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CHAPTER 17

IS SURROGACY ETHICALLY PROBLEMATIC?

LESLIE FRANCIS

Risks of exploitation in surrogacy, especially commercial surrogacy, are impressive, as eloquently documented by Donna Dickenson in this volume. Many commentators also have written about potential harms to the child when gestation is achieved through surrogacy—from commodification in apparent baby selling, to unsafe pregnancy conditions, to unfit parents or parents with abusive conceptions of who or what they want their child to be.¹ Concerns have also been raised about the frequency with which apparently voluntary commercial surrogacy is really a form of trafficking, either of the surrogate or of the child. This chapter will assume that exploitation and its extreme form in trafficking, as well as these forms of harm to the child, are wrongs to be avoided in any permissible surrogacy. If a surrogacy practice inevitably incorporates or creates serious risks of these wrongs, the practice would be wrong. But supposing these harms do not actually exist or could be left aside, is surrogacy itself ethically permissible? Are there ethical reasons to question all surrogacy, even noncommercialized, uncoerced, and altruistic arrangements among family members?

This chapter takes up less well-trodden questions² about whether a surrogacy arrangement in which one person carries a pregnancy for another is ethically problematic in itself—and if so, why. Pregnancy and delivery are quintessential bodily labor. One set of arguments tests whether carrying a pregnancy is the type of bodily labor one person ethically may perform for another, whether or not for pay. These arguments contend that surrogacy cannot be a permissible service, no matter how well intended or structured. Another set of questions probes the value and identity of the child, asking whether surrogacy is inevitably akin to baby selling or, if not, devalues the child in some other way. A final set of related questions attends to whether surrogacy properly respects the relationship between the pregnant woman and the child-to-be. The general strategy of the argument is to show that we cannot reject all surrogacy on any of these grounds without also rejecting other practices that we find acceptable. The conclusion is that although there are serious ethical issues about surrogacy arrangements, they can be

allayed by how these arrangements are structured and are far outweighed by the interests of infertile individuals or couples in becoming parents.

Most surrogacy today is "gestational" surrogacy, in which neither the surrogate nor her partner contributes the gametes to be used in the pregnancy. I address this form of surrogacy primarily³ but begin with some remarks about "traditional" surrogacy, because it initiated the practice and has to some extent continued to frame the debates.

TRADITIONAL AND GESTATIONAL SURROGACY

Surrogacy exploded onto the legal scene in the 1988 New Jersey case of *Baby M.*⁴ In this case, Mary Beth Whitehead was the genetic and gestational mother of the child; William Stern was the child's genetic father; and William and Elizabeth Stern were the child's intended rearing parents. The pregnancy was achieved by artificial insemination using sperm from William Stern. The surrogacy contract provided that Whitehead was to be paid \$10,000 for gestation of the child and doing whatever was necessary to terminate her maternal rights so that Elizabeth Stern would be able to adopt the child. Mary Beth Whitehead's husband was also a party to the contract; he agreed to do whatever was necessary to rebut presumptions of paternity under state law. After the baby's birth, Whitehead became emotionally distraught and sought to keep the child; Stern brought suit to enforce the surrogacy contract. The New Jersey Supreme Court ultimately concluded that the surrogacy contract violated the public policy of the state, using instructive reasoning.

Core to the court's reasoning was New Jersey's adoption statute. That statute prohibited money payments in exchange for an adoption and imposed strict requirements on the relinquishment of parental rights, which was not permitted until after the child's birth. The court determined that the surrogacy arrangement employed private contract law to circumvent these restrictions of the adoption statute. In the court's view, the money was being paid to obtain an adoption and not for personal services, despite provisions in the contract reciting that it was for services. Moreover, the contract was necessarily coercive because it created an irrevocable agreement, prior to birth or even conception, for the surrender of any resulting child, also not permitted for private adoptions under New Jersey state law. Adoption is for humanitarian purposes, the court said; in contrast, the surrogacy arrangement between William Stern and the Whiteheads was an economic arrangement "without regard to the interest of the child or the natural mother."⁵

Several themes stand out in the court's critique of contractual surrogacy. The first is that carrying a child for another is not an ordinary service that can be the subject of ordinary contract law. The second is that the woman carrying the child as its genetic and gestational mother is the child's "natural" mother. This relationship can only be terminated

under very special conditions of either voluntariness (as with adoption) or malfeasance (as with the termination of parental rights for cause). These themes continue to sound in criticisms of surrogacy arrangements today.

In another early surrogacy case, this time involving gestational surrogacy, the California Supreme Court reasoned quite differently.⁶ Mark and Crispina Calvert contracted with Anna Johnson to bear a child created from Mark's sperm and Christina's egg. Anna was to be paid \$10,000 and was to relinquish all parental rights to the child in favor of the Calverts. Rejecting adoption as a model,⁷ the court turned instead to the Uniform Parentage Act's treatment of the parent-child relationship between natural or adoptive parents and their children. Under that Act, any interested party can bring suit to determine the existence of a mother-child relationship; this includes the genetic mother of the child. Just as fathers can establish paternity by establishing the genetic linkage, so can mothers, reasoned the California court. Cristina's claim to parenthood was genetic, Anna's gestational; in that sense both had claims to a maternal relationship with the child. According to the court, California law provided no basis for choosing between the two; thus, the court examined the terms of the surrogacy agreement to establish intended parenthood. According to the court: "although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."⁸

Like the New Jersey court, the California court uses the language of "natural" motherhood to describe what is also a legal choice—that is, the identification of the legal mother. Unlike New Jersey, however, California contends that the surrogate would not have been able to conceive the child in question without the intentions of the planned parents. The gestational mother is "agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own."⁹ The arrangement could be fully voluntary, as at the time of contracting Anna was not expected to "part with her own expected offspring."¹⁰ The court also opined that it is unlikely that prospective parents would choose to procreate in this way without taking the child's interests as central.

Perhaps the difference between the New Jersey and California courts' analyses hinges on the difference between traditional and gestational surrogacy. Gestational surrogacy may involve a biological relationship between the intended mother and the child that traditional surrogacy does not, the genetic tie; with traditional surrogacy, the intended mother bears no biological relationship with her prospective child. Of course, gestational surrogacy also may involve the use of third-party gametes, in which case neither the surrogate nor the intended mother is a source of the child's genetic makeup. Subsequent case law in New Jersey does reflect consideration of such genetic ties, at least to some extent. In a case decided in 2000, a sister carried an embryo created from the sperm of her brother-in-law and the egg of her sister who was unable to carry a pregnancy. The intended parents (with the surrogate's agreement) petitioned for a prebirth order to have the birth certificate list them as the child's parents. Bowing to the postbirth

right of the surrogate not to relinquish the child for adoption for 72 hours after birth, the court refused to issue the requested prebirth order. To support this conclusion, the court relied on the emotional ties created by pregnancy: the intended parents' "simplistic comparison to an incubator disregards the fact that there are human emotions and biological changes involved in pregnancy."¹¹ However, as the window for relinquishment of parental rights opened before the birth certificate needed to be filed at 5 days after birth, the court issued an order permitting the certificate to be changed before filing to list the intended parents as the child's parents, on condition that the gestational mother agree to relinquish her rights to the child. In a later decision, however, the New Jersey courts declined to extend this strategy to a case of gestational surrogacy in which the parties used a donated egg, so that the intended mother bore no biological relationship to the child and the gestational mother bore only a gestational relationship.¹² The intended parents claimed that application of the Uniform Parentage Act—the statute employed in the *Baby M* case—to allow the intended (and genetic) father to claim parentage on the birth certificate but not the intended mother violated equal protection, but the New Jersey court found that it did not as it tracked actual biological differences.¹³

This reasoning of the New Jersey court that biological ties somehow matter—whether gestational or genetic—persists in some criticisms of surrogacy arrangements. Yet it leaves puzzles about which biological ties matter and why. Moreover, in contemporary surrogacy arrangements involving oocyte donation, neither the gestational nor the intended mother has genetic ties to the child (and the intended father might not have such ties as well). Fuller examination of the services and relationships involved in surrogacy is thus critical to understanding its ethical permissibility.

SURROGACY AS SERVICE

Surrogacy is a quintessential act of bodily labor for another. It is physically intrusive, involving pregnancy, birth, and in its gestational form, hormonal stimulation and embryo transfer. Are there reasons for thinking that it is wrongful for one person to perform such invasive bodily labor as a service for another? This section addresses the ethical permissibility of providing gestational services, whether or not in exchange for pay. If it were unethical to perform these services altruistically, it would presumably also be unethical to do so for less compelling economic reasons.

The most sweeping objection to surrogacy doubts the permissibility of one person performing any invasive bodily labor for another. This claim is surely too strong: we permit and even applaud people for donating organs for others or bearing babies in loving relationships where the nongestating partner has the primary desire for the child, both examples of invasive bodily labor performed for the benefit of others. A thought experiment in Judith Jarvis Thomson's famous abortion article (1971) illustrates. Thomson analogized pregnancy to dialysis with a human being providing the kidney: suppose, she asked, you were kidnapped by a society of violin lovers and attached to a great

violinist. The plan was to allow the violinist use of your kidneys for 9 months in a manner that would save the violinist's life and that would be inconvenient but not physically risky to you. Thomson's conclusion was that because the violinist had no right to the use of your kidneys, it would be ethically permissible for you to unhook yourself from the arrangement; the analogy was used to show that it does not follow from a claim of the right to life (by the violinist) that there is a right to the means of life. To be sure, a "good Samaritan" might continue to allow the kidney use, and a "minimally decent Samaritan" might do so for a short period of time, Thomson observes; her point is only that allowing the continued kidney use is not morally obligatory. Subsequent commentary on Thomson's thought experiment has been primarily directed to supposed disanalogies between the hypothetical kidnapping and actual pregnancy. I know of no discussions that have attacked Thomson's observation that it is ethically permissible for good—or decent—Samaritans to permit the ongoing use of their kidneys in this way. Yet this is exactly what would be questioned if it were thought impermissible to allow one person to provide such invasive bodily labor for another.

A more limited objection contends that it is wrong for one person to provide particularly risky or burdensome invasive bodily labor for another. For example, in organ donation living donors are assessed and rejected if the risks to them are judged to be too high, even if they are willing to consent to the use of their bodies in this way (e.g., Reichman et al. 2011). Surrogates are also assessed for risk and—at least in programs complying with professional guidelines—rejected for significant physical or psychological risk (ASRM Practice Committee 2015; Daar, this volume). Thus if surrogates are appropriately screened for risk, it would appear that level of risk does not present a principled distinction between this use of the body of another and other uses that are judged ethically permissible. To be sure, kidney or liver transplants from living donors are performed as life-saving measures for their recipients; carrying a child for another is not typically life saving, although it may be deeply meaningful. But to defend this distinction in this way is to rely on contested judgments about whether assisted reproduction is a sufficiently weighty purpose to override the risks it might impose. One such judgment might be that services that carry a risk of death (as organ donation or pregnancy may in very unusual cases) are only permissible if their goal is to save the life of another. But this judgment would prohibit any rescue that risks the life of the rescuer (no matter how small the risk) to save another from serious but nonfatal harm. Another such judgment might be that reproduction is not a sufficiently important service, but this defense devalues reproductive bodily services in a manner that remains to be argued.

Indeed, we regard as ethically permissible other forms of physical labor for others that are quite risky. Nursing is an example. Over a third of nurses suffer debilitating back injuries primarily attributable to repetitive lifting and transferring of patients (Brown 2003). Residential care workers have similarly high rates of injury (Harris 2013). These injury rates are far beyond those associated with normal pregnancy and birth. Although many lifts and transfers are performed to avoid morbidity such as sores, others are for quality of life reasons such as a nursing home patient's ability to have meals with others or go outside. Many family members also perform these tasks in order to enable loved

ones to remain at home and in the community; although I know of no data studying familial injury rates, presumably they would be at least similar to those of trained professionals performing the same service, likely with better equipment.

Another more limited way to argue against surrogacy as a service is to argue that it is a special form of bodily labor for another that ought not to be compensated but that might permissibly be performed altruistically. As in the example of the New Jersey case described above, intrafamilial surrogacy arrangements or close-friend arrangements may be desirable for some infertile couples (ESHRE Task Force 2011). Implementing this approach are laws prohibiting commercial surrogacy but allowing uncompensated arrangements.¹⁴ This is only an objection to commercialized forms of surrogacy, however; uncompensated surrogacy would remain permissible (as in many countries of the world), unless it is inevitably tied to commercial surrogacy. However, examining arguments offered against commercial surrogacy presents the opportunity to consider whether they extend to noncommercial surrogacy as well.

COMPENSATED SURROGACY

Many jurisdictions prohibit paid surrogacy while permitting supposedly uncompensated versions of the practice. Although my primary focus is the ethics of unpaid surrogacy, examining issues about paid surrogacy can be revealing about unpaid surrogacy.

A threshold problem with drawing the commercial/noncommercial line is the difficulty in distinguishing commercial from purely uncompensated forms of surrogacy (van Zyl and Walker 2013). Although there no doubt are arrangements in which the surrogate receives no form of payment, many surrogacies—including those in jurisdictions that do not permit paid surrogacy—compensate for expenses the surrogate would not otherwise have incurred but for the gestation. These typically include medical expenses, maternity clothes (and perhaps new clothes post birth), compensation for lost wages, and other expenses associated with the pregnancy. Of note, these pregnancy-related expenses are so significant that it would arguably be unfair to the surrogate to expect her to bear them on her own.¹⁵ Moreover, pregnancies do go awry at times, and it would seem especially unfair not to provide a surrogate with insurance against unexpected medical expenses.

Recognizing these issues in distinguishing commercial from noncommercial surrogacy, van Zyl and Walker (2013) argue that neither fully commercialized models nor fully altruistic models are appropriate for understanding the practice. As another reason for rejecting the purely altruistic paradigm, these authors also contend that it fails to take into account the reciprocal obligations parties in a surrogacy arrangement have to one another; for example, the surrogate has obligations to take care during the pregnancy and the intended parents have obligations to treat the surrogate with respect. Instead, van Zyl and Walker defend surrogacy as analogous to helping professions in which altruistic motivations are important, but fair compensation and the legitimate

expectations of the parties also are recognized. An additional advantage of the professional analogy, they observe, is that professionals typically have organizations and rules to protect them from unethical conduct—both their own and those of others. On their view, if surrogacy arrangements were subject to proper oversight, it would be appropriate to enforce contracts on which the surrogate agrees in advance to relinquish the child to the intended parents.

Unfortunately, surrogacy also may be cast in altruistic terms when this is not at all what is taking place. Critics of commercial surrogacy such as Dickinson (this volume) rightly demonstrate how blatantly economic surrogate arrangements may be masked as gifts—and how this mischaracterization may conceal exploitation of surrogates. The point is important that misleadingly characterizing surrogacy as a pure gift may devalue the pressures and burdens on the surrogate. But similar concerns apply to regarding family caregivers as altruistic actors—and the ethical response is that these caregivers should be treated fairly and compensated reasonably, not that they should not engage in the care at all.

In assessing paid surrogacy, it is worth noting that we do allow some intimate activities for others to be compensated, so it cannot be the intimacy alone that explains opposition to compensation. Assistants are paid to wash, bathe, feed, and perform bowel care for people who cannot achieve these functions independently. While families often take primary roles in performing these functions—and desire to perform such caregiving functions out of love—on many views they are neither obligated to do this nor thought less of because they rely on help from others who are paid for their work (e.g., Levine 2005). Wet nursing as a social practice historically was identified with infant abandonment or with aristocratic women handing off tasks they regarded as unpleasant to the poor, but today it has garnered increased interest in light of evidence about the negative health effects of formula feeding (Stevens, Patrick, and Pickler 2009).

On the other hand, there may be intimate functions that only or primarily families can do, especially functions that rely on close personal knowledge. Hilde Lindemann (2009), for example, argues that family members have special responsibilities to construct continuing identities with people with dementia. Or there may be functions that should be reserved only to intimates such as the performance of sexual services for people with disabilities.¹⁶ But that some intimate functions are or should be special to families does not show that all are; reasons would still be required for concluding that gestation is a service that can or should only be performed within the familial or close friend relationships that are likely to be the context for noncommercial surrogacy.

Further reasons offered for viewing surrogacy as special in a way that precludes commercialization rest in accounts of the surrogate's own flourishing, the identity of the child, or the desirability of preserving certain forms of parent-child relationships. Two early and powerful criticisms of surrogacy—by Margaret Jane Radin and by Elizabeth Anderson—both developed arguments that performing this particular kind of intimate bodily labor for another is inconsistent with the pregnant woman's own flourishing. Writing before the transition from traditional to gestational surrogacy, both authors

addressed commercial forms of traditional surrogacy primarily, but with arguments that have more general import.

In her seminal article about commodification of intimate activities, Margaret Jane Radin (1987) defended a view of market-inalienability rooted in human flourishing. On her account, the dividing line between permissible and impermissible commodification lies in core aspects of personhood, freedom, and identity, set in context. Freedom is the power to choose for oneself, and identity is the continuing integrity of the self that is necessary for individuation; these interact in the context of environments in which persons seek to constitute themselves. Surrogacy (along with baby selling and prostitution) should not be subject to purchase and sale in an ideal world, Radin concludes, because they alienate important personal attributes and relationships (p. 1904). A complication for a nonideal world is that some forms of at least partial commodification may be tolerated to avoid even worse injustices. Commercialized sex is problematic because sex should be "freely shared," not engaged in only if the parties believe it is economically worthwhile. However, there may be nonideal contexts in which selling sex is the best of very bad options for otherwise impoverished or oppressed women. By contrast, babies are not fungible; to sell them is deny their individual identity (p. 1908) and is never ethically permissible, even in the worst of contexts.

Surrogacy, Radin thinks, is a more difficult case for a nonideal world, but she concludes that reproductive services should be market-inalienable even in contexts in which women have few other choices. Her reasoning is that to sell these services is to alienate a core aspect of identity. Much of her concern lies with commercialization, of both child and gestating mother, but some of what she says applies also to surrogacy in which the gestation is not commercialized. In particular, she deploys her understanding of identity to query whether the gestating woman is regarded as a fungible source of something—the child—produced to satisfy the needs or wants of others. Still worse, Radin says, what the surrogate does is embedded in gender hierarchy, at least in traditional surrogacy, where the goal is the father's but not the intended mother's genetic child: she is expected to give up her own child, and the intended infertile mother is expected to raise someone else's child, all to satisfy the intended father's desire for a genetic heir (pp. 1929-1930). These points—that the surrogate's body is being used to satisfy the wants of another, and that the desire for a surrogate-borne child (that may or may not be genetically related) is ineluctably gendered—apply even to noncommercial forms of the practice, on Radin's view.

Along similar lines, Elizabeth Anderson (1990) contends that surrogacy attributes the wrong sort of value—use value—to gestation. Legal rules that deprive the surrogate of any claims to her child, for example by requiring her to relinquish claims prebirth or even preconception, deprive her of what is "hers both genetically and gestationally" (p. 79). Gestational ties are critical to avoid reducing "the surrogate mothers from persons worthy of respect and consideration to objects of mere use" (p. 80). If these ties are not respected, we fail on Anderson's view to treat the surrogate in accord with principles consistent with her autonomy and her deeply felt emotions (p. 81).

Undoubtedly, surrogacy uses the woman's body and in this respect treats the body as having a use value. The surrogate's body is physically essential for the gestation of the resulting child. It is a significant leap from this biological fact, however, to the conclusion that the surrogacy relationship fails ethically to treat her as a subject of respect and consideration. Surrogacy arrangements that are exploitative would surely be ones in which she is not treated with the respect due persons, but this would be true of any exploitative arrangement. Surrogacy relationships in which the intended parents regard the surrogate only as a vessel for the production of their child and not as a person in her own right would also fail to respect the surrogate as a person. But similar concerns apply to many service relationships in which the servant is devalued. Moreover, while these concerns likely attend some surrogacy arrangements—medical tourism suggests illustrations (Pande 2014)—there is no reason to think they must attend all.

Concerning the surrogate, some have contended that in entering into a surrogacy arrangement she fails to treat herself with appropriate self-respect and thus devalues herself. This view requires an account of self-respect that would explain why gestating a child with the intention that others be its parents cannot demonstrate sufficient respect for oneself. Cecile Fabre (2006) attributes such a view to certain theories of the integrity of the body found in liberalism. On these liberal views, personal services involving the body are radically different from taxation: while it might be permissible (albeit not for libertarians) to require taxation to meet the material needs of others, it is impermissible to command personal services to the same end. Fabre replies that if there are duties in justice to provide the poor with material goods needed for a meaningful life by means of taxation, there are also duties in justice to provide them with necessary personal services—at least, absent some other reason to differentiate personal services from material goods. But what might these reasons be, and can they be applied to surrogacy? I have already set aside arguments that these services are uniquely burdensome or intimate. Drawing once again from Radin and Anderson, other arguments might be that surrogacy services can never be freely chosen, that these services must compromise the surrogate's integrity and thus her ability to lead a flourishing life, or that reproduction must be regarded in a special way that surrogacy does not allow.

Radin holds that market-inalienability should apply when needed to protect individual freedom. Some reasons are prophylactic, if in practice prohibiting any surrogacy is necessary to prevent the emergence of coercive surrogacy. Analogous arguments have been made recently about the Swedish law prohibiting the purchase of sex (but not its sale) that prohibition of voluntary prostitution is necessary to root out human trafficking.¹⁸ Actual likelihoods of coercion are an empirical question, but it might be hypothesized that coercive surrogacy is more likely in trans-border arrangements than in domestic surrogacy contracts and in arrangements where there is a great deal of economic disparity between the parties.¹⁹ At a minimum, it is surely important to have adequate protections against exploitation implemented in all surrogacy arrangements. At present, it is questionable whether voluntary self-regulation on the part of reproductive professionals is sufficient to ensure that these protections are implemented and followed.²⁰

Radin also hypothesizes a kind of domino effect, if permitting commercialized versions of a practice undermines keeping noncommercialized versions intact. It would thus be an argument against commercialized surrogacy if its presence undercuts altruistic surrogacy, at least assuming that it is desirable for altruistic surrogacy to continue. I know of no empirical evidence that this is the case, however, although there surely are concerns about unregulated commercial surrogacy in some US states. Moreover, noncommercial surrogacy (including compensation for expenses and lost wages) is permitted in many nations across the globe and continues despite the availability of commercial forms elsewhere.²¹ A concern on the other side is that those who favor non-commercialized surrogacy are more likely to engage a traditional surrogate, which is a far riskier endeavor from a family law perspective.²²

A related reason given by Radin is that a surrogate cannot act freely. But it is unclear why as a general matter decisions to carry a surrogate pregnancy should all be unfree, any more so than other pregnancies. Indeed, surrogate pregnancies have an advantage over as many as half of other pregnancies at least in that they are planned. So it would need to be true that clear, deliberative choices to undergo pregnancy in these circumstances cannot be freely undertaken. Surely with appropriate counseling surrogacy arrangements can be entered into with full information. Appropriate legal protections can give assurances that surrogacy contracts are not adopted as a result of threats or coercive economic need. Categorical views about the types of pregnancies that can be voluntary—such as that only pregnancies within marriage can be voluntary, or that no pregnancies can ever be fully voluntary—would seem to rely on questionable essentialist assumptions about the forms that free reproduction can take.

These points do not take fully into account the possibility that many surrogacy choices arise out of such complex circumstances and emotions that they should be regarded with suspicion. For example, Fabre cites data to the effect that surrogates most frequently enter into the arrangement out of a complexity of emotions, including guilt over prior abortions and other "mistakes" (2006, p. 192). If so, this would provide a reason for concern about whether surrogacy can be seen as evincing appropriate self-respect, or as manifesting problematic self-blame. Other data indicate that the most likely motivation for surrogacy is the altruistic desire to give parenthood to others (Jadva et al. 2003). Here, too, however, there are concerns about whether in intrafamilial arrangements subtle forms of coercion might be operative; for example, a fertile sister might feel guilty about her ability to reproduce when confronted with the pain of a sister who cannot (ESHRE Task Force 2011). Surely these pressures are operative in some surrogacy decisions; whether they are operative in sufficient numbers to say that the practice is unethical is another matter. Moreover, careful counseling can identify many cases of inappropriate pressures, even if some may remain. In assessing the evidence about the likelihood that surrogates are not choosing freely, care must be taken not to assume that reproductive choices must be irrational or subject to emotions so strong as to overwhelm choice.

A related argument made by surrogacy's critics is that the surrogate fails to recognize the inevitable emotional ties resulting from gestation. Some claims about these ties

were hypothesized before gestational surrogacy's replacement of traditional surrogacy. But even with gestational surrogacy, surely the biological changes associated with pregnancy and birth will generate emotional reactions. It is an empirical matter what forms these emotions are likely to take, how severe they are likely to be, or whether they are likely to interfere with the surrogate's subsequent life to an extent that suggests that surrogacy is wrong. One recent (albeit small) study indicates that although the immediate postbirth period is difficult, surrogates do not show signs of depression or reduced self-esteem 10 years after birth (Jadva, Imrie, and Golombok 2014). Moreover, surrogates frequently maintain contact with the intended parents and offspring to an extent that they find satisfying. Arguing that the emotional reactions of pregnancy must be so strong or manifested in a parent-child relationship—so that surrogacy is inconsistent with self-respect—would appear at best a risky strategy for feminists who want to avoid essentialist commitments about the nature of women's emotions.

Another freedom-based concern is that surrogacy contracts may be structured to commit the woman to relinquish the child before birth, or even before pregnancy has been achieved. Critics argue that this precommitment does not respect the woman's liberty to change her mind about a very important life event. Some contend that women even when they believe they have completed their own families may not be able to anticipate the emotions they will feel upon being expected to surrender the child they have borne after birth, and so should not be committed to this until after the child's arrival. On this view, no surrogacy contracts could be enforceable unless they provide a window of choice postpartum for the surrogate to decide whether to relinquish her parental rights. These arguments against precommitment were developed when traditional surrogacy was the primary form of the practice; it is understandable that women with genetic ties to the child might feel differently about relinquishment than women without genetic ties as would be the case with gestational surrogacy, as is also illustrated in the case of adoption.

In assessing surrogacy arrangements involving prebirth commitments, it is useful to ask whether surrogacy contracts are unique in the likelihood of subsequent regret, or whether there are other proposed contracts that are judged impermissible because of their unanticipated emotional burdens when the time comes for enforcement. Several doctrines in contract law might be analytically helpful here (see Fabre 2006, pp. 215–216). On a theory of unilateral mistake, contracts are voidable if one party held a mistaken belief at the time the contract was entered, that party does not bear the risk of the mistake under the contract, and either enforcement of the contract would be unconscionable or the other party had reason to know of the mistake at the time of contracting or was at fault for the mistake.²³ Typical cases of unilateral mistake are sales in which the seller was grossly in error about the nature of the item sold and seeks to undo the deal. In surrogacy, the mistake would be the surrogate's belief about her future feelings about relinquishing the child and the judgment that enforcement of the contract would be unconscionable would be based on the surrogate's attachment to the child. Cases in which contracts are voidable for unilateral mistake are very unusual, however, given the aim of contract law to introduce stability into exchange relationships. If surrogacy is

different, perhaps the conclusion to be drawn is that surrogate contracts lacking a postpartum window should be unenforceable as unconscionable. This introduces an element of uncertainty into any surrogacy agreement, although in the vast majority of cases the arrangement will conclude as planned. In any event, a determination that freedom requires this limitation on surrogacy contracts is not an argument against surrogacy, but only for structuring surrogacy contracts to give surrogates the liberty to change their minds within a postpartum window.

Yet another reason for rejecting surrogacy is the judgment that surrogacy expresses the wrong sort of regard for one's reproductive capacities. On this view, the surrogate sees her reproductive capacities as something to be used to produce a child for someone else rather than for her own parenting. It would be question begging to argue that surrogacy is wrong because it is wrong to use one's reproductive capacities for another—whether or not this use is wrong is exactly what is at issue. Radin, Anderson, and other writers argue that reproduction is alienated if the child is for another; the idea here is that reproduction must be linked to the intention to parent (even though there are circumstances such as wartime, privation, or disease in which it seems unlikely that the intention will come to fruition). For example, Stuart Oultram writes that “women who donate eggs arguably do so in an alienated way in so much as they donate to assist others rather than because they want to become parents themselves” (2015, p. 472). Christine Overall advances a similar point in arguing that surrogacy demonstrates inadequate levels of care for the child: “it must be acknowledged that the gestating woman creates the baby not because she wants it for its own sake but precisely *in order* to give it away; so her caring certainly has strict limits (2015, p. 354). And Carole Pateman (1988) argues that surrogacy is wrong because it detaches women from their reproductive identities.

Now, powerful reasons for linking reproduction to the intention to parent are protection of the resulting child or the parent-child relationship. It is unclear, however, why the parenting intention or the parent-child relation must lie between the gestating woman and the child she bears, and not between the child and the intended parents (notably even in cases in which they are the genetic parents of the child, having contributed the gametes used in *in vitro* fertilization, or in which neither the surrogate nor the intended parents are genetically related to the child because conception was achieved with a donated embryo). In any event, subsequent sections will take up regard for the child and regard for the parent-child relationship. Here, the issue is why reproduction would be problematic because it is not linked to the gestating woman's own intention to parent and it is hard to see what an answer would be that is not simply a rejection of surrogacy.

A final possibility is that in becoming a surrogate, a woman compromises her own ability to have a meaningful conception of her good. Conceptual claims to this effect might be that having a child for another cannot be part of a meaningful conception of the good, or that intending to parent a child one bears must be part of a meaningful conception of one's good. But it is hard to see why these claims are not question begging. Empirical versions of this concern would be that surrogacy is such a commitment that it precludes other activities that are critical to a meaningful conception of one's good.

If surrogacy compromised women's later capabilities to form partnerships or families, or reduced the likelihood of surrogates pursuing educations or satisfying careers, this would indeed be a weighty concern. But there are ways of selecting surrogates that blunt this objection. Surrogacy could be limited to women who have already had children or to those whose partners consent—although either of these limits might themselves be regarded as impermissible restrictions on reproductive liberty. Moreover, many women become surrogates because they believe that surrogacy will further their conceptions of their good. With commercial surrogacy, women may engage in the practice to provide more than they would otherwise be able to for their own children, or to stay at home with their children rather than entering the workforce in other ways. Some women become surrogates in order to pay for their educations. To be sure, care must be taken that these arrangements are not exploitative. But in practice there surely are contexts in which surrogacy does not detract from and even furthers the surrogate's well-formed conception of her good.

Surrogacy's critics also argue that the practice is inevitably gendered, as it imposes the male intended parent's preferences on the surrogate or compels his partner to raise another's child. This objection, if it has purchase at all, applies most clearly to situations such as the Baby M case in which the traditional surrogate is artificially inseminated with the intended father's sperm. Many surrogate pregnancies today involve the gametes of the intended parents or gametes from unrelated donors. In such cases, the genetic tie to the child may be as important to the female partner as to the male. Surrogacy is also a reproductive option for same-sex couples wanting to become parents through means other than adoption. Although surely some pregnancies and some surrogate pregnancies involve gendered pressures to have "his" child, it is by no means necessary for all or many surrogate pregnancies to do so. It would seem particularly odd to make this argument in the cases in which a woman's oocyte and donated sperm are used, or gametes from neither intended parent are used, or the intended parents are a same-sex couple. At most, the concerns about gender hierarchy seem applicable to surrogacy using sperm from the male intended parent but donated oocytes, as might be the case for older couples seeking to become parents. But this would yield the odd result: that surrogacy is ethically problematic in just the case in which gametes of the male intended parent are used. A far more reasonable position is to screen and counsel surrogates and intended parents to do the best to assure that the choices of all parties are genuinely made in a manner free from pressure.

SURROGACY: THE CHILD'S INTERESTS AND IDENTITY

Surrogacy is about assisting in the creation of a baby for another. Many objections to surrogacy contend that it is "baby selling." In noncommercial surrogacy, these objections

do not hold, but other concerns about the baby may apply. Before turning to these other objections, however, it is important to unpack what might be the subject of sale in commercial surrogacy. Here are some possibilities: the child, rights of the child, rights over the child, or gestational services. It is generally agreed that the sale of a human being by another human being is wrong: it treats the person as a commodity, violates the person's freedom and dignity, and likely subjects the person to oppression or worse. It also treats persons as fungible commodities, exchangeable for other commodities with more desirable characteristics if the price is right. Children are not fungible commodities and must not be treated as such, either by the producing surrogate or by the intended parents. Fabre draws the conclusion that the surrogate must regard the child as more than an object with exchange value, as must the receiving parents. This regard, she thinks, differentiates surrogacy from the case of a celebrity couple having a baby to sell it to the highest bidder, or of parents deciding to put an older child up for bids.

But if we distinguish such sales regarding the person as a fungible commodity—in which there is a paid transfer of all rights and duties over the person as object—from the sale of more particular rights of or over the person (Fabre 2006, p. 190; Hanna 2010), whether these other forms of sale are objectionable is more complex. Parenthetically, it should be noted that there are other cases in which the use value of a child is coupled with respect for the child in his or her own right. Consider the creation of so-called replacement babies for a child who has died (Encyclopedia of Death and Dying 2016) or savior siblings for a child in need of stem cell replacement after high-dose chemotherapy (Sheldon and Wilkinson 2003). Although these practices are ethically controversial, many contend that they are ethically permissible as long as the resulting child will be raised in a loving fashion.

The impermissibility of the sale of rights of the person depends on what those rights are and the process of sale. Many rights of persons—ordinary property rights, for example—are subject to sale at the discretion of the person. Other rights—liberty rights, rights to be a property owner, or rights to nondiscrimination—are judged on many political theories not to be alienable in this way. Commercial surrogacy presses whether the child's right to particular parents could be subject to sale. But a core question about surrogacy is whether the child has a right to be raised by a gestational parent—or instead whether genetic or social ties are the basis for the child's right to be parented by the persons with those ties. From the claim that the child has a right to be parented, or the weaker claim that the child has a right to be assured that his or her needs will be met and that she will be afforded the opportunities requisite for a meaningful life, it does not follow that the child has a right to be parented by her gestational parent. It would, of course, follow that the child's rights to adequate parenting, welfare, or opportunities must be protected in any surrogacy arrangement and that surrogacy arrangements without such protections are impermissible.

An additional complication about the child's rights is that children cannot act for themselves. This complication does not mean that rights of the child cannot be alienated, but it does mean that any alienation must be subject to conditions that protect the interests of the child and that hold open critically important choices for the child to make at

a later time to the extent possible (e.g., Davis 1997, Feinberg 1980, Mills 2003). To be permissible, surrogacy arrangements must respect these constraints. In this regard, there is an important dispute about whether children should be told the circumstances of their conception or gestation, including information about the identity of gamete donors or surrogates. This issue is considered by Glenn Cohen's contribution to this volume.

In commercial surrogacy, another possible object of sale is the gestating parent's parental rights over the child. Elizabeth Anderson, for example, has argued that parental rights of genetic parents should not be bought or sold (1990, p. 79). In considering whether selling these rights is objectionable, it is worth noting that some sales of rights over persons may be permissible, depending on the context and the rights in question. Although most political philosophies agree it is wrong for persons to sell themselves into slavery, or to be sold into slavery, it is not so clear that it is wrong for people to buy themselves out of slavery or for others to do so on their behalf, thus extinguishing the rights of slaveholders. (Of course, this would only be an issue in partial compliance theory, as slavery itself is wrong.) Radin contends that it is wrong for parents to sell their rights to a child, because it is in effect selling the child (1987, p. 1904). But this raises the question whether sale of these particular rights over a child treats the child as an object of sale; I have argued earlier that it need not do so if the rights and interests of the child are protected.

Yet another possibility is that it wrongs the gestational parent for her parental rights to be subject to sale. Surely it does when the circumstances of sale are coercive, but it is a different question whether it does so in other cases. The preceding section argued that the sale of gestational services is not a wrong to the surrogate if it occurs in a context in which she is adequately protected. Such sales need not interfere with her liberty, her integrity, or her ability to lead a meaningful life if they are structured in ways that protect her adequately. Leaving for the next section whether commercial surrogacy appropriately respects the parent-child relationship, similar reasoning can be applied to the sale of parental rights.

A further question is whether the gestational surrogate has parental rights to sell or to give away in the first place. Why parental rights should attach exclusively or at all to the gestational parent is itself at issue in surrogacy. Elizabeth Anderson argued about traditional surrogacy that a "consent-intent" conceptualization of parenthood—that the intended parents are the possessors of parental rights—makes parenthood arbitrary. Instead, she argues for recognition of genetic ties as determinative of parenthood: in recognizing these ties, she says, "we help to secure children's interests in having an assured place in the world, which is more firm than the wills of their parents . . . [it] does not make the obligation to care for those whom one has created (intentionally or not) contingent upon an arbitrary desire to do so" (1990, p. 79). This view, however, would vest parental rights in the surrogate only when she is the genetic parent, which she will not be in cases of gestational surrogacy where the genetic parents will either be the intended parents or donors. It would seem implausible to assume that vesting parental rights in this way will be most protective of children. This suggests that the determination of where to locate parental rights is a normative choice, constructed rather

than determined by some “natural” feature such as gestation or genetics. For a variety of historical reasons, among them identifying stable sources of parenting for children, legal regimes have identified gestating women and their partners during gestation as the legal parents of the child, but there is nothing inevitable about this location. On the other side of gestational parenting is the argument that the failure to recognize the role of the intended parent devalues the role of persons in initiating reproductive projects (Robertson 1996; see also Oultram 2015).

In addition to stable parenting and protection of the child’s interests, another issue that has been raised about surrogacy is the child’s identity. Understanding identity is far beyond the scope of this discussion, but it should be noted briefly that there are many different accounts of identity not at all linked to genetics or gestation. Especially important here are views of identity as social (e.g., Appiah 2014, 2005). Such accounts may link identity to nation, culture, race, sex, disability, or religion, among other social constructions. To hold that children’s identity is violated if their genetic parents do not raise them is to ignore the complexity of these matters. And it is also, of course, to reject any reproduction in which gamete donation plays a part, as well as adoption. Children need identities, but it is far from clear that these must be identities constructed by their genetic parents.

THE RELATIONSHIP OF GESTATING

A final set of criticisms of surrogacy claims that it has a mistaken view of the parent–child relationship. The surrogate interacts with the baby in carrying it, these critics argue, and this relationship is not respected if the child is given away. In this respect, pregnancy is a unique form of labor. Overall writes: “The situation of a pregnant woman is radically different from the situation of a factory worker. The factory worker brings only his skill and labor to the factory; he does not provide the materials on which he labors or the environment in which he labors. The pregnant woman, on the other hand, is, herself, the environment in which her reproductive labor is performed. She also provides the materials out of which the child is created” (Overall 2015, p. 357). Earlier sections of this chapter have considered the interests of the surrogate and the child separately; the view to be explored here is that the pregnancy itself creates a relationship that is not properly respected by relinquishment of the child. On this view, there must be overriding reasons—such as the incapacity of gestators—to warrant sundering this relationship, but these reasons do not obtain in surrogacy.

But why should gestation be regarded as ethically weighty in this way? To be sure, 9 months of interaction with a fetus (assuming the pregnancy is carried to term) has effects on the woman’s body and emotions that must be taken into account. And the child in utero has experiences, too; there is evidence that after birth children respond in particular ways to prebirth experiences. These facts may be taken to have metaphysical significance, as Hilde Lindemann (this volume) explores. But whether these

considerations yield the conclusion that the gestational relationship should have overriding ethical force is another matter.

CONCLUSION

This chapter has addressed objections to surrogacy that do not depend on exploitation or commercialization. It has argued that reasons offered for claims that surrogacy wrongs the surrogate, the resulting child, or the parent-child relationship would rule out other practices widely regarded as permissible, devalue the desire of infertile couples to become intended parents, or assume the impermissibility of surrogacy. The examination of these arguments does reveal important cautions about surrogacy, however. Care must be taken to assure that all parties are well informed as to risks. Both surrogates and intended parents must be carefully evaluated. Interests of the child in adequate parenting must be assured. Although payment for surrogacy is not per se problematic, exploitation is a risk of surrogacy; the protections in place today in at least some jurisdictions may not be adequate safeguards, especially when surrogacy is commercialized. Finally, protection of the woman's choice about matters important to identity and relationships is a reason for giving her the option to relinquish any parental claims she might have after birth.

NOTES

1. For example, Christine Overall (2014) has recently proposed a system of parental licensing for people using surrogates.
2. A symposium issue of the *Washington Law Review* published in December 2014 does consider whether commercial surrogacy should be more widely available in light of the decision of the US Supreme Court rejecting California's ban on same-sex marriage. The contribution by David Orentlicher to this volume contains an excellent summary of state laws concerning surrogacy, including limits on traditional surrogacy and commercial surrogacy.
3. For an argument that legal preferences for gestational surrogacy mistakenly limit the liberty of surrogates and intended parents, and impose greater risks and costs on all parties, see Shapiro (2014).
4. *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (N.J. 1988).
5. 109 N.J. at 425.
6. *Johnson v. Calvert*, 19 Cal. Rptr.2d 494, 851 P.2d 776 (Cal. 1993) (en banc).
7. 851 P.2d at 784.
8. 851 P.2d at 782.
9. 851 P.2d at 787.
10. 851 P.2d at 784.
11. *A.W.H. & P.W. v. G.H.B.*, 339 N.J. Super. 495, 503 (2000).
12. *In re T.J.S.*, 212 N.J. 334, 54 A.3d 263 (N.J. 2012).

13. Ibid. at 336 (Hoens, J., concurring) (per curiam).
14. Washington is an example, West's RCWA 26.26.101, 26.26.230. By comparison, organ donation is another example of bodily use in service of another that many believe ought not to be commercialized, even leaving aside risks of exploitation; this view is implemented in the prohibition on organ sales in the United States and elsewhere.
15. Shapiro (2014) extends this fairness concern in arguing that compensation isn't the important issue for feminist analysis of surrogacy; instead, power dynamics and exploitation are critical to judgments of forms of surrogacy.
16. Commercialization aside, the therapeutic sex performed with a man with severe physical disabilities in the movie *The Sessions* would be regarded as inappropriate on this basis. The movie is based on the story of Mark O'Brian, "On Seeing a Sex Surrogate," <http://noteasybeingred.tumblr.com/post/16646893808/on-seeing-a-sex-surrogate-mark-obrian>.
17. For a discussion of the difference between use value and exchange value, see Dickenson, this volume.
18. estonica!co, "Sweden's Prostitution Solution: Why Hasn't Anyone Tried This Before?" <http://prostitutionresearch.com/wp-content/uploads/2014/11/Swedens-Prostitution-Solution.pdf>.
19. Jeffrey Kirby (2014) explains why current transnational practices are coercive and how they might be rendered less so.
20. For an excellent discussion of protections for surrogates, see ASRM Ethics Committee 2013. Although ASRM requires its members to subscribe to the standards and principles of the Society, this does not prevent nonmembers from engaging in activities that ASRM would find unethical.
21. The European Society of Human Reproduction and Endocrinology, for example, takes the position that noncommercial surrogacy is the only permissible form of the practice, including payment for medical expenses not otherwise covered, expenses of pregnancy, and lost wages (ESHRE Task Force 2005).
22. I owe this point to Judith Daar.
23. Rest. (2d) Contracts § 153.

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