Human Reproductive Technology and Law

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Perhaps no domain of science presents more challenges to the law than the regulation of human reproductive technologies. Here, morality, religion, rapid technological advances and human life collide to create sharply differing opinions and policies. From one perspective, the prevailing view is that if science can help an infertile couple, for example, to achieve their long-sought goal of parenthood, then the resources should be deployed. Conversely, fervent proponents will argue that the new technologies must be viewed in a societal context, with concerns that focus on genetic manipulation, equal access to services, and the qualifications (and ethics) of providers.

Dr Patricia Baird

Among many accolades and qualifications that attest to her enduring presence in the reproductive technologies debate, Dr Patricia Baird was the Chair of the Royal Commission on New Reproductive Technologies. The Commission's final report recommended both criminal and regulatory provisions that would enhance the federal government's control over evolving areas of reproductive science. In an Executive Summary of the final report,[1] the following comments appear:

> "New reproductive and genetic technologies (NRGTs) include interventions which attempt to overcome infertility or manipulate the conventional conception process to produce a pregnancy and enable the identification of fetal genetic anomalies and fetal sex. The power

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1 Canada, Minister of Supply and Services, *New Reproductive Technologies—Setting Boundaries, Enhancing Health* (Ottawa: Minister of Health, 1996) at 5.

> of NRGTs to create life outside the womb has the potential to reshape society and redefine the lives of future generations.
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> The development and application of NRGTs in Canada has raised many profound social, ethical, legal and health issues. While some NRGTs can enhance health and well-being, others threaten human dignity and treat women, children and the reproductive process as commodities. Opinion is divided on many of these issues, and consensus has not yet fully emerged on their appropriate place in Canadian society. However, Canadians have made it clear that they are looking to the federal government to manage these technologies in a way that protects those most affected and reflects our collective values."

Dr Baird's presentation is entitled APolicy challenges posed by new reproductive and genetic technologies.

Dean Alison Harvison Young

Dean of the Faculty of Law at Queen's University, Alison Harvison Young has been a strong critic of the Royal Commission's procedures and of its recommendations for the criminalization of certain reproductive services. She has also been critical of the federal government's failure to even begin to implement the broader recommendations of the Royal Commission, relating to regulation of the procedures and providers. In describing the "individual rights" approach to the reproductive technologies debate, beginning with a reference to a New York Times article in which "a gestational surrogacy arrangement was portrayed sympathetically",[2] Dean Harvison Young wrote:[3]

> "If my first dose of culture shock consisted of the realization that a practice generally considered anathema at home was 'business as usual' here, the second dose came when I discussed the subject with my University of Pennsylvania class for the first time. The context was the famous U.S. case, *Johnson* v. *Calvert*,[4] in which a gestational surrogate (a woman of colour) sued for a declaration that she, as the woman who carried and delivered the baby, was the legal

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2 A. Harvison Young, "New Reproductive Technologies in Canada and the United States: Same Problems, Different Discourses" (1998) 12 Temple Int'l & Comp. L.J. 43 at 77.

3 *Ibid*. [secondary footnotes omitted].

4 19 Cal. Rptr. 2d 494 (1993).

mother of the child. The court held that the genetic parents were the legal parents, but it did not do so simply on the basis of genetics. It did so on the basis that the genetic parents were the 'intended parents'; the entire project was undertaken on the basis of that intention by all the parties. I went into that class expecting (as had been the case in the past with my students at McGill) that at least half of them would be incensed at this result and the notion that contractual principles should be applied to such a situation. Some would have felt that the gestational mother was the 'real mother' by virtue of the relationship developed during the pregnancy. Some would have felt that the use of intent or contract rendered the child a commodity, and that the issue should have been resolved according to the 'best interests of the child' standard. Some would have been appalled at the potential for exploitation of women—and especially women of color—by such arrangements. More significantly, past experience had led me to expect that at least a significant number of them, if not a majority, would have been very much inclined to support criminalization.

Students at the University of Pennsylvania not only agreed with the result, but also with the reasoning. The idea of treating surrogacy within the rubric of contract did not strike them as problematic at all. Moreover, and more to the point for present purposes, their reasons had everything to do with 'rights.' Students noted that reproductive choice has been a hard-fought battle in this country and *Roe* v. *Wade*[5] is not taken for granted. Women have won the right to make those crucial decisions, and restricting the ability of women to make choices about how they deploy their reproductive selves risks undermining those gains.

The recurrent theme in the students' comments was one of individual rights: the right to liberty and to be left alone by the state to make personal decisions and choices, the right to privacy, the right to order one's affairs as one sees fit. In this context, the individual choices made by individuals suffering the pain of infertility or those made by a prospective surrogate are as deserving of protection as the decision of a woman to have an abortion."

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[5] 410 U.S. 113 (1993).

Dean Harvison Young will discuss these issues further in her presentation entitled "Legislative Responses to New Reproductive and Genetic Technologies."