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ARTICLE

Criminalising commercial surrogacy in Canada and Australia: the political construction of ‘national consensus’

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ABSTRACT

This article examines the language used to justify a criminal prohibition on commercial surrogacy in Canada and Australia. I demonstrate that legislators in each country framed commercial surrogacy as an area over which there was national ‘consensus’ because of uniquely Canadian and Australian values. This was an effective political strategy, but for different reasons in each country: in Canada, because it fit with frames surrounding healthcare and anti-commercialisation, and in Australia, because the distinction between ‘altruistic’ and ‘commercial’ surrogacy mapped onto broader themes of altruism in Australian society. This suggests that the political use of national frames is especially successful when it taps into pre-existing narratives of what constitutes unacceptable behaviour in a given polity, and when it is attached to criminal prohibitions.

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Introduction

When making public policy, it is not uncommon for legislators to rhetorically wrap themselves in their national flag. The evocation of national values, national struggle and national consensus has often proven a powerful tool to justify government action. Moreover, such symbolism is obviously effective when made with explicit reference to historical, political and cultural symbols of unity – such as the military, monarchy and common ancestry – but governments have increasingly tied nation-building language to social programs (Banting 1995; Dufresne, Jeram and Pelletier 2014).

By proscribing certain forms of behaviour seen as contrary to norms of citizenship, criminal law can also be tied to nation-building. However, this link has been underexplored by scholars. This article seeks to fill that gap by examining the political use of national symbols and values to justify a criminal prohibition on commercial surrogacy – paying a woman beyond expenditures for acting as a surrogate – in Canada and Australia. In Canada, where criminal law is federal jurisdiction, the federal government prohibited commercial surrogacy in 2004. In Australia, where states have jurisdiction over criminal law, every state has introduced surrogacy legislation since 2008, and each has maintained or introduced criminal penalties for commercial surrogacy. Unpaid surrogacy, however, is permitted in both countries.

In this article, I begin by discussing the ethical debate over commercial surrogacy. Then, drawing from government commissions, committee hearings, legislative debates and interviews conducted with policymakers,¹ I explore the dominant ideas that were used to frame domestic surrogacy legislation in both countries.² In particular, I show how legislators framed commercial surrogacy in two ways: first, in terms of exploitation and commodification, which were used to create a dichotomy between commercial and ‘altruistic’ surrogacy; second, and more pointedly, as an area over which there was national ‘consensus’ because of uniquely Canadian and Australian values. There is little empirical support for a public consensus in either country, but the pervasiveness of national symbols and rhetoric was nonetheless an extremely effective political strategy. Support for prohibiting commercial surrogacy crossed partisan, regional and ideological lines, and the language of ‘consensus’ effectively precluded commercial surrogacy as a permissible policy option.

This study offers several contributions for political scientists studying federalism, criminal law and policy framing. First, it provides additional evidence that framing is especially useful at proscribing certain policy options when a field is relatively new. Because commercial surrogacy was far from the mainstream during the time of policy initiation, the ideas used to frame the surrogacy debate often took place in a legal vacuum, allowing legislators to have a profound effect on policy definition. Second, the language of national consensus can be especially powerful when it corresponds to pre-existing political narratives. In Canada, a commercial surrogacy prohibition was consistent with other policies related to healthcare and anti-commercialisation, while the Australian distinction between ‘altruistic’ and ‘commercial’ surrogacy mapped onto broader political narratives of altruism in Australian society. This suggests that the political use of national frames, symbols and language can successfully extend beyond traditional political and historical policy fields, particularly when attached to criminal prohibitions.

Finally, this article provides comparative scholars of federalism and criminal law a hitherto underexplored avenue for future analysis: the use of criminal prohibitions as, first and foremost, rhetorical devices to demonstrate a national consensus. Preliminary evidence suggests criminal law has not been the most effective instrument to actually prevent exploitation and commodification associated with commercial surrogacy in Canada and Australia, but it was certainly a useful tool to articulate the supposed consensus. Future scholarship should explore other policy fields in which a criminal prohibition is used, first and foremost, to signal disapprobation rather than encourage prosecution.

Commercial surrogacy: the ethical debate

Surrogacy refers to an arrangement in which a woman (the surrogate) gestates and bears a child with the intention that said child is raised by someone else (the intended parent(s)). Governments typically legislate for two aspects of surrogacy policy: first, the legality and enforceability of surrogacy arrangements; second, the distinction between commercial and unpaid surrogacy, which is the focus of this article. In a commercial surrogacy arrangement, the surrogate is paid for her gestational services above and beyond expenditures. In an unpaid surrogacy arrangement, the surrogate is not paid beyond direct expenditures (such as medical costs, legal fees, and counselling). Those regimes that permit payment only for direct expenditures are still referred to as unpaid or ‘altruistic’³ in the literature because their goal is to prevent surrogacy as a *de facto* occupation.

There are myriad reasons, some culturally-specific, that individuals, advocacy groups and policymakers oppose commercial surrogacy (see A. Campbell 2013: 103–04; Pande 2014: 3, 128–30; Teman 2010: 23). Broadly speaking, however, opposition to commercial surrogacy typically rests on two main ethical pillars. First, critics fear that commercial surrogacy is exploitative. The introduction of commercial exchange increases the potential exploitation of surrogates insofar as it enables economically secure people to buy the procreative labour and custodial rights of vulnerable women (Shanley 2007: 116; Wilkinson 2003). As with sex work and pornography, some claim that poor women with limited employment prospects will be induced into surrogacy for financial gain, relegating women to the status of ‘paid breeder’ (Capron and Radin 1990: 62; see also Parks 2010: 335). Second, critics claim commercial surrogacy ‘commodifies’ both women and children. It commodifies women by obscuring the special bond between mother and child during pregnancy and by reducing women to mere ‘objects of use’, and it commodifies children because it treats them as objects to be purchased and sold (Anderson 1990: 92; 2000: 23; Warnock 1985).

By contrast, scholars who favour commercial surrogacy typically draw from three inter-related arguments. First, proponents argue that a criminal ban is harmful to surrogates’ reproductive autonomy. Criminal prohibitions ‘reinforce the state’s power to define what constitutes legitimate and illegitimate reproduction’ and ‘insinuate that surrogates are not actively or rationally choosing their path’ (A. Campbell 2013: 125; Shalev 1989: 94). Second, some claim commercial surrogacy prohibitions perpetuate gender stereotypes by treating reproduction as another form of women’s domestic labour – ‘as unpaid, noneconomic acts of love and nurturing rather than as work and real economic contributions to family life’ (Shanley 1995: 160–61; see also Cattapan 2014: 363; Shalev 1989: 165–66). In this vein, recent feminist scholarship claims commercial surrogacy can present a ‘powerful challenge’ to traditional conceptions of reproductive labour, as the reproductive capacities of women become ‘valued and monetized’ outside the domestic sphere, often providing a source of income to women with otherwise-limited economic opportunities (Pande 2014: 166; Panitch 2013: 277). Finally, many reject the distinction between ‘commercial’ and ‘altruistic’ surrogacy as a false dichotomy and thus a poor metric for assessing exploitation and commodification. Just as women can be coerced into unpaid surrogacy due to family or community pressure (Ruparelia 2007), payment ‘is rarely the sole or primary motivator’ in commercial arrangements (A. Campbell 2013: 102; Busby and Vun 2010: 55; Millbank 2015).

In the end, both sides of the debate recognise that surrogacy has the potential to transform traditional norms of kinship, parenthood and social values. Those opposed to commercial surrogacy find this problematic, but these transformations are accepted and often advocated by those defending surrogacy (Markens 2007: 78). This understanding about the transformative nature of surrogacy was shared by policymakers in Canada and Australia, as the subsequent section shows.

Framing commercial surrogacy in Canada and Australia

There has been a recent trend among comparative political scientists to use Canada and Australia to better understand of a wide array of policy issues, from rights protection to equalisation to child welfare (Banfield and Knopff 2009; Béland and Lecours 2011; Mahon and Brennan 2012). As two federal, constitutional, bicameral parliamentary

democracies with a shared language, Canada and Australia certainly fit into the ‘most similar’ category, which is ‘at the heart of the comparative method’ (Dogan and Pelassy 1990: 133). Relative institutional, demographic and historical similarities ‘neutralize a number of potentially important differences’ between the two countries (Stewart 1994: 186). Yet as Mahon and Brennan (2012: 91) note, it is the ‘important differences between them that make such a comparison of interest’.

This is particularly salient for surrogacy, where different constitutional structures have influenced the course of policy development. Canadian provinces have broad jurisdiction over family law, parentage transfer, birth registration, adoption and healthcare, but the federal government has the sole authority to define the criminal law (Busby and Vun 2010: 28). Accordingly, Canada’s federal government has set criminal prohibitions for commercial surrogacy, while provincial governments have created rules for surrogacy arrangements and parentage. By contrast, criminal law, parentage and birth registration are considered state rather than Commonwealth jurisdiction in Australia, meaning Australian surrogacy policy has been set almost entirely by subnational governments, with legislation occurring at different times in different states and territories.

In spite of these institutional differences, policymakers’ views on surrogacy have developed along similar trajectories in each country. Jenni Millbank has identified two ‘waves’ of surrogacy inquiry and reform in Australia; the first, from the 1980s to the mid-1990s, was characterised by ‘moral panic’, wherein policymakers posited that surrogacy as a whole was harmful (2011: 170). During this period, every jurisdiction other than New South Wales and the Northern Territory prohibited commercial surrogacy, and most discouraged unpaid surrogacy through a variety of means, including criminal law (Millbank 2011: 170–73; Stuhmcke 2011: 602–04). The second wave, beginning in the mid-2000s, reflected ‘tightly controlled tolerance’ of surrogacy. Reforms in this wave removed barriers to unpaid surrogacy and payment of surrogacy-related expenditures, but maintained or created prohibitions on commercial surrogacy. As of 2015, unpaid surrogacy is permitted in every Australian jurisdiction, while commercial surrogacy is prohibited everywhere except the Northern Territory.

Millbank’s ‘two waves’ description is equally applicable to Canada, whose policy can be traced back to the 1993 *Royal Commission on New Reproductive Technologies*. The Commission recommended that provinces make surrogacy arrangements unenforceable and that the federal government criminalise commercial surrogacy (Canada 1993: 683, 690–91). Its rationale – that surrogacy, whether commercial and unpaid, should not be ‘undertaken, sanctioned or encouraged’ (Canada 1993: 689) – reflected the moral panic Millbank describes in Australia. However, as Parliament debated creating legislation for assisted reproductive technologies (ARTs) in the early 2000s, the Commission’s initial trepidation gave way to tightly controlled tolerance. The 2004 *Assisted Human Reproduction Act* (AHR Act) criminally prohibits paying ‘consideration’ to a surrogate mother,⁴ but permits unpaid surrogacy and the reimbursement of surrogacy-related expenditures, as long as that reimbursement accords with (as-yet nonexistent) federal regulations (Canada 2004c: §§6, 12). In Canada and every Australian state, commercial surrogacy is strictly prohibited, while unpaid surrogacy – and payment of surrogacy-related expenditures – is permitted.⁵

Fusing frames: anti-commercialisation as a 'national consensus'

This relative policy uniformity between Canada and Australia is also reflected in the way policymakers constructed narratives around surrogacy – that is, how they framed the policy field. As Daviter (2011: 2) notes, policy framing is the process of ‘selecting and emphasizing aspects of an issue according to an overriding evaluative or analytical criterion’ to privilege certain information (see also Baumgartner and Jones 1991). When frames become dominant during initial phases of policy development, they can successfully structure debate, influence the perceived range of choices and effectively forestall certain policy options entirely. Drawing from parliamentary debates, committee hearings and interviews with policymakers, I highlight here the prominence of two frames in the Australian and Canadian debates: the creation of a sharp distinction between ‘altruistic’ and ‘commercial’ surrogacy, using the language of exploitation and commodification; and the subsequent framing of a ‘national consensus’ against commercial surrogacy specifically. Framing a national consensus was especially important to conceal fractures and dissensus regarding the altruistic/commercial distinction.

Many have noted how prohibitions on commercial surrogacy in Canada and Australia were justified on the basis of avoiding ‘commodification’ and ‘exploitation’ (Cattapan 2014; Downie and Baylis 2013; Millbank 2011; 2015). What is most interesting for present purposes is that, while conceptually distinct in theory, these two terms were rarely pulled apart during parliamentary debate. Instead, commodification and exploitation were used interchangeably, along with ‘dehumanisation’ and threats to ‘human dignity’, all under the banner of ‘commercialisation’. During the first wave, Canada’s Royal Commission rejected a ‘market production model’ whereby ‘commissioning couples are willing to pay and gestational women are free to sell their labour’. One cabinet minister similarly claimed ‘commercialization modifies reproduction, offends human dignity and may lead to the exploitation of vulnerable persons or groups’ (Canada 1993: 687; see also Canada 1996a). The same language prevailed during Australia’s first wave: a Victorian committee suggested ‘surrogate arrangements where fees are paid are, in reality, agreements for the purchase of a child’ (Victoria 1984: 4.6). A government MP in Queensland claimed payment for reproduction was ‘the ultimate in dehumanisation’ and that ‘a baby must not be treated as a commodity to be purchased’ (Queensland Parliament 1988a); and another Queensland MP feared surrogacy might lead to a society in which ‘women of low socio-economic status may seek to become “breeders” for economic reasons’ (Queensland Parliament 1988b).

During the second wave, one aspect of surrogacy – payment – was selected and emphasised to construct a simplified frame: altruistic surrogacy was desirable, while commercial surrogacy was harmful. A New South Wales Labor MP claimed he opposed commercial surrogacy because his party had rejected ‘the intrusion of market capitalism into every aspect of the lives of human beings’ and ‘the commodification of people’s labour’ (New South Wales Legislative Council 2010), while Queensland’s then-Premier Anna Bligh stated that ‘[n]o one should be able to make a commercial profit from their reproductive capacities’ (Queensland Parliament 2008). In Canada, one health committee member described the purpose of the prohibition, which was ‘to keep [surrogacy] altruistic and an initiative to help people, not one for profit or vulnerable to being exploited for commercial purposes’ (Canada 2003a). As summarised by Bloc Québécois MP Pauline Picard,

most Canadian MPs felt ‘women will be much more exploited if they are paid than if they are not paid’ (Canada 2001b). Canada’s *AHR Act* itself justifies the prohibition on the basis that ‘trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns’ (Canada 2004c: 2f).

A second, less-explored frame that nevertheless dominated discussion was that opposition to commercial surrogacy represented a ‘national consensus’ in each country. It is not entirely surprising that Canada’s historically centralising Liberal Party, holding a majority government during the entire ART policymaking process (1993–2004), favoured a national policy. More interesting is the direct invocation of anti-commercialisation as a uniquely Canadian value. Cabinet ministers and even deputy ministers claimed commercialisation was ‘contrary to the basic values we hold about the inalienable rights of people not to be bought or sold’ (Canada 1996b), that there was a ‘broad consensus’ against payment for surrogacy in Canadian society (Canada 1997), and therefore a prohibition fit ‘squarely within the Canadian tradition of using the criminal law to protect the health of Canadians, their safety, and their values’ (Canada 2001a). In short, the ‘national consensus’ narrative blended perfectly with the altruistic/commercial dichotomy detailed above: altruism is Canadian, therefore commercialisation of reproduction is un-Canadian. Fusing Canadian values with anti-commercialisation was a useful, and omnipresent, rhetorical framing strategy.

Given that surrogacy policy was produced primarily in state legislatures in Australia, one might expect the frame of ‘national consensus’ would have been less pronounced. However, intergovernmental and national research bodies opposed commercial surrogacy (National Health and Medical Research Council 2007: 57; Standing Committee of Attorneys General 2008: 2), and the language of national consensus was just as prominent at the state level. In Queensland, former National Party leader Lawrence Springborg remarked that ‘commercial surrogacy is seen as an instance of disdain and contempt ... that’s consensus in Australia’ (Interview 2010d) while Labor MP Linda Lavarch claimed that this was ‘a true consensus’ that ‘cuts across both major parties, and it comes out of a different value of body and body parts in Australia’ (Interview 2010e). A civil servant with the Victoria Law Reform Commission referenced a ‘broad consensus that commercial surrogacy should not be permissible’ (Interview 2010a); a NSW Legislative Assembly member spoke of ‘uphold[ing] Australian values, which must mean respect for all and the rights of all to live lives free of exploitation’ (New South Wales Legislative Assembly 2010); and the Western Australian shadow Attorney General claimed commercial surrogacy ‘is not something that is part of the Australian culture’ (Western Australia Legislative Assembly 2008). Opposition to commercial surrogacy crossed both the parliamentary floor and state boundaries.

Manufacturing consensus in the face of narrative fractures

In terms of actual government outputs,⁶ the legislative framing of a national consensus against commercial surrogacy was highly successful. The commercial/altruistic dichotomy, false or not, has been instantiated in public policy via a criminal prohibition in Canada and in every Australian jurisdiction except the Northern Territory. Of course, in countries as regionally and demographically diverse as Canada and Australia, the

very idea of a ‘national consensus’ against a practice in which citizens were known to participate was a simplification. After all, the goal of policy framing and narrative construction is to create a ‘simplified image of complex policy choices and thereby exert bias towards the inclusion of certain types of information and interests over others’ (Daviter 2011: 4). In this vein, the attempted articulation of a national consensus did face (and continues to face) certain obstacles.

Most tellingly, there was no empirical evidence that such a consensus existed in either country. In Canada, a poll of 2565 Canadians commissioned in 2002 – still the most recent survey on the issue – showed that 54 per cent were in favour of allowing payment for surrogacy (Greenaway 2002). Many parliamentary witnesses also advocated against the prohibition. For example, a representative of the British Columbia Civil Liberties Association rejected the ‘false dichotomy’ between commercial and altruistic surrogacy (Canada 2001c), while the head of a surrogacy counselling agency and a former surrogate herself claimed ‘[n]o woman going through my service has ever been exploited or forced into this’ (Canada 2004b). Despite this ambivalence among the public and contestation among witnesses, only one MP actively spoke out in favour of allowing commercial surrogacy, with Dr Keith Martin calling criminalisation ‘heavy handed and completely arrogant’, and arguing ‘to criminalize a woman or a couple for engaging in [surrogacy] is absolutely unbelievable’ (Canada 1996c; 2003b).

In Australia as well, political opposition to commercial surrogacy was so widespread that among nearly every policymaker, it was a nonstarter (A. Campbell 2013: 130). In her comprehensive study of surrogacy reform in the Australian states, Millbank concludes that commercial surrogacy has ‘deliberately been excluded’ from parliamentary discussion, as ‘only one MP [David Gibson from the Queensland Liberal National Party] even questioned’ whether criminalising the actions of intended parents was in the best interest of their children (2012: 126). A former policy advisor for Queensland’s 2008 public investigation into unpaid surrogacy remarked that ‘commercial surrogacy was never on the agenda, even early in the process ... it was never a consideration’ (Interview 2010b), while a Standing Committee of the Attorneys General (SCAG) official similarly claimed ‘the Ministers decided there would be no commercial surrogacy fairly early on, and the project just moved on from that’ (Interview 2010c). A ‘national consensus’ may indeed have been manufactured in each country, but the framing was sufficient to create a *political* consensus.

There does exist some contestation of this consensus in terms of subnational policy, albeit at the margins. The legality of surrogacy arrangements is one such example in Canada, particularly Quebec’s Civil Code declaration that all surrogacy arrangements are null. Quebec recently struck a committee to examine whether to change this law and recognise surrogacy arrangements (Richer 2015), but until it actually changes its law, Quebec is the ‘sole Canadian province whose laws cast surrogacy as against public morals and policy’ (Campbell 2012: 32). This law does not affect the national criminalisation of commercial surrogacy, but it does challenge the altruistic/commercial dichotomy by moving away from the narrative of payment as the sole source of exploitation and commodification. Likewise, it is ‘assumed’ commercial surrogacy is unenforceable and illegal in the Northern Territory on the basis that its ART policy is governed by a combination of South Australia statutes and the National Health and Medical Research Council guidelines (Stuhmcke 2011: 603), but the actual absence of a criminal prohibition renders Australia’s national consensus technically incomplete.

Another challenge to the idea of a national consensus concerns the reimbursement of surrogacy-related expenditures. One government lawyer noted that Canadian legislation was drafted ‘to prevent any financial gain ... from being a surrogate’ (Canada 2004a), but MPs from all parties were sceptical even of such minimal expenditures. The health committee chair worried expenditures could work as commercialisation by stealth, claiming that proponents of commercial surrogacy wanted potential reimbursements to ‘include everything under the sun’ (Canada 2002). One New Democratic Party MP similarly claimed that permitting reimbursement sent a ‘confusing mixed message ... prohibiting paid surrogacy activity on the one hand, while simultaneously supporting it financially on the other’ (Canada 2003c). As Canada’s federal government has still yet to write regulations articulating what is permitted and what is excluded as a reasonable expenditure, variation in what is deemed permissible likely exists across the country (Baylis, Downie and Snow 2014).⁷ There is also considerable variation among Australian jurisdictions as to what constitutes a reasonable expenditure. As Millbank describes, some states’ legal regimes are ‘exacting and detailed, categorised by type of expense’ while others are merely ‘defined by a broader notion of “reasonableness”’ (2015: 479). Such variation in terms of what constitutes ‘commercial’ surely complicates the commercial/altruistic dichotomy that supposedly informs each country’s national consensus.

From a scholarly perspective, there are also growing cracks in the narrative of consensus. The last five years have seen a growth in social science evidence contesting the rationales behind commercial surrogacy prohibitions in Canada, Australia and elsewhere (Busby and Vun 2010; Pande 2014; Stuhmcke 2011; Teman 2010). These studies have been particularly effective at highlighting the artificial dichotomy between commercial and altruistic surrogacy by demonstrating that payment is not the determinative feature for many surrogates. Others have noted how domestic bans merely serve to shift commercial surrogacy to the developing world, where issues of legitimate exploitation and under-regulation abound (see A. Campbell 2013: 138; Panitch 2013; Wilson 2014). However, this sustained scholarly attention has not yet inspired outright political advocacy. Some have even suggested that policymakers in Australia ‘failed to gather or even consider’ the growing body of empirical evidence that serve to complicate the altruistic/commercial dichotomy (Millbank 2015: 479–80; Stuhmcke 2011). In Canada, where the criminal prohibition has existed for over a decade, the only attempt at reform came from a private member’s bill from an independent MP who was subsequently sentenced to prison for violating election finance law (Canadian Press 2015). Needless to say, the bill received minimal attention.

These minor issues do complicate the dominant frames of ‘altruistic vs. commercial’ and ‘national consensus’ in each country. At the end of the day, however, across-the-board criminalisation was largely successful in terms of legislative outputs. This occurred in no small part due to the harnessing the language of anti-commercialisation to a supposed ‘national consensus’.

Discussion

In terms of legislative attitudes towards surrogacy, Millbank’s (2011) description of Australian waves of ‘moral panic’ followed by ‘tightly controlled tolerance’ is an apt portrayal of Canada as well. The 1993 Royal Commission criticised surrogacy *as a whole*, but

Canada's 2004 *AHR Act* reflected the view that, absent its commercial aspect, unpaid surrogacy was tolerable and perhaps even beneficial. Likewise, the Australian states that prohibited unpaid surrogacy in the 1980s and 1990s had rescinded those prohibitions by 2012. The clear demarcation between commercial and 'altruistic' was aided by near-identical framing strategies in each country: first, that surrogacy is commodifying and exploitative *only* when it takes on a commercial aspect; and second, that there is a national consensus against commercialisation, reflective of uniquely national values.

Framing commercial surrogacy as exploitative and commodifying is in keeping with arguments from the ethical literature against the practice. More unusual is the notion that commercial surrogacy offends national values and that a criminal ban reflects a national consensus. Why did legislators in each country attach a national frame to this discrete policy field? One explanation, for Canada at least, concerns the proximity of commercial surrogacy to other social policy fields to which the federal government has attributed a national consensus. As Dufresne, Jeram and Pelletier note, 'once connected to collective values, social programmes may become the focus of nationalist politics and mobilization' (2014: 572). This was certainly true of commercial surrogacy where, beginning with the *Royal Commission on New Reproductive Technologies*, policymakers justified a criminal prohibition as reflecting the 'views of Canadians', in spite of 'scant evidence' Canadians held such 'monolithic' views, or that such views would necessarily favour the blunt force of the criminal law (Cattapan 2014: 337; Harvison Young and Wasunna 1998: 240–41). Canada has a long history of national governments using the language of values, consensus and nationhood to harness social programs to agendas of nation-building (Banting 1995: 284; Johnston, Banting, Kymlicka and Soroka 2010). As surrogacy (and ART policy more generally) was a relatively new field in the 1990s, attributing pan-Canadian values to anti-commercialisation fit with the established Canadian pattern of adding policy fields to existing 'identity markers' to distinguish a sense of national community (Dufresne, Jeram and Pelletier 2014: 571).

This is especially relevant given how intertwined surrogacy policy is with healthcare policy, which is a point of national pride and identity verging on the sacred for some Canadians. Especially for English Canadians, universal healthcare, frequently linked to the idea of non-payment, is seen as a symbol of 'Canadian distinctiveness' within North America in direct contrast to the American system (Dufresne, Jeram and Pelletier 2014: 574). Tellingly, the language used to express opposition to private health insurance is similar to language concerning commercialisation and commodification of reproduction. In this vein, then-Minister of Health Allan Rock's statement that the goal of the *Assisted Human Reproduction Act* was to create a 'comprehensive pan-Canadian approach that would not follow the patchwork situation that exists in the United States' fit with standard references to universal healthcare, commercialisation of medicine and anti-American sentiment among national political leaders (Canada 2001a).

In Australia, the connection between national values and a prohibition on commercial surrogacy is less intuitive. Unlike Canada, public health insurance and commercialised medicine are not typically tied to an inherent national desire to distinguish Australian from American (or any other) culture (but see Altman 2006). Moreover, the institutional and legislative environment for Australia's commercial surrogacy prohibition was far different than Canada's. Legislation came from the state rather than national level; inter-governmental collaboration played a part in forming the political consensus against

commercial surrogacy; and surrogacy legislation was often made independent of public policy for other aspects of ARTs. Yet the fact that every Australian state has prohibited commercial surrogacy while permitting unpaid surrogacy arguably speaks to a stronger consensus, politically if not publicly, in Australia than in Canada. Lawmakers at the *state* level viewed the commercial surrogacy prohibition as reflecting *Australian* values, rather than the values of, say, Queenslanders, Victorians or Tasmanians. True, it is not unusual in Australian politics for certain behaviours to become proscribed as ‘un-Australian’, insofar as they step ‘over the bounds of what is deemed as acceptable behaviour in an Australian context’ (Walsh and Karolis 2008: 720). However, this only raises questions of what it means to be Australian (or un-Australian) and, moreover, how commercial surrogacy fits into this narrative.

A number of recent empirical surveys on Australian values and ‘Australian-ness’, which highlight the importance of altruism as a national value, offer some guidance. Historian John Hirst has summarised contemporary Australian values as including ‘stoicism, making no fuss, pitching in, making do, [and] helping each other’ (2007: 2). Likewise, Phillips and Smith’s qualitative interviews with a wide array of Australian participants identified ‘generosity of spirit and a desire to help others’ as Australian qualities (2000: 212). Tellingly, the ‘most popular’ value referenced by participants was ‘mateship’, an umbrella term seen to encompass ‘volunteering, helping others, [and] pulling together’ (Phillips and Smith 2000: 217). Historically, however, mateship is a highly gendered term that excludes women’s experiences (C. Campbell 2013; Wagner 2014: 143). This makes the connection between altruism and surrogacy notable, and potentially problematic. Surrogacy itself is a highly gendered experience, one which disproportionately affects women because of the biological realities associated with childbirth. Viewed this way, the ‘moral celebration of women’s altruism’ (Raymond 1990: 8) inherent in Australian policymakers’ altruistic/commercial dichotomy poses an additional challenge to the dominant narratives produced by policymakers. By framing altruism as a national value, Australian policymakers have arguably encouraged surrogates to contribute to the Australian narrative of ‘mateship’, a concept which is unlikely to reflect their actual lived experience as women.

Acknowledging the gendered nature of altruism adds an additional layer of complexity to the already-tenuous basis for criminalising commercial surrogacy in Australia. Yet the recognition of mateship as a commonly-articulated Australian value can contribute to explaining how and why policymakers in every Australian state were able to successfully frame the political debate to exclude commercial surrogacy as a palatable option. By tapping into latent myths and symbols regarding the altruistic character of Australian society, connecting ‘altruism’ to a ‘national consensus’ served as a useful framing device by which one aspect of surrogacy could be deemed as un-Australian.

Conclusion

Canada and Australia have much in common, but institutional differences in federal arrangements led to different trajectories for surrogacy policy. Australia’s policy developed at the state rather than national level; it was temporally staggered, moving from a patchwork in the 1990s to greater harmonisation in the late 2000s; and, compared to Canada, surrogacy was typically isolated from the other aspects of ART policy. In the face of these institutional differences, it is notable that Canada and Australia have ended up with

similar surrogacy policies, with commercial surrogacy prohibited and unpaid surrogacy permitted. Even more notable is the extent to which these policies were justified on the basis of similar narrative framing strategies, particularly given policy variation among comparator countries (Lozanski 2015: 386). Language of commodification, exploitation and even affronts to human dignity was buttressed by frequent reference to uniquely Canadian and Australian 'values' and to a 'national consensus' against commercialisation. In Canada, criminalising commercial surrogacy fit onto pre-existing narratives about Canadian healthcare, social policy, anti-commercialisation and a desire to avoid 'American'-style social policy. In Australia, the dichotomy between 'altruistic' and 'commercial' surrogacy helped tie the commercial surrogacy prohibition to broader narratives of altruism and even 'mateship'.

Does such a consensus against commercialisation truly exist among the public in either country? Here the answer is far from certain. In terms of existing public policy, Canada and Australia have historically been opposed to markets in human blood, blood constituents, tissues and kidneys (Burkell, Chandler and Shemie 2013; Tonti-Filippini and Zeps 2011). However, there is a qualitative difference between the sale of tissues/organs and surrogacy, insofar as the surrogacy sells a 'service as opposed to a good' (Panitch 2013: 279). Likewise, public opinion on commercial surrogacy in each country is considerably outdated, with older polls (Greenaway 2002) and recent online ones (Everingham and Tobin 2015) suggesting Canadian and Australian citizens have been ambivalent on the issue of commercial surrogacy, and certainly not as united as legislators. Absent new polling data, whether such a consensus truly exists at the level of the public will remain elusive.

Regardless of whether there actually exists a public consensus, in both countries there has undoubtedly been a *political* consensus that cuts across region, party and level of government. As predicted by the policy framing literature, legislators created a 'simplified image of complex policy choices' to 'convinc[e] the population to support the policy alternatives they put forward' (Béland 2005: 2–3; Daviter 2011: 4). This consensus against commercial surrogacy 'has never been questioned by policy-makers' nor 'opened to public debate' in the Australian states, while 'every incarnation of public policy' in Canada contained a criminal prohibition (Cattapan 2014: 371; Stuhmcke 2011: 601). Some scholars have criticised these criminal prohibitions (Busby and Vun 2010; Cattapan 2014; Millbank 2011; 2012; 2015), but there has been no interest group movement around the issue, little public concern and no discussion of reform among political parties. The frames put forward by opponents of commercial surrogacy have prevailed, with few prospects of legislative change.

The evidence here provides several contributions for comparative scholars interested in the link between nationalism, public policy and criminal law. The first concerns policy framing for relatively new fields such as surrogacy. Specifically, frames established early in the policymaking process can be especially effective at proscribing certain options as politically untenable. The language of 'national consensus' meant commercial surrogacy was essentially eliminated as a policy option at an early stage in the legislative process in the Canadian Parliament and each Australian state. Second, the application of national frames to new policy fields is more successful when those frames tap into pre-existing narratives of what constitutes acceptable or, more importantly, unacceptable behaviour. In Canada, the frame of national consensus fit with pre-existing narratives about the

potential commercialisation and Americanisation of Canadian healthcare; in Australia, it fit with broader ideas about altruism. Canada and Australia have different institutional configurations regarding federalism and criminal law, but the same framing tool – a ‘national consensus’ – was used to justify a criminal prohibition.

Third, the evidence from Canada and Australia shows that the primary purpose of a criminal prohibition may not necessarily be to put citizens in jail to even to deter against a practice. Minimal surrogacy-related prosecutions in either country, in spite of evidence of transgressions, demonstrates that prosecution has not been a major objective following the instantiation of legislation. The most that can be said is that the prohibitions have moved commercial surrogacy to foreign jurisdictions, which certainly was not policy-makers’ stated purpose (although it very well could have been an unstated one; see A. Campbell 2013: 138; Pennings 2004; Snow, Baylis and Downie 2015). Rather, the above analysis of legislative debates suggests that the criminal law was used primarily for rhetorical rather than punitive purposes. There are concerns over whether the criminal law is the most appropriate vehicle for actually preventing commodification and exploitation, but there can be little debate that it is easily the most powerful state instrument used to convey moral disapprobation. In the words of Canada’s Standing Committee on Health, ‘[a]n outright statutory ban signals more clearly that certain activities are either unsafe or socially unacceptable’ (Canada 2001d: 9). Coupled with the fact that it is far easier to implement a criminal prohibition than to create and maintain a complex regulatory regime, it is not surprising that the criminal law was framed as the best instrument to demonstrate a national consensus.

This final point suggests that there is a need for greater scholarly exploration of the use of the criminal law as, first and foremost, a rhetorical device for nation-building in federations. Marijuana consumption and assisted dying – two practices often prohibited by law but subject to limited prosecution in practice – would be especially fertile ground for future analysis. Even when created at the subnational level of government, the combination of national policy frames with criminal prohibitions should remain a popular policy option among legislators in new and evolving policy fields, particularly as a way of mitigating centrifugal tendencies inherent in federations.

Notes

1. As part of a larger research project, 55 interviews were conducted from May 2010 to July 2012 in Canada and Australia. Five Australian participants are cited in this particular study. Parliamentary debates and committee hearings took place primarily from 2008 to 2012 in Australia and from 1996 to 1997 and 2001 to 2004 in Canada. These Canadian debates are over a decade old, but they nonetheless represent the best explanation of the rationale for Canada’s commercial surrogacy prohibition, which was passed in 2004 and remains the law of the land.
2. International commercial surrogacy has become a growing issue of public concern for both countries (especially Australia), but for brevity I only address domestic commercial surrogacy here. For more information on international surrogacy, see Parks (2010), Panitch (2013) and Lozanski (2015).
3. Like many others, I prefer the term ‘unpaid’ to ‘altruistic’, insofar as surrogates may enter into unpaid surrogacy arrangements for reasons other than pure altruism, and altruistic professions can permit payment (see Millbank 2011). However, as is shown, both Australian and Canadian legislators frequently adopted the language of altruism, and as such ‘altruistic surrogacy’ is referred to frequently throughout the article.

4. The legislation also prohibits acting as an intermediary for commercial surrogacy, and counseling someone under 21 to be a surrogate.
5. The regulations have not been created, but Health Canada has officially stated that ‘surrogate mothers are currently allowed to be reimbursed for actual expenses they may incur’ (cited in Downie and Baylis 2013: 229).
6. An altogether different question, beyond the scope of this article, concerns the movement beyond the passage of law to the actual realm of prosecution. In Canada, for example, just a single criminal charge has been laid under *AHR Act*, and only then after ‘long, systemic and deliberate’ transgressions by the person in question, a fertility consultant (Motluk 2013). The lack of prosecution could also be used to question the true level of consensus regarding the desirability of criminal law.
7. In 2015, the Canadian Standards Association (CSA) announced it will amend its standard on tissues for assisted reproduction by adding an ‘Annex on Reimbursement’ pertaining to reimbursement for surrogacy on donors of human reproductive material. The draft amendment is available online (Canadian Standards Association 2015). However, unless referenced by federal legislation, compliance with these standards would be voluntary.

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