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The changing profile of surrogacy in the UK – Implications for national and international policy and practice

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Abstract: Since 2007, the numbers of UK Parental Orders granted following surrogacy have markedly increased. More recently, eligibility criteria have been extended to unmarried heterosexual couples and same-sex couples rather than only married couples. Numbers seeking fertility treatments, including through surrogates, outside their country of residence have also increased. This paper presents the limited data currently available – from UK General Register Offices, Child and Family Court Advisory and Support Service for England and the UK surrogacy agencies: COTS, Surrogacy UK, British Surrogacy Centre – to consider potential reasons for the increase and to consider policy and practice implications. It charts the apparent decline in involvement of surrogacy agencies and suggests the potential for exploitation where scrutiny of arrangements and follow up are limited. It recommends improvements to data collection and argues the need for a more integrated approach to review of surrogacy arrangements both nationally and internationally.

Keywords: surrogacy; parental orders; overseas surrogacy; birth registration; crossborder reproductive care, gay parents

Introduction

This paper examines the changing profile of surrogacy arrangements in the UK and considers the implications for future policy and practice nationally and internationally, in particular the need to have more robust mechanisms in place to minimise the risk of exploitation of any of the parties affected.

Surrogacy arrangements can involve either genetic or gestational surrogacy. ‘Genetic’ surrogacy (also described as ‘traditional’, ‘straight’, ‘complete’ or ‘genetic-gestational’ surrogacy) is where the child is the genetic child of the surrogate and (usually) the commissioning father and hence the surrogate is both the birth mother and the genetic mother. Although the insemination can involve medical intervention, it is more commonly undertaken informally between the parties involved. ‘Gestational’ surrogacy (also described as ‘IVF’, ‘carrier’ or ‘host’ surrogacy) is where the child has no genetic relationship to the surrogate but must (usually) be the genetic child of at least one of the commissioning parents¹. This type of surrogacy will always involve medical intervention.

The first UK legislation concerned with surrogacy arrangements – the Surrogacy Arrangements Act 1985 – followed the publicity surrounding a high-profile surrogate, (Kim Cotton Cotton and Winn 1985). Its primary concern was to prevent commercialisation. At that time, existing arrangements regulating the adoption of infants were the principal means of transferring legal parentage from the surrogate (and her husband if she had one) to the commissioning parents. Dedicated legal measures for such transfer were addressed later under the Human Fertilisation and Embryology Act 1990 which introduced Parental Orders (POs). In order to be eligible to apply for a PO, commissioning parents had to be married, aged 18 or over, domiciled in the UK, Channel Islands or Isle of Man, and at least one had to be the child’s genetic parent. Additional criteria included that the child’s home was with the commissioning parents, the application was made within six months of the child’s birth, the existing legal parents gave consent and only ‘reasonable expenses’ had been paid. The Human Fertilisation and Embryology Act 2008 (hereafter called the 2008 Act) extended the right to legal parentage following assisted conception, including surrogacy (Section 54), to those in a same-sex relationship or ‘to two persons who are living as partners in an enduring family relationship and are

¹ In some jurisdictions, it is legal for a single person or a couple to commission a woman to carry and give birth to a child whom they intend to raise but with whom they have no genetic link. As this paper focuses on the UK, where this is illegal, we will not be discussing this type of surrogacy arrangement. Please note, however, that children who were conceived and born overseas using such arrangements and for whom the transfer of legal parentage was made in the country where they were born, may be living in the UK. No records are kept of such arrangements to our knowledge. Commissioning parents are sometimes known as intended parents.

not within prohibited degrees of relationship to each other' (hereafter called 'an enduring family relationship'): there is as yet no fuller definition of 'an enduring family relationship'. Accompanying Regulations (the Human Fertilisation and Embryology (Parental Orders) Regulations 2010; the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 2010) also introduced the principle for the first time that the welfare of the child should be the paramount consideration of the court. In considering the welfare of the child, Regulations also stated that account should be taken of the Welfare Checklist (adapted from s 1 of the Adoption and Children Act 2002 England and Wales) (for more detail on POs see Baron et al. 2012).

As responsibility for adoption arrangements had historically been devolved to England and Wales, Northern Ireland and Scotland respectively, arrangements for POs were also devolved under the Human Fertilisation and Embryology Act 1990. As part of the legal process, courts appoint a social worker to the role of Guardian ad litem in England, Wales and Northern Ireland (subsequently re-titled Parental Order Reporter in England and Wales) to undertake investigations of the parties and to provide a report for the court; in Scotland the equivalent role is that of Curator ad litem and can be held by social workers or lawyers. Hereafter we use the generic term 'Reporter' to describe this role. Until recently, the numbers of POs that were granted each year in the UK had remained fairly stable at between 33 and 50. However a number of developments indicated a potential for these numbers to rise. With the introduction of its Eighth Code of Practice in 2009, the Human Fertilisation and Embryology Authority (HFEA) removed its previous guidance to licensed treatment centres (which become involved where there is medical intervention) to offer surrogacy only where it was physically impossible or highly undesirable for medical reasons for the commissioning mother to carry a pregnancy (Human Fertilisation and Embryology Authority 2009). The 2008 Act's extension of eligibility criteria for legal parentage meant that more couples would be able to use surrogacy arrangements from its implementation in 2010. In 2011, the British Surrogacy Centre opened a UK office aimed especially at gay couples, the first new UK-based service since the establishment of Childlessness Overcome Through Surrogacy (COTS) in 1988 and Surrogacy UK in 2002. Media reports and academic studies reported growth in the prevalence of people seeking cross-border fertility treatments (Culley et al., 2011) and surrogacy arrangements (Pande 2009, Palattiyil et al. 2010, Whittaker 2011). Finally, increasingly favourable social attitudes towards surrogacy were reported (van den Akker 2005, 2007, Poote and van den Akker 2009), possibly fuelled by the more recent use of surrogacy by high-profile media celebrities such as Elton John (BBC 2010) and Nicole Kidman (Donnelly 2011).

Although the European Society for Human Reproduction and Embryology [ESHRE] Task Force on Ethics and Law has produced recommendations on both surrogacy (2005) and cross-border reproductive services (Shenfield et al. 2011) and the HFEA Code of Practice (2009 as updated) sets out the legal requirements and guidance specific to the UK, none of these include any recommendations about systematic data collection. In addition, all aspects of surrogacy remain under-researched both nationally and internationally.

As a consequence of the lack of research or publicly available data about the incidence of POs and any changes to the profile of surrogates and commissioning parents, including whether overseas arrangements were involved and if there were increases in non-married applicants, we surveyed a number of sources to try and clarify the position: General Register Offices (GROs) for the four UK nations; the Child and Family Court Advisory And Support Service for England (Cafcass); and the three surrogacy agencies operating in the UK: COTS, Surrogacy UK and the British Surrogacy Centre. The latter was unable to supply directly any UK specific data (personal communication 30 October 2011) so we included information from its website alone. While our enquiries confirmed an upward trend, they also revealed apparent discrepancies and shortcomings in the records held, as is shown below.

The numbers of Parental Orders being granted

The only information kept routinely across all the organisations approached for the data is the number of POs that are granted. The status of the applicants (i.e. whether married, in a civil partnership or in

an ‘enduring family relationship’), for example, is not kept routinely. Figures obtained from the GROs for the four nations show a sharp increase starting in 2008 through until the end of 2011, the latest figures available (see Table 1).

Figures obtained from Cafcass – where by far the largest number of orders are made – match those of the GRO (England and Wales), although they use a different reporting year, i.e. 1 April to 31 March (note that Cafcass was only established in 2002 and figures from its predecessor are not available).

Table 1. Parental Orders Registered 1995–2011

Year	England and Wales	Northern Ireland	Scotland	Total
1995	50	0	2	52
1996	37	0	2	39
1997	33	0	3	36
1998	37	0	2	39
1999	36	0	0	36
2000	40	1	1	42
2001	36	0	0	36
2002	44	0	2	46
2003	45	1	1	47
2004	35	0	4	39
2005	39	1	2	42
2006	47	0	4	51
2007	47	0	4	51
2008	73	0	2	75
2009	73	0	6	79
2010	75	0	8	83
2011	133	1	15	149
Total	880	4	55	939

Sources: General Register Office England and Wales: personal communication 13 October 2011 and 11 May 2012; General Register Office Northern Ireland: personal communications 13 October 2011 and 20 March 2012; National Records of Scotland (formerly General Register Office Scotland): personal communications 13 October 2011 and 19 March 2012.

Figures from the surrogacy agencies present a different picture (see Figure 1). An earlier study by one of the authors reported surrogacy agencies as facilitating arrangements that resulted in a total of 332 surrogate births from 1995 to 1998 (van den Akker 1999). When compared with the GRO figures in Table 1 for the same period (166), this suggests that only half of those commissioning parents went on to obtain a Parental Order. The reasons for this are unclear. More recent figures also indicate a discrepancy. COTS’ website announced its six-hundredth birthday in 2007 (month unspecified) and Surrogacy UK recorded 25 POs made to the couples using their service by end of 2007 (personal communication 7 December 2011) but, according to GRO official figures, only 556 POs had been made by the end of that same year. Even allowing for the possibility that some of the ‘COTS’ births took place before POs were introduced or involved transfer of parentage in an overseas jurisdiction, this suggests that some children born through surrogacy during this time are being raised by commissioning parents who carry neither legal parentage rights nor legal parental responsibility, or had their birth incorrectly registered.

However the picture changes with the rise in POs from 2008. COTS recently reported being involved in a total of 785 births (personal communication 7 February 2012); Surrogacy UK with 57 births (personal communication 24 October 2011) and the British Surrogacy Centre, which had been operating in the US prior to opening its UK base, report on its website its involvement with 45 surrogate births to UK couples over the last eight years. Although it is likely that some of the latter will have been legally adopted in the US prior to being brought to the UK by commissioning parents,

this will not be the case for all (<http://www.britishsurrogacycentre.co.uk/success-stories/>). Thus, while surrogacy agencies currently report involvement in a total of 887 births (which may be a slight underestimate if figures were updated to end December 2011), the overall total of Pos made in the UK at the end of 2011 according to GRO figures stands at 939. This leaves the question as to why there appears to have been a downturn in the involvement of UK surrogacy agencies and who, if anyone, is filling the apparent gap? We consider this question alongside possible explanations for the rise in numbers by seeking data about the use of overseas arrangements and changes to the eligibility criteria for applicants for POs.

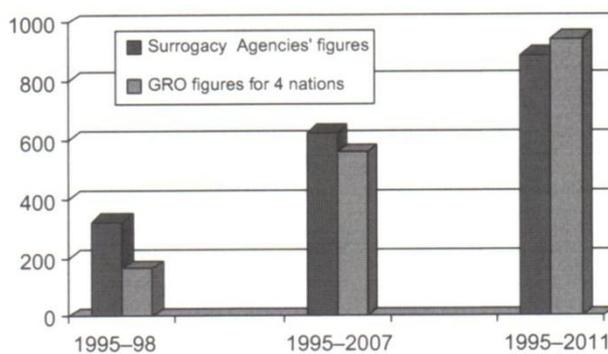


Figure 1. Numbers of Parental Orders/births recorded by surrogacy agencies and General Register Offices in the UK from 1995–2011.

Use of surrogates living overseas

Information about the country of origin of the different parties proved elusive. The GRO for England and Wales informed us that births in approximately 26% of Orders made in the year to October 2011 took place overseas, contrasting with 13% in 2010, 4% in 2009, 2% in 2008 and 0% in 1995, the first year of registration (personal communication 11 May 2012). Similar figures for Scotland were 13% in 2011 and none at all prior to that (personal communication 18 April 2012). None of the small number of POs made in Northern Ireland involved births outside the UK (personal communication 17th February 2012). Although it is reasonable to assume that surrogate births that are recorded overseas indicate planned overseas surrogacy arrangements, such data are not conclusive. Neither does knowledge of place of birth of the surrogate baby provide any information about the residence status of the surrogate. In addition, women could be brought to the UK specifically for the purpose of acting as a surrogate, or foreign nationals already living in the UK could act as a surrogate (one such case of the latter kind was reported in Crawshaw et al. 2012).

There is no legal requirement in the UK to record country of origin or citizenship of the adults involved. Neither do General Register Offices routinely record such details. Since 2007, Cafcass has recorded addresses of the parties at the time of the PO application but has advised us that their records are incomplete. Additionally, surrogates (and their partners if also a legal parent – both are called ‘respondents’ for court purposes) and commissioning parents (called ‘applicants’ for court purposes) were grouped together as ‘Adults’ until recently. Table 2 shows Cafcass figures for surrogates for 2010–2011 and for 2011–2012 (part), noting that they may be under-estimated as this period covers the introduction of a new recording system. Since our interest is to investigate any increase in the use of surrogates who appear to be based overseas, we are not reporting here on male respondents whose consent is required because they are married to the surrogate. Excluding those whose country address was not specified, 27% (49) of all surrogates over this time came from non-UK countries and 22% (40) were from three countries alone: India, US and Ukraine. It is possible that at least some of the six surrogates whose country address was ‘not specified’ may also be living overseas.

Table 2. Country address of surrogate (female respondent) in Parental Order applications as recorded by Cafcass 2010–2012.

Address Country	2010–2011	2011–2012*	Total*
Belgium	1	0	1
Canada	0	1	1
England	62	67	129
Georgia	0	2	2
India	6	14	20
Ireland	1	1	2
Scotland	0	4	4
South Africa	0	1	1
Thailand	1	1	2
Ukraine	3	1	4
US	9	7	16
Wales	1	1	2
Not specified	3	3	6
Total	87	103	190

*These figures are up to end December 2011.

We were unable to find any data about children born to overseas surrogates and brought into the country but for whom there was no intention to apply for a Parental Order, perhaps because an Adoption Order had been made in the country where the birth took place. However a search of the Westlaw UK system using the term ‘surrogacy’ showed that there have been increasing numbers of ‘reported cases’ involving overseas surrogacy arrangements in recent years where PO applications have been made. In 2007 – the last year before the number of Parental Orders started to rise – there were three reported cases with only one involving an overseas element. In subsequent years these have risen as follows: one in 2008 (Ukrainian element); one in 2009 (US element); two in 2010 (one India and one US); five in 2011 (two India; one Israeli; one Ukraine; one no overseas element). While the majority involved issues arising from the use of commercial surrogacy, several also included complex aspects arising from differences between the legal jurisdictions involved. For example, under UK law the surrogate’s husband (if she has one) as well as the surrogate are the child’s legal parents, thus effectively preventing the commissioning parents from obtaining entry clearance for the child from the UK Border Agency in such circumstances, even if the commissioning father is the biological father.

Impact of changes to eligibility criteria

The possibility that some of the rise in PO numbers results from changes to eligibility in 2010 is supported by Cafcass figures. By the end of December 2011 there were at least 29 successful gay couple applicants and three successful lesbian couple applicants, although Cafcass advised that such figures are likely to be an under-estimate as their recording of diversity is not a legislative requirement and is known to be patchy. As reported above, the British Surrogacy Centre aims its services particularly at gay couples. Surrogacy UK reported recent increased involvement with gay couples with one child already born, two pregnancies and another three gay couples actively seeking a surrogate. COTS did not supply disaggregated figures.

Discussion

The situation with regard to numbers of POs granted in the UK to transfer legal parentage from the surrogate (and husband/civil partner if she has one) to the commissioning parents remained fairly stable until 2007, moving only slowly towards around 50%. From 2007 to 2011, the annual rate more than doubled so that for 2011 it stood at 133. Changes to UK law that allowed same-sex couples and couples in an ‘enduring family relationship’ to apply for POs (providing they met the other eligibility

criteria) were introduced in 2010 and our data suggest that same-sex couples account for some of the increase (figures for those in 'enduring family relationships' are not kept). Reliable figures are not available for any changes to the profile of the countries of residence of surrogates but those obtained suggest an increase in the use of surrogates living outside the UK, especially in India and the US. However, the available figures for overseas and same-sex couples applying for a PO when taken together do not account fully for the increase. Data on the numbers of successful fertility treatments involving surrogacy arrangements that are carried out in HFEA licensed centres or on surrogacy arrangements carried out 'at home' without medical intervention are not available. Whether any changes in the social acceptability of surrogacy have prompted an increase in its use is difficult to gauge without further research.

Over this same period, there appears to have been a downturn in the involvement of UK surrogacy agencies in the arrangements. This is of some concern because agencies typically remain involved with the parties throughout the pregnancy and offer ongoing support (including peer support) following the birth on an open-ended basis – unlike those using fertility treatment centres where professional support does not usually extend beyond confirmation of the pregnancy and where there are no comparative peer support activities. A reduction in ongoing support could be disadvantageous for the parents, surrogates and the children affected.

The International Federation of Social Workers (2008) has warned of the need to monitor the global situation if we are to minimise the risk of exploitative developments. Such developments could include financial risk to the adults concerned, physical and emotional risk to both adults and children concerned and failure to afford due dignity and attention to the children and to the formation of family life. There are already some worrying indications that overseas arrangements may pose such risks. One media report exposed a 'surrogacy ring' in Thailand in 2011 in which 13 Vietnamese women, seven of whom were pregnant, had been trafficked for the purpose of acting as surrogates (ABC News 2011), leading to calls for surrogacy to be seen as a potential human trafficking activity (Whittaker 2011). Recent media reports highlight grave concerns about the exploitation of Indian surrogates. Estimates of the numbers of children being born in India to UK commissioning parents also suggest them to be well in excess of the cases known to official sources through Parental Order applications to the UK courts, thus bypassing such scrutiny and making monitoring and other follow up more difficult (Bhatia 2012, Jones 2012). There is increasing evidence of considerable economic disparity between surrogates and commissioning couples in overseas arrangements and concerns for the surrogates and children involved (Pande 2009, Palattiyil et al. 2010) as has previously been identified in the UK (van den Akker 2007). US social workers have warned that the decline in intercountry adoption may be leading to its replacement by global surrogacy as the preferred route for those wanting to build their family with a 'healthy' infant but with no less concerns among professionals as to associated ethical dilemmas and human rights concerns (Rotabi and Bromfield 2012).

In 2009, the Home Office UK Border Agency issued guidance on 'Inter-Country Surrogacy and the Immigration Rules' which sets out the conditions under which the Secretary of State can grant entry outside the Immigration Rules for children in respect of whom a Parental Order application has been made and is considered likely to be granted. The growing number of 'reported cases' that involve an overseas element makes clear the potential complexity of such arrangements and the risk to the child's (and family's) wellbeing from such arrangements in themselves and from the uncertainty of later complex and prolonged legal proceedings. Not only do they involve commercial elements that are illegal in the UK, but they have also involved medical procedures considered to be poor practice both medically and psychologically such as multiple embryo transfer, mixing of embryos formed with the surrogate's oocytes and those of donors and use of two surrogates simultaneously carrying a pregnancy for a commissioning couple and giving birth within days of each other. Concerns about overseas arrangements were echoed at a recent meeting chaired by Mr Justice Hedley, a family law judge with extensive experience of handling surrogacy cases, at which the lack of international conventions governing international surrogacy or assisted conception was highlighted (Malynn 2012).

A recent practitioner guide has also drawn attention to the difficulties faced by UK courts that need to be assured that (i) overseas surrogates (and their partners if married) have given their informed

consent to the transfer of legal parentage, (ii) children born to overseas surrogates and commissioning parents will have sufficient access to biographical details, identifying information about the surrogate and contact with her, should they wish it, and (iii) commissioning parents are sufficiently well attuned to cultural and/or racial issues that they need to incorporate into their parenting if using an overseas surrogate (Baron et al. 2012).

A recent study into the work of Parental Order Reporters (PORs) in England (Crawshaw et al. 2012, Purewal et al. 2012) reported their concerns in relation to overseas arrangements, drawing on social work's experience with overseas adoption. Further, a number of operational issues were identified including: PORs' limited access to information about assessments carried out by surrogacy agencies; varied approaches to their own assessments of, and to collecting information about, 'reasonable expenses'; concerns about the lateness of PORs' entry into the arrangement and their potentially limited influence over it; concerns about the welfare of the surrogate's 'own' children. Concerns among some PORs about the use (or potential misuse) of 'reasonable expenses', whereby a 'set rate for the job' of at least £10,000 in the UK and more elsewhere (Bhatia 2012) appears to be widespread practice, have been reflected in several court cases, with senior judges making clear that expenses should be explicitly accounted for (Blackburn-Starza 2010). Nevertheless, POs were granted in each case where these concerns were brought to the court's attention on the grounds that the child's welfare needs were best met through remaining with the parents with whom they had lived since birth and that the parent-child relationship required legal safeguard. There are well established, internationally recognised prohibitions on children being 'bought and sold'. These principles have also been reflected in agreement within Europe on payment for gamete donors (European Union 2004, Council of Europe 2007) (although flat rate 'compensation' is allowed, as recently introduced in the UK). Financial arrangements associated with surrogacy have, by contrast, been little challenged. It will be important to monitor any impact in the UK of the principle that the child's welfare should be paramount through the 2010 Regulations on this and other welfare concerns.

It is now well over a decade since the first calls were made for improved monitoring and regulation of practices surrounding surrogacy arrangements and their outcomes, and for attention to the potential for financial and other exploitation of all parties (van den Akker 1998, 2007; Brazier et al. 1998). Despite this, only limited data remain available to inform policy and practice at organisational, national and international levels. The rise in the numbers of POs and the apparent rise in overseas arrangements that do not come before the UK courts adds urgency to the need for data to be kept that allows any changes to be more readily understood and monitored and to inform policy and practice interventions and guidance that attend to the wellbeing of the children and lower the risk of exploitation of surrogates, including those overseas.

To achieve this, GROs, Cafcass (and its equivalents in the other UK nations) and the Home Office should ensure that data are maintained regarding overseas arrangements that result in a child being brought into the UK by the commissioning parents either where a Parental Order has been applied for or where other legal parentage transfer has been made already, as evidenced through an application for a UK passport to bring a child into the UK. These data should include:

- Country of origin, citizenship and address of all parties in surrogacy arrangements
- Country of birth of the surrogate child.

Cafcass (and its equivalents) should consider requiring Parental Order Reporters to record additional data to facilitate a fuller understanding of any profile changes among the parties, including:

- Whether the commissioning parents (applicants) are married, in a same-sex relationship or in an 'enduring family relationship'.
- Whether the parties used medical intervention and if so in which country.
- Whether the arrangements involved using an overseas surrogate either in another country or the UK and, if so, the country involved and the citizenship of the surrogate.
- Whether the surrogacy was genetic or gestational.

- Whether donor gametes/ embryos were used and, if so, from which country they came and the citizenship of the donor(s).

There is also a need for research into the current involvement of fertility treatment centres in surrogacy arrangements, the international situation, and more generally into the immediate and longer term impact of surrogacy on those involved, including the surrogate's own children. International surrogacy has also made available increased possibilities for family-building for gay couples. While there is now a considerable body of knowledge concerning the development of children and family relationships in two-parent female households built using reproductive technology, there is no comparable quality or quantity of information about the development of children and family relationships in two-parent male households. Further research in this specific area is also now warranted. Given that numbers involved in all these areas are relatively small and given the apparent increase in global arrangements, the value of such research being conducted internationally is apparent.

By itself, the collection of such data is insufficient beyond its value to researchers and others concerned with monitoring. It also needs a structure through which its profile can be considered on a regular basis for implications and action nationally by policy makers and service providers, informed by the data collection suggested and including that from regulators of fertility treatment centres (currently the HFEA in the UK). In addition the debate needs to continue into the role for international regulation and scrutiny and the role for professional bodies in collecting systematic data on surrogacy (Thorn et al. 2012).

In summary, changes to the UK profile of those involved in surrogacy arrangements as numbers rise is impossible to glean from existing data and the discrepancy in the figures supplied by UK surrogacy centres and those from official sources is difficult to understand. The steep increase in the number of Parental Orders made since 2008 following years of relative stability indicates the need for improved systems of monitoring, recording and scrutiny. The apparent increase in overseas arrangements that do not result in applications for Parental Orders is a matter of considerable concern as are the growing numbers of 'reported cases' involving complex issues arising from overseas elements when PO applications are made. Without well informed professionals, including child welfare and health professionals, there is a potential danger of parties being poorly informed and inadequately supported both during the surrogacy process itself and in the years ahead. If the rise in the numbers of surrogacy arrangements is accompanied (or fuelled) by an increase in the social acceptability of surrogacy, there is a further danger that more people will enter informal arrangements without any professional involvement until the court process is engaged. Without well-informed policy, the emotional, physical and financial exploitation of vulnerable parties here and overseas is looming, with the risk that a market for surrogate children is left to develop without restriction.

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