

Beyond Considering Surrogates' Reports at 'Face Value':  
Theorizing and Contextualizing the Autonomy-Related Threats of Surrogacy Arrangements

by

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## Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

## Abstract

As research on surrogacy in Canada is only emerging, this thesis seeks to incite discussion relating to the autonomy of surrogates by analyzing recent studies which capture the experiences of surrogates through surveys and interviews. Much of the current literature on surrogacy focuses on issues around commercialization which are less applicable to Canada where surrogacy is altruistic. Moreover, many scholars have either discussed the autonomy of surrogates only from a theoretical perspective, neglecting surrogates' personal accounts, or have assumed that the reports of surrogates should be considered at 'face value.' Ultimately, I show how the reports of surrogates should be acknowledged but it is also important to consider contextual factors, such as whether the reports may be influenced and shaped by the constraints of surrogacy arrangements. While the reports of surrogates reveal the ways surrogates experience and often manage and resist autonomy-related threats, and in turn call into question theoretical concerns about surrogates lacking autonomy and power, certain theoretical concerns remain which are not identified in the studies, either because of empirical limitations or a failure to engage with them. Overall, my discussion is action guiding: I aim to shape emerging scholarship on surrogacy, so that it accounts for the complexity and nuances of surrogates' experiences, and I gesture to certain policy interventions which follow from my discussion.

## Acknowledgements

I would foremostly like to thank Dr. Katy Fulfer, who supervised this thesis and supported me throughout the process of writing it, providing insightful perspectives—especially about relational accounts of autonomy and complicated feminist issues—and helpful guidance which respected my ideas but enabled me to properly develop them. I would also like to thank my readers, Dr. Patricia Marino and Dr. Mathieu Doucet, who provided a number of thoughtful comments relevant to the thesis and future work relating to it.

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## Dedication

This thesis is dedicated in memory of Dr. Geoff Hollis-Haynes. Geoff taught me PSYCH 105 at the University of Alberta. After class I often stayed behind to ask philosophical questions which he liked and much preferred to students' usual questions about the syllabus. We eventually became good friends and would often meet for coffee and talk philosophy. Meeting Geoff was a transformative experience and I am grateful for our enriching discussions which I remember with surprising clarity. In addition to being an intellectual, Geoff had a big heart, was a feminist who liked animals—and, when applicable, the placebo effect of decaf coffee—and was a fervent supporter of my abilities and ambitions. Geoff was, and remains to be, a special person who I kept in mind as I was writing this thesis.

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# Introduction

Surrogacy is increasingly pursued by Canadians seeking to expand their families.<sup>1</sup> Yet surrogacy's increase in prevalence has been met with little research, to the effect that even the number of surrogacy arrangements pursued in Canada is unknown.<sup>2</sup> However, in recent years, a few studies have been conducted which capture the experiences of surrogates in Canada.<sup>3</sup> These studies are significant because, since the 1980s, scholars have made theoretical claims about surrogacy without accounting for the experiences of surrogates themselves. Often such claims are negative, assuming that surrogates are harmed, oppressed, and degraded by their arrangements.<sup>4</sup> These claims suggest, whether explicitly or by implication, that surrogacy arrangements undermine the autonomy of surrogates.<sup>5</sup> In response, recent studies have called for an assessment of whether these claims are substantiated by the reports of surrogates.

In my thesis I will be examining studies, published within the last few years, which provide insight into the experiences of surrogates.<sup>6</sup> Many of the studies I review are Canadian: Yee et al. (2019) and Yee et al. (2020),<sup>7</sup> who surveyed surrogates to gauge their satisfaction with their arrangements; Fantus (2020), who interviewed surrogates and intended parents, observing the barriers they encountered when seeking information and services pertinent to surrogacy; and Carsley (2021), who interviewed fertility lawyers to ascertain their views on surrogacy agreements and the associated laws and regulations. I will also consider two studies conducted

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<sup>1</sup> Fantus (2020), 804.

<sup>2</sup> E.g., see Yee et al. (2020). 256; Reilly, 483. One estimate is more than 400 arrangements are pursued each year (see Surrogacy in Canada Online, "Surrogacy FAQ").

<sup>3</sup> And some are ongoing. See "Surrogates' Voices: Exploring Surrogates' Experiences and Insights," <https://surrogatesvoices.webflow.io/>.

<sup>4</sup> E.g., see Anderson (1990) and Dodds and Jones (1989). See also: Peng, 557.

<sup>5</sup> Many of these theorists, including Anderson and Dodds and Jones, have discussed surrogacy as inherently commodifying or otherwise problematic in a way that cannot be resolved (e.g., that surrogates are harmed as they 'give away' the child).

<sup>6</sup> These I consider significant as they discuss the experiences of surrogates as opposed to the intended parents.

<sup>7</sup> Yee et al.'s research (of both their 2019 and 2020 articles) was funded by a fertility centre.

outside of Canada, which capture the complicated ways in which surrogates experience and manage *autonomy-related threats*, which I define as factors which are potentially, but not necessarily, autonomy undermining (akin to ‘risks to autonomy’): Teman (2010), whose ethnographic study was based in Israel, and Ziff (2021), who interviewed American surrogates. My aim by analyzing these studies is to discern what kinds of autonomy-related implications these reports might have.<sup>8</sup>

Much of the scholarship on the ethics of surrogacy focuses on broad questions, such as whether surrogacy should be commercialized, and related issues of commodification and exploitation.<sup>9</sup> As such, when scholars address the autonomy of surrogates it is often in tandem with these concerns, specifically considering whether surrogates are generally oppressed, harmed, commodified, or exploited. Some scholars have considered more narrow issues, such as whether surrogates autonomously consent to their surrogacy arrangements, considering concerns around financial coercion and difficulties in preemptively anticipating and agreeing to potential harms. There is limited scholarship on the ethical significance of the experiences of surrogates, especially as they navigate various stressors during the course of their pregnancy.

In my thesis, I will ultimately argue for a balanced view of surrogacy arrangements, as not necessarily autonomy undermining nor empowering. There is currently a stark divide in the literature. Much of the longstanding theoretical views of surrogacy display a pessimistic perspective of autonomy, which neglects the experiences of surrogates, whereas many of the studies appear optimistic about the autonomy of surrogates, emphasizing the ways they benefit from their arrangements, maintain their agency, and manage the autonomy-related threats they

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<sup>8</sup> Although I will focus on the studies I have mentioned here, I will also refer to Payne et al. (2020), who critically reviewed research on surrogacy arrangements in various countries, including Canada, and Toledano and Zeiler (2017), who analyze interviews conducted in Canada, the United States, and Australia.

<sup>9</sup> Especially in relation to countries perceived as ‘poor’ like India.

encounter. In my view, each of these approaches are problematic. I stress the importance of attending to the perspectives of surrogates but also being mindful of the limitations of considering surrogates' reports (and how they are framed in the studies) at face value.<sup>10</sup>

The thesis will be organized as such. *Chapter 1* will introduce surrogacy in Canada, including its legal and regulatory context. *Chapter 2* will address what the studies reveal about the autonomy of surrogates in Canada. Specifically, I will describe the autonomy-related threats which tend to emerge in surrogacy arrangements—loss of control, external pressure, and unexpected harm—and then consider the threats from a broader context which attends to the complicated ways in which surrogates experience and manage these threats. Ultimately, this chapter demonstrates that surrogacy arrangements are potentially, but not necessarily, autonomy undermining. *Chapter 3* will examine what the studies neglect to consider about the autonomy of surrogates. In particular, in this chapter I will discuss a problem present in many of these studies: a failure to contextualize and theorize the reports of surrogates. By this I mean that scholars often consider the reports of surrogates at face value, in a way which neglects potential concerns, such as how reports which seem to indicate surrogates' empowerment or satisfaction may rather signal autonomy-related harms. *Chapter 4* will discuss the practical implications of chapters 2 and 3. Specifically, I will outline the factors which protect against autonomy-related threats and examine how they might be addressed through policy. In particular, I will focus on improving the consent process for prospective surrogates.

### *My Account of (Relational) Autonomy*

My account of autonomy is intentionally broad as my aim is to demonstrate some of the autonomy-related implications which follow from the reports of surrogates in Canada. The

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<sup>10</sup> Some scholars, like Teman, have advocated for considering the reports at “face value.” See Payne et al., 184.

standard account of autonomy in medical law and ethics emphasizes the need to support patients' interests, regardless of whether others (e.g., medical professionals) agree with them. A case which captures this understanding of autonomy is *Kings College Hospital NHS Foundation Trust v. C*, in which C rejected life-saving interventions out of the fear that, in pursuing these interventions, her life would no longer 'sparkle.'<sup>11</sup> The courts ruled in favour of C, citing her personal autonomy, but admitted that her justifications could be viewed as "unreasonable, illogical or even immoral."<sup>12</sup> In this thesis I will be using a similar approach as my foundational account of autonomy, holding an individual autonomous so long as they are able to fulfill their autonomous interests, meaning those which genuinely (e.g., upon reflection) support or align with their desires or values.<sup>13</sup> This approach has a subjective component and is based on preference satisfaction.<sup>14</sup> However, I nuance this definition by increasingly attending to broader contexts: how interests are situated relationally and can be influenced by external constraints.

My view of autonomy is largely informed by the work of McLeod and Sherwin, in particular their book chapter, "Relational Autonomy, Self-Trust, and Health Care for Patients Who are Oppressed."<sup>15</sup> I accept their distinction between global autonomy (where an individual as they navigate their life has a certain level of autonomy) and local autonomy (where autonomy can be obstructed or enhanced at specific times and in specific contexts).<sup>16</sup> I also accept their

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<sup>11</sup> *King's College Hospital NHS Foundation Trust v. C & Anor*, 2015 EWCOP 80, para. 8. Note this is a UK case.

<sup>12</sup> *ibid*, para. 97.

<sup>13</sup> I begin with this approach because it broadly captures views which are widely held in medical law and ethics. Moreover, the studies have approached surrogates' experiences in a subjective way, relying on surrogates' self-reports, so it is sensible to use a view of autonomy which has a significant subjective component in this chapter.

<sup>14</sup> I assume that this definition is 'procedural' or value-neutral, emphasizing the need to not prescribe what an individual's interests should be. However, whether my overall stance is best captured as procedural or weakly substantive is debatable.

<sup>15</sup> I note that much of this chapter discusses the concept of 'self-trust' (which is roughly the ability to trust your own decisions, trust the resources which inform your decisions, and trust your ability to act on your decisions). I will allude to this concept throughout my thesis, though will only address it in detail in chapter 4.

<sup>16</sup> While I do not explicitly refer to this distinction it may be useful for understanding and conceptualizing some of my points. E.g., I address the ways in which a surrogate's autonomy may be harmed at certain points in the arrangement (which relates to local autonomy) and distinguish this from surrogacy arrangements as a whole being autonomy undermining (which may be related to global autonomy).

belief that autonomy is a matter of degrees. Once someone is an autonomous agent, with the capacity to make autonomous decisions at a basic level,<sup>17</sup> their autonomy can be diminished, just as it can be enabled or enhanced. Autonomy can be diminished (or undermined<sup>18</sup>) for various reasons, some of which are: if someone lacks the capacity or resources to make an informed choice; if they are forced to make certain decisions which contradict their autonomous interests; if they are unsure about their autonomous interests; and if their circumstances prevent them from exercising their autonomy.

In this thesis, I will also distinguish between ‘threatened’ and ‘undermined’ autonomy. If autonomy is threatened this means it is only potentially undermined. For example, an individual could face various barriers which threaten their autonomy (e.g., because they are oppressed due to their identity), but this does not necessarily mean their autonomy is actually undermined.<sup>19</sup> Whether individuals’ autonomy is undermined depends on their autonomous interests and how they are impacted by the threats. Consider a woman who is catcalled; there are many ways this act could be said to threaten autonomy (e.g., in potentially causing psychological harm<sup>20</sup> or in being an objectifying act) but it may not undermine her autonomy if, for example, she is genuinely unbothered by it. Similarly, someone could encounter an autonomy-related threat but be able to manage it to an extent it does not interfere with their autonomy. Consider, for example, a sales agent attempting to manipulate someone into buying a product they do not want—but doing so unsuccessfully.

In this thesis I will draw on feminist perspectives in philosophy, referring primarily to McLeod and Sherwin (2000) and Oshana (2006), while also touching upon the work of Bailey

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<sup>17</sup> E.g., not in a coma, not a young child, not severely intellectually disabled.

<sup>18</sup> I view diminished and undermined synonymously. McLeod and Sherwin use the former but I will mainly use the latter out of personal preference.

<sup>19</sup> E.g., see McLeod and Sherwin, 260 (they say some people are able to manage the barriers they encounter).

<sup>20</sup> Which can for example interfere with the capacity to make an autonomous decision in the right mindset.

(2011), Mohanty (1984), and others. Feminist theorists, such as Mohanty, often emphasize the need to understand women from their own contexts, which includes engaging with their perspectives and avoiding forming generalizations about them in a way that is abstracted from their experiences. Chapter 2 is generally aligned with this idea. Other feminist theorists, like Bailey, consider how experiences should be considered but also theorized, for example with attention to structural harms. Chapter 3 will provide a similar critique of scholars' engagement with the reports of surrogates. More generally, feminist approaches to bioethics often employ a relational perspective. Relational approaches see individuals as interconnected, with their autonomy impacted by the relationships they have with others and with society more broadly.<sup>21</sup> Some scholars have maintained that traditional approaches to autonomy are insufficient for capturing the concerns emerging in surrogacy arrangements. This is because surrogacy is by nature a relational practice, involving the interests of multiple people: the intended parents, the surrogate, and the child.<sup>22</sup> Thus, this thesis will emphasize a relational approach to surrogacy which addresses surrogates' relationships with others—especially the intended parents—and the contexts from which surrogates experience and often manage autonomy-related threats.

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<sup>21</sup> E.g., see McLeod and Sherwin, 259. Relational approaches tend to be distinguished from traditional approaches, which consider persons as individuals without considering how they are situated within broader (e.g., oppressive) contexts.

<sup>22</sup> E.g., see Fulfer. Sometimes others' interests are significant, such as the families/partners of the surrogates.

# 1. Surrogacy in The Canadian Context

Surrogacy is a kind of assisted human reproduction which has been regulated in Canada since 2004. Although surrogacy is becoming increasingly popular, there is limited knowledge of it in Canada, considering a lack of empirical research and, given the lack of case law in this area, legal uncertainty.<sup>23</sup> However, the studies published in the last three years remedy some empirical gaps, particularly on the experiences of parties to surrogacy agreements. Moreover, the laws on surrogacy have been somewhat clarified in the last few years, as the courts have considered more cases involving surrogacy and as regulations on surrogacy have been implemented as well as amended. Thus, surrogacy is in certain respects an unexplored, but developing, issue in Canada.

In this chapter, I will first introduce the basics of surrogacy: what it is, what happens in surrogacy arrangements and who the involved parties are, and relevant key terms. I will then outline the legal and regulatory context of surrogacy.

## 1.1 Introducing Surrogacy

‘Surrogacy’ describes the process of a ‘surrogate’—usually but not always someone who identifies as a woman—carrying a child to term with the goal of relinquishing custody to the ‘intended parents.’ Surrogacy can be domestic (where both parties reside in the same country) or transnational (where the surrogate is in a different country than the intended parents); as my thesis focuses on Canada, I will be predominately discussing the former.<sup>24</sup> Surrogates can be gestational or traditional, the former which means that the child is not the surrogate’s genetic

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<sup>23</sup> E.g., see Lepine, 3. It is unclear how courts would consider the interests of the child and of surrogate if they conflict.

<sup>24</sup> It seems that most of the intended parents for surrogates in Canada are residents of Canada (e.g., see Yee et al. 2019, 252) so I will be mostly referring to domestic surrogacy arrangements where both the surrogate and intended parents reside in Canada. However, some of the surrogates represented in the studies have intended parents living abroad. I am only discussing surrogates residing in Canada, regardless of whether their intended parents are residing in Canada as well.

offspring (the ovum is contributed by a donor, usually an intended parent). As gestational surrogacy is more common in Canada I will focus on this kind of surrogacy in my thesis.

A ‘surrogacy arrangement’ I understand as similar to but broader than a ‘surrogacy agreement,’ which I view as synonymous with surrogacy contracts. Surrogacy agreements are consented to by the parties belonging to the surrogacy arrangement: the surrogate and intended parents. Once the agreement is signed the arrangement commences and ends shortly after the birth of the child<sup>25</sup> (the exact time is variable based on the terms of the agreement<sup>26</sup>). Overall, the surrogacy arrangement describes the relationship between the surrogate and the intended parents and the obligations they have toward each other. In this thesis I will discuss the complexity of these arrangements: they are lengthy, dynamic, and variable; some arrangements are marred by conflict, whereas others are positive and relatively uneventful.

In this thesis, my focus will be on surrogacy arrangements and not agreements, although I will refer to the latter throughout the thesis. One reason for this is the empirical research, while sparse, tends to address the experiences of surrogates within their arrangements, rather than contractual issues. With the exception of the study by Carsley (2021), little information has been made available as to the experiences of surrogates during the contract stage, such as the kinds of information surrogates access. Surrogacy agreements also foremostly are about informed consent which is crucial to the autonomy of surrogates—and hence will be discussed at different points in this thesis—but brings up a host of issues I do not have the space to discuss.<sup>27</sup> While I will at times refer to informed consent, including how it can be improved, my focus will be more on the experiences of surrogates within arrangements more broadly.

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<sup>25</sup> For simplicity, I will often refer to ‘the interests of the child’ instead of the ‘interests of the fetus,’ since whether and when fetuses have interests is morally contentious.

<sup>26</sup> Usually one week, but sometimes obligations persist (e.g., some intended parents want the child to be breastfed).

<sup>27</sup> E.g., some scholars have considered the question of whether surrogates can genuinely consent to surrogacy agreements, considering the potential for unforeseen harm, etc. This is beyond the scope of this thesis.

## *The Demographics of Surrogates and Intended Parents*

As the commercialization of surrogacy is prohibited in Canada, surrogates enter arrangements voluntarily, without the expectation or possibility of getting paid for their efforts.<sup>28</sup> Individuals become surrogates for various reasons, such as an interest in helping family and friends (or strangers) experiencing infertility, an interest in becoming pregnant but not having children of their own, an interest compensating for a loss they experienced (e.g., a miscarriage), or an interest in achieving a sense of personal fulfillment.<sup>29</sup> Not everyone can become a surrogate in Canada, however: surrogates have to be at least twenty-one years of age.<sup>30</sup>

Surrogates in Canada tend to be middle-class, educated, and white, with children of their own.<sup>31</sup> While scholars often worry about surrogates being financially coerced into arrangements (i.e., due to experiencing poverty), this does not appear to be a concern in Canada, due to these factors and likely the fact commercialization is prohibited (thus vulnerable individuals are not incentivized by profit to enter arrangements).<sup>32</sup> Moreover, surrogacy agencies typically prefer surrogates who are not obviously vulnerable: those who have financial security, those who have a stable home environment and strong support system, and those without serious physical and mental health issues.<sup>33</sup> While it is unclear how many surrogates are supported by surrogacy agencies, it seems that the vast majority are.<sup>34</sup>

Surrogacy agencies match surrogates with intended parents, who pursue surrogacy for various reasons but mainly the fact they are experiencing infertility or are incapable of having

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<sup>28</sup> See *AHRA*, 6(1), 6(2), and 6(3).

<sup>29</sup> Campbell, 36-7; Carsley (2021), 826.

<sup>30</sup> *AHRA*, 6(4).

<sup>31</sup> Peng, 561; Yee et al (2020), e258. Tolendo and Zeiler, 167. It is recommended that surrogates have prior experiences with pregnancy to enhance their ability to provide informed consent (see Reilly 283-4).

<sup>32</sup> There are some related concerns which could be addressed in a further paper, such as blurred lines between reimbursement and payment (e.g., see Carsley 2021, 828).

<sup>33</sup> E.g., see Surrogacy Canada Online, "Surrogate Mother Qualifications."

<sup>34</sup> E.g., see Yee et al. (2020), e258.

children of their own. Intended parents are usually heterosexual couples but gay couples—especially but not exclusively men—do enter surrogacy arrangements, and increasingly so.<sup>35</sup>

While many intended parents are couples, some are single.<sup>36</sup> As will be discussed in this thesis, the relationship between surrogates and intended parents is often complicated.

### *Insight into the Surrogacy Pathway*

The point from the beginning to end of a surrogacy arrangement can be described as the ‘surrogacy pathway.’ Before an arrangement begins, surrogates and intended parents typically contact a surrogacy agency for assistance.<sup>37</sup> Prospective surrogates apply to an agency; if they are deemed suitable as surrogates (upon undergoing a consultation and screening process), they will be matched with potential intended parents. Once the parties communicate, provided both want to continue with the arrangement, the surrogate undergoes psychological and medical screening. Then, the parties, with the assistance of their attorneys (one for each party),<sup>38</sup> draft and negotiate the terms of the surrogacy agreement. Once the agreement is signed by the parties the arrangement (and the surrogacy pathway) begins.

To be considered valid—that is, to be recognized by the courts—surrogacy agreements must meet certain requirements, one being they must be produced in writing.<sup>39</sup> Furthermore, certain provisions must be included: agreements must identify the parties to the agreement (the surrogate and intended parents) and express intended parentage (that the surrogate will relinquish custody to the intended parents).<sup>40</sup> Other provisions are optional (i.e., a surrogacy agreement can be ‘valid’ even without these provisions) and depend on the interests and expectations of the

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<sup>35</sup> Fantus (2020), 804.

<sup>36</sup> For simplicity I will refer to them plurally, as ‘intended parents.’

<sup>37</sup> Using a surrogacy agency is not required though. E.g., see Yee et al. (2020), e258.

<sup>38</sup> Who ensure the agreement is legally valid and that the interests of the parties to the agreement are represented contractually. Though the attorneys are usually all paid for by the intended parents the surrogate gets their own independent counsel.

<sup>39</sup> E.g., see *CLRA*, 10(3).

<sup>40</sup> *CLRA*, s. 10, 11.

parties.<sup>41</sup> Nonetheless, provisions tend to address: financial matters, such as what expenses the surrogate will be reimbursed for; medical issues, such as the medical interventions the surrogate will undergo; expectations regarding confidentiality, like what medical information will be shared between parties; the risks associated with surrogacy and the surrogate pregnancy; and actions to be taken if there is a breach in the agreement.<sup>42</sup>

After the agreement is signed, surrogates undergo various measures which facilitate and support the surrogate pregnancy, such as: in vitro fertilization (IVF), where an ovum contributed by an intended parent (or donor) is combined with sperm from an intended parent (or donor) and fertilized in a lab, in turn creating an embryo; embryonic implantation, where embryos are implanted into the surrogate's uterus; and medications (e.g., hormonal injections) which improve the chance of successful embryonic implantation.<sup>43</sup>

The rest of the arrangement depends on the expectations of the parties, as indicated in the agreement. Some surrogate-intended parents' relationships are very close, with regular contact between them; others are more distant. Likewise, some surrogates are quite independent, while others are not (some live with their intended parents and are 'micro-managed' by them). In many arrangements intended parents expect surrogates to modify their lifestyles, whether this means not drinking, eating certain foods and taking vitamins, restricting travel, and so on.<sup>44</sup>

Intended parents often attempt to manage various medical matters emerging in the arrangement, expecting surrogates to be transparent about their medical information (effectively 'waiving their right to confidentiality'), expecting to accompany surrogates at their medical appointments, and expecting the surrogates to undergo certain medical procedures relating to the

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<sup>41</sup> E.g., see Lepine. And as discussed, these provisions are not legally enforceable.

<sup>42</sup> Lepine, 9.

<sup>43</sup> E.g., see Teman, 17; Ziff, 513-4.

<sup>44</sup> E.g., see Carsley (2021), Lepine, 5

pregnancy, such as fetal screening, and relating to complications (e.g., abortion in certain circumstances). Although these expectations are normally indicated in surrogacy agreements, surrogates have the right to change their mind: they are not legally bound to these provisions, as they are not legally enforceable.<sup>45</sup> Moreover, surrogates have the right to informed consent, with respect to medical procedures and reproductive technologies,<sup>46</sup> and the right to privacy with respect to their medical information.<sup>47</sup> These rights make it highly unlikely that provisions around medical decisions and confidentiality would ever be legally enforceable.<sup>48</sup>

## 1.2 Surrogacy: The Legal and Regulatory Context

The *Assisted Human Reproduction Act* (henceforth the ‘*AHRA*’), which oversees assisted reproduction and the use of associated technologies in Canada, received royal assent in 2004, before which point surrogacy was unregulated. Prior to the implementation of the *AHRA*, the Government of Canada organized a commission—the Royal Commission on New Reproductive Technologies—to investigate the “social, ethical, health, research, legal and economic implications” of what were at the time emerging reproductive technologies.<sup>49</sup> In 1993, the commission published their final report, titled ‘Proceed with Care,’ which formed the basis of what would become the *AHRA*.<sup>50</sup> A primary recommendation of this report was to prohibit the commercialization of assisted reproductive technologies, and by extension surrogacy, in order to prevent concerns related to commodification and exploitation.<sup>51</sup>

Some principles of the *AHRA* pertain to surrogates and particularly autonomy-related

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<sup>45</sup> None of the provisions are really legally enforceable as surrogacy agreements are not legally enforceable in Canada.

<sup>46</sup> The *AHRA*, principle 2d, states: “the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies.”

<sup>47</sup> Reiley, 484. These rights are ensured through the Charter of Rights and Freedoms and medical regulations.

<sup>48</sup> Lepine, 3.

<sup>49</sup> See Privy Council Office, “Proceed with Care.”

<sup>50</sup> Campbell, 44-5. See also: Carsley (2021), 814-5.

<sup>51</sup> See Privy Council Office, “Proceed with Care.” See also: Campbell, 44-5; Carsley (2021), 814-5.

concerns: the second principle recognizes the importance of facilitating “human health, safety, dignity and rights” as assisted reproduction is pursued and researched;<sup>52</sup> the third principle emphasizes that assisted reproduction disproportionately impacts women, whose health and wellbeing must therefore be protected;<sup>53</sup> the fourth principle states that “the principle of free and informed consent” must be employed as assisted reproductive technologies are utilized;<sup>54</sup> and the sixth principle emphasizes the need to prohibit the commercialization of assisted reproduction because of related “health and ethical concerns,” such as the concern of exploitation.<sup>55</sup>

Besides the principles, two sections of the *AHRA* are applicable to surrogacy: section 6, which outlines prohibitions around surrogacy, and section 12, which oversees reimbursements. Section 6(1) stipulates that surrogates cannot be paid for their services and individuals cannot offer to pay them or advertise that they will do so. Sections 6(2) and 6(3) prohibit the compensation of individuals (and organizations) who facilitate surrogacy arrangements.<sup>56</sup> Section 6(4) requires individuals to not encourage women to become surrogates if they are under twenty-one years of age (or perceived as such), and to not assist them with medical procedures relating to surrogacy. Finally, section 6(5) specifies that these provisions do not impact the validity of surrogacy agreements under provincial law, meaning that provinces are responsible for determining their validity and enforcing them.<sup>57</sup>

Although section 6 of the *AHRA* stipulates that surrogates cannot be directly paid for their services, section 12 allows surrogates to be reimbursed for expenses relating to the surrogacy

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<sup>52</sup> *AHRA*, 2(b).

<sup>53</sup> *AHRA*, 2(c).

<sup>54</sup> *AHRA*, 2(d).

<sup>55</sup> *AHRA*, 2(f). Other principles missing in this list: The first principle states that the “health and wellbeing” of children born through assisted reproduction must be prioritized as assisted reproductive technology is utilized (which raises the question of how surrogates’ interests are considered given this prioritization of children’s interests). The fifth principle requires that individuals pursuing assisted reproduction are not discriminated against (e.g., due to sexual orientation). The last principle suggests the importance of protecting “human individuality and diversity,” as well as the “integrity of the genome.”

<sup>56</sup> Offers to pay them are also prohibited, per the *AHRA*.

<sup>57</sup> Nelson, 125.

arrangement. Section 12 requires, for reimbursements to be legally accepted, that: receipts must be provided, documenting the expenses incurred,<sup>58</sup> and surrogates must not be reimbursed for “loss of work-related income,” unless the mother cannot work because of the pregnancy, as certified by a qualified medical professional.<sup>59</sup> Note that there is no guarantee that surrogates will be reimbursed for their services, although they typically are.<sup>60</sup>

Health Canada published the *Reimbursement Related to Assisted Human Reproduction Regulations* in 2020, years after the *AHRA* was implemented.<sup>61</sup> These regulations specify the kinds of reimbursements which are considered acceptable under the Act: expenditures related to travel, pets, counselling and legal services, insurance, groceries, maternity clothes, services related to the pregnancy, and so on.<sup>62</sup> Furthermore, the regulations indicate how the expenses to be reimbursed must be documented: receipts must be provided which record the expenses and are dated and signed, with some exceptions.<sup>63</sup> In addition to a guidance document, which outlines these requirements, Health Canada has produced a policy document, “Compliance and enforcement policy for the *Assisted Human Reproduction Act* (POL-0100),”<sup>64</sup> which outlines policies relating to the enforcement of the Act more broadly.

While many, including parties to surrogacy agreements, find Health Canada’s regulations and guidance helpful, the regulations have still invited criticism. For example, some believe the documents are not sufficiently informative. The regulations on reimbursements, and the related guidance document, clarify the broad categories of expenses which are acceptable to reimburse,

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<sup>58</sup> *AHRA*, 12(2).

<sup>59</sup> *AHRA*, 12(3).

<sup>60</sup> The language of the *AHRA* is that reimbursements are allowed, but there is no indication they are necessary. E.g., see Carsley, 2021, 812; Lepine 8. While surrogates can sue if they are not reimbursed, it is often not worth it (see Carsley 2021, 829).

<sup>61</sup> See Nelson; Carsely, 821: Health Canada did not produce regulations for section 12 of the Act (which stipulates that reimbursements must follow ‘the regulations’) for years, making the section unenforceable.

<sup>62</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*, s. 4.

<sup>63</sup> *ibid*, s. 6-10.

<sup>64</sup> See “Compliance and Enforcement Policy for the *Assisted Human Reproduction Act* (POL-0100)” in the bibliography.

but do not advise how to determine whether a particular expense is reasonable. This can be problematic given ambiguity over whether an expenditure is necessary and therefore deserving of reimbursement (e.g., consider a surrogate who wants ‘designer maternity clothes’).<sup>65</sup>

Overall, failure to abide by the *AHRA*’s provisions, as well as the aforementioned regulations, can lead to jail time (of a maximum of ten years) and fines (of a maximum of five hundred thousand).<sup>66</sup> Although surrogacy agencies are not themselves regulated (or licensed), they must abide by the *AHRA*’s provisions. In *R v. Picard and Canadian Fertility Consulting Ltd*,<sup>67</sup> the owner of a surrogacy agency, Leia Picard, was fined sixty thousand dollars for contravening the *AHRA*. In particular, an RCMP investigation found that Picard paid surrogates for their efforts and accepted compensation for her surrogacy services, violating section 6 of the *AHRA*.<sup>68</sup> Admittedly, *R v. Picard* was the only case of the *AHRA* being enforced, which has incited criticism from legal scholars, although it demonstrates the potential for individuals and organizations to be prosecuted under the Act.

### *Provincial Laws on Surrogacy*

While the *AHRA* oversees criminal prohibitions around surrogacy, contract law and family law are applicable to surrogacy arrangements—in particular, surrogacy agreements—<sup>69</sup> and are under provincial (and territorial) jurisdiction.<sup>70</sup> In Ontario, the *Children’s Law Reform Act* (henceforth, ‘*CLRA*’) oversees surrogacy agreements. In the *CLRA*, surrogacy is explicitly mentioned in sections 10 and 11. Section 10(1) requires that surrogacy agreements be in writing

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<sup>65</sup> Carsley (2021), 826-8.

<sup>66</sup> *AHRA*, sections 60-61; Carsley (2021), 812. See also: Nelson.

<sup>67</sup> *R v. Picard and Canadian Fertility Consulting Ltd* (this case was unreported so is not cited in the case law section of the bibliography, but you can find it in “*R v. Picard and Canadian Fertility Consulting Ltd: Agreed Statement of Facts*,” in the secondary sources section of the bibliography).

<sup>68</sup> See “*R. v. Picard and Canadian Fertility Consulting Ltd*” in the bibliography.

Moreover, Picard paid women for their ovum donations, contravening section 7 of the Act.

<sup>69</sup> In the U.S. they tend to be called contracts, but in Canada they are often called agreements.

<sup>70</sup> E.g., see Nelson.

and that they specify intended parentage: that the intended parents, and not the surrogate, will gain custody of the child. Section 10(2) indicates that surrogacy agreements must be written prior to the birth of the child; that each party (the surrogate and intended parents) must receive legal advice prior to forming the agreement; and that the child “is conceived through assisted reproduction.” Moreover, the *CLRA* stipulates that, provided the surrogacy agreement is valid,<sup>71</sup> the intended parents will be legally recognized as parents of the child and the surrogate will not be.<sup>72</sup> However, both surrogates and intended parents are considered parents of the child until seven days following birth,<sup>73</sup> unless the agreement specifies otherwise.<sup>74</sup>

The last of the *CLRA*’s provisions on surrogacy indicate the enforceability of surrogacy agreements, stating they are “unenforceable in law, but may be used as evidence” which documents one’s intent to parent the child (or not).<sup>75</sup> This provision reflects the common understanding of surrogacy agreements in Canada: that they are not legally enforceable, although they are often recognized as expressing intent. This is clear considering provincial case law. For provincial cases involving surrogacy, most have taken place in Ontario, British Columbia, Alberta, and Quebec. Usually such cases concern custody disputes.<sup>76</sup> While these cases are often straightforward,<sup>77</sup> some of them are complicated. Consider *K.B. v M.S.B. and N.B.B.*<sup>78</sup> In this case, which was advanced to the Supreme Court of British Columbia, the claimant, K.B., sought custody over the child they brought to term while a surrogate. Complicating matters, the child

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<sup>71</sup> If the above criteria is not met the agreement may not be considered valid.

<sup>72</sup> *CLRA*, 10(3).

<sup>73</sup> They all “share in the rights and responsibilities” of parenting and technically custody does not come into effect until after birth. *CLRA*, 10(5).

<sup>74</sup> *CLRA*, 10(5).

<sup>75</sup> *CLRA*, 10(9).

<sup>76</sup> While cases on surrogacy usually relate to custody issues, monetary issues are also relevant. Interestingly, the courts have awarded damages to support a future surrogacy arrangement in the case of a loss of reproductive capacity, per *Wilhelmson v Dumma*, 2017 BCSC 616.

<sup>77</sup> E.g., just a matter of the child being the biological offspring of someone or a matter of adhering to the contract.

<sup>78</sup> *K.B. v. M.S.B.*, 2021 BCSC 1283.

was their biological offspring. Ultimately, the court dismissed K.B.'s application, viewing it contrary to the best interests of the child.

Often legal cases on surrogacy fixate on the question of whether a surrogacy agreement is valid. For instance, in *C.P.B. v L.M.B.*,<sup>79</sup> a married couple sought to be recognized as the legal parents of a child born through surrogacy. Although the claimants entered into a surrogacy arrangement, there was found to be no valid surrogacy agreement made in this case. As such, the claimants' application was denied by the Saskatchewan courts. In Ontario, similar cases have been undertaken, which show how the *CLRA* has been interpreted and enforced by the courts. In *M.L. v. J.C.*,<sup>80</sup> for example, it was found that there was no valid surrogacy agreement, per the *CLRA*: there was no written agreement and parties to the surrogacy arrangement did not consult legal advice and, as such, both parties were granted custody of the child.

### *The Surrogacy Context in Canada*

In this chapter I introduced surrogacy in Canada, overviewing the nature of surrogacy arrangements and the processes and procedures involved. As well, I introduced the legal and regulatory frameworks which form the context underpinning surrogacy arrangements in Canada.

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<sup>79</sup> *C.P.B. v. L.M.B.*, 2019 SKQB 306.

<sup>80</sup> *M.L. v. J.C.*, 2017 ONSC 7179.

## 2. What Do the Studies Suggest About the Autonomy of Surrogates?

In this section, I will consider surrogacy arrangements with reference to the recent empirical studies, with the view of determining whether it is fair to say that the autonomy of surrogates in Canada is undermined by virtue of their surrogacy arrangements. Many scholars have examined this issue in some sense, by discussing issues relating to commodification and exploitation which are said to reduce autonomy in certain ways.<sup>81</sup> However, there has been little engagement with these recent studies and especially their implications with regards to autonomy. This chapter will therefore respond to some problems in the existing literature, including longstanding theoretical concerns—about surrogates lacking autonomy, being oppressed and degraded—which have not been substantiated by surrogates’ experiences.

I will first highlight autonomy-related threats which tend to manifest in surrogacy arrangements: loss of control, pressure, and unexpected harm. I will then discuss how, per the studies, surrogacy arrangements are complicated and so are the experiences of surrogates themselves. The autonomy-related threats do not emerge in isolation: how they impact surrogates depends on contextual factors, such as the relationship between surrogates and intended parents. Moreover, many surrogates are able to manage the autonomy-related threats, “remaining agential actors” in the process.<sup>82</sup> Overall, I will show how scholars should be hesitant to generalize about the experiences of surrogates, while demonstrating that surrogacy arrangements are potentially, but not necessarily, autonomy undermining.

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<sup>81</sup> E.g., see Fulfer. See also NeJaime et al.

<sup>82</sup> Ziff, 511.

## 2.1 Describing the Threats to Autonomy

In this section, I will describe the threats to autonomy identified in leading studies focusing on the experiences of surrogates. I note that I will not be able to examine all the autonomy-related concerns relating to surrogacy arrangements; some of these will be covered in the next chapters. The threats I will discuss—loss of control, external pressure, and unexpected harm—at times overlap and are mutually reinforcing. For example, unexpected harm and external pressure sometimes result in a loss of control, which can in turn reduce one’s capacity to deal with the threats they encounter. After describing these threats, I will discuss their significance and then examine the discussed studies from a relational perspective.

### *Loss of Control*

A loss of control may reflect a reduced ability for someone to exercise their autonomy due to external factors (e.g., if they have fewer options available to them), but it can also be a subjective feeling: someone may feel a loss of control over their body if their boundaries are crossed (e.g., if others do not respect their need for privacy).<sup>83</sup> Considering the latter, this subjective feeling can undermine autonomy in various respects. Feeling less in control of one’s life can impact one’s ability to make autonomous decisions, by for example lowering the confidence they have in their decisions (they may be unsure whether their decisions align with their autonomous interests) and reducing their ability to act on them (they may feel unable to assert control or lose the motivation to do so, out of hopelessness or impaired self-esteem).<sup>84</sup>

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<sup>83</sup> These two explanations reflect different theories of autonomy. Theorists like Oshana and Cudd (who will be discussed in chapter 3) attend to external factors but McLeod and Sherwin to an extent discuss more ‘internal properties’ like whether individuals feel they can exercise their autonomy.

<sup>84</sup> E.g., see McLeod and Sherwin.

Surrogates tend to experience a loss of control—in different ways and for different reasons—to the extent that some find it “inherent” to surrogacy.<sup>85</sup> Many surrogates feel a loss of control due to the pregnancy itself. Pregnancy and childbirth often come with “significant hormonal, biological, and physiological changes”<sup>86</sup> which may be difficult to anticipate. These changes, as well as possible medical complications, can result in pregnant individuals feeling a loss of control over their bodies. With surrogacy these issues are often more pronounced. Some surrogates have reported feeling that their bodies were ‘invaded’ by the hormones they received (as part of the surrogate pregnancy), which they referred to as ‘unnatural.’<sup>87</sup> This ‘invasion’ may signify a loss of control in the sense surrogates can feel as though their bodies are controlled by these ‘strangers’ (the hormones), which they have limited control over.<sup>88</sup> Some surrogates have described this phenomenon as a matter of their bodies being ‘overpowered’ and their minds being ‘taken over,’ with the effects of the hormones lasting throughout the surrogacy.<sup>89</sup>

Surrogates have expressed their feeling that their bodies are ‘not theirs’—or at least that there is an “artificial” component of their body they have no control over—<sup>90</sup> because of the different ‘bodily intrusions’ they face, whether the ‘invaders’ (the hormones), the child that is ‘not theirs,’ or the various medical interventions they are subjected to.<sup>91</sup> For the last concern, scholars have taken issue with the medicalization and “technological colonization” of women’s bodies, and have applied this concern to surrogacy.<sup>92</sup> This is roughly the idea that the medical procedures and reproductive technologies involved in surrogacy “fragment women’s bodies and

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<sup>85</sup> Ziff 2021, 516. See also Dodds and Jones.

<sup>86</sup> Canner, 137.

<sup>87</sup> Teman, 42.

<sup>88</sup> Ibid.

<sup>89</sup> Teman, 42.

<sup>90</sup> Teman, 86-7, 98.

<sup>91</sup> E.g., see Teman, 98.

<sup>92</sup> Teman, 32.

alienate women from their selves.”<sup>93</sup> This concern has been confirmed by studies: Ziff (2021) found that surrogates express a loss of control stemming from this medicalization, “resulting in stigma and doubt about one’s own body.”<sup>94</sup>

Thus, while individuals can experience a loss of control due to pregnancy or childbirth in general, surrogates often suffer an even greater loss of control. Compounding these issues, in a regular pregnancy “no one is controlling your life,” whereas in a surrogate pregnancy surrogates have obligations toward the intended parents and the surrogacy agreement.<sup>95</sup> While pregnant individuals are normally expected to adjust their behaviours in order to support the health of their child, whether they do so is ultimately their choice.<sup>96</sup> However, in a surrogate pregnancy, surrogates are expected to attend to the interests of the child and the intended parents which can lead to a loss of control. As Payne et al. (2020) reveals, some intended parents can be quite controlling: “In some cases, physical proximity and frequent contact were used as a means to control the surrogate (diet, exercise, etc.), especially in cases where she was living together with the intended parents or in-laws.”<sup>97</sup> In such cases, surrogates are not only controlled by the provisions of the surrogacy agreement but are also ‘micro-managed,’ with intended parents attempting to control various components of the surrogacy, from the “medical aspects”<sup>98</sup> to the surrogate’s lifestyle, such as features of their house (e.g., an intended couple expected the surrogate to use two different dishwashers for religious reasons) and where they obtain groceries (another insisted on consuming only organic food obtained from Whole Foods).<sup>99</sup>

The control intended parents exert onto the surrogate can be overbearing, with one

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<sup>93</sup> Teman, 101.

<sup>94</sup> Ziff, 521.

<sup>95</sup> Teman, 100.

<sup>96</sup> Of course, this can get complicated, for example if they have a controlling partner.

<sup>97</sup> Payne et al., 186.

<sup>98</sup> Payne et al., 185-6.

<sup>99</sup> Carsley (2021), 826.

surrogate revealing they felt “colonized” by an intended parent,<sup>100</sup> as if they were a “walking belly” (treated not as a human but akin to a ‘baby factory’) which was “occupied” and was being “taken over” by both the intended parents and the child.<sup>101</sup> As the surrogate’s intended parents frequently tried to control her, she lost her sense of independence and the control she had over her life prior to entering the arrangement.<sup>102</sup> Moreover, she lost the ability to assert herself, feeling “powerless” and defeated, as if she had no choice but to appease the intended parents.<sup>103</sup> Although many surrogates experience a loss of control, sometimes which is severe, many surrogates are able to manage this issue or are otherwise relatively unaffected by it.<sup>104</sup>

### *External Pressure*

In general, pressure can undermine autonomy if it obstructs an individual’s ability to make an autonomous decision. Pressure is most detrimental when it is coercive: when in compelling individuals to change their decisions, behaviours, or their understanding of what their autonomous interests are. However, pressure can manifest in more subtle ways which can also undermine autonomy. For example, pressure can undermine an agent’s confidence in their decisions, potentially leading to them being unsure about what their autonomous interests are.<sup>105</sup> In medical settings, pressure can originate from family members and doctors, who often have ideas of what is in the patient’s best interest which can conflict with the patient’s own wishes.<sup>106</sup>

Pressure is commonly cited as a concern with respect to surrogacy arrangements, including in Canada. The studies reveal that pressure manifests in various ways, varying from

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<sup>100</sup> Teman, 96.

<sup>101</sup> Teman, 97.

<sup>102</sup> Teman, 97.

<sup>103</sup> Teman, 97.

<sup>104</sup> Teman, 103. See also: Ziff. I will return to this idea in the next two chapters.

<sup>105</sup> E.g., see McLeod and Sherwin.

<sup>106</sup> E.g., see Ho (2008).

obvious (e.g., intended parents becoming extremely overbearing<sup>107</sup>), to explicit (e.g., intended parents telling a surrogate to abort the fetus or raise the child themselves<sup>108</sup>), and to more subtle (e.g., feeling bound to the surrogacy contract). Although surrogacy contracts are not per se legally binding, surrogates often feel pressure to adhere to them, which can detriment their autonomy. As one American scholar, Laufer-Ukeles, writes:<sup>109</sup>

[E]ven if [the provisions of a contract] might be deemed unenforceable if enforced, such a potential result does not change the pressures and stress a surrogate feels to comply with the contract due to uncertainty, and any inability to afford legal fees.

Carsley (2021) reiterates these concerns. In talking with fertility lawyers practising in Canada, Carsley found that there is no guarantee surrogates will be reimbursed for their services and little room for recourse if they are not.<sup>110</sup> Thus, if there is a breach in the contract (e.g., because of surrogates failing to abide by certain provisions or leaving their arrangement) surrogates may find themselves in a financially precarious position, creating pressure to adhere to the contract.<sup>111</sup>

Surrogates usually want to adhere to the contract, either because of the above considerations or because they want to fulfill their obligations toward the intended parents. Consider one surrogate's report that "It hurt [getting hormonal injections] and the meds suck and you're just sore and you can't do anything about it... You don't want to screw it up. It's a little bit of pressure."<sup>112</sup> This 'pressure' was a common theme in Ziff's interviews, which she attributes to the reality that "the whole pregnancy is contingent on them doing their part

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<sup>107</sup> There are many examples of this but one example is found here: Ziff, 260.

<sup>108</sup> E.g., see Drabiak-Syed, 559. This is a real case which happened in Canada, though the surrogate aborted the fetus.

<sup>109</sup> Laufer-Ukeles, 43.

<sup>110</sup> Carsley (2021), 829. See also Lepine, 8. Surrogates can technically sue intended parents in the case of a breach of contract (i.e., if they are not properly reimbursed for their efforts), but there is a question of whether the surrogates would afford the cost of litigation and whether pursuing it would be worth it; often the answer is no.

<sup>111</sup> *Ibid.*

<sup>112</sup> Ziff, 518.

correctly.”<sup>113</sup> According to the reports of surrogates in Ziff’s study, much of this pressure has to do with feeling bad for the intended parents and not wanting to disappoint them.<sup>114</sup> For example, one surrogate reported enduring “significant medical complications”—and even an ectopic pregnancy—but continued with the arrangement in part because she felt bad that the intended parents incurred substantial costs without reaching their goal of having a child.<sup>115</sup>

In such cases, there is a question of whether surrogates are autonomously choosing to adhere to the contract, considering the substantial pressure they face to ‘play their part.’<sup>116</sup> Clearly, this kind of pressure is problematic as it curtails the surrogate’s ability to make autonomous decisions during the surrogacy pathway. As scholars have observed, surrogates’ needs may change during the surrogacy pathway and are therefore not always represented within surrogacy contracts.<sup>117</sup> Regardless of the contract’s provisions—which may specify that the surrogate ‘waives their right to confidentiality’ and vows to undergo certain medical procedures—<sup>118</sup> surrogates have the right to make their own decisions about their body and have the right to change their mind.<sup>119</sup> However, if they are pressured to adhere to the contract, they may not be able to exercise these rights and, more broadly, their autonomous interests.<sup>120</sup>

Surrogates and intended parents commonly have conflicting interests and values; in such cases, pressure is more likely to emerge as an issue.<sup>121</sup> Many surrogates are ‘pushed’ by their intended parents into certain decisions which may, and often do, misalign with their autonomous interests. In general, a potential concern is that intended parents, and sometimes medical

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<sup>113</sup> Ziff, 518-519.

<sup>114</sup> Ziff, 520-1.

<sup>115</sup> Ziff, 520.

<sup>116</sup> E.g., see Gomez et al.

<sup>117</sup> E.g., see Carsley (2021), 832.

<sup>118</sup> Drabiak-Syed; Lepine; Laufer-Ukeles.

<sup>119</sup> E.g., see Reilly, 484.

<sup>120</sup> E.g., see Laufer-Ukeles, Drabiak-Syed.

<sup>121</sup> E.g., see Yee et al 2020, Carsley (2021). see also Ho (2008).

professionals, are foremostly concerned with the welfare of the fetus (as well as their own interests), which can be in tension with interests of the surrogate.<sup>122</sup> It may be in the interests of the surrogate to exit a surrogacy arrangement—some experience severe psychological and physical harm, whether because of the surrogate pregnancy or because of conflicts in the arrangement—when the intended parents’ priority (and what is likely perceived as in the child’s best interests) is to ensure the fetus is carried to term. It is unclear what would happen if a surrogate wanted to abort the fetus to the objections of the intended parents,<sup>123</sup> but a similarly extreme case of conflict between a surrogate and their intended parents occurred in British Columbia. The intended parents insisted that the surrogate abort the child or that she would have to raise the child herself. The surrogate adamantly refused but ultimately decided to undergo an abortion, raising the question of whether this decision was aligned with her autonomous interests or whether she underwent the abortion because of pressure from the intended parents.<sup>124</sup>

As can be inferred from this case, pressure from intended parents can be explicit: they often tell their surrogates to make certain medical decisions or to modify their lifestyle to suit their preferences. While lifestyle modifications and medical interventions are standard to surrogacy arrangements, many surrogates feel that they have no choice but to appease the expectations of intended parents, which can be demanding and conflict with the surrogate’s usual preferences.<sup>125</sup> This is an example of the concerns relating to control overlapping with the concerns with respect to pressure. When intended parents attempt to control various aspects of the surrogacy, including the medical decisions,<sup>126</sup> this can lead surrogates to feel “colonized”

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<sup>122</sup> Laufer-Ukeles, 43, 50. This article is American, but this is a concern in Canada given the relevant laws put the interests of the child first.

<sup>123</sup> Probably the interests of the surrogate would be prioritized given their bodily autonomy, but this is unclear (see Lepine, 4). See also: Reilly, 484.

<sup>124</sup> Drabiak-Syed, 559.

<sup>125</sup> Consider the examples in the ‘loss of control’ section.

<sup>126</sup> Payne et al., 185-6.

which can exasperate the pressure they already experience.<sup>127</sup> Thus, the pressure surrogates often face is complicated and can emerge in different ways throughout the arrangement. As discussed in this section, this pressure is potentially autonomy undermining.

### *Unexpected Harm*

Broadly, wellbeing and autonomy are interrelated, with harm to one impacting the other. Individuals generally want to be in a state of good mental and physical health; physical and psychological harm frustrates this interest, while often making it difficult for individuals to exercise their autonomy, whether because they become less able to fulfill their interests (e.g., someone experiencing mental or physical issues may have less ability to pursue the activities they enjoy<sup>128</sup>) or because they encounter barriers in forming autonomous decisions (e.g., psychological symptoms, such as stress, may impact one's judgements and their ability to be confident in their decision-making skills). Clearly, surrogacy arrangements are notable in the sense that they present harms but surrogates consent to arrangements despite the potential for harm (which is akin to patients consenting to surgery knowing about possible medical complications but weighing the risk against the benefit of the procedure). Surrogates tend to be aware of the general risks surrogacy presents as they often do their own research<sup>129</sup> and it is standard for them to be informed of possible psychological, medical, and physical complications during the signing of the surrogacy contract.<sup>130</sup> However, surrogates' autonomy can still be undermined if their wellbeing is harmed, and especially when this harm is unexpected.

Scholars and policymakers have for decades expressed concern about the physical and psychological effects of surrogacy.<sup>131</sup> While some of these concerns are overstated—such as the

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<sup>127</sup> Teman, 96.

<sup>128</sup> E.g., someone with an illness might be bedridden and unable to enjoy their hobby of skydiving.

<sup>129</sup> E.g., see Fantus, Ziff. Screening and counselling can also help them know about the risks.

<sup>130</sup> This is standard but not really legally mandated. See Lepine 6.

<sup>131</sup> E.g., see Reilly, 485. See also: Teman.

worry that surrogates are harmed because of having to relinquish custody of the child—<sup>132</sup> there are serious risks to surrogacy arrangements, including but not limited to: complications resulting from embryo implantation; psychological harm emerging from conflict within the arrangement; and risks associated with the pregnancy, such as complications leading to infertility and unpleasant reactions to hormonal injections.<sup>133</sup>

Physical and psychological harms can be especially damaging to autonomy when they are unexpected, as one cannot properly consent to, or prepare to deal with, unexpected issues. Unexpected harm is common within surrogacy arrangements, largely due to unknown and difficult to predict factors such as whether the pregnancy will be viable, how painful the medical procedures will be for the surrogate, whether there will be conflict between parties to the agreement, how the surrogate’s needs and feelings will change throughout the arrangement,<sup>134</sup> and whether the surrogate will face medical complications.

In response to some of these concerns, the Canadian Medical Association recommends that surrogates not be first-time mothers, given the potential for unexpected harm amongst those who have not experienced pregnancy before.<sup>135</sup> Although this recommendation is typically upheld, surrogates still encounter unexpected harms since surrogacy is “no regular pregnancy.”<sup>136</sup> Teman (2010) found, after observing and interviewing surrogates in Israel for ten years, that most experienced “unexpected suffering” despite being previously pregnant.<sup>137</sup> As one surrogate said: “this pregnancy is making me experience all sorts of strange and unexpected

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<sup>132</sup> Though this concern is theoretically possible, studies on surrogacy in Canada have disputed this idea, finding that surrogates report either not having an emotional bond with the child or using conscious efforts to distance themselves from the child and ensure the bond does not interfere with the agreement (specifically, the eventual relinquishment of custody). See Teman; Ziff, 520; Payne et al., 186; Yee et al. (2020), 263; Peng, 562-3.

<sup>133</sup> Lepine, 6; Yee et al. (2020), e263.

<sup>134</sup> E.g., see Carsley (2021), 832.

<sup>135</sup> Reilly, 483-4.

<sup>136</sup> Teman, 39.

<sup>137</sup> Teman, 43; in Teman’s research the average surrogate had 2.5 pregnancies before.

things with my body.”<sup>138</sup> Others reported physical issues absent in their previous pregnancies, from significant weight gain to weakness, labour pains, and hair loss.<sup>139</sup>

Unexpected harm also results when surrogates are not screened and counselled before entering arrangements (which are intended to prevent harm by ensuring surrogacy is right for the individual).<sup>140</sup> One surrogate Teman encountered sued her intended parents, claiming she should have not been a surrogate as she was not “psychologically prepared” for it and, as a result, experiences psychological trauma years later.<sup>141</sup> While Teman maintains that such extreme complications are rare,<sup>142</sup> it is worth addressing the unexpected psychological and emotional issues surrogates often grapple with. In Ziff’s 2021 study, many surrogates recalled having unexpected feelings, from feeling grief to feeling a lack of control over their bodies. Although surrogates can anticipate the possibility of complications, many surrogates have had successful pregnancies before and therefore do not expect feeling grief or loss.<sup>143</sup> As well, in addition to the unexpected physical harms accompanying an unsuccessful pregnancy (e.g., prolonged administration of hormonal injections and medication), surrogates in this position often feel as though they have failed their intended parents.<sup>144</sup>

Such issues commonly arise in Canada as well. Yee et al. (2019) found that only 19.5 percent of surveyed surrogates reported their surrogacy experience was “as expected.”<sup>145</sup> While some surrogates reported being pleasantly surprised by their arrangement, many encountered unexpected challenges.<sup>146</sup> Similarly, each surrogate Fantus (2020) interviewed “reported

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<sup>138</sup> Teman, 42.

<sup>139</sup> Teman, 41-42, 43.

<sup>140</sup> E.g., see Fantus.

<sup>141</sup> Teman, 100. See also: 98-9.

<sup>142</sup> Teman, 100.

<sup>143</sup> Ziff, 522.

<sup>144</sup> Ziff, 522.

<sup>145</sup> Yee et al. (2019), 252.

<sup>146</sup> Although Yee et al (2019) reports that surrogates faced unexpected challenges, they did not ask surrogates what these challenges were.

unanticipated health and/or mental health complications.”<sup>147</sup>

Other harms, which are often unexpected, are attributed to the nature of the relationship between a surrogate and their intended parents. Surrogates can feel harmed by their arrangement if their expectations are not met. For example, some expect gratitude and appreciation for their work and otherwise feel objectified (e.g., like a ‘vessel’ and part of a ‘business transaction’).<sup>148</sup> Surrogates can also be harmed because of unexpected conflict<sup>149</sup> or pressure within their arrangements. For example, one surrogate suffered from physical and psychological harm due to pressure from their intended parents:<sup>150</sup>

At first, I felt like we were friends, and this was going to be a wonderful journey. As soon as I was pregnant, it was all about the baby [...] Furthermore, they put so much stress and anxiety on me that I ended up with hypertension and migraines throughout the pregnancy. In certain cases, surrogates can be impacted psychologically by the arrangement to the point it is clear they are unable to fulfill their autonomous interests. As one surrogate says:<sup>151</sup>

I didn’t go outside, and when I did, I acted like an escaped prisoner [...]. Most of the time I sat at home, rotting and wilting. I disconnected from all my friends...I felt choked, lonely, horrible frustration because my independence was taken from me.

This surrogate felt constricted by her arrangement, and specifically the intended parents, to the extent she adopted a lifestyle—of sitting at home—she did not want (thus becoming occupied with goods contrary to her autonomous interests) and which impeded her ability to pursue the goods she did want (e.g., her friendships). This surrogate also indicated her regret entering the

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<sup>147</sup> Fantus, 2. Fantus does not describe what these complications are.

<sup>148</sup> Yee et al. (2020), e260-261; Payne et al., 189.

<sup>149</sup> This can include separation of the intended parents, death of one of them, breaches in the agreement, disputes about medical issues or custody, and so on (see Lepine).

<sup>150</sup> Yee et al. (2020), e260.

<sup>151</sup> Teman, 97.

arrangement, suggesting that these harms (physical or autonomy-related) were unexpected.<sup>152</sup>

While this surrogate encountered severe threats to her autonomy, including unexpected harm, Teman stresses that not all surrogates have experiences like this.<sup>153</sup> Many surrogates do experience significant medical complications in a way that impacts their autonomy (e.g., some surrogates want to have children in the future but medical complications during their surrogate pregnancy renders them unable to do so, frustrating their desires<sup>154</sup>). However, many have relatively uneventful arrangements, sometimes because they do not encounter certain threats to begin with (whether conflict or medical complications). Other times, surrogates encounter significant physical and psychological harms but are relatively unaffected by them, either because they are able to manage the harms as they arise (e.g., they deal with emotional stressors by relying on a support network<sup>155</sup>) or they anticipate the harms in advance (i.e., prior to entering an arrangement<sup>156</sup>) and are thereby able to prepare for them and factor them into their decision making (ensuring that despite potential harms surrogacy aligns with their autonomous interests).

## 2.2 Making Sense of the Threats to Autonomy

I have discussed certain autonomy-related threats: loss of control, pressure, and unexpected harm. The studies I have examined highlight how common it is for surrogates to experience these threats. In certain ways, my analysis of these threats confirms the perspectives of existing scholarship: some scholars have expressed similar concerns, although often without connecting them to autonomy specifically.<sup>157</sup> The next question is how these threats are

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<sup>152</sup> Teman, 100. The surrogate said she should have never been approved as a surrogate.

<sup>153</sup> Teman, 100.

<sup>154</sup> This is a concern. See Yee et al. (2020), e263.

<sup>155</sup> Yee et al. (2020), e261-3.

<sup>156</sup> Including in consent process, or even earlier

<sup>157</sup> E.g., Laufer-Ukeles discusses the pressure surrogates face and how this often undermines informed consent; Canner (see p. 137) discussed unexpected harm in relation to informed consent; Carsley (2021) and Teman discuss how some harms may be unexpected; Ziff and Teman address loss of control, as do Dodds and Jones.

significant. At this point, we can agree with Teman (2010) that surrogacy presents a “high stakes” situation, where much can ‘go wrong.’<sup>158</sup> Here, Teman is referring to harm in a broad sense, as encompassing psychological and physical harm. However, we can say the same about autonomy: surrogates face various autonomy-related threats, making surrogacy arrangements high-risk or potentially autonomy undermining.

As far as I am aware, these threats are the main autonomy-related concerns which emerge in surrogacy arrangements, as evidenced by the studies. It is important to stress that these threats do not entail that surrogacy arrangements are necessarily or inherently autonomy undermining. These threats are akin to risks or potential harms, as they impact surrogates differently, with some significantly impacted and others minimally, if at all. For example, one surrogate reported that their surrogacy experience was “amazing” and that they enjoyed being pregnant and attending medical appointments,<sup>159</sup> which contradicts the experiences of other surrogates who feel a substantial loss of control because of their pregnancy or because of receiving medical interventions.<sup>160</sup> Additionally, some surrogates do not report encountering unexpected harm, even indicating they felt “healthier” (while experiencing the surrogate pregnancy, in comparison to previous pregnancies) and that they “bloomed.”<sup>161</sup> Some surrogates do perceive autonomy-related threats, like unexpected harm or a loss of control, but are able to manage them, by being proactive (e.g., learning about the medical procedures they receive) and by playing an active role in the surrogacy (e.g., such as utilizing the “best way” to self-administer hormonal injections).<sup>162</sup>

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<sup>158</sup> Teman, 100.

<sup>159</sup> Many surrogates appear to just report good experiences. As Ziff says, loss of control often emerges but does not impact all surrogates: “sometimes, they do lament the lack of control they experienced” (513).

<sup>160</sup> E.g., see Teman, 41-3.

<sup>161</sup> Teman, 43.

<sup>162</sup> Ziff, 518-9.

Overall, whether the autonomy of surrogates is actually diminished would depend on various factors, such as their autonomous interests (e.g., some surrogates do not mind it when intended parents attend their medical appointments, whereas others consider this a significant infringement of privacy<sup>163</sup>), how severe the threats are (e.g., some intended parents are controlling and even abusive; others avoid making surrogates uncomfortable<sup>164</sup>), and whether the surrogates are able to adequately prevent or manage the threats (e.g., many report researching surrogacy long before entering an arrangement, which helps them prepare to manage them<sup>165</sup>).

Yet it is worth highlighting that, while these threats manifest and impact surrogates differently, they are to an extent inherent in surrogacy arrangements. Unexpected harm would be worse depending on the complications which arise in the arrangement, as well as the adequacy of the consent process, but is always a possibility considering that it would be impossible to anticipate all potential harms prior to entering surrogacy arrangements.<sup>166</sup> Similarly, pressure can vary depending on the nature of the relationship between the parties to the agreement, but it is always a potential concern considering surrogates are bound to surrogacy agreements (although not legally) and subject to the interests and sway of the intended parents. Finally, some surrogates may not be impacted by a loss of control but this is always a potential issue, due to the demands of surrogacy (e.g., the disconnect between the surrogate's body and the 'artificial body' of surrogacy<sup>167</sup>) and the fact a loss of control may follow from the other threats, like pressure.

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<sup>163</sup> E.g., one surrogate felt "embarrassed" when a male intended parent attended a checkup (Teman, 97); Others encouraged the intended parents to attend appointments such as ultrasounds (Teman, 92-3).

<sup>164</sup> Teman, 94; Payne et al.

<sup>165</sup> Ziff, 516.

<sup>166</sup> Pregnancy in general can be unpredictable.

<sup>167</sup> E.g., see Teman, 36-7.

## 2.3 When Autonomy Becomes Undermined: A Contextually Dependent Question

Whether surrogacy is potentially autonomy undermining is not very contentious: scholars have expressed autonomy-related concerns about surrogacy for decades, often viewing it as an oppressive and risky practice. The recent studies to an extent confirm these concerns as they highlight various autonomy-related threats which commonly emerge in surrogacy arrangements and, in turn, support the idea that surrogacy arrangements are potentially autonomy undermining. However, the specific ways in which surrogates experience and manage autonomy-related threats have been captured more recently, in the studies produced in the last few years. So far in this chapter I have identified and described the autonomy-related threats that surrogates encounter. In this section I will discuss another aspect of these studies: they emphasize the complicated and contextually dependent nature of surrogacy arrangements and, by extension, surrogates' experiences. The studies reveal that the autonomy-related threats do not operate in isolation and are not passively experienced by surrogates, who are often able to navigate the threats they encounter. As such, these studies disrupt the stereotype of them being powerless, oppressed, harmed, and lacking in autonomy and agency.<sup>168</sup>

### *How Surrogates Experience and Manage Threats to Their Autonomy*

Although it is often assumed that surrogacy arrangements are oppressive or harmful, surrogates in general do not feel this way. Some surrogates face serious infringements of autonomy—such as clear invasions of bodily autonomy and privacy—and feel more harmed than benefitted by their arrangement, but these experiences are identified by scholars as 'outliers.'<sup>169</sup> Studies have revealed that the majority of surrogates report being satisfied with, and not

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<sup>168</sup> Peng, 561-3. See also: Ziff; Mohanty.

<sup>169</sup> See Teman, 100; Ziff; Yee et al. (2020).

regretting, their arrangement.<sup>170</sup> The satisfaction surrogates tend to experience may signal that their autonomous interests were fulfilled by their arrangements, or at least that they did not perceive being harmed in a significant way.

Studies have revealed that surrogates generally report entering agreements consensually<sup>171</sup> and enthusiastically, often initiating agreements themselves because they want to assist individuals they see struggling with infertility.<sup>172</sup> Moreover, many surrogates describe being empowered by their arrangements (e.g., being proud of their body's ability to support a pregnancy and feeling confident as a result; finding their decision to enter a surrogacy arrangement meaningful, rewarding, and enriching in supporting personal growth<sup>173</sup>). Given that surrogates often, or even typically, do not feel their autonomy is impaired, this may suggest that they do not encounter significant autonomy-related threats (or that their arrangements align with their autonomous interests despite experiencing harm).<sup>174</sup>

Surrogates are also often aware of autonomy-related issues, with some citing bodily autonomy as granting them the right to pursue surrogacy arrangements, some conducting their own research in order to determine whether they should become surrogates—and feeling empowered as a result—and others expressing opinions about the laws on surrogacy.<sup>175</sup>

### *How Surrogates Manage the Threats They Encounter*

For surrogates who experience threats to their autonomy, many are aware of them and tend to manage them. Teman (2010) found that surrogates are often involved in 'boundary

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<sup>170</sup> Yee et al. (2019); Yee et al. (2020), 252. See also: Teman.

<sup>171</sup> Peng, 560, 567.

<sup>172</sup> Toledano and Zeiler, 166-7.

<sup>173</sup> Ziff, 262. See also: Yee et al. (2020), e263; Rozée et al.

<sup>174</sup> Note I will consider other explanations, of why surrogates do not feel harmed, in chapter 3.

<sup>175</sup> Yee et al. (2020), 260: some surrogates have reported they are fully consenting and autonomous; others have said surrogacy should be commercialized. Some of these issues were confirmed by Carsley (2021).

maintenance:’ in “erecting red lines” to protect themselves against potential harms.<sup>176</sup> In establishing boundaries with intended parents, surrogates assert control over their bodies (leading to them feeling empowered or at least not perceiving a lack of control) and reduce the likelihood of their autonomy being infringed upon (considering intended parents become equipped to recognize and therefore better respect the surrogates’ boundaries).

Some studies have confirmed similar experiences among Canadian surrogates specifically. Yee et al. (2020) found that a significant component of surrogacy arrangements is ‘boundary management.’ Consider one surrogate’s report: “I had to put the brakes on with this journey because she [intended mother] was becoming quite overbearing...I told her that she needed to trust me and be less invasive.”<sup>177</sup> Similarly, As Ziff (2021) reveals, many surrogates report becoming ‘experts’ on various topics relating to surrogacy,<sup>178</sup> researching medical procedures (in turn improving their autonomous decision-making with respect to the procedures and the arrangement more broadly) and regarding medical interventions as a source of ‘empowerment,’ for example when they administer them themselves.<sup>179</sup> Scholars often discuss ‘medicalization’ as a source of harm but Ziff finds that it “becomes a tool that allows them to remain agentic actors while pursuing the at times contentious and alienating experience of surrogacy.”<sup>180</sup> As well, surrogates, including in Canada, utilize various cognitive techniques to distance themselves emotionally from the child they carry, avoiding possible harms attributed to attachment.<sup>181</sup>

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<sup>176</sup> Teman, 95. I will return to this in chapter 4.

<sup>177</sup> Yee et al. (2020), e260.

<sup>178</sup> E.g., see Ziff, 519: “Brenda developed expertise of the medications in surrogacy and gained new knowledge about her own body, expanding the realm of her medicalized understanding.”

<sup>179</sup> E.g., see Ziff, 519: “While not her original plan, Lucy specifically links the embodied practice of giving herself the shots to feeling in control and having agency in the process, noting it made her feel better.”

<sup>180</sup> Ziff, 511.

<sup>181</sup> Yee et al. (2020), e263.

These reports of surrogates suggest a few salient points. These threats do not appear to impact surrogates equally; while a minority are significantly and adversely impacted, many are able to manage the threats they encounter. Some pre-emptively deal with the threats, either by becoming informed on surrogacy before entering arrangements (thereby preventing the potential for unexpected harm and ensuring the arrangement aligns with their autonomous interests) or by erecting boundaries to avoid potential issues (such as infringements of autonomy by intended parents). Others deal with the threats as they happen (e.g., many surrogates feel a loss of control and react accordingly; consider the surrogate who self-administers hormonal injections).

Finally, it is clear that even if surrogates are potentially harmed during their arrangements, they are not powerless and unwilling participants who passively respond to threats; rather, they are active participants in their contexts, who regularly resist the stressors they encounter. As Mohanty (1984) argues, it is important to engage with the realities of women who, even while oppressed, negotiate and resist oppressive forces.<sup>182</sup>

As such, surrogates generally do not completely lack autonomy or agency, and many are able to participate in surrogacy arrangements without having their autonomy undermined in significant respects (and, for surrogates who find their arrangements empowering, their autonomy may be actually bolstered). As the studies indicate, agency and autonomy are complicated matters which vary within and between surrogacy arrangements—although the threats oftentimes enter arrangements and persist.

### *Contextualizing the Threats to Autonomy*

I have discussed the threats to autonomy which surrogates tend to encounter. But it is important to recognize the social context of surrogacy arrangements, which are foremostly

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<sup>182</sup> Mohanty (see especially 344-345).

relationships between surrogates and intended parents or, as some surrogates say, a “shared experience.”<sup>183</sup> Surrogates do not face these threats in isolation. The nature of the relationship they have with intended parents, and more broadly the social context of surrogacy, has a bearing on the threats they are exposed to and whether they can manage them. Therefore, in this section I will discuss the social context surrogates navigate, and how it impacts their autonomy.

Traditional theories of autonomy, including ones commonly employed in medical law and ethics, consider individuals isolated from broader contexts, whether their relationships with others or how they navigate within, and are impacted by, broader society.<sup>184</sup> Consider the assumption—which is prolific in medical law and ethics—that involving third parties in decision-making is detrimental to autonomy: that, for example, family members of patients threaten their autonomy by pressuring (or even coercing) them to make certain decisions about their medical care.<sup>185</sup> Ho (2008) opposes this belief, arguing that involving multiple people in decision-making can actually enhance autonomy. Ho notes that viewing external pressure as usually a threat to autonomy often implies that the other parties involved in decision-making do not have the individual’s interests in mind or have opposing values.<sup>186</sup> However, individuals are often autonomous because of, and not merely in spite of, their connections with others. In medical contexts family members can motivate and empower patients to make decisions aligned with their autonomous interests. In a similar way, intended parents do not always adversely impact the autonomy of surrogates.

Studies have revealed that the experiences of surrogates—including how they encounter and respond to threats to their autonomy—can be better or worse depending on the relationship

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<sup>183</sup> Toledano and Zeiler, 168.

<sup>184</sup> E.g., see McLeod and Sherwin, 260.

<sup>185</sup> Ho, 128.

<sup>186</sup> Ho, 128, 131.

they have with intended parents. Payne et al. (2020) reviewed several studies on surrogacy and was able to sort surrogacy arrangements into four categories. ‘Open’ arrangements are characterized by a fulfillment of expectations, a “high degree of satisfaction” for both parties, positive emotions such as joy, and a sense of friendship and “shared experiences.”<sup>187</sup> In such arrangements, the expectations of the parties align,<sup>188</sup> leaving less room for conflict and unexpected harm (e.g., “disappointment or even grief” when surrogates’ needs are not met).<sup>189</sup>

Conversely, ‘restricted’ arrangements are characterized by low levels of surrogate satisfaction, with most regretting entering their arrangements, feeling forced into them, and having unmet needs and expectations (e.g., they are treated only as a “vessel” when they want more support and appreciation).<sup>190</sup> ‘Structured’ arrangements are tightly controlled (i.e., with contractual regulations) but in them the expectations of each party are usually fulfilled because they are indicated in the surrogacy agreement.<sup>191</sup> Finally, ‘enmeshed’ arrangements involve “often unfulfilled or failed” expectations, largely because of one party adhering to the provisions of the contract and the other expecting more (i.e., that the arrangement is not just a ‘business transaction’).<sup>192</sup> Based on Payne et al.’s typology, it is clear that surrogates’ experiences, and how their autonomy is potentially undermined, depend on the nature of their arrangements.

Payne et al.’s contributions concern, but do not centre on, Canadian surrogates. Even so, Yee et al. (2020)’s study of Canadian surrogates corroborates their findings. Per this study, “incongruent expectations” between the parties are a source of conflict which contributes to a negative experience for the surrogates.<sup>193</sup> Consider one surrogate’s assertion that “the mother and

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<sup>187</sup> Payne et al., 187. See also: Toledano and Zeiler, 168.

<sup>188</sup> Payne et al., 188.

<sup>189</sup> Payne et al., 186.

<sup>190</sup> Payne et al., 188.

<sup>191</sup> Payne et al., 188. E.g., one surrogate says, “we’re on the same page.”

<sup>192</sup> Payne et al., 188.

<sup>193</sup> Yee et al. (2020), 263.

I didn't see eye to eye on all things," which resulted in a "horrible experience" defined by stress and physical harm (hypertension).<sup>194</sup> Overall, surrogates have reported being expected to behave contrariwise to their values.<sup>195</sup> Clearly, such cases are potentially autonomy undermining. Revisiting the threats to autonomy I overviewed, surrogates experience pressure, loss of control, and unexpected harm because of incompatible values or interests. For example, surrogates report having the intended parents' lifestyle 'forced' onto them (e.g., with intended parents insisting on surrogates using a second dishwasher<sup>196</sup>), causing them to feel less in control of their lives. Although surrogacy agreements are intended to prevent such conflicts, interests can change during the course of the arrangement (e.g., a surrogate may be initially open to abortion but change their mind later in the pregnancy<sup>197</sup>).

More broadly, there is the concern that intended parents would always prioritize the interests of the child over and above the interests of the surrogate, potentially leading to autonomy-related threats (e.g., emerging with conflict).<sup>198</sup> However, this matter is often complicated. Many intended parents recognize the obvious fact: that the surrogate is carrying the child—which is a source of their power—and is a fundamental piece of the 'surrogacy puzzle.'<sup>199</sup> Likewise, surrogates often have a good relationship with the intended parents, characterized by "high satisfaction," a strong "emotional connection" between parties, and compatible values and expectations.<sup>200</sup> In this way, the interests of the surrogate and the intended parents may align (and surrogates may prioritize the interests of the child too) and, if they do not, the parties may be able to navigate potential stressors in a healthy way. In many arrangements,

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<sup>194</sup> Yee et al. (2020), 260-1.

<sup>195</sup> Yee et al. (2020), 263.

<sup>196</sup> Carsley (2021), 832.

<sup>197</sup> E.g., see Drabiak-Syed, 560.

<sup>198</sup> Laufer-Ukeles, 43, 50.

<sup>199</sup> Ziff, 520; Teman, 32; Carsley (2020), 1.

<sup>200</sup> Yee et al. (2019), 252.

surrogates describe a mutually respectful partnership, where intended parents respect surrogates as decision-makers, valuing their opinions with regards to the pregnancy.<sup>201</sup>

Many theorists have also assumed that surrogates are harmed by what they consider to be foreign infringements of their autonomy and bodily space. While there is truth to this, in the sense the various medical procedures (like hormonal injections) can result in surrogates feeling a loss of control, recent studies have found that surrogates often assert control by using their environment (these ‘environmental threats’) to their advantage.<sup>202</sup> Consider Ziff’s assertion that “medicalization becomes a tool” which allows surrogates to preserve their agency.<sup>203</sup> In this case, Ziff responds to the common assumption of agents being harmed by ‘external threats,’ when theories of relational autonomy, for example as advanced by McLeod and Sherwin, situate agents within their broader contexts, where they can be benefitted by their environment just as they can be harmed by it. I will return to these considerations in chapter 4, as I discuss factors which bolster the autonomy of surrogates.

### *How Surrogates Are Situated in Surrogacy Arrangements*

Beyond considering the relational context of surrogacy arrangements, it is important to acknowledge that power disparities can impact the kinds of autonomy-related threats surrogates encounter and their ability to respond to them. While many scholars consider power imbalances inevitable within surrogacy arrangements, recent studies illustrate the power dynamics of surrogacy as “complex.”<sup>204</sup> In Canada, power disparities between intended parents and surrogates can emerge, though oftentimes they are subtle. As some scholars have found, there is a lack of evidence to support the assumption that surrogates are impoverished (at least in

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<sup>201</sup> Yee et al. (2019), 250; Yee et al. (2020), e260.

<sup>202</sup> E.g., see Teman; Ziff.

<sup>203</sup> Ziff, 511.

<sup>204</sup> E.g., see Teman, 37.

countries such as Canada),<sup>205</sup> and Canadian surrogates do not tend to be uneducated or of a low socioeconomic status.<sup>206</sup> Thus, extreme power disparities, attributed to stark differences in socioeconomic status, are unlikely to emerge in surrogacy arrangements.

Yet it is possible for power disparities to manifest in other ways. Some research has shown that in Canada intended parents tend to be in a better socioeconomic position than surrogates (although not extremely so<sup>207</sup>), presumably because of how costly surrogacy is for intended parents.<sup>208</sup> The fact intended parents may have more financial power can cause problems, especially considering issues with the reimbursement regulations: that sometimes surrogates may not be reimbursed, putting them in a financially precarious position (while they can pursue litigation many would not be able to afford it).<sup>209</sup> As well, one could argue that surrogates face more potential harms than intended parents do, and are disproportionately more vulnerable, creating a power divide.<sup>210</sup>

In general, we can assume that if intended parents have significantly more power than surrogates, the threats surrogates encounter may be more pronounced and more difficult to navigate. If a surrogate belongs to a group which is oppressed in society and their intended parents have more privilege, this may mean that the former has not developed autonomy-related skills, such as the self-confidence required for asserting themselves.<sup>211</sup> If the intended parents are

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<sup>205</sup> Peng, 561-3.

<sup>206</sup> See Yee et al. (2019), 252: many surrogates report financial problems. See also 253, which reveals it is untrue that most surrogates are uneducated. Financial coercion and extreme disparities in socioeconomic status between intended parents and surrogates are not significant concerns in Canada: surrogates would likely not enter agreements in order to improve their financial situation, since they cannot profit off of surrogacy arrangements. However, Carsley (2021) gestures to a potential concern: that the line between reimbursements/profit and need/improvement of lifestyle can become fuzzy.

<sup>207</sup> See Yee et al. (2020), e258.

<sup>208</sup> Carsley (2021), 826-7. See also: Fantus (2020), 803.

<sup>209</sup> Carsley (2021), 829.

<sup>210</sup> It is unclear how much a power divide *per se* undermines surrogates' autonomy (e.g., whether even a slight divide impacts autonomy) but there appears to be a correlation between the severity of the power imbalance and the extent to which surrogates' autonomy is potentially undermined.

<sup>211</sup> E.g., see McLeod and Sherwin.

wealthy and the surrogate is relatively poor the surrogate may have a reduced ability to assert themselves (e.g., breach the contract) because of financial concerns (e.g., the possibility they will not be reimbursed for their efforts), whereas the intended parents without encountering comparable barriers may be better able to advance their own interests (e.g., if they are wealthy they may not be as financially invested in the arrangement and therefore may be less mindful about potentially harming their surrogate and risking a breach in the agreement).

Thus, power disparities between surrogates and intended parents can impact the former's autonomy. At the same time, it is important to recognize the complicated nature of these imbalances. Power disparities vary between surrogacy arrangements: in some arrangements, power disparities are severe; in others they are relatively minimal.<sup>212</sup> Power disparities also vary within arrangements. Surrogacy arrangements cannot be accurately represented as featuring an extreme and static power imbalance, where intended parents have unrestricted power and surrogates have little. Rather, recent studies have acknowledged power as a “fluid” property which can be negotiated between parties.<sup>213</sup> As discussed in the previous sections, surrogates are not powerless: they respond to and often resist the stressors they encounter. As well, surrogates can have power over their intended parents in particular circumstances.<sup>214</sup> Surrogates can take advantage of intended parents, by for example maximizing reimbursement amounts beyond a point which is necessary.<sup>215</sup> In such circumstances, intended parents—especially if they are

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<sup>212</sup> Returning to Payne et al.'s typology, arrangements occurring in places with serious power disparities and inequality tend to be marred by conflicting expectations, low levels of satisfaction, and difficulty renegotiating surrogacy agreements. Conversely, in arrangements undertaken in contexts with minimal power divides, surrogates commonly report feeling satisfied with the arrangement and autonomous throughout the surrogacy pathway. This distinction appears to reflect a disparity in the severity of autonomy-related concerns.

<sup>213</sup> Ziff, 521.

<sup>214</sup> E.g., see Teman, 37. Further complicating matters, factors such as gender and sexuality can impact power in relationships. It is becoming increasingly common for gay men to become intended parents, and some studies have revealed they report experiencing discrimination because of their sexuality (see Fantus, 2021). Thus, while scholars have argued that surrogacy oppresses and degrades women, it is possible for intended parents to be oppressed, which may change the power dynamics of a specific surrogacy arrangement.

<sup>215</sup> Carsley (2021), 827.

desperate for children and are significantly invested, emotionally or financially, in the arrangement—<sup>216</sup> may feel that they have no choice but to appease their surrogate.

As can be concluded from this section, the power dynamics within surrogacy arrangements are complicated but are worth acknowledging, as they can impact the autonomy of surrogates, including the threats they encounter and their ability to manage them.

## 2.4 What Do the Studies Reveal About the Autonomy of Surrogates?

Based on the recent empirical studies, and as discussed in section 2.1, we can say there are significant threats to autonomy which commonly arise in surrogacy arrangements. Sections 2.2 and 2.3 emphasize that we should be careful to not make assumptions and generalizations that surrogates all have undermined autonomy or experience the autonomy-related threats in the same way. Some surrogates encounter severe threats, whereas others are relatively unaffected by them, whether because the threats they encounter are less severe or because they can manage them. The previous section also emphasized that the autonomy-related threats do not emerge in isolation: they are shaped by different factors, many of them relational in nature.

Considering the contexts of surrogacy also reveals how complicated the issues of autonomy, agency, and power are within surrogacy arrangements. In the previous section I demonstrated how surrogates generally do not identify as significantly harmed (including oppressed and degraded) and oftentimes feel empowered by, and within, their arrangements. Mohanty (1984) urges theorists to avoid making generalizations about women—especially women of colour—being oppressed and lacking autonomy and power.<sup>217</sup> Mohanty stresses the need to understand women from within their own contexts and understand the ways in which

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<sup>216</sup> Ziff, 520; See Teman, 37 who discusses how the ‘hunger’ of the intended parents contributes to the “upturning any connotations that the couple is more powerful than she is in the relationship.”

<sup>217</sup> Mohanty (see especially 352, 337).

they have agency and power as they actively navigate oppressive forces.<sup>218</sup> In a similar way, the studies demonstrate that surrogates are not powerless: rather than passively enduring autonomy-related threats, surrogates actively respond to and often resist threats.

We should therefore hesitate to conclude that surrogates necessarily experience harm in their arrangements or that their autonomy is undermined. In reality, surrogacy arrangements vary considerably and so do the experiences of surrogates, including how they navigate autonomy-related threats. There is also variance within each surrogacy arrangement: as Payne et al. et al. (2020) suggest, there are “temporal changes” during a surrogacy arrangement.<sup>219</sup> Thus, a surrogate may feel empowered at one point in the arrangement but later experience autonomy-related threats which significantly undermine their autonomy (e.g., many intended parents become increasingly controlling as the arrangement progresses<sup>220</sup>).

### *The Implications of this Discussion*

As the autonomy-related threats have the potential to seriously undermine autonomy, and often do, they should be prevented and dealt with (e.g., through policy). At the same time, there is a lack of indication that extreme measures are needed (e.g., that surrogacy should be prohibited) as these threats do not necessarily impact surrogates in general and, more specifically, undermine their autonomy. That is, it is not clear that, following these autonomy-related concerns, surrogacy is overwhelmingly problematic to the extent that would warrant extreme regulatory measures. A few scholars have argued that the fact surrogacy is threatening to autonomy welcomes a stringent response. For example, Dodds and Jones (1989) say:<sup>221</sup>

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<sup>218</sup> Mohanty (see especially 344-345).

<sup>219</sup> Payne et al., 189-90.

<sup>220</sup> This is commonly reported by surrogates. E.g., see Ziff, 260.

<sup>221</sup> Dodds and Jones, 1.

Surrogacy contracts pose a sufficiently great number of serious risks to personal autonomy to justify their impermissibility. These risks, such as the surrogate mother's loss of control over her body and daily activities during the pregnancy, the powerlessness of having to give up a child to whom one may have formed a deep attachment, and the normal dangers of pregnancy, seriously undercut the ability to make a fully informed and free choice to become a surrogate mother.

In this passage, Dodds and Jones capture some of the early theoretical concerns that feminists advanced but have since not been substantiated by empirical research. As discussed in this thesis, surrogates do not necessarily encounter a loss of control (to an extent that undermines their autonomy) and are not necessarily powerless (or even impacted by "having to give up" the child<sup>222</sup>). Nonetheless, it is interesting that Dodds and Jones consider these risks sufficient for making surrogacy morally impermissible. While I have identified a few significant autonomy-related threats it is not obvious to me that they are sufficient for making surrogacy arrangements morally impermissible (especially given the evidence about surrogate experiences that has emerged since Dodds and Jones expressed their concerns about surrogacy). In part this is because it is unclear what number or severity of threats would be sufficient in this regard and in part this is because it is difficult to know how severe the autonomy-related threats with respect to surrogacy are. Considering this last point, the next chapter will discuss how the studies may be understating the autonomy-related harms emerging in surrogacy arrangements.<sup>223</sup>

Overall, my stance is similar to Laufer-Ukeles's claim that, in comparison to pregnancy in general, "the potential problems and threats to autonomy are multiplied exponentially in the

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<sup>222</sup> Most surrogates do not express concern about this. See Teman; Ziff, 520; Payne et al., 186; Yee et al. (2020), 263; Peng, 562-3.

<sup>223</sup> It is difficult to say how severe the threats are, given a lack of research and also the fact many surrogates have not reported experiencing the threats.

context of surrogacy.”<sup>224</sup> While ‘exponentially’ may be an exaggeration, this statement highlights surrogacy as threatening and risky, although not necessarily autonomy undermining. Yet, as will be discussed in the next chapter, it is also important to recognize that one’s autonomy may be undermined even if they possess agency, respond to autonomy-related threats, and identify as empowered (or at least as not harmed) within their arrangements.

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<sup>224</sup> Laufer-Ukeles, 31.

### 3. The Need for Contextualization: What is Missing in the Studies?

In the previous chapter I discussed how surrogates' autonomy is threatened in various ways but not necessarily undermined. Whether the threats impact a surrogate's autonomy depends on various factors, such as the severity of the threats (e.g., how controlling the intended parents become), the circumstances of the surrogate (e.g., how surrogates experience and are impacted by the threats depends on their autonomous interests and their ability to manage the stressors), and whether the threats can be properly dealt with. As such, the studies arguably undermine the idea that the autonomy of surrogates is necessarily diminished, given that surrogates experience threats to their autonomy in different ways, with many able to manage them and some even finding surrogacy empowering.

In this chapter I will respond to these studies and specifically address how scholars have analyzed the reports of surrogates. In so doing, I will emphasize how these studies may not be capturing the full extent of autonomy-related concerns emerging in surrogacy arrangements. Although the recent studies present a more accurate representation of surrogacy arrangements, as they engage with the experiences of surrogates themselves, they suffer from a failure to properly contextualize surrogates' reports. By 'contextualize,' I mean that studies do not consider why surrogates say what they do, nor do they recognize how surrogates experience various external constraints. As I will argue, contextualizing surrogacy requires that a researcher theorize surrogates' experiences (e.g., identify autonomy-related threats which are evident when one scrutinizes the reports instead of considering them at face value).<sup>225</sup> In turn, while it is important

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<sup>225</sup> Bailey (2011) makes a similar argument although she focuses on research on Indian surrogates and problematic depictions of them.

to acknowledge the experiences of surrogates, we should understand them from a larger context.

### 3.1 Limitations in the Empirical Research

Besides the fact there are few studies focused on surrogacy in Canada, one could take issue with problems present in the existing studies. There is a divide in the available scholarship, between publications focused on theoretical concerns—with limited to no engagement with the experiences of surrogates—and studies, including the ones I have overviewed, which centre on the perspectives of surrogates but with limited theoretical analysis. Bailey (2011) draws attention to the problem of “under-theoretizing” amongst feminist researchers who rightly consider surrogates from their own cultural contexts but fail to properly attend to theoretical issues concerning “structural harms and injustices.”<sup>226</sup> Many of the studies I overviewed suffer from similar issues.<sup>227</sup> Some of these issues pertain to each scholar’s optimistic tone and related emphasis on empowerment. Consider Yee et al. (2020), who say:<sup>228</sup>

Half of our survey participants were repeat surrogates; it is plausible that these women were motivated to repeat the experience due to their personal fulfillment and gratification gained from the previous surrogacy journey.

In this passage, one explanation (the one which is optimistic about surrogates’ experiences) is privileged over another plausible one (that which is more critical). While many repeat surrogates are satisfied by their previous arrangements, there is another explanation: many surrogates face immense pressure to pursue “back-to-back” arrangements so that intended parents can have sibling children.<sup>229</sup> Consider also Ziff (2021), who focuses on how surrogates can feel

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<sup>226</sup> Bailey, 715.

<sup>227</sup> Perhaps because they are responding to longstanding theoretical concerns rather than attempting to offer a balanced perspective.

<sup>228</sup> Yee et al. (2020), e263.

<sup>229</sup> Gomez et al.

empowered throughout the surrogacy arrangement and says:

When Becky’s first transfer resulted in an undiagnosed ectopic pregnancy that resulted in significant medical complications for her, she reported feeling no hesitation about jumping into a second transfer.<sup>230</sup>

This is an example of a surrogate’s perspective which could signal autonomy-related concerns. Becky’s explanation of why she wanted to immediately continue treatments, even in the face of medical problems, includes the statement “I didn’t want him to start all over screening, and contracts, and [...] at that point, he had already spent 40,000 USD.”<sup>231</sup> Becky’s statement is arguably troubling because it reflects the kinds of pressure—both from intended parents and from surrogacy contracts—surrogates tend to experience. However, Ziff does not explicitly discuss these issues in relation to Becky’s account. Rather than framing Becky’s statement as a matter of pressure, Ziff frames it positively, as a perceived “responsibility” which surrogates “embrace.”<sup>232</sup> Similarly, another surrogate Ziff discusses as “giving herself [hormonal injections]” and as such “feeling in control and having agency in the process, noting it made her feel better.”<sup>233</sup> Ziff views this statement as evidence that surrogacy, and its related procedures, can be empowering. However, it also raises potential concerns, which Ziff does not acknowledge, around the measures surrogates may be ‘forced’ to take in order to have control.<sup>234</sup>

### *Does it Matter Whether Surrogates Feel Empowered?*

In studies, including the ones overviewed, surrogates generally do not report being powerless or having their autonomy compromised, and recent studies emphasize how the surrogates assert control and manage the threats they encounter. Yet the studies do capture

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<sup>230</sup> Ziff, 520.

<sup>231</sup> Ziff, 520.

<sup>232</sup> Ziff, 521.

<sup>233</sup> Ziff, 519.

<sup>234</sup> These concerns will be returned to later in this chapter.

concerns the surrogates may not be consciously aware of and the scholars may not explicitly address. Consider Becky's reported enthusiasm about "jumping into a second transfer;" she admits the pressures she faced to continue the procedures, without considering how they might have impacted her autonomy.<sup>235</sup> Consider also the surrogate who felt empowered through self-administering painful injections, not seeing this as problematic (and potentially reflective of the measures she had to take to feel in control). In such cases, there is an apparent disconnect between how surrogates feel and how their autonomy is threatened (and even undermined).

An example of this problem is presented in Rozée et al. (2020)'s study based in India. In this study, surrogates reported being 'empowered' by surrogacy (e.g., as a means to support their families), while also detailing their impoverished conditions and how they felt obligated to become surrogates<sup>236</sup> (raising the question of whether they were coerced into the agreement, financially or otherwise), and admitting they were forced to undergo medical procedures relating to the surrogacy (clearly reflecting a violation of bodily autonomy).<sup>237</sup> The surrogates interviewed in this study do not identify as oppressed or harmed, nor as "vulnerable women and victims," but instead as women "taking control of their destiny."<sup>238</sup> Yet their autonomy was obstructed in certain ways: at times "they had no autonomy although they did not express complaints [including related to their autonomy]."<sup>239</sup>

Given this study, it seems clear that surrogates may not feel harmed during the surrogacy pathway, while also having their autonomy undermined in significant respects. In Canada, there is less of an obvious tension between the subjective accounts of surrogates and the ways in which their autonomy may be threatened or undermined, as the potential harms are often subtle (e.g.,

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<sup>235</sup> Ziff, 520.

<sup>236</sup> Rozée et al., 4-6, 9.

<sup>237</sup> Rozée et al., 1, 9. It is unclear whether they were physically forced, but they had no say over the medical decisions.

<sup>238</sup> Rozée et al., 11.

<sup>239</sup> Rozée et al., 1.

financial coercion and forcing surrogates to undergo medical procedures are generally not concerns because of legal protections in place; instead, a surrogate may feel inclined to pursue surrogacy not because of impoverished circumstances but because of a related interest in bettering their lifestyle,<sup>240</sup> and surrogates may feel pressured to undergo medical procedures to appease the intended parents). However, there is a potential tension between the subjective feelings of surrogates and the ways in which their autonomy may be undermined, raising a need to not always consider their reports at face value.<sup>241</sup>

At this point it should be clear that many surrogates do not identify as oppressed or as lacking autonomy. Some scholars have stressed this idea, acknowledging reports by surrogates that surrogacy is rewarding or empowering,<sup>242</sup> and making claims like “surrogacy is a self-actualizing deed that can enhance self-confidence, self-worth, and personal values.”<sup>243</sup> It should also be clear that this kind of optimism requires further scrutiny and can sometimes be misplaced. In part this is because individuals can have diminished autonomy without realizing it—a woman may not realize that she was pressured to become a beautician due to gender norms, just as someone may not realize their lack of assertiveness inhibits their ability to make autonomous decisions.<sup>244</sup>

### *Do the Studies Capture the Complexity of Surrogacy Arrangements?*

Many of the aforementioned studies only capture some of the considerations relevant to autonomy. For example, Yee et al. (2020) focuses on surrogates’ level of satisfaction with respect to their surrogacy arrangements. While a high level of satisfaction is likely not a cause

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<sup>240</sup> E.g., with access to organic foods, designer clothing (see Carsley 2021, 828).

<sup>241</sup> This tension may be captured by the distinction between local and global autonomy: one can feel empowered in the moment while having their autonomy undermined in other significant, and perhaps more global, ways.

<sup>242</sup> E.g., see Yee et al. (2020); Ziff; Campbell; Teman.

<sup>243</sup> Yee et al. (2020), e263.

<sup>244</sup> E.g., see McLeod and Sherwin.

for concern and can indicate that a surrogate has pursued their arrangement autonomously and has not been significantly harmed, a retrospective glimpse into the arrangement does not necessarily consider the different ways autonomy (and wellbeing) may be undermined at different stages of the arrangement. Consider, for example, a surrogate’s assertion that “[Being a surrogate was] worth all the trials and tribulations just to see how happy the intended parents are to meet their baby for the first time.”<sup>245</sup> In this case, what are the “trials and tribulations”? A surrogate’s overall impression of the arrangement does not capture the complicated ways in which their autonomy may be undermined, threatened, or supported. Moreover, measuring surrogates’ overall satisfaction with their arrangements is potentially problematic.

There is the question of whether a surrogate’s impression of their arrangement may be impacted, and the associated harms undermined, due to a psychological phenomenon: recency effects. This phenomenon describes the tendency for individuals to ‘forget’ the harms they endured and focus on more recent, and oftentimes rewarding, events. A well-known example is individuals who climb Mount Everest; even those who face extreme, even life-threatening, trials may say “that was awesome!” and vow to repeat the climb, as what they remember is the overwhelming satisfaction they had while reaching the bottom.<sup>246</sup> Similarly, consider cognitive dissonance: individuals do not like being confronted with realities which conflict with their beliefs. This is especially the case when they cannot change the circumstances they encounter—which is relevant to surrogacy as it is difficult to back out of arrangements—<sup>247</sup> and so they feel a need to rationalize their decision:<sup>248</sup>

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<sup>245</sup> Yee et al. (2020), e262.

<sup>246</sup> I learned about this from Dr. Hollis-Haynes, who this thesis is dedicated in memory of. See Hollis-Haynes in the bibliography. Also, other psychological phenomenon are relevant: cognitive dissonance and rationalization.

<sup>247</sup> Surrogates can feel this way for various reasons. Some have been covered, like the pressure to adhere to the agreement. More generally, surrogates can feel like they have no option but to continue with the arrangement when they are pregnant.

<sup>248</sup> This is an example based on Dr. Hollis-Haynes’s lecture (again, see the bibliography).

- (1) “I do not like entering situations where my autonomy or wellbeing is harmed”
- (2) “I am currently in an arrangement I cannot leave, wherein I am harmed”
- (3) “This arrangement is worthwhile because of  $x$  (e.g., the newborn’s smile).”

It is difficult to know how much surrogates are impacted by psychological phenomena like recency effects and cognitive dissonance, but they are explanations for why surrogates can face various harms during their arrangements and yet have a positive impression of their experiences. Considering different explanations like this would support addressing the complicated nature of surrogacy arrangements and related questions of surrogates’ autonomy and agency. It would be dubious to assume that it is wrong for surrogates to find their arrangements rewarding, or that what they say results from psychological tricks, but points like this are worth considering.

This section has outlined reasons to consider the kinds of studies which have been published and to be careful about the conclusions which are made accordingly. Given more empirical research, which acknowledges the complicated nature of surrogacy arrangements and strives for a more balanced approach, it is possible that we could get a different impression of surrogacy as possibly presenting more threats or undermining autonomy in significant ways. At the very least, investigating surrogacy in such a way would facilitate a more nuanced understanding of the threats and harms surrogates experience and how they navigate them.

### 3.2 Neglected Contexts: Considering External Constraints

Given limitations of the aforementioned studies, and the lack of empirical research on surrogacy in Canada more generally, we should not rule out the possibility of surrogates’ autonomy being severely undermined or threatened. In other words, although it is important to consider the subjective experiences of surrogates, they do not necessarily invalidate theoretical

(and specifically ethical) concerns.<sup>249</sup> The overviewed studies present potential harms while illuminating the different ways surrogates assert agency, empower themselves, and respond to the stressors they may encounter. In chapter 2 I outlined the threats to autonomy surrogates tend to encounter; now I will consider some of the theoretical positions which, although they are not explicitly discussed by the scholars of the aforementioned studies, are nonetheless applicable.

Beyond the general concern that surrogates' autonomy may be undermined even if they do not consciously realize it (and even if the scholarly emphasis is on the ways in which they manage, and are empowered in spite of, the stressors they encounter), some feminist theories on agency and autonomy explain specific concerns which may withstand the subjective reports of surrogates. Although different feminist theorists are applicable to this discussion, I will focus on Oshana (2006), who captures some of the ways in which surrogates' autonomy may be impacted by the external constraints of their arrangements.<sup>250</sup> In turn, Oshana considers contextual factors which are not acknowledged by the authors of the studies in question and are not typically considered in the standard view of autonomy in medical law and ethics. Yet, as will be discussed in this section, these factors are relevant to the autonomy of surrogates.

In the literature perspectives on coercion with regards to surrogacy usually focus on issues less relevant to Canadian surrogates, especially around commercialization (e.g., surrogates facing impoverished conditions being financially coerced to pursue a paid agreement<sup>251</sup>). However, some of the threats I previously discussed relate to coercion (i.e., pressure, control, and power imbalances). Many scholars have viewed some of these factors, like power imbalances, as

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<sup>249</sup> Some of the scholars of these studies allude to a similar point. E.g., consider Ziff, who says that her study “does not render the issues of power and control obsolete” (510).

<sup>250</sup> Oshana (2006) discusses autonomy as dependent on one's environment and as a more objective matter—that is, that individuals can have diminished autonomy even if they are unaware of it. Oshana is also more concerned with ‘global autonomy,’ highlighting the ways in which an individual's overall autonomy can be diminished even if they have the ability to form autonomous decisions in particular moments.

<sup>251</sup> Some of these concerns are alluded to in Rozée et al. (2020)'s study.

inherent to surrogacy arrangements. I have discussed these factors as potentially, but not necessarily, autonomy undermining. An open question is when these threats actually could be said to undermine autonomy. One could say that someone who faces various threats has a constrained ability to make autonomous decisions, even if they are relatively unaffected by the threats or able to manage them; in this case their autonomy may be undermined in some respect.

Some feminist scholars, including Oshana (2006), maintain that “severely constraining external conditions are autonomy-undermining.”<sup>252</sup> An example Oshana provides concerns feudalism: serfs have diminished autonomy because of “a social structure in which the ‘general and routine’ aspects of a serf’s life are not under his or her own control but rather under that of the lord of the manor.”<sup>253</sup> In this and other cases, Oshana draws attention to an oppressive social structure which systematically and holistically undermines autonomy, rather than specific threats. One might think that surrogacy arrangements present a similar social structure, where surrogates routinely encounter threats and are subject to external control (whether by the surrogacy agreement or by the intended parents), akin to intended parents turning on an oven (where the oven represents the surrogate and bread the child<sup>254</sup>).

Oshana maintains external constraints can undermine autonomy even if agents do not realize this is the case and even if they endorse these conditions (as has been discussed, surrogates do not always feel that their autonomy is undermined).<sup>255</sup> Turning then to the more ‘objective’ (i.e., structural) harms of surrogacy, the argument can be made that surrogates encounter “constraining external conditions.” Pressure, control, and power imbalances are conditions external to surrogates which tend to manifest in surrogacy arrangements and often

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<sup>252</sup> Oshana (2006), 62. See also: Stoljar (2018).

<sup>253</sup> Oshana (2006), 62. See also: Stoljar (2018).

<sup>254</sup> Teman, 32.

<sup>255</sup> Oshana (2006), 62. See also: Stoljar (2018).

interfere with their capacity to exercise their autonomy. Within arrangements, surrogates are generally vulnerable: they face a number of threats to their autonomy (and wellbeing) and their capacity for making decisions is to an extent stifled (their decision making operates from within the confines of a potentially oppressive arrangement, wherein they have to report to a number of parties as well as the surrogacy agreement and cannot easily back out of the arrangement).

Even if one agreed that these external conditions collectively threaten autonomy, it is not obvious that they are, in Oshana's words, "severe" enough to necessarily undermine autonomy. Oshana uses an extreme example, of serfs forced to participate in certain kinds of labour.<sup>256</sup> With surrogacy in Canada, there is no clear indication that surrogates enter arrangements involuntarily.<sup>257</sup> If individuals consent to potentially oppressive circumstances, wherein they expect to encounter external constraints, it is unclear whether these threats would genuinely undermine their autonomy. There are many cases of individuals choosing to enter situations which may restrict the options available to them and the goods they normally pursue which align with their autonomous interests. An example is individuals choosing to take airplanes despite their aversion to sitting for long periods of time in confined spaces. In a similar way, individuals choose to become pregnant, undergo certain medical treatments, and enter surrogacy arrangements, likely with a sense that the goods they normally pursue, which align with their autonomous interests, will be less accessible in some sense. In such cases, it is not obvious that these individuals have undermined autonomy, provided they consent to enter these situations with the knowledge their goods may be restricted.<sup>258</sup> Yet it is important to acknowledge the potential for surrogates' autonomy to be impacted by external constraints such as the ones

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<sup>256</sup> Oshana (2006), 62. See also: Stoljar (2018).

<sup>257</sup> E.g., see Peng.

<sup>258</sup> I will return to this idea of informed choice in chapter 4.

highlighted by Oshana.

### *Surrogates Adapting to Threats: Autonomy Undermining?*

As discussed, surrogates encounter various threats to their autonomy: pressure, control, and unexpected harm. These threats potentially, but not necessarily, undermine the autonomy of surrogates. In part this is because many surrogates are able to manage the threats they encounter and seem relatively unaffected by them as a result. However, similar to the concerns discussed in the previous section, perhaps the problem is not (merely) that surrogates are exposed to these threats but that they are ‘forced’ to manage the threats they encounter—and may be burdened accordingly—in respects they may not always anticipate and, as such, consent to.

Many of the aforementioned studies discuss surrogates preventing or managing threats to their autonomy. Teman (2010) examines the ‘boundary work’ surrogates perform in order to protect their privacy and sense of control (e.g., the “red lines” surrogates draw which specify the kinds of situations they are comfortable with, and the lines intended parents should not cross).<sup>259</sup> Ziff (2021) observes that surrogates are expected to be “savvy negotiators, protecting themselves and their families,”<sup>260</sup> which reflects the general need for surrogates to negotiate (e.g., whether related to boundary work or negotiating the provisions of surrogacy agreements). When surrogates do not assert themselves—by erecting boundaries, informing intended parents of their needs, and negotiating—they can be significantly harmed, with their autonomy infringed upon. Asserting themselves in such a way is an ongoing practice of “boundary maintenance,” as the needs of surrogates change over time,<sup>261</sup> as do the threats surrogates encounter (e.g., based on how controlling the intended parents are).

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<sup>259</sup> Teman, 95. I will return to this in chapter 4.

<sup>260</sup> Ziff, 517.

<sup>261</sup> E.g., see Carsley (2021), 832.

Studies have demonstrated other ways surrogates manage the threats they contend with. Scholars often discuss ‘medicalization’ as a source of harm but Ziff finds that it “becomes a tool that allows [surrogates] to remain agentic actors” during the surrogacy pathway.<sup>262</sup> An example of this is the surrogate who eventually found it empowering—instilling her with a sense of control—to give herself painful hormonal injections.<sup>263</sup> Similarly, surrogates utilize various cognitive techniques to distance themselves emotionally from the child they carry, avoiding the possible harms resulting from attachment.<sup>264</sup>

Therefore, the studies reveal a tendency for many surrogates to manage the threats they encounter, to the extent the threats themselves do not appear to significantly undermine their autonomy. Consider the surrogate who self-administered the ‘painful hormonal injections’ which “made her feel better;” this act enabled her to feel in control and allowed her some agency.<sup>265</sup> It is evident, from Ziff’s study, that surrogates commonly feel a (potential) loss of control, perceive it as a threat, and compensate for it by “actively executing the day to day medical protocol,” which allows some surrogates to feel “in control of everything.”<sup>266</sup> While such surrogates could be said to be maximizing their autonomy in a reasonable and proactive way (e.g., akin to patients asking their physician questions in order to support their decision making), the fact surrogates may *have to* manage the threats is troubling and is worth conceptualizing as a threat itself.

If a surrogate self-administers painful injections, employs cognitive tools, or does boundary maintenance, are they doing so out of necessity? That is, do surrogates encounter a coercive environment where they have to respond to these threats in certain ways? Oshana is yet

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<sup>262</sup> Ziff, 511.

<sup>263</sup> Ziff, 518-9.

<sup>264</sup> Yee et al. (2020), e263.

<sup>265</sup> Ziff, 518.

<sup>266</sup> Ziff, 519.

again relevant to this discussion, saying:<sup>267</sup>

Interferences threaten autonomy when they relegate persons to a position whereby, in order to live in a self-managed, self-directed fashion, persons must resist the interference, or at least resist the temptation to regard the interference as normal and legitimate, even as they adapt to its presence.

Here Oshana draws attention to the fact individuals may manage threats they encounter but this very action, of having to adapt to the threats, is potentially autonomy undermining. Clearly, this relates to surrogacy: many surrogates manage the threats they encounter, such as a perceived loss of control, but they may be ‘forced’ to do so, raising the question of whether they are managing the threats autonomously. If surrogates perceive a loss of control, it would likely be in their interest to manage it—many surrogates find a loss of control troubling and go to extensive lengths to remedy it—and for this reason they may have no option but to deal with it. However, surrogates may encounter a double-bind, where their autonomy is potentially undermined regardless of what they do: either they feel a lack of control (or encounter a different threat) or they manage the threat they experience in a way which may not serve their autonomous interests.

There are different issues emerging from surrogates being or feeling compelled to manage the threats they encounter. One is that, regardless of whether managing the threats is aligned with their autonomous interests, they did not choose to do so. One is that managing the threats in general may not be aligned with their autonomous interests.<sup>268</sup> Surrogates are usually informed of the harms involved in surrogacy, such as the potential for medical complications, but it does not appear standard for surrogates to be informed of the ways in which they may have to manage them, meaning this aspect of surrogacy may not be factored into their overall assessment

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<sup>267</sup> Oshana (2006), 88. See also: Johnston, 318-319, 324.

<sup>268</sup> I note that this is a complicated point which invites further engagement, potentially in another paper.

of surrogacy arrangements and their decision of whether to sign a contract. We can imagine a prospective surrogate who would not want to consent to an arrangement if they knew how they might have to deal with these threats. Imagine a woman who has trouble with assertiveness and becomes anxious when she is placed in a position where she has to assert herself; if she has to ‘erect red lines’ in order to restrict the intended parent’s pressure and control over her she may be seriously harmed by the arrangement.

Besides the possibility that surrogates may be compelled to deal with threats to their autonomy, they may have to manage the threats in particular ways—including in ways they dislike or are unprepared for—given the confines and constraints of surrogacy arrangements. Surrogates are expected to receive hormonal injections in order to support the surrogate pregnancy; self-administering them may be the only way to exert control over this process (making doing so necessary if one wants to avoid a loss of control). Surrogates often cannot easily change their circumstances (e.g., the fact they are pregnant, the importance of hormonal injections in surrogacy, etc.), which perhaps explains why many of them employ cognitive strategies for dealing with the issues they face (e.g., if emotional attachment to the child is perceived as a concern, there is a question of how else they would deal with this besides using cognitive barriers). Similarly, if a surrogate feels that their body is ‘overtaken’ by various medical procedures inherent to surrogacy (such as hormonal injections), it is unclear how else they would assert control besides administering the procedures themselves or changing their frame of mind (so they begin to view the procedures as empowering). Lastly, if surrogates feel a loss of control or immense pressure from their intended parents, erecting boundaries may be the only reasonable option—and may be necessary—for dealing with these problems.

These strategies can be especially burdensome, considering the dynamic and lengthy nature of surrogacy arrangements (and of the threats they encounter; consider how intended parents often become more controlling as the surrogacy progresses). Surrogates do not usually have to only deal with hormonal injections once—sometimes they endure months of them—<sup>269</sup> and things like boundaries, cognitive tools to compartmentalize one’s emotions, and so on, have to be employed and maintained throughout the arrangement as surrogates respond to emerging and changing issues. Thus, there is not one solution that is invoked; surrogates often have to go to extensive lengths to manage the threats they encounter.<sup>270</sup> In this way, the management of the threats may interfere with one’s ability to pursue the goods aligned with their autonomous interests.

### *Adaptive Preference Formation*

Returning to Oshana, she mentions that autonomy is threatened when agents have to manage an ‘interference,’ seeing this obtaining “even as they adapt to its presence.”<sup>271</sup> An example of this adaptation is a Black man having to “adapt to being a person subject to racial profiling, by resistance, or by cunning, or by ingratiation.”<sup>272</sup> Although the experiences of Black men are quite distinct from the experiences of surrogates—one reason being that surrogates can choose to enter arrangements but Black men do not choose to be racially oppressed—this example raises concerns related to adaptive preference formation.

Feminist theorists discuss adaptive preferences as not only a matter of responding to an oppressive situation, where individuals adjust their preferences in response to the external constraints they experience; there is a cognitive aspect to it, where individuals unconsciously

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<sup>269</sup> E.g., see Ziff, 521.

<sup>270</sup> Even if surrogates do not seem enormously burdened as they manage these threats, they are often still mindful of them and must be in order to protect themselves (they do not identify the threat as, in Oshana’s words, “normal and legitimate”).

<sup>271</sup> Oshana (2006), 88. See also: Johnston, 318-319, 324.

<sup>272</sup> Oshana (2006), 90. See also: Johnston, 318-319, 324.

change their preferences to suit their environment, akin to a fox wanting grapes until they become unable to grasp them.<sup>273</sup> In the previous section I discussed the ways in which surrogates may be compelled to manage threats to their autonomy. Adaptive preferences are worth considering in this context as they may explain why some surrogates appear relatively unaffected by having to resist the stressors they face (and in turn further call into question the idea that the reports of surrogates should be taken at ‘face value’).<sup>274</sup>

Some surrogates have reported taking on enormous burdens in order to manage the autonomy-related threats, while suggesting they became accustomed to them; others have considered the management of the threats ‘empowering’ instead of burdensome. Perhaps surrogates who do not seem impacted by these ‘burdens’ or having to cope with the threats are changing their preferences to suit the environment of constraints they encounter. Adaptive preference formation can include the tendency for individuals who are oppressed to “come to desire that which is oppressive to them,” even to the extent that they “turn away from goods and even needs that, absent those conditions, they would want.”<sup>275</sup> This may explain why surrogates report being ‘empowered’ by ‘transcending’ the barriers they encounter and, moreover, may explain why surrogates often describe themselves in ways that are arguably objectifying: as ‘ovens’ and ‘incubators.’<sup>276</sup> These descriptions have been understood by some scholars as reflecting surrogates ‘taking control’ and displaying their agency (e.g., they are the ones ‘carrying the bread’ and are playing an active role in the process).<sup>277</sup> However, perhaps this is an

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<sup>273</sup> Stoljar (2018). This is an example given by Jon Elster.

<sup>274</sup> I recognize there is a possible tension between the view of autonomy employed in chapter 2 (which has a subjective component relating to preference satisfaction) and the idea of adaptive preferences, which could be discussed in a further paper. Adaptive preferences offer a more nuanced understanding of autonomy than just taking the interests of individuals (including surrogates) at face value; in this way this section is aligned with my argument more generally, as the thesis as a whole calls for a more nuanced understanding of surrogates’ experiences.

<sup>275</sup> Cudd, 181. See also: Stoljar (2018).

<sup>276</sup> Teman, 32.

<sup>277</sup> *ibid.*

example of surrogates coming to “desire that which is oppressive to them,”<sup>278</sup> either because of internalized oppression or because that is how they can cope with feeling oppressed and having restricted options for dealing with it. In turn, this may be an example of surrogates rationalizing their decisions in response to experiencing cognitive dissonance: if surrogates face threats to their autonomy and have to deal with them in an undesirable way, they may change their frame of mind in order to cope with circumstances they cannot change.

### 3.3 The Need for Contextualizing the Reports of Surrogates

This chapter has revealed that while we should not assume surrogates necessarily experience undermined autonomy, we should also not be overly optimistic about the experiences of surrogates and, in particular, their autonomy. Some of the evidence which seemingly supports surrogates’ autonomy could be explained differently (e.g., surrogates’ satisfaction as a form of cognitive dissonance) and much of the surrogates’ reports would benefit from further analysis which captures remaining theoretical concerns and contextual issues. Surrogates may feel empowered or manage the threats they encounter at the same time that their autonomy may be undermined (perhaps because of having to manage the threats).

While it is difficult to know how problematic the autonomy-related theoretical concerns are, they do signal that the magnitude of the potential issues is more pronounced. Rather than only being concerned about the autonomy-related threats introduced in chapter 2, this chapter has demonstrated the need to be mindful of additional concerns which are not considered in the existing scholarship. Autonomy-related harms may be understated by recent studies because of the narrow kinds of analysis which are being used to frame surrogates’ reports. As examples, Yee et al. emphasizes the satisfaction of surrogates without explicating what this means or

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<sup>278</sup> Cudd, 181. See also: Stoljar (2018).

offering alternative explanations for their reports, and Ziff emphasizes how surrogates assert control and “remain agential” without considering remaining theoretical concerns,<sup>279</sup> such as how surrogates may be forced to manage the threats in certain ways. In turn, there are additional autonomy-related threats which should be, but are not, addressed by these scholars.

While this chapter has revealed that surrogacy arrangements are potentially more threatening than initially discussed (in chapter 2), it is important to acknowledge that just as autonomy-related threats do not impact surrogates equally, issues such as coercion and adaptive preferences would likely impact surrogates in different ways and should therefore be understood from the contexts in which they operate. Not all surrogates would be impacted by adaptive preferences and other concerns, as some are relatively unaffected by the threats to begin with (e.g., some surrogates feel absolutely “no attachment” to the child and do not have to adopt emotional boundaries<sup>280</sup>) but also because some surrogates may have the means to deal with these threats, without having to adjust their behaviours in a way that might undermine their autonomy (e.g., imagine someone, like an attorney, who negotiates for a living and therefore erects boundaries with ease). As will be discussed in the next section, there are factors which can reduce and prevent autonomy-related harm.

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<sup>279</sup> Ziff, 511.

<sup>280</sup> Teman, 40. See also: Ziff, 520; Payne et al., 186; Yee et al. (2020), 263.

## 4. Future Directions in Research and Policy

Most generally, I have stressed the need to consider surrogacy, including the nuances of surrogacy arrangements, accurately. Part of this need entails a more balanced approach in the existing scholarship, where the experiences of surrogates are acknowledged but also adequately theorized and their reports understood from their contexts. There is a stark divide in the literature between scholars forming conclusions in an abstract way, often without acknowledging the experiences of surrogates and subsequently arriving at pessimistic conclusions of surrogates being oppressed, degraded, and so on; and scholars who consider the experiences of surrogates and often present them in an optimistic way while sometimes neglecting relevant theoretical concerns.<sup>281</sup> While clearly the experiences of surrogates should be considered in order to determine how their autonomy is impacted within surrogacy arrangements, it would be useful for research to focus on the threats surrogates experience and how they are resisted—rather than broad questions which tend to be explored, such as whether surrogates have autonomy—and to do so in a balanced way. By extension, more empirical research should be produced which addresses the specific aspects of surrogacy arrangements and how they progress, rather than general facts around the overall satisfaction of surrogates.

Given the lack of empirical research on surrogacy arrangements, especially ones pursued in Canada, I have pointed to how future research might better address autonomy-related concerns which emerge in surrogacy arrangements. It is important to engage with the experiences of surrogates, particularly in a way that attends to the complexity of surrogacy arrangements—it would be better to track the reports of surrogates as their arrangements progress, to gain accurate insight into the ways in which their autonomy may be undermined, rather than gauging their

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<sup>281</sup> Similar arguments have been made by Bailey and Fulfer.

overall satisfaction with their arrangement, for example. It is also important to acknowledge how the reports of surrogates should not be taken at face value, at least not without contextualization. Some of the recent studies discuss issues applicable to feminist philosophy, observing surrogates from within their own contexts, understanding how they exert control and agency and examining their reports from a ‘relational’ perspective. However, I have demonstrated how scholars—in particular those conducting the studies in question—are not adequately contextualizing the reports of surrogates, whether this means they are not considering alternative explanations for why surrogates claim what they do, or whether they are insufficiently engaging with the theoretical concerns I overviewed.

When these empirical concerns are acknowledged this will better shape policy discussions and clarify ethical issues around the autonomy of surrogates. Regardless of the empirical drawbacks, surrogates’ autonomy can be enhanced in certain ways, which will be addressed in this section. I will first discuss the ‘protective factors’ which have been identified in the literature as resources, capacities, and circumstances which increase the likelihood that surrogates’ autonomy will be protected during their arrangements. A good policy approach would not only address potential harms but also account for relational factors which, more than merely preventing the harms, equip surrogates to better deal with them. After examining the protective factors, I will gesture to an intervention which would enhance (or protect) the autonomy of surrogates: strengthening the consent process.

#### 4.1 Factors Which Protect Against Threats to Autonomy

As discussed in earlier sections, there are factors which can either increase or decrease the likelihood that a surrogate’s autonomy will be diminished during their surrogacy arrangement. These factors emphasize surrogacy—specifically the question of whether

surrogates' autonomy is undermined—as complicated and contextually dependent. Many of these factors parallel the ones McLeod and Sherwin discuss: access to information (which empowers individuals to make autonomous decisions), personal attributes (self-trust, as well as related concepts: self-sufficiency and assertiveness), and social circumstances (an individual's relationships with others and with society).<sup>282</sup>

### *Resources (Information)*

It is well established that individuals require access to certain resources—including information—in order to be confident that their decisions serve their autonomous interests. An example of this need is articulated by McLeod and Sherwin:<sup>283</sup>

[T]o be motivated to exercise her own choices, the agent must trust her capacity to choose effectively [which] involves having good decision-making skills and also being situated to choose well, meaning that the agent is adequately informed of alternative courses of action and of whatever facts are relevant to her decisions.

Surrogates have reported feeling empowered through becoming informed about surrogacy and the processes involved in it.<sup>284</sup> Better access to information early in the surrogacy pathway (e.g., prior to the signing of a surrogacy agreement) likely increases the chance of a good outcome for the surrogate and decreases the chance that they will be unexpectedly harmed.<sup>285</sup> In this case, information acts as a buffer against potential threats to autonomy. The more information surrogates have the better they can anticipate and respond to potential issues, thereby reducing the possibility of unexpected harm. Moreover, when surrogates have adequate access to

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<sup>282</sup> E.g., see McLeod and Sherwin, 263-4.

<sup>283</sup> McLeod and Sherwin, 263.

<sup>284</sup> E.g., see Ziff.

<sup>285</sup> Many scholars have argued something to this effect or at least alluded to it by mentioning surrogates who knew what to expect and therefore were not harmed (and vice versa). E.g., see Teman; Ziff, 516-7.

information—and trust it to be reliable—this can help them feel confident about their decisions and in control despite the threats (to autonomy) they encounter.

Evidently, access to information about surrogacy can assist surrogates in resisting autonomy-related threats. While there is not significant evidence that surrogates tend to be generally misinformed about surrogacy,<sup>286</sup> there is a question of what kinds of information surrogates do—and should—receive. Some studies have shown that surrogates attempt to educate themselves about surrogacy prior to entering arrangements and before undergoing medical procedures (e.g., hormonal injections).<sup>287</sup> In Canada there is a lack of research on the kinds of information surrogates access (including the information provided to them by surrogacy agencies, medical professionals, and attorneys), although Canadian surrogates have expressed difficulty in finding information about surrogacy.

Fantus (2020) found that Canadian surrogates browse the internet for relevant information but are unable to trust its accuracy considering much of the information is American, biased against the permissibility of surrogacy, or outdated.<sup>288</sup> Surrogacy agencies appear to be advertising on social media (e.g., Instagram) which is potentially problematic for similar reasons (e.g., surrogacy agencies have an interest in retaining surrogates and therefore in showcasing surrogacy positively). There is no reason to believe surrogates would be incapable of scrutinizing information on social media or the internet, but there is a possibility that some would be less able to do so, considering this is a problem within the general population.

Yee et al. (2020) notes that intermediaries can assist surrogates in navigating potential issues throughout the surrogacy pathway, which reflects the general idea in medical ethics that

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<sup>286</sup> Peng, 561.

<sup>287</sup> Among the American surrogates Ziff interviewed, the majority expressed researching surrogacy for at least six months prior to entering an arrangement (516).

<sup>288</sup> Fantus (2020), 804.

experts facilitate autonomous decision-making and the relational idea that shared decision-making can be beneficial. Surrogacy agencies, medical professionals, and attorneys can provide surrogates with information they may find difficult to access or understand on their own.<sup>289</sup> Surrogates tend to, but not always, receive assistance from surrogacy agencies; medical professionals tend to be consulted (either for counselling prior or during an arrangement, which is not required but normally recommended, or for medical procedures relating to the pregnancy); and surrogates are legally required to have an attorney's assistance during the signing of the surrogacy agreement. Thus, various individuals are involved in information sharing—but not necessarily in a way that significantly benefits surrogates.

While one would hope the information surrogacy agencies deliver is accurate and comprehensive, surrogacy agencies are unregulated in Canada. This may explain why the quality of information surrogates receive varies by surrogacy agency: some receive limited information about surrogacy and possible harms; some report being pressured by the agencies supposedly assisting them; and others report being genuinely helped.<sup>290</sup> Though surrogacy agencies must abide by the provisions of the *AHRA*, this Act is rarely enforced<sup>291</sup> and does not address issues specific to surrogacy contracts (which fall under provincial jurisdiction). The *AHRA* does require that assisted reproductive technologies be pursued with “free and fully informed consent”<sup>292</sup> (aligning with the medical doctrine of informed consent<sup>293</sup>) but does not specify the nature of information required for making such decisions. Per Ontario law, certain provisions are legally required (e.g., the parties to the agreement, including intended parentage, must be specified)<sup>294</sup>

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<sup>289</sup> Yee et al. (2020), e263.

<sup>290</sup> See Fantus (2020), 804. See also: Fantus (2021).

<sup>291</sup> Carsley (2021), 817-8. See also: Nelson.

<sup>292</sup> *AHRA*, 2(d).

<sup>293</sup> E.g., see Reilly, 484, Lepine, 4.

<sup>294</sup> *CLRA*, 10.

and others are not required (or legally enforceable) but standard among surrogacy agreements:<sup>295</sup>

- Medical issues including assessments, procedures, decision making and information sharing (e.g., whether, and under what conditions, the surrogate is open to abortion);
- Liability and risks (e.g., physical and psychological risks of surrogacy);
- Financial issues (e.g., anticipated expenses, post-surgery care);
- Matters of confidentiality (e.g., the surrogate’s right to privacy with respect to medical information);
- Remedies for breach (e.g., expectations regarding reimbursements).

As such, much of the information pertinent to surrogacy would likely, but not necessarily, be addressed as surrogacy agreements are negotiated and signed. Yet in addition to the fact not all these provisions are guaranteed to be addressed, contracts—and accompanying discussions—do not sufficiently capture the complexity of surrogacy arrangements.

Several studies have found that virtually all surrogates report experiencing “unexpected physical and psychological harms,” one reason being that the harms were not properly articulated to them (e.g., because of medical professionals being biased against surrogacy and providing inadequate surrogacy-related information).<sup>296</sup> Furthermore, many scholars have argued for certain harms to be addressed which are not typically included within surrogacy contracts, including stigma against surrogacy—which is well-evidenced as an issue causing Canadian surrogates psychological harm—<sup>297</sup> and “employment issues” arising during the arrangement, for which surrogates are often “ill prepared” to deal with.<sup>298</sup> The majority of surrogacy contracts

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<sup>295</sup> The bullet points are quoted but I added examples in parentheses. See: Lepine, 2.

<sup>296</sup> Fantus (2020), Fantus (2021).

<sup>297</sup> See Fantus (2020), Fantus (2021), Yee et al. (2019), Yee et al. (2020).

<sup>298</sup> Yee et al. (2019), 259.

focus on custody issues, the needs of the fetus (e.g., dietary concerns), and the psychological and physical impacts of surrogacy (although, as discussed, this concern is somewhat exaggerated<sup>299</sup>).

This information seems insufficient for addressing the ways in which surrogates are potentially harmed by their arrangements. For one, it does not address the autonomy-related harms, including the threats surrogates often experience (as discussed in chapter 2) and how they might have to manage them (as discussed in chapter 3). As well, this information may not address the relational aspects of surrogacy, in particular the correlation between the nature of the relationship between parties (e.g., whether it is conflictual) and the experiences of the surrogate (including whether they are significantly harmed). As studies have emphasized compatibility between surrogates and intended parents as crucial to the success of the arrangement, it is important that this is acknowledged.

#### *Personal Attributes (Assertiveness and the Ability to Negotiate)*

Scholars recognize that surrogates' ability to manage the various obstacles they encounter often depends on their personal attributes, which to an extent overlap with McLeod and Sherwin's concept of self-trust. McLeod and Sherwin consider self-trust essential to the development of autonomy and maintain that this attribute shares resemblance to others: self-esteem, assertiveness, and a sense of control over one's life.<sup>300</sup> If an individual has obstructed self-trust, they likely have diminished autonomy, as self-trust reflects the ability to trust one's decisions, the resources they access for making those decisions, and the ability to enact them.<sup>301</sup>

For a surrogate to be able to withstand the threats to autonomy, it is important that they not only have access to certain resources, as discussed in the previous section, but also have the

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<sup>299</sup> E.g., see Campbell, 41-3, Reilly, 485.

<sup>300</sup> E.g., see Sherwin and McLeod, 266.

<sup>301</sup> Sherwin and McLeod, 264.

capacity for doing so. Many scholars have explicated ‘boundary setting’ as a way to manage the stressors of surrogacy. As Teman (2010) says, “by erecting ‘red lines,’ surrogates are able to deal with the many intrusions, submissions, and challenges they are faced with.”<sup>302</sup> Teman discusses these ‘red lines’ as lines surrogates draw, either between themselves and the children they carry in an effort to prevent emotional attachment (e.g., surrogates referring to themselves as ‘ovens’ or ‘nannies’ in an effort to avoid motherly descriptors<sup>303</sup>) or between themselves and the intended parents (e.g., boundaries enacted to assert control over their bodies).

Regarding the latter, we have seen how external pressure, particularly from intended parents, can undermine surrogates’ autonomy. The ability to enact boundaries therefore is advantageous in preventing this harm. Consider, for example, a surrogate who “put the brakes on” in response to an intended parent “becoming quite overbearing.”<sup>304</sup> Setting boundaries, such as in this case, is really an exercise in assertiveness: knowing how and when to say ‘no’ and having the confidence to do so. Boundary setting is used throughout the surrogacy pathway, as a mechanism for surrogates to maintain control of their bodies and their sense of self. For instance, some surrogates prefer to attend gynecologist appointments alone and expect the intended parents to respect their privacy.<sup>305</sup> Others draw a line between their personal lives and their ‘surrogacy lives,’ ensuring their independence by living separated from the intended parents.<sup>306</sup> This kind of boundary setting is critical: “If a surrogate does not have an explicit map of classifications and boundaries in place, she runs the risk of ‘losing her self’ in the body.”<sup>307</sup>

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<sup>302</sup> Teman, 95.

<sup>303</sup> Payne et al., 186.

<sup>304</sup> Yee et al. (2020), e260.

<sup>305</sup> Teman, 93.

<sup>306</sup> Teman, 97-8. It seems rare that surrogates live with intended parents, both in Teman’s study and in Canada.

<sup>307</sup> Teman, 96.

To effectively set boundaries, surrogates have to identify their boundaries, communicate them to the intended parents, and enforce them.<sup>308</sup> Some surrogates find these requirements challenging, whether because of their situation (e.g., if they face a significant power imbalance) or because of difficulties with assertiveness. Many women struggle with assertiveness (e.g., because of gendered socialization) and may therefore lack the capacity to set and enforce boundaries as surrogates. One surrogate Teman discusses experienced a traumatic surrogacy arrangement; problems during the arrangement were largely attributed to the fact the surrogate did not set appropriate boundaries (she was “unable or unaware of the need to erect boundary signposts early on”).<sup>309</sup> As such, the surrogate felt “colonized” and that her body was not hers.<sup>310</sup>

Thus, it is apparent that surrogates are expected to manage various stressors through ‘boundary work’ and, while this can be effective at combating threats to autonomy, some surrogates have difficulty with this, especially if they lack certain attributes: “if she doesn’t know herself, if she isn’t strong enough of a fighter, ... and isn’t sure that she can get past every crisis on the way, ... then she will crumble.”<sup>311</sup> These attributes—strength, resilience, self-awareness, and confidence—resemble McLeod and Sherwin’s understanding of self-trust:<sup>312</sup>

It is essential in developing the capacity to be autonomous that the agent trusts her capacity to make appropriate choices, given her beliefs, desires, and values; that she trusts her ability to act on her decisions; and also that she trusts the judgments she makes that underlie her decisions.

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<sup>308</sup> E.g., see Teman, 96-8.

<sup>309</sup> Teman, 96. Also it is important to recognize this was the first surrogate in Israel and therefore may have been unable to cope because of a lack of familiarity (e.g., a lack of surrogacy network which would offer support).

<sup>310</sup> Teman, 96-7. Additionally, the surrogate found it difficult to keep emotional distance from the child and, years later, is still impacted by this.

<sup>311</sup> Teman, 253.

<sup>312</sup> McLeod and Sherwin, 262-3.

Some surrogates appear to display a high degree of self-trust. Consider, for example, Carsley’s observation: “I’ve met with surrogates who are incredibly strong women [who] know exactly what they’re doing and why they are doing it.”<sup>313</sup> Such surrogates appear to trust their judgements and their ability to act on them (and perhaps ‘strong’ in this context suggests assertiveness) which likely serves them well as they navigate various autonomy-related threats.

Other surrogates appear less able to trust their judgements and their ability to act on them, whether because they lack the resources (e.g., information) required for forming good decisions, they doubt their capacity to do so (e.g., because they do not feel in control of their lives because of pressure from the intended parents), or because they effectively cannot exercise their autonomy properly (e.g., they live with the intended parents and therefore have a restricted ability to do things<sup>314</sup>).

Surrogates are also expected to be “savvy negotiators”<sup>315</sup> who negotiate and manage boundaries throughout the surrogacy pathway.<sup>316</sup> This negotiation aspect emphasizes that respecting boundaries takes place in a social context, where communication is critical and whether the surrogate is able to exercise their autonomy depends on their particular situation— they may have the skills and resources required, without being properly able to act on their autonomous interests because of the nature of the surrogacy arrangement they belong to.<sup>317</sup>

### *Social Circumstances (Relationships and Social Networks)*

McLeod and Sherwin consider how an individual’s autonomy is impacted by their social circumstances: how they are situated in society (e.g., the barriers they encounter) as well as the

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<sup>313</sup> Carsley (2020), 1.

<sup>314</sup> E.g., see Teman, 96-7.

<sup>315</sup> Ziff, 517.

<sup>316</sup> Ziff, 513.

<sup>317</sup> E.g., see McLeod and Sherwin (specifically 264), who discuss how external constraints can reduce one’s ability to exercise their autonomy.

relationships they form.<sup>318</sup> This perspective captures another important aspect of the surrogate’s journey: whether they can effectively manage threats to their autonomy is not just a matter of their skills and resources; it also depends on how they relate to others and to society.

While surrogates’ relationships with others can threaten, and even undermine, their autonomy—for example, if the intended parent(s) are particularly controlling or if the surrogacy arrangement is marred by conflict—the opposite can also be true. As I previously mentioned, it has been assumed that involving multiple perspectives in decision-making is harmful. Consider the worry that patients are pressured by family members to make certain decisions. As Ho (2008) argues, this is generally only a concern when family members and patients have conflicting values and interests.<sup>319</sup> Similarly, when intended parents and surrogates have compatible values and expectations,<sup>320</sup> surrogates are less likely to encounter unexpected harms (e.g., which would emerge with conflict or pressure to realize values the surrogates disagree with) and generally report being satisfied with their arrangements.<sup>321</sup>

Studies have revealed that many surrogates and intended parents form close and meaningful friendships.<sup>322</sup> Such relationships, typically considered ‘harmonious,’ are frequently described by surrogates as mutually respectful,<sup>323</sup> which may signal that the surrogates in such arrangements do not feel a substantial loss of control, unexpected harm, or pressure due to their interactions with their intended parents. In some surrogacy arrangements, intended parents are attentive to the surrogate’s boundaries and ensure they are respected, leading to fewer instances

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<sup>318</sup> E.g., see McLeod and Sherwin, 260.

<sup>319</sup> Ho, 133.

<sup>320</sup> See Yee et al. (2020), e263: if they are “like minded” there is a “good chance” of a “harmonious relationship.”

<sup>321</sup> Payne et al., 188.

<sup>322</sup> E.g., see Teman, 197; Payne et al., 185-6; Ziff, 259-260; Yee et al. (2020), e260.

<sup>323</sup> See Yee et al. (2020): “In instances where the surrogates described having a ‘harmonious’ relationship with their intended parents, strong emotional connection, trust, and respect between parties were frequently mentioned” (e259-260).

of surrogates feeling controlled and pressured.<sup>324</sup> Consider, for example, one couple who expressed discomfort at the prospect of forcing their surrogate to undergo certain medical procedures, citing the surrogate’s right to bodily autonomy.<sup>325</sup> They also avoided touching the surrogate’s belly, with the view that doing so would violate her privacy and bodily autonomy.<sup>326</sup>

As such, relationships between intended parents and surrogates, if they are positive and respectful, oftentimes support the autonomy of surrogates. At the same time, other kinds of relationships and support systems can protect against threats to autonomy. Many surrogates consider social support—from family, friends, and often surrogacy networks (i.e., current and previous surrogates)—critical for having a good surrogacy experience.<sup>327</sup> This is perhaps why some surrogacy agencies prefer (even require) surrogates who are married or otherwise “have a good support system.”<sup>328</sup> Access to surrogacy networks assists surrogates in knowing what to expect in their arrangement—thereby reducing the chance of unexpected harm—and in dealing with the various stressors they encounter (e.g., related to a loss of control), making it a good means of protecting their autonomy.<sup>329</sup> In Canada, accessing surrogacy networks can be difficult because of how few surrogates there have been; surrogacy agencies may help in this regard.<sup>330</sup>

As can be discerned from the above, a surrogate’s relationships with others, whether intended parents, family and friends, surrogacy agencies, or medical professionals, can protect against threats to autonomy—and also bolster the surrogate’s access to resources and capacity for managing and preventing the threats. If the surrogate/intended parents’ relationship is supportive and mutually respectful, the surrogate may be enabled to “operationalize” the skills

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<sup>324</sup> Teman, 94.

<sup>325</sup> Teman, 94.

<sup>326</sup> Teman, 94.

<sup>327</sup> Yee et al. (2020), e261, e263.

<sup>328</sup> See Surrogacy in Canada Online, “Surrogate Mother Qualifications.”

<sup>329</sup> Yee et al., (2020). See especially: e263.

<sup>330</sup> Yee et al., (2020). See especially: e261-263.

they have (e.g., the surrogate may have the means to set boundaries and may feel like they can if they are in a safe place to do so).<sup>331</sup> If the relationship is instead abusive or has significant power divides, the surrogate may feel like they are incapable of asserting themselves even if they have the resources and skills to do so. If the intended parents are attuned to personal space and other aspects of bodily autonomy, they may encourage surrogates to develop skills reflecting assertiveness (e.g., the ability to ‘erect boundaries’).

Surrogacy agencies can assist surrogates in navigating surrogacy and the adjoining stressors to their wellbeing and autonomy (e.g., by putting them into contact with other surrogates at their agency, which can in turn provide support and help surrogates to predict and manage potential stressors),<sup>332</sup> although it seems some are more supportive than others (e.g., some appear to prioritize the needs of surrogates, whereas others appear biased in favour of the intended parents<sup>333</sup>). Similarly, medical and mental health professionals can ensure surrogates receive the information required for making decisions with respect to surrogacy (e.g., whether to enter an arrangement), thereby reducing the potential for unexpected harm. While counselling is not legally required, it is typically paid for by the intended parents and highly recommended by scholars and surrogacy agencies.<sup>334</sup> During the surrogacy pathway, counsellors can reduce conflict in the arrangement and assist in the “management of expectations,”<sup>335</sup> which presumably lowers the chance of surrogates having their autonomy being infringed upon (open communication can enable surrogates to express their boundaries).

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<sup>331</sup> Teman, 96.

<sup>332</sup> Yee et al. (2020), e262.

<sup>333</sup> See Fantus (2020), 804; Yee et al. (2020), e260.

<sup>334</sup> E.g., see Yee et al. (2020), e263; Reilly, 485.

<sup>335</sup> Yee et al. (2020), e263.

## 4.2 Capturing the Protective Factors—and Threats to Autonomy—in Policy

As the protective factors support the autonomy of surrogates, they should be considered in policy discussions. While dealing with certain theoretical concerns may be difficult—for example, addressing the problem of adaptive preferences—there are different ways these protective factors, and the threats to autonomy more directly, may be acknowledged in policy. In this section, I will focus on informed choice and, in particular, the information surrogates should receive prior to signing surrogacy agreements. As I will discuss, much of the information surrogates should access—in order to make an informed choice as to whether to enter an arrangement—is not mandatory to address, and the information which is typically addressed does not sufficiently capture the autonomy-related concerns surrogacy presents.

The first part of this chapter examined resources, particularly information, which support surrogates' autonomy. As discussed, having adequate access to information can prevent some threats and assist surrogates in managing others (e.g., unexpected harm is diminished as surrogates are able to anticipate potential issues, and therefore prepare for them and properly consent to them). There are measures in place which support this protective factor: legal requirements of consent (with the assistance of an attorney) and the information typically addressed during the process of contract signing. However, potential issues were highlighted, one being that the information surrogates receive is variable, in part because of the lack of publicly available information on surrogacy<sup>336</sup> and in part because of issues with the laws on surrogacy.

A related and more general concern is that surrogacy agreements do not emphasize

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<sup>336</sup> Most of the information now seems to be on surrogacy agency websites, which perhaps is not good as they have an interest in attracting surrogates. Health Canada could come up with a webpage on surrogacy information.

considerations which would support a surrogate’s capacity to make an informed choice.

Although the *AHRA* specifies that consent, regarding reproductive technologies (and medical procedures) must be “free and fully informed,”<sup>337</sup> no definition is provided: it is unclear what informed consent means in this case and how it would be best supported (e.g., what kinds of information should be addressed). Similarly, the *CLRA* says that for surrogacy agreements to be valid they have to be consented to, but it is unclear what this means besides the requirement that surrogates have to be “capable of providing consent.”<sup>338</sup> Thus, neither the *AHRA* nor the *CLRA* ensure that surrogates provide informed consent when they sign surrogacy agreements.<sup>339</sup>

As for what is covered by the consent process, surrogacy agreements tend to prioritize the interests of the child,<sup>340</sup> reflecting how the *AHRA* prioritizes the interests of children.<sup>341</sup> More specifically, most of the provisions in surrogacy agreements are directed at supporting the interests of the child (e.g., how the surrogate should modify their lifestyle for the benefit of the child). With this imbalance,<sup>342</sup> not enough attention is given to the information surrogates should access in order to make an informed choice of whether to consent to an agreement.

It appears that the information surrogates receive during the contract stage of surrogacy arrangements depends on what attorneys (or surrogacy agencies) relay. While attorneys assist the parties in negotiating and signing agreements, only some provisions are legally required, and these only minimally facilitate informed choice (for the agreement to be valid only the parties and their roles, i.e., whether they are intended parents or surrogates, have to be indicated).

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<sup>337</sup> *AHRA*, 2(d).

<sup>338</sup> *CLRA*, 10 (6).

<sup>339</sup> While surrogates would always have the right to informed consent in medicine, this is a different matter from informed consent with respect to the surrogacy agreement more broadly.

<sup>340</sup> See *CLRA*, 10(8).

<sup>341</sup> *AHRA* 2(a): consider its first principle: “the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use.”

<sup>342</sup> This imbalance in protections is potentially problematic itself: as surrogates are already vulnerable to various threats, this imbalance in protections may exasperate issues surrogates experience, such as power imbalances and the pressure they face.

Surrogacy agreements ideally make the expectations of each party clear, so as to avoid future conflict,<sup>343</sup> but these expectations are not required to be addressed. Clearly, this fact may impact the protective factors: if the expectations of the intended parents and surrogates are not identified, surrogates likely would be less able to prepare for potential issues (e.g., prepare to ‘erect boundaries’ which prevent a loss of control), less able to determine compatibility between the parties (which impacts the surrogate’s experience, including whether they experience pressure because of conflicting values), and generally less able to gauge whether the arrangement aligns with their autonomous interests (i.e., whether they should consent to it).

It is recommended—but again, not necessary—that attorneys inform surrogates of the risks involved in surrogacy. This is sensible, as whether the arrangement supports the autonomous interests of the surrogate rests on whether the arrangement is worth pursuing despite potential harm. However, the risks which are recommended (and seemingly standard<sup>344</sup>) to disclose only account for some autonomy-related harms. Consider a guidance document on surrogacy agreements in Ontario, which states: “A good [s]urrogacy [a]greement will include provisions that detail [medical and legal risks associated with the surrogacy arrangement] and recognition of those risks by the parties involved.”<sup>345</sup> These risks are qualified as: the potential for medical complications impacting either the surrogate or the child; the potential for the child to have disabilities, die, or be aborted; and the potential for the intended parents to separate, die, or otherwise breach their agreement.<sup>346</sup> Although some of these concerns are rare and potentially overstated,<sup>347</sup> these risks address some autonomy-related concerns: the potential for unexpected

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<sup>343</sup> E.g., see Lepine.

<sup>344</sup> It seems that, per Lepine (2016) and Carsley (2021), these provisions tend to be discussed. However, there is no official data on this so it is hard to know how standard they are.

<sup>345</sup> Lepine, 6.

<sup>346</sup> Lepine 6.

<sup>347</sup> Some of these concerns may be less relevant. E.g., the aforementioned studies have not revealed cases of an intended parent dying or a child being born with disabilities and this impacting the surrogate.

harm, emerging from medical complications or conflict between the parties.

However, these risks do not fully capture the autonomy-related threats surrogates tend to encounter. Loss of control and pressure are not identified in this risk disclosure (and do not appear to be addressed in surrogacy agreements) and neither are the ways in which surrogates can and do (and may be forced to) navigate these threats. The closest acknowledgement of these issues is the guidance document's recommendation that "[l]awyers for Surrogates should ensure that their clients understand that the Surrogates have the right to resist pressures from Intended Parents to control their choices during the pregnancy."<sup>348</sup> While this information is applicable to autonomy-related issues, it is not very helpful. Based on my discussions in chapters 2 and 3, and specifically the reports of surrogates—which emphasize autonomy-related threats and how they are managed—the following information should be addressed:

- How surrogates commonly encounter threats to autonomy: a loss of control, pressure to adhere to the agreement and to appease the intended parents, and unexpected harm
- How surrogates can manage these threats, through certain strategies (e.g., the protective factors) which may not be available to everyone (e.g., the capacity to be assertive)
- How surrogates may be 'forced' to manage the threats in certain ways, given the constraints of the arrangement (e.g., modifying their preferences or erecting boundaries).

With this information, surrogates would have the resources for anticipating potential threats and preparing for them. This information would facilitate all of the protective factors and diminish the potential for autonomy-related harm. Considering the former, this information would be a kind of resource (therefore under the first protective factor) which would enable prospective surrogates to autonomously decide whether to enter an agreement, and better enable them to

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<sup>348</sup> Lepine 5.

manage threats in a way that does not obstruct their autonomy. With this knowledge, surrogates would be able to better access the second and third protective factors, by knowing the importance of boundary work and of having relevant capacities (e.g., assertiveness) and by knowing the relational dimensions of surrogacy arrangements (e.g., how compatibility impacts the threats surrogates encounter and whether they have access to the right social supports).

This knowledge would better equip surrogates to predict and manage the threats they encounter throughout the arrangement, as well as determine whether the arrangement accords with their autonomous interests. Considering this latter point, knowing about the autonomy-related threats can help prospective surrogates determine whether they will be impacted by them. As discussed in this thesis, the threats impact surrogates differently, depending on their interests (e.g., whether they are significantly bothered by conflict<sup>349</sup> or by the prospect of having to manage the threats in certain ways), capacities (e.g., whether they can easily assert themselves), and supports (e.g., whether they have a good social support system for managing threats). Thus, having knowledge of these potential harms would allow surrogates to decide whether to enter the arrangement. We can imagine some prospective surrogates who would not pursue surrogacy knowing about some of these threats (e.g., consider those who easily ‘cave into pressure’).

This knowledge would clearly not prevent all potential harms, one reason being that making an autonomous decision—even if ‘fully informed’—may depend on one’s capacities and prior experiences. Part of knowing whether a decision accords with one’s autonomous interests depends on how well someone knows themselves and whether they trust this self-knowledge.<sup>350</sup> Moreover, some of the harms may be difficult to anticipate and prepare for (e.g., being sure

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<sup>349</sup> We can imagine someone who is effectively unphased by conflict between parties for whatever reason (e.g., perhaps they naturally have a high tolerance for stress).

<sup>350</sup> E.g., see McLeod and Sherwin.

about compatibility between the parties would likely only reduce the potential for conflict<sup>351</sup>) and it may be challenging to gauge one’s capacity to deal with the threats and how their autonomy may be impacted by them. Some of these concerns may be addressed with assistance from others: in general, counselling can help individuals develop self-awareness (e.g., about their capacities) and deal with issues in relationships (e.g., difficulties dealing with conflict or setting boundaries).

In terms of delivering the autonomy-related information, it would be sensible to first shift the kinds of information attorneys, surrogacy agencies, and counsellors emphasize when they communicate with (prospective) surrogates.<sup>352</sup> Currently, the emphasis is on psychological and physical harms, which are related to but distinct from the autonomy-related harms. For instance, screening of surrogates typically amounts to an assessment of “physical and psychological vulnerabilities.”<sup>353</sup> This assessment can be easily amended to include autonomy-related issues, such as whether someone is particularly vulnerable to autonomy-related threats.<sup>354</sup> Similarly, when attorneys address medical complications, they can also relay autonomy-related harms.

Additional measures would likely be needed: the issue is not just the *kinds* of information surrogates receive, but also how—and whether—they receive it.<sup>355</sup> As revealed in this chapter, the information surrogates receive is variable, depending on what the attorneys and agencies relay (and whether the agencies connect them with surrogacy networks).<sup>356</sup> In order to ensure that (prospective) surrogates access the right information, the consent process could be modified

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<sup>351</sup> Payne et al., 186.

<sup>352</sup> It would make sense for all of these parties to play a role in delivering this information, since they are usually the ‘intermediaries’ which enable prospective surrogates to make informed choices (see Yee et al., 2020 and Fantus 2020).

<sup>353</sup> Lepine, 4.

<sup>354</sup> E.g., whether they are normally confident navigating conflict and forming boundaries.

<sup>355</sup> For how the information is delivered, it should be in a manner which appreciates the complexity of surrogates arrangements and the associated harms. For example, as opposed to telling prospective surrogates “you may experience a loss of control,” it would be important for surrogates to have a good grasp of how they might experience potential threats.

<sup>356</sup> As this information is not mandatory to address. E.g., see Fantus (2020).

to require attorneys to discuss relevant (including autonomy-related) risks with surrogates. The *CLRA* could be amended accordingly (e.g., to require surrogates to provide *informed* consent<sup>357</sup>). A less stringent approach would be to encourage attorneys to discuss the autonomy-related threats with prospective surrogates (e.g., in a guidance document) with the hope that this would eventually become standard practice. A drawback of this would of course be the fact that attorneys may not be motivated by this guidance.<sup>358</sup>

Another measure would be to organize, and require prospective surrogates to attend, a ‘class’ on surrogacy which is informed by surrogates’ experiences.<sup>359</sup> Although it is unclear how this class would be implemented,<sup>360</sup> it would be a sensible approach, as it would guarantee that surrogates would access the same information (perhaps it would be easier to have oversight over the class as opposed to attorneys delivering the information to surrogates themselves), and the information could be delivered by former or current surrogates themselves, which would provide prospective surrogates with insight into the complexity of surrogacy arrangements (and can therefore account for information attorneys may not have familiarity with or be able to address).<sup>361</sup> Extending the class in the form of information sessions, which function as support groups for surrogates, would attend to the dynamic nature of surrogacy arrangements.<sup>362</sup> This would be a good approach, as it would ensure that surrogates have access to a support system which would in turn enable them to cope with the autonomy-related threats they encounter.<sup>363</sup>

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<sup>357</sup> E.g., qualifying this as informing surrogates of physical, psychological, and autonomy-related risks. The *AHRA* could qualify what ‘informed consent’ with respect to reproductive technologies means, but likely this would be addressed provincially in which case the *CLRA* would be amended.

<sup>358</sup> That is, if there is no legal requirement to address this information or no repercussion if they do not.

<sup>359</sup> Damelio and Sorensen (2018) support this approach, though they focus on issues less relevant to Canada like commercialization.

<sup>360</sup> E.g., whether under provincial or federal purview. Another measure would be to regulate agencies and require that they offer the class.

<sup>361</sup> E.g., see Damelio and Sorensen, 276.

<sup>362</sup> E.g., see *ibid.*

<sup>363</sup> This would deal with the issue of unequal access to surrogate networks. E.g., see Yee et al. (2020). These sessions could be optional as not every surrogate would feel they need help managing the threats, whereas the initial session should be mandatory to facilitate informed choice.

## 5. Conclusion

This thesis has examined surrogacy with a focus on surrogacy arrangements in Canada and specifically the experiences of surrogates. Overall, I have emphasized how surrogacy arrangements vary considerably and surrogates encounter and manage autonomy-related threats in different ways. As such, we should be careful to avoid generalizing about surrogates having undermined autonomy or surrogacy arrangements being inherently autonomy undermining. Yet it is also important to consider what may be missing from the studies and in particular the reports of surrogates. While the studies capture the complexity of surrogacy arrangements and the ways in which surrogates navigate autonomy-related threats, they would benefit from a more balanced approach which analyzes the reports from within a broader context which considers factors such as the external constraints surrogates experience and why they report as they do. This thesis has therefore gestured to directions research on surrogacy should take, while also highlighting policy implications around how autonomy-related threats should be dealt with.

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