She warned that moving the common law beyond the "born alive" rule could have a negative effect on the reproductive autonomy of women:

> Any right or interest the fetus may have remains inchoate and incomplete until the child's birth... Recognition of a fetal action against the mother for lifestyle choices would affect women, who might find themselves incarcerated and treated against their will for conduct alleged to harm the fetus. (3-4)

McLachlin also argued that extending the common law to make a pregnant mother liable for lifestyle choices could drive problems underground or even persuade women to have more abortions (para. 44). Because the "born alive" rule was based only on the common law, Justice McLachlin stressed that, if it wished, the legislature could affect legal change with respect to fetal personhood via statute. However, she accompanied this suggestion with a not-so-tacit warning: "In the event that the legislature chooses to address the problem, its legislation in substance and procedure would fall to be assessed against the provisions of the *Charter*" (para. 58).

In a vigorous dissent, Justice Major (with Justice Sopinka concurring) argued that the "born alive" rule was a "legal anachronism based on rudimentary medical knowledge" (para. 102). Justice Major stressed that reproductive autonomy must be balanced with some parental responsibility:

> It is a fundamental precept of our society and justice system that society *can* restrict an individual's right to autonomy where the exercise of that right causes harm to others... The afflicted children may be sentenced to a permanently lower standard of life. To advocate not confining the mother to prevent this harm seems extreme and shortsighted. (paras. 131-132)

In rejecting Justice McLachlin's approach and the "born alive" rule, Justice Major's approach shared two characteristics of the "collectivist" moral approach. First, it recognized society's ability to constrain rights for the good of others. Second, and more importantly, it did so on behalf of an unborn fetus. In the end, however, Justice Major did not prevent a majority of the Court from once again embracing an expansive, "liberal" view of reproductive autonomy. The Court was moving the common law towards an understanding of personal and parental liberty consistent with Wilson's classical liberal interpretation in *Morgentaler*.

Dobson (Litigation Guardian of) v. Dobson (1999)

The Supreme Court's greatest explicit expansion of reproductive autonomy was in *Dobson (Litigation Guardian of) v. Dobson* (1999). *Dobson* concerned whether a mother could be held liable for negligent driving that caused mental and physical damage to the child while *in utero*. Unlike *Daigle*, *Sullivan*, and *Winnipeg*, the case did not involve a fetus. Instead, the guardian of *Dobson* was suing on behalf of a human being, born alive and viable, who suffered damages while in fetal development.

Although the "born alive" rule had no application, the Court overturned the New Brunswick Court of Appeal, holding that the mother could not be held liable for damages. Justice Cory, writing the majority judgment, claimed the Court of Appeal had erred by not fully appreciating "the extensive intrusion into the privacy and autonomy rights of women that would be required by the imposition of tort liability on mothers for prenatal negligence" (para. 41). Although he explicitly avoided using the *Charter* when making his determination (para. 22), Justice Cory's reasoning sounded remarkably similar to that

made by Justice Wilson in *Morgentaler*:

> [F]or reasons of public policy, the Court should not impose a duty of care upon a pregnant woman towards her foetus or subsequently born child. To do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women. (para. 23)

Justice McLachlin, speaking for herself and Justice L'Heureux-Dubé in a separate concurring judgment, made more explicit reference to the *Charter*. While supporting Justice Cory's reasoning, she held that using tort principles to restrict the autonomy of pregnant women also violated the "*Charter* values" of liberty and equality (para. 84). Unequivocally endorsing Justice Wilson's conception of liberty from *Morgentaler*, Justice McLachlin held that imposing a duty of care on a pregnant women has "the potential to jeopardize [her] fundamental right to control her body and make decisions in her own interest" (para. 85). As in *Winnipeg*, McLachlin buttressed her decision by stressing that any curtailment of women's reproductive autonomy is contrary to the language of the *Charter*.

Once again, Justice Major (this time with Justice Bastarache concurring) offered a sharp dissent. In asserting liability, he denied that reproductive autonomy was the central concern in this case:

> The appellant's autonomy interests are not in issue... She did not have the freedom to drive carelessly... The respondent child cannot take away from his mother a freedom she did not have. I respectfully disagree with [Justice McLachlin] that the liberty and equality interests of pregnant women are in issue in this appeal. The values enshrined in the *Canadian Charter of Rights and Freedoms* do not grant pregnant women interests of any kind in negligent driving. (paras. 113-114)

Justice Major's attempt to balance the rights of unborn (or, in this case, the formerly unborn) with the reproductive autonomy of the mother was once again unconvincing to a majority of the Court. *Dobson* therefore represented the final step in the expansion of

reproductive autonomy, a concept scarcely familiar to that embraced by the majority in *Eve* and *Morgentaler*.

Reproductive Autonomy and the Implications for Commercial Surrogacy

The consistent change from earlier cases (particularly *Eve* and *Morgentaler*) leaves little doubt that the Court has endorsed an expansive view of women's reproductive autonomy. Justice La Forest's assertion in *Eve* that a "fundamental right to procreative choice" goes "beyond the kind of protection s. 7 was intended to afford" now seems a distant memory. Instead, Justice Wilson's conception of reproductive autonomy, embraced only by herself in *Morgentaler*, was endorsed explicitly by two justices in *Dobson* and implicitly by five others. Moreover, Justice McLachlin used the "values of the *Charter*" to buttress her argument in both *Winnipeg* and *Dobson*. In contrast to collectivist considerations that would limit reproductive autonomy by granting legal personhood to the unborn, the expansive interpretation of reproductive autonomy clearly falls into the "liberal" perspective.

The Supreme Court's reproductive autonomy jurisprudence has important implications for the commercial surrogacy prohibition, as it represents a movement away from recognizing personhood for the unborn in favour of an expanded scope for reproductive autonomy. It stands in stark contrast to the justifications for Canada's commercial surrogacy prohibition, which are based in large part on the interests of not-yet-born children. While the *Brown Report* stressed "children conceived through assisted human reproduction warrant even greater consideration than the adults seeking to build

families" (Canada 2001, 4), the Court's jurisprudence on reproductive autonomy clearly suggests a movement in the other direction.

From *Mossop* to *Halpern*: Gay Rights, Marriage, and the Evolving Family

While the cases related to reproductive autonomy have focused on individualistic accounts of rights at the expense of collectivist ones, another set of cases coming from the Supreme Court of Canada – those related to the recognition of non-traditional families – have explicitly rejected arguments designed to preserve the "traditional" family and prevent "social harms." Like the reproductive autonomy cases, those related to non-traditional families represent a slow movement in a direction that favours liberal individualism, not collectivism. This section surveys several section 15 cases, all of which concern gay rights and/or the definition of marriage.

Lessard (2002) argues that the Supreme Court's division in equality cases throughout the 1990s represents a victory for neither liberal nor collectivist principles. However, a closer reading of recent Canadian equality jurisprudence suggests the Court has gradually rejected the collectivist approach. While early gay rights decisions included some deference to organic, more traditional familial institutions, fewer and fewer justices have been drawn to collectivist arguments. Just as it did with reproductive autonomy jurisprudence, the Court has gradually moved away from collectivist moral arguments in favour of liberal arguments stressing individual self-fulfillment and an inclusive, expanding view of traditional social institutions.

Canada (Attorney General) v. Mossop (1993)

Section 15(1) of the *Charter* states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15 thus guarantees equality by preventing discrimination, and provides a list of grounds by which the state may not discriminate. In *Andrews v. Law Society of British Columbia* (1989), the Supreme Court interpreted the section as preventing discrimination only on grounds listed, or on grounds that were "analogous." However, at the outset it was not clear whether or not the *Charter* prevented discrimination on the grounds of sexual orientation.

The first post-*Charter* equality case in which the Supreme Court considered sexual orientation was *Canada (Attorney General) v. Mossop* (1993). Although *Mossop* dealt with unequal treatment of same-sex couples, it did not directly concern the *Charter*. Instead, the case dealt with the *Canadian Human Rights Act*, which prevented discrimination based on "family status." Brian Mossop sought bereavement leave from his employer to attend the funeral of his same-sex partner's father. However, because "family status" only referred to opposite-sex couples, Mossop was denied the bereavement pay. He argued that the *Human Rights Act* should include same-sex couples as part of common-law spouses. Although he was victorious at the Canadian Human Rights Tribunal, the Federal Court of Appeal overturned that decision. Mossop then appealed to the Supreme Court of Canada.

In *Mossop*, the Supreme Court upheld the definition of "common-law spouse" as pertaining only to opposite-sex couples. In a 4-3 decision with no less than five separate

opinions, Chief Justice Lamer (with Justices Iacobucci, Sopinka, and La Forest concurring) rejected the argument that section 15(1) *Charter* mandated the inclusion of same-sex couples in the term "family status," deferring to Parliament's decision to leave sexual orientation out of the *Canadian Human Rights Act*. In concurrence, Justice La Forest pointed out that the dominant conception of family was the "traditional family," and that same-sex relationships had not yet reached similar status in "ordinary language" (39).

In dissent, Justice L'Heureux-Dubé (with Justices Cory and McLachlin concurring separately) argued that human rights legislation must be given a "large, purposive and liberal interpretation" (67). She rejected the majority's deferential approach, holding that the conception of family must be broadened beyond the traditional family in order to "improve conditions to enable families to function as best they can, free from discrimination":

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values. (93)

Although Justice L'Heureux-Dubé's argument was a minority in *Mossop*, it would be far more successful in subsequent cases concerning gay rights and marriage, particularly those that pertained to the *Charter*. Like Justice Wilson's minority position in *Morgentaler*, an interpretation favoured by a minority of justices would later become the majority position.

Miron v. Trudel (1995)

In *Miron v. Trudel* (1995), the Supreme Court struck down, by a 5-4 margin, a

provision that offered insurance benefits to married couples but not to common law couples. Like *Mossop*, *Miron* highlighted a division within the Supreme Court regarding the amount of deference owed to legislative schemes purporting to defend "traditional" family values through particular social policies. However, far from the deferential approach in *Mossop*, a majority of justices in *Miron* openly rejected Parliament's limitation of "family" to traditional forms of family rooted in biology and nature. Although the case concerned only heterosexual relationships, its rejection of traditional family structures would echo in later decisions.

For the majority, Justice McLachlin (with Justices Cory, Iacobucci, and Sopinka concurring, and Justice L'Heureux-Dubé concurring separately) found the legislation in violation of section 15(1) of the *Charter*, and not saved by section 1. McLachlin held that the Court could not simply defer to "fundamental values" rooted in biological or social "realities" when engaging in section 15 analysis. Instead, the Court must "go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate" (para. 137). After citing Justice L'Heureux-Dubé's argument in *Mossop* that "it is not anti-family to support protection for non-traditional families," McLachlin held that "one might equally say it is not anti-marriage to accord equal benefit of the law to non-traditional couples" (para. 158).

In dissent, Justice Gonthier (with Justices Lamer, La Forest, and Major concurring) defended the government's decision to offer benefits only to those who entered into the marriage contract. Gonthier defended the legislative ability to define the scope of a "marriage-like relationship" as being a reasonable social policy choice,

holding that "marriage is both a basic social institution and a fundamental right which states can legitimately legislate to foster" (para. 45). Like Lamer in *Mossop*, Justice Gonthier advocated judicial deference to the legislature in terms of social policy, allowing considerable room to define marriage in terms of fundamental values: "the courts must be wary of second-guessing legislative social policy choices relating to the status, rights and obligations of marriage, a basic institution of our society intimately related to its fundamental values" (11).

The division between the majority and the dissent in *Miron* is indicative of the split between liberal and collectivist conceptions of the family. The majority views the individual as the fundamental social unit, and does not accord any unique moral status to particular relationships. Justice McLachlin's argument that the expansion of social benefits to non-traditional relationships was not "anti-marriage" sees social relationships as "transactional in nature," with cohabiting relationships "viewed as the product of agreements between individuals who seek self-definition through choosing and planning their lives" (Lessard 2002, 224). By prizing individual choice and rejecting state sanction of traditional familial institutions, the majority opinion is quintessentially liberal, lending evidence to Smith and Tatalovich's claim that the traditional family is particularly vulnerable to the forces of liberal individualism (2003, 59). By contrast, Gonthier's deference to traditional familial and social structures treats "the social context of rights claims – the relationships and institutions within which they occur – as analytically important" (Lessard 2002, 230). By referring to marriage as a "basic institution" based on "fundamental values," Justice Gonthier emphasized strands of collectivist moral arguments that stress the importance of traditional social institutions.

Egan v. Canada (1995)

Egan v. Canada (1995), released concurrently with *Miron*, concerned the constitutionality of the definition of "spouse" in section 2 of the *Old Age Security Act*. The Act defined a "spouse" as a person of the opposite-sex who "is living with [another] person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife" (527). The appellants, James Egan and John Norris Nesbitt, had lived together in a homosexual relationship for several decades but were denied the spousal allowance offered under section 19(1) of the *Act*. Because their relationship did not fall within the confines of "spouse," Egan and Nesbitt charged that the term "spouse" violated section 15 of the *Charter*, insofar as it discriminated based on sexual orientation.

The Supreme Court split 5-4, with the majority dismissing the appeal and upholding the law. Once again, there was a clear divide within the court regarding the extent to which a government could rely on moralistic arguments pertaining to the traditional family when according benefits. Speaking for the plurality judgment, La Forest (with Justices Gonthier, Major, and Chief Justice Lamer concurring) defended Parliament's decision to limit "spouse" to heterosexual couples as a legitimate social policy choice. He did so in language that was deferential to philosophical arguments positing procreative relationships as the natural basis for the family:

> Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally

> cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage. (515)

The deference to collectivist moral arguments is unmistakable. Justice La Forest appealed to "philosophical and religious traditions" in order to justify the "unique ability" of heterosexual couples to procreate; the "biological and social realities" underlying traditional marriage constituted a perfectly legitimate state objective for offering spousal benefits solely to heterosexual couples. Describing marriage as a "fundamental social unit" worthy of specific state support, La Forest found the distinction between heterosexual and homosexual couples "irrelevant" to the legislation in question, and thus not in violation of section 15.

In dissent, Justices Cory and Iacobucci (Justices L'Heureux-Dubé and McLachlin concurring) rejected La Forest's argument, arguing that the impugned law violated section 15 of the *Charter* and could not be saved by section 1. Justice Cory rejected the argument that the appellants were asking the Court "to change fundamentally the essential meaning of the societal concept of marriage," arguing that the case merely dealt with whether the state can apply the definition of "common law spouse" in a way that excludes heterosexual couples. Because sexual orientation was an analogous ground of discrimination, the opposite-sex definition of "spouse" reinforced negative stereotypes regarding the inability of homosexuals to engage in caring, lasting relationships (para. 180).

In his section 1 analysis, Justice Iacobucci explicitly rejected La Forest's collectivist line of reasoning. For Justice Iacobucci, according the same benefits to opposite-sex and same-sex couples did nothing to threaten the formation of heterosexual

unions, citing L'Heureux-Dubé's claim in *Mossop* that "[i]t is possible to be pro-family without rejecting less traditional family forms" (*Mossop*, 63). Although she agreed with Justices Cory and Iacobucci, L'Heureux-Dubé also wrote a separate concurring judgment in *Egan*, explicitly rejecting the argument that heterosexual relationships have a distinct biological reality because of their procreative nature. She further suggested the Court steer clear of biologically based arguments in the future.

In this case, the tie-breaking vote came down to Justice Sopinka, who wrote a concurring judgment, finding the impugned law constitutional, but for different reasons than Justice La Forest. He agreed with Justice Cory that the law was a violation of section 15 of the *Charter*, but found that it was saved under section 1, the "reasonable limitations" clause. In his reasons, Sopinka held that "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships" (para. 104). Sopinka claimed it was perfectly legitimate for government to make policy choices between disadvantaged groups, and that the Court must provide it a certain leeway to do so (para. 104). However, while this tie-breaking vote effectively denied the appellants' *Charter* claim, it was a far cry from La Forest's deferential approach to collectivist moral arguments. Instead, Sopinka read the *Act* as taking an "incremental" approach to gradually becoming more inclusive, suggesting that over time, the law may not withstand judicial scrutiny.

While the case was decided 5-4 against the appellant, it was nonetheless critical for two reasons that remain important for any legislation concerning "natural" familial relationships. First, and most importantly for gay rights advocates, all nine justices on the Court recognized that sexual orientation constituted an analogous ground of

discrimination, protected by section 15 of the *Charter*. Second, five of the nine justices (Justice Sopinka and the four dissenting justices) were not persuaded by Justice La Forest's argument, which focused on biological and procreative aspects of heterosexual marriage. While the Court remained strongly divided, a majority in both *Egan* and *Miron* rejected arguments based on "traditional" forms of family and marriage.

M. v. H (1999)

Following further success for the gay rights movement in *Vriend v. Alberta* (1998),[15] the Supreme Court ruled in *M. v. H.* (1999), a watershed case for gay rights in Canada. In *M. v. H.*, the Court struck down section 29 of the *Ontario Family Law Act*, which excluded same-sex couples from the definition of common-law spouse. Justices Cory and Iacobucci (with Justices McLachlin, L'Heureux-Dubé, Binnie, and Chief Justice Lamer concurring), writing for the majority, argued that the distinction between opposite-sex and same-sex couples was discriminatory, in violation of section 15(1) of the *Charter*, and could not be saved by section 1. Using the newly-formed test for measuring section 15 claims set out in *Law v. Canada* (1999), Justice Cory claimed, "[t]he crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships" (para. 3). By excluding same-sex couples from the benefits of the legislation, the Act promoted the view that individuals in same-sex relationships were less worthy of protection and recognition. For Justice Cory, this perpetuated their disadvantage and could even be seen as contributing to "the erasure of their existence" (para. 73).

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[15] In *Vriend*, the Court mandated that Alberta's *Individual Rights Protection Act* include "sexual orientation" as a ground of discrimination. Although *Vriend* did not pertain to arguments concerning the "traditional family" or marriage, it set the stage for *M. v. H.*

Turning to section 1 analysis, Justice Iacobucci found that the exclusion of same-sex couples was not rationally connected to the objectives of the legislation – providing equitable resolution of economic disputes and alleviating the burden on the public purse to provide for dependent spouses. Once again, Justice Iacobucci opted against a deferential approach to defining traditional familial structures. He rejected the argument that one of the purposes of the legislation was to protect children, saying the scheme was underinclusive. In so doing, he made direct reference to newer, non-traditional methods of conception that were fast becoming commonplace:

> An increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination... the goal of protecting children cannot be but incompletely achieved by denying some children the benefits that flow from a spousal support award merely because their parents were in a same-sex relationship. (para. 114)

As in previous cases, Justice Iacobucci rejected Parliament's role in protecting and enhancing the traditional family, echoing L'Heureux'-Dubé's argument in *Mossop* that such a distinction was discriminatory. Although taking a narrower approach than Iacobucci, Justice Bastarache agreed in concurrence, arguing that "denial of status and benefits to same-sex partners does not *a priori* enhance respect for the traditional family, nor does it reinforce the commitment of the legislature to the values in the *Charter*" (para. 356). Justice Major also wrote a short concurrence, suggesting there was no need for the Court to go into greater analysis of the role of traditional and non-traditional families.

Justice Gonthier was the lone dissenting justice in *M. v. H.*, arguing that the legislative distinction between same-sex and opposite-sex couples did not violate section 15(1). As with *Egan* and *Miron*, the division between the majority and the dissent was

based on whether biological and procreative "uniqueness" made opposite-sex couples a "fundamental" family unit. Gonthier held that the restricted definition of "spouse" was not based on stereotypes about homosexuals, but instead corresponded with "an accurate account of the actual needs, capacity, and circumstances of opposite-sex couples as compared to others," adding, "cohabiting opposite-sex couples are the natural and most likely site for the procreation and raising of children. This is their specific, unique role" (para. 232- 233). Because the legislation was designed to reduce a type of economic dependence far more prominent in opposite-sex than same-sex relationships, the legislature was perfectly justified in pursuing its goal.

As in previous decisions, Gonthier relied on arguments pertaining to the "social function" of opposite-sex couples as a "fundamental unit" in society, and the dependence fostered by opposite-sex relationships:

> In addition to this specific social function, this dynamic of dependence stems from the roles regularly taken by one member of that relationship, the biological reality of the relationship, and the pre-existing economic disadvantage that is usually, but not exclusively, suffered by women. (para. 181)

Although Gonthier recognized that it was possible for same-sex couples (and indeed, same-sex individuals) to have children through adoption, previous relationships, or artificial insemination, he argued that these circumstances were exceptional. Mere acknowledgement that these relationships exist "does not alter the demographic, social, and biological reality that the overwhelming majority of children are born to, and raised by, married or cohabiting couples of the opposite sex, and that they are the only couples capable of procreation" (para. 236).

Once again, Gonthier's reference to collectivist moral arguments is clear. Not

only did he stress the unique social function of procreative relationships, he also referred to the "pre-existing economic disadvantage" usually suffered by women. For Gonthier, the state had a role in offering benefits to heterosexual couples not only because of the historical and social underpinnings of the traditional family, but also because of the historical dependence of female spouses. Like the collectivist arguments advocating a prohibition on commercial surrogacy, Gonthier's argument for heterosexual-only spousal benefits stemmed from a combination of tradition and a recognition of the disadvantaged status of women.

However, Justice Gonthier was fighting a losing battle. Of the Justices who commonly supported deference to legislatures on collectivist grounds, Justice La Forest had retired, Justice Sopinka had passed away, while Chief Justice Lamer and Justice Major were persuaded by the doctrinal arguments on the other side.[16] This did not stop Justice Gonthier from warning of a slippery slope stemming from the Court's jurisprudence, arguing that the Court's expansion of the definition of "spouse" would "have far-reaching effects beyond the present appeal" and very likely "open the door to a raft of other claims" (para. 155).

After M. v. H.*: Halpern and the Marriage Reference*

If Justice Gonthier was talking about the possibility of same-sex marriage, the prediction was prescient. In response to *M. v. H.*, Parliament passed the *Modernization of Benefits and Obligations Act*, which extended common law spousal benefits to

[16] The fact that Chief Justice Lamer and Justice Major "switched sides" compared with earlier decisions further demonstrates the fact that evolving doctrine can influence judicial decisions. It also raises questions about a "fundamental assumption" put forward by attitudinalist scholars: that "justices vote according to their personal values, which rarely change over time" (Ostberg and Wetstein 2007, 80).

homosexual couples (Canada 2000). However, the Act also contained a provision that defined marriage as "the lawful union of one man and one woman to the exclusion of all others." Yet very soon after, provincial high courts rejected this definition. In *Halpern v. Canada* (2003) the Ontario Court of Appeal unanimously ruled the common law opposite-sex definition of marriage was a violation of section 15(1), and was not saved by section 1. In its decision (which the federal government chose not to appeal to the Supreme Court of Canada), the Court of Appeal explicitly rejected the collectivist arguments that were present throughout the marriage and gay rights cases of the 1990s:

> In our view... "natural" procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. As previously stated [by the Supreme Court of Canada in *M.v. H.*], same-sex couples can have children by other means, such as adoption, surrogacy and donor insemination. A law that aims to encourage only "natural" procreation ignores the fact that same-sex couples are capable of having children. (para. 122)

Halpern represented more than a watershed moment for gay rights advocates across the country. It also signified the failure of legislative objectives based on fostering "natural procreation," "biological realities," or "traditional families" to pass the test of the *Charter*.

Following similar decisions by provincial appellate courts in British Columbia (*Barbeau v. British Columbia*) and Quebec (*Catholic Civil Rights League v. Hendricks*), the federal government opted not to appeal the decision. Instead, it proposed a new law in 2004 that would describe marriage as "the lawful union of two persons to the exclusion of all others," consistent with the rulings in Canada's three most populous provinces. However, rather than formally introducing the bill into Parliament, the government asked the Supreme Court of Canada to rule on the constitutionality of the proposed legislation

(Hogg 2006). Given that a reference procedure is a common way for governments to avoid taking responsibility for contentious issues through "privatization" of conflict (Smith and Tatalovich 2003, 137-138), it was clear that the government was attempting to depoliticize the issue (Hogg 2006, 9). In *Reference re Same-Sex Marriage* (2004), the government asked the Court, among other questions, whether the proposed legalization of same-sex marriage was consistent with the *Charter*, and whether the previous definition of marriage – "the lawful union of one man and one woman to the exclusion of all others" – was constitutional.

On the question of new legislation, the Court unanimously held that same-sex marriage, "far from violating the *Charter*, flows from it" (para. 43). More interesting was the Court's response to the constitutionality of the heterosexual definition of marriage. The Court was asked the following question:

> Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law–Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

Although the government had decided to go ahead with expanding the definition of marriage, this was an obvious attempt to exercise blame avoidance through the "depolitization" of conflict. Perhaps surprisingly, the Court opted not to answer the question for three reasons. First, the Court essentially found the question to be moot, since the federal government had already "stated its intention to address the issue of same-sex marriage legislatively regardless of the Court's opinion on this question" (para. 71). Second, successful litigation in other provinces would throw the newly acquired rights of married same-sex couples into question. Finally, the Court held that a negative

answer could "undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada" by throwing into question the lower court rulings across the country (para. 69). For these reasons, the Supreme Court of Canada did not give a definitive answer as to whether opposite-sex marriages would be unconstitutional.

The Supreme Court has been criticized for not answering the final question. Peter W. Hogg argues that the Court's reasons for abstaining were "neither clear nor persuasive." Instead, Hogg claims the main reason the Court did not answer the question was "a desire to make Parliament play a role in the legalization of same-sex marriage. If Parliament acted, it could not be claimed that such a controversial project was driven by judges" (Hogg 2006, 720). While this is likely true, the Court's determination that Parliament should not be allowed to avoid responsibility for a contentious morality policy is not necessarily undesirable. With morality policy driven by judicial and political elites in western democracies, especially Canada, Smith and Tatalovich come to the conclusion that it is "both anti-majoritarian and politically unaccountable" (2003, 251). Although the Supreme Court of Canada has determined much of Canadian morality policy, this has been due as much to Parliament's purposeful avoidance as an overzealous judiciary (Hiebert 2002). By making Parliament accountable for its own law, the Supreme Court ensured that the legislature would take responsibility for its own policy choice.

Yet the Court's decision was not entirely neutral on the definition of same-sex marriage. Lower court decisions that rendered the heterosexual definition of marriage unconstitutional had relied with the Supreme Court's gay rights and marriage jurisprudence, which Justice Gonthier (no longer on the Court in 2004) had predicted. Moreover, the Court's view that same-sex marriage "flows from" the *Charter* suggests

that had the federal government appealed the lower court rulings, the Supreme Court would have indeed found the opposite-sex definition of marriage in violation of section 15(1).

The string of Supreme Court cases concerning marriage and the recognition of non-traditional families has important implications for the Canada's commercial surrogacy prohibition. By *M. v. H.*, the Court (with the exception of Justice Gonthier) rejected all arguments based on defending "traditional" (opposite-sex) marriage and traditional families. More importantly, the Court rejected as "incomplete" legislative schemes designed to protect children by limiting options for non-traditional families. Justice Iacobucci's acknowledgement that increasing numbers of children are reared by homosexual parents because of adoption, surrogacy and donor insemination explicitly recognizes new reproductive technology as an important component in building modern families. Lower court rulings used the Supreme Court's ruling to eliminate the opposite-sex definition of marriage, and the Supreme Court's own ruling in *Reference re Same-Sex Marriage* endorsed an expansive definition of marriage that "flows from" the *Charter*. Like the cases on reproductive autonomy, the cases concerning the recognition of non-traditional families indicate the Canadian Supreme Court will continue to resist legislation based on collectivist norms in favour of a liberal approach when it comes reproduction and "traditional" familial institutions.

Conclusion

Chapters 1 through 4 demonstrated that Canada's commercial surrogacy represents a morality policy, and that change to morality policy in Canada often involves

Charter litigation. This chapter examined the possibility that Canada's commercial surrogacy prohibition could be subject to a *Charter* challenge. The first section demonstrated that a case could indeed arise. Canadians are openly breaking the law, prosecution of offenders is possible (though not yet happening), and interest groups opposed to the prohibition have a history of engaging in *Charter* litigation.

The chapter then moved to an analysis of Supreme Court doctrine in order to determine whether a *Charter* challenge to the legislation would be successful. Drawing on neoinstitutional theorists (Cushman 1998; Richards and Kritzer 2002; Baier 2006), it suggested that Supreme Court doctrine acts as an important independent variable that shapes and influences judicial decision-making when the Court is faced with "new fact situations." The chapter then analyzed Supreme Court jurisprudence on two sets of cases involving similar moral considerations as the debate over commercial surrogacy: reproductive autonomy and the recognition of non-traditional families. It is clear that the Supreme Court has gradually moved in a "liberal" direction, rejecting legislation based on "collectivist" moral considerations such as protecting children in the abstract or preventing social harms. Because the commercial surrogacy prohibition is largely defended on collectivist grounds, the Supreme Court's doctrine suggests that if a case were to arise, the Court would likely find the legislation in violation of the *Canadian Charter of Rights and Freedoms*.

CHAPTER SIX: CONCLUSION

This thesis began as an attempt to understand the politics of Canada's commercial surrogacy prohibition by situating the prohibition within the comparative literature on morality policy. In particular, it sought to examine whether Canada's decision to prohibit commercial surrogacy could lead to an institutional clash between the courts and the legislature. After the introduction, Chapter 2 looked at the history of the surrogacy prohibition in Canada, situating it within the broader debate on new reproductive technologies. An examination the legislative process from the *Royal Commission on New Reproductive Technologies* to the creation of the 2004 *Assisted Human Reproduction Act* suggests the legislative process eventually created a monumental compromise on new reproductive technologies. However, because having a compromise meant combining some permissive regulations with strict prohibitions, some pieces of the legislation fell to one side of the moral debate. On surrogacy policy more generally, the AHRA strikes a balance, by allowing altruistic surrogacy and prohibiting commercial surrogacy. On commercial surrogacy specifically, however, the strict criminal prohibitions fall to the collectivist side of the moral debate.

Chapter 3 examined the literature on moral issues, focusing on the increased salience of morality policy in Canadian politics. In an era of postmaterial value change, morality policies have gained increasing prominence as diverging constituencies fight for the validation of particular sets of values. Following Lowi's determination that "policy determines politics," the political interests interested in changing morality policy have increasingly opted to attempt policy change through the courts. Coupled with the

corresponding growth of judicial power following the introduction of the *Charter*, morality policies are often determined in the Supreme Court of Canada. In short, judicial power and morality policy have been mutually reinforcing.

Chapter 4 then examined the competing moral arguments concerning commercial surrogacy, demonstrating that it represents a morality policy. Like other morality policies such as abortion and same-sex marriage, the debate largely concerns an unbridgeable divide between "collectivists," stressing traditional family values and the avoidance of social harms, and "liberal individualists," who focus on individual autonomy, freedom of contract, and the equalization of status differences. Like many other morality policies – particularly those related to the family and reproduction – collectivists favour criminal prohibition, while liberals favour minimal state interference. After examining these competing perspectives, it becomes clear that commercial surrogacy belongs in the category of morality policy.

If policy determines politics, how might we expect the surrogacy prohibition to play out politically in Canada? As mentioned in Chapter 3, opponents of the policy status quo – particularly with morality policy – often take their fight to the court. Indeed, many (if not most) of Canada's morality policies have received input in one form or another from the Supreme Court of Canada. Given that surrogacy prohibition leans to the collectivist side of the moral debate – and that comparative experiences suggests courts assert individual rights and liberties at the expense of traditional social values (Tatalovich and Daynes 2005) – Chapter 5 examined the evolving position of the Supreme Court of Canada, the other major institutional player in the realm of morality policy. On two moral issues similar to commercial surrogacy – reproductive autonomy and the evolving

definition of marriage – the Court's doctrine has gradually moved in a path dependent direction, dismissing collectivist arguments based on nature, the welfare of the unborn, and traditional families, while accepting arguments based on individual liberty, autonomy, and choice. In short, on cognate moral issues, the Court has embraced liberalism which eschewing collectivism. An institutional clash between the courts and the legislatures could be in the cards.

This study goes beyond legal-constitutional literature by examining the broader institutional realities of morality politics in Canada. It rejects attitudinal theories of judicial decision-making, arguing that judicial doctrine acts as an important constraining variable in high court cases. To the question of whether we can expect a clash between the Supreme Court and Parliament on commercial surrogacy, the answer is yes. There is evidence that Canadians continue to pay for surrogacy in spite of the prohibition, and interest groups opposed to the legislation have a history of *Charter* litigation. The Supreme Court's jurisprudence on cognate moral issues suggests that the collectivist justifications for the surrogacy ban – outlined in the Royal Commission on New Reproductive Technologies, the Brown Report, and the *Assisted Human Reproduction Act* itself – simply do not correspond with Supreme Court doctrine. As Tatalovich and Daynes (2005) and Smith and Tatalovich (2003) predict, on issues surrounding traditional families and parental norms, courts will largely side on individual parental liberty rather than collectivist conceptions of social harms.

This study deliberately chose to examine commercial surrogacy as a morality policy, rather than other new reproductive technologies as a whole. However, the analysis speaks more broadly to issues of new reproductive technology. Indeed, new reproductive

technologies give rise to many two-sided moral controversies for which there are no fixed answers. Should the state grant sperm and egg donors anonymity, or is this trumped by the wishes of a child born from new reproductive technologies to know their genetic origin? Should the state accede to the desire of parents who wish to have children, even if this policy results in a single mother under the age of 30 having 14 young children, as happened in California recently (Saul 2009)? At what age should prospective parents no longer be allowed the use of in vitro fertilization? When the technology becomes available, should parents be able to genetically modify embryos and screen for desired traits, if such modification represents a sincere attempt to act in the best interests of the child?

The above situations raise important questions concerning the acceptable boundaries of new reproductive technologies, and the role of the state in determining those boundaries. As with other morality policies, questions about new reproductive technologies raise ethical grey areas, and the responses to these questions are derived from incompatible first principles concerning the sanctity of life and the role of the state with respect to the family. Recent events suggest that, with the proliferation and normalization of new reproductive technologies, these questions will only gain in importance.

It is important, however, to understand that in post-*Charter* Canada, these questions have been – and will likely continue to be – decided by the Supreme Court of Canada. While the result is by no means preordained, this analysis suggests that the Court will continue to side on the liberal side of the ethical debate. Concern about the judicialization of politics should not be limited to *Charter* skeptics, but also to those

concerned about the potential commodification, exploitation, and social harms that could result from current and future reproductive technologies.

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