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Commodification and Commercial Surrogacy

Is commercial surrogate motherhood immoral? Should this practice be legally prohibited or severely restricted? A commercial surrogate mother is someone who is commissioned and paid to undertake the labor of pregnancy in order to produce a child that will be delivered to the commissioning parties (usually a couple), who will raise the child as their own and will hold all parental rights. A *partial* surrogate contributes the egg that becomes the child and so is genetically as well as gestationally the parent of the child. A *full* surrogate is not the genetic mother of the child she is paid to bear.[1] The law regarding commercial surrogacy is currently unsettled, and moral opinion on the topic also seems to be in flux. Interestingly, feminist theorists addressing the commercial surrogacy issue have been divided in their responses, though one can perhaps discern an emerging consensus among feminists against legal tolerance of the practice.[2]

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1. The terms *partial* and *full* surrogate are introduced in Peter Singer and Deane Wells, *Making Babies: The New Science and Ethics of Conception* (New York: Charles Scribner's Sons, 1985), p. 96.

2. For a feminist argument in favor of commercial surrogacy (and more generally in favor of determination by free contract rather than by patriarchal custom) see Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989). For a feminist case against commercial surrogacy, see Elizabeth S. Anderson, "Is Women's Labor a Commodity?" *Philosophy & Public Affairs* 19, no. 1 (Winter 1990): 71–92; see also Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100 (1987): 1849–1937.

In this article I shall argue tentatively for the claim that commercial surrogacy should be legally permissible. I am more strongly convinced that a commitment to feminism should not predispose anyone against surrogacy. At least, no arguments offered so far should persuade anyone who is committed to equal rights for women and men and the dismantling of gender-based hierarchies to favor either legal prohibition or moral condemnation of commercial surrogacy.

I take it to be a datum of commonsense morality that we ought to be left free to engage in some activities or not as we wish, but not to engage in them for a price. Similarly, there are some goods that we should be left free to transfer to others if we wish, but not to buy or sell. In these respects there should be limits on the permissible scope of market exchange activity.[3] An uncontroversial example of such a limit is the norm that citizens should be legally free to vote or not as they wish, but not to sell their votes or to vote a certain way for a price. A free market in votes would not serve the purposes that support the democratic rule of one person, one vote.

John Stuart Mill touched upon this topic in the final chapter of *On Liberty*. Mill there countenanced the possibility that a due regard for the value of individual liberty might lead a society to permit fornication and gambling but prohibit pimping and the keeping of gambling houses. Mill comments, "Whatever it is permitted to do, it must be permitted to advise to do. The question is doubtful only when the instigator derives a personal benefit from the advice, when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil."[4] Mill does not pronounce a definitive verdict on the issue.

I propose to investigate this topic in the spirit of Mill's remarks. That is, I suggest that proposed bans on the market exchange of goods and services should be evaluated according to the expected consequences of such bans. Consequences shall be evaluated according to an egalitarian welfarist standard. In the context of public policy formation, *welfarism* holds that the object of policy should be to advance the welfare or utility of those affected by it. *Welfarism* names a family of views whose mem-

3. For a clear statement of this point, see Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp. 95–103.

4. John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (1859; Indianapolis and Cambridge: Hackett, 1978), pp. 97–98.

bers include the identification of a person's welfare with the extent to which she (a) is happy, or (b) achieves satisfaction of her self-interested preferences, or (c) achieves the values she would endorse after ideal, fully informed deliberation, or (d) attains goods that are objectively valuable according to the correct perfectionist account of these matters. *Egalitarianism*, a variant of consequentialism, holds that the moral value of obtaining a benefit (or avoiding a loss) for a person is greater, the worse-off in terms of lifetime welfare the person is prior to receipt of the benefit. So understood, egalitarianism includes a spectrum of positions that vary in the amount of extra weight that is assigned to welfare gains for the worse-off. At one end of the spectrum is a leximin norm; at the other end of the spectrum egalitarianism yields only marginally different recommendations from those yielded by straight utilitarianism.[5] Consequentialism is the view that one should always act so as to maximize the expected moral value of the consequences. Applied to the choice of institutions and policies, consequentialism holds that institutions should be so arranged as to maximize good consequences. Egalitarianism requires assigning extra weight to benefits to the worse-off when aggregating the consequences of possible policies with a view to deciding which is optimal. Roughly speaking, egalitarianism is utilitarianism modified to give priority to the interests of the worse-off.[6]

Egalitarian welfarism as a version of consequentialism will collect standard objections against consequentialism. One that is especially relevant to the commercial surrogacy issue is that in some possible circumstances egalitarian welfarism would recommend against equal treatment of men and women. It could be the case that the worst-off sector of society includes a large number of misogynist men and efficiently catering to their interests requires discrimination against women. I think this objection is mistaken, but rather than argue the point here I will stipulate as a prior moral constraint on governmental policies that they not permit discrimination against women.

5. A leximin norm stipulates that as a first priority one should maximize benefits for the worst-off individual; then as a second priority maximize benefits for the second-worst-off individual (provided that doing so does not lessen at all the benefit secured for the worst-off individual); then as a third priority maximize benefits for the third-worst-off individual (provided that doing so does not lessen at all the benefits secured for the worst-off and second-worst-off individuals); and so on, proceeding to the best-off individual.

6. Samuel Scheffler describes an egalitarian consequentialist position in *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1982), pp. 26–33. See also Paul Weirich, "Utility Tempered with Equality," *Nous* 17 (1983): 423–39.

In this article the aim is to apply egalitarian welfarism to the issue of how it is proper to set limits on market interactions. No attempt is made here to defend egalitarianism beyond showing that its implications for this difficult issue are sensible.

Restricting the Permitted Scope of Market Exchange

In a helpful discussion, Margaret Radin defines *market-inalienability* and analyzes what is required to justify assigning the legal status of market-inalienability to categories of goods and services.[7] As Radin defines the term, a good that is market-inalienable is not to be bought and sold on the market. Market-inalienability or nonsalability is only one sort of inalienability; a prohibition on market-inalienability does not forbid transfer of ownership by gift, bequest, or abandonment.

Radin points out that enacting a legal rule of market-inalienability "often expresses an aspiration for noncommodification."[8] What is made market-inalienable, we think, should not be treated or conceived as something that is appropriately bought and sold on a market.

A good might be market-alienable or market-inalienable by moral rule, by law, or both. With respect to either morals or law, the status of market-inalienability can vary in degree. At the limit, it might be permissible to sell a good on the open market to anyone who is willing to purchase it and can afford whatever price is charged, the same price holding for all purchasers. Short of open-market trading, a good might be permissibly sold only by means of barter exchange, or only to a restricted set of purchasers, or only at restricted prices. Goods the salability of which is limited in any of these ways are not fully market-alienable.

To be a candidate for the status of market-inalienability, the good in question must be such that it would be possible, even if not desirable, to sell it. If love and friendship are understood as goods that cannot be sold or traded, then love and friendship cannot be market-inalienable.

The demand for legal market-inalienability tends to arise when a social custom or norm restricting free-market exchange is important to many people yet precarious, either because a significant number of persons would flout the norm if legally free to do so or because the very people who affirm the norm are afraid that if legally free to violate it they would

7. Radin, "Market-Inalienability."
8. Ibid., p. 1855.

do so. In the first case, the dissenters from the norm, by acting in violation of it, impose a psychic externality on those who wish to live in a society in which everyone complies with the norm. In the second case, those who wish to restrict liberty are afraid that they might abuse it in this area by choosing to act against their own present considered values. The bare fact that there is legal freedom to violate the norm might tempt some who presently accept the norm to violate it owing to their weakness of will or to an irrational change of belief on their part.

In this connection, note Radin's striking description of what she calls the "domino effect" of permitting market transactions in sexual services:

> What if sex were fully and openly commodified? Suppose newspapers, radio, TV, and billboards advertised sexual services as imaginatively and vividly as they advertise computer services, health clubs, or soft drinks. Suppose the sexual partner of your choice could be ordered through a catalog, or through a large brokerage firm that has an "800" number, or in a local showroom. Suppose the business of recruiting suppliers of sexual services was carried on in the same way as corporate headhunting or training of word-processing operators. A change would occur in everyone's discourse about sex, and in particular about women's sexuality. . . . The open market might render subconscious valuation of women (and perhaps everyone) in sexual dollar value impossible to avoid.[9]

This observation might be parlayed into an argument for legal prohibition or restriction of prostitution in order to prevent serious psychic harm to persons who would prefer to adhere to an ideal of nonmonetized sexual sharing but would find themselves deviating from this ideal against their considered judgment if the sale of sexual services were legally tolerated and became prevalent. According to this account, laws against prostitution are needed in order to protect unwilling persons from becoming swingers.

An initial difficulty that must be faced is that modern societies contain willing swingers as well as unwilling swingers. Citizens affirm diverse and conflicting conceptions of the good in sexual matters. Many citizens believe that sexual behavior should be confined to religiously sanctioned marriage, and that within marriage sexual behavior between husband

9. Ibid., p. 1922.

and wife should be subordinated to the goal of procreation. Of those who would approve in the abstract of the ideal of "nonmonetized sharing," some would include within that ideal "one-night stands" or engagement in sex by persons who are sexually attracted to one another but who do not have in mind any commitment to building a relationship of friendship or mutual affection with their sexual partners. Others who prize the ideal of nonmonetized sharing might view sex for pleasure divorced from any context of friendship or affection as hardly different from prostitution. The enactment of laws that render sexual activity market-inalienable puts state power behind controversial conceptions of the good. How can the government justify taking sides in such disputes? One influential version of liberalism proceeds from the core intuition that the government should be neutral in all disputes among citizens about conceptions of the good and of what constitutes human flourishing.[10]

The response might be made that perhaps the government would be taking sides as much by letting the free market take its course as by interfering in the operation of the market. So perhaps there is no neutrality to be had in this context. Whether government intervenes or refrains from intervention, its choices will promote some ways of life and conceptions of the good and hinder others.[11] Any responsible governmental policy must be formulated in the light of these consequences.

Some of the points asserted in the previous paragraph are disputable, but I accept them. They require reinterpretation, not rejection, of the liberal ideal of neutrality on the good. Welfarist theories of justice hold that the proper business of the state is to advance the welfare of all citi-

10. The *locus classicus* for this position is Ronald Dworkin, "Liberalism" and "Do We Have a Right to Pornography?"—essays reprinted in his collection *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985). For further discussion see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 111–24; Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987); John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy & Public Affairs* 17, no. 4 (Fall 1988): 251–76; Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy & Public Affairs* 16, no. 3 (Summer 1987): 215–40; and Richard Arneson, "Neutrality and Utility," *Canadian Journal of Philosophy* 20 (1990): 215–40.

11. In this connection one should distinguish between a governmental policy that deliberately aims to foster some ways of life and conceptions of the good and to inhibit the flourishing of others and a governmental policy that is motivated by no such aim but that as a (perhaps) foreseen but unintended by-product will result in promoting some ways and hindering others. One might hold that government is obligated to abide by "neutrality of aim" but not "neutrality of outcome."

zens fairly. In an obvious sense welfarism is non-neutral on the good: the good for each citizen is identified with utility or welfare. There are varieties of welfarism proceeding from various interpretations of *utility* or *welfare*. But we can reintroduce a form of liberal neutrality by requiring that the state not try to advance any individual's welfare by striving to achieve a specification that she rejects and would continue to reject if she were reasonable and well informed. If Smith seeks a life of hedonistic satisfaction, and would continue to affirm this goal even after reasonable and well-informed deliberation proceeding from her own standpoint, welfarism as amended by this neutrality constraint forbids the government to seek Smith's welfare by helping her attain deep friendships and excellence in achievements, even if these latter goals seem superior from my own standpoint. On this view the liberal state might block Smith's pursuit of hedonistic satisfaction to some extent in order to help others attain their good, but not in order to impose on Smith some good that is alien to her.

In theory, action by the state to promote some highly controversial view of human good is consistent with the weak state neutrality norm just described. We might urge the state to promote Catholicism over Buddhism in the expectation that all reasonable persons after adequate reflection would embrace Catholicism. The issue then is whether this expectation is itself reasonable. Weak neutrality grounds a broad toleration policy only when it is conjoined to the further claim that individuals, being highly diverse, would reasonably continue to disagree about what is ultimately valuable for themselves, so that state policy in promoting the good must respect this diversity in people's ultimate goals for themselves.[12]

According to welfarism, the state should be neutral also in the further sense of not excluding any person's good from equal consideration and influence in policy formation. Welfarism in conjunction with an egalitarian maximizing principle of policy provides a principled response to the question of how state policy should be formed to deal with conflicts of interest among citizens arising from their allegiance to conflicting ways of life and conceptions of the good. This response holds that fulfillment of each individual's conception of her good should count for one, and none for more than one (except to the extent that some persons' concep-

12. For an argument supporting this further claim, see Mill, *On Liberty*, esp. chap. 3.

tions have already been fulfilled to a greater extent) in the determination of state policy.

Radin's discussion does not reach the issue of how the state might fairly promote human flourishing when citizens disagree about what constitutes human flourishing. She instead appeals to her own somewhat Aristotelian-Marxian conception of human flourishing as she ponders whether extending, restricting, or maintaining the present scope of the market would best help us live well. The lesson she draws is that goods that are important to personhood should be protected, so far as is feasible, from commodity status. The difficulty in all of this is that the conceptions of personhood and the good to which she is appealing are deeply controversial in modern society. They would be even more controversial if they were stated in greater detail at a somewhat lower level of abstraction. In the absence of a convincing argument for the particular conception of human flourishing that she favors, the attempt to justify any proposed market-inalienability by appeal to that conception is bound to appear merely arbitrary to those who happen to disagree.[13]

The counterposition of the economic market and personhood stands in need of justification especially in view of the commonplace liberal notion that markets are not just a device for satisfying given wants efficiently but are also a desirable mechanism for forming people's values and preferences. The opportunity to choose among a wide array of goods for sale and among a wide array of employment opportunities, and hence among a wide variety of lives, is thought to be a good way to facilitate thoughtful and informed refining of one's preferences and values. In this way the market enhances individuality.

Consider in the same light Elizabeth Anderson's view that "to say that something is properly regarded as a commodity is to claim that the norms of the market are appropriate for regulating its production, exchange, and enjoyment."[14] Leaving aside the quibble that there are no "market norms" of enjoyment, I find this assertion ambiguous. It could mean that if something is a *proper commodity*, market norms *alone* are applicable

13. But see Martha Nussbaum, "Aristotelian Social Democracy," in *Liberalism and the Good*, ed. R. Bruce Douglass, Gerald R. Mara, and Henry S. Richardson (New York and London: Routledge, Chapman and Hall, 1990), pp. 203–52, for an attempt to work out a liberal, disjunctive perfectionist view of the good as the basis for an activist state policy.

14. Anderson, "Is Women's Labor a Commodity?" p. 72. See also Elizabeth S. Anderson, "The Ethical Limitations of the Market," *Economics and Philosophy* 6 (1990): 179–205.

to its production and exchange (call this the "strong sense"), or it could mean that if something is a proper commodity, market norms—perhaps along with other norms—are applicable to its production and exchange (call this the "weak sense"). I doubt that anything is a proper commodity in the strong sense. For instance, it is perfectly appropriate that strawberries are sold on a free and open market *and* properly appreciated for their color, taste, and other aesthetic qualities, some of which are reliably detectable only by strawberry cognoscenti. But from the fact that nonmarket norms are properly applicable to a type of good it does not follow that the good is not a proper commodity in the weak sense.[15]

More important is the following: From the premise that from some reasonable standpoint the nature of a good is such that it should not be exchanged on the market it cannot be inferred that the state should remove the good from the sphere of market exchange. For it may be that from other equally reasonable standpoints the good is legitimately the object of market trading. The state cannot simply associate itself with one viewpoint shared by some citizens and denied by others. The state must be able to justify its policies by appeal to principles that offer a reasonable way of adjudicating among conflicting viewpoints in a diverse democracy.

In passing, I note that even if it were agreed that a good deserves to be treated in accordance with its worth and that such treatment is not guaranteed by permitting its exchange on the market, it still would not follow that the good should be made market-inalienable. The market may be the best that we can do so far as ensuring appropriately respectful treatment is concerned.

Allowing a class of goods to be distributed by market exchange permits their sale by persons who do not truly appreciate the goods to persons who do not truly appreciate them either. But the existence of a market for a good does not guarantee unappreciative use. That depends on the tastes and resources of potential consumers and producers. Indeed, an unregulated market displays a tendency to place goods in the hands of those who truly appreciate them. I myself have little understanding or appreciation of Elvis Presley memorabilia, and the market effectively prevents unappreciative persons like me from retaining ownership of them. The market price is driven up by those who have the greatest apprecia-

15. This point is made by Will Kymlicka, "Rethinking the Family," *Philosophy & Public Affairs* 20, no. 1 (Winter 1991): 95.

tion of these relics. Of course, this tendency for ownership and appreciation to coincide when goods are freely exchangeable is quite weak, in that willingness to pay is limited by ability to pay. To evaluate the market on this score one must compare it with feasible institutional alternatives such as bureaucratic assignment. One must also evaluate nonmarket distribution mechanisms in the same way. The state may attempt to foster the widespread appreciation of great works of art by displaying them in public museums. This method of distribution allows tourists to degrade classic works of art by applying to them utterly inappropriate standards of interior decoration ("Honey, that Delacroix would look swell in our living room next to our pink sofa, against our velvet wallpaper"). This does not mean that it is deplorable for the state to exhibit great art in ways that permit its degradation. Public display at nominal cost to viewers with guards monitoring the viewers might be the best overall means for fostering widespread aesthetically sophisticated appreciation of the art.

In short, even if securing a particular mode of appropriate respect and valuation of a type of good is deemed to be of top priority, it might be that commodification of the good is the best means to this end. But in most cases, where citizens reasonably maintain quite divergent views about the nature of appropriate treatment of a type of good, the state should regulate the production and distribution of the good in a way that respects this diversity, and here tolerance of commodification is often, though not always, the best diversity-respecting mechanism.

Commodification as Harm to Persons

The intrusion of market relations into the decision to become a parent is said to have a symbolic significance that threatens to erode the idea that persons are to be prized and respected for their intrinsic humanity, not valued at their market price. Radin and Alexander Capron write, "a market in reproductive services would have adverse effects on all persons, not simply on those who choose to enter that market. All personal attributes of ourselves as well as our children (sex, eye color, predicted IQ and athletic ability, and so forth) would be given a dollar value by the market, whether or not we wanted to regard ourselves and our progeny in these terms."[16]

16. A. M. Capron and M. J. Radin, "Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood," *Law, Medicine, and Health Care* 16 (1988): 36.

This is a serious concern, not to be dismissed lightly. Capron and Radin are asserting (1) that we all have a stake in maintaining social norms that function as barriers to regarding persons as fungible commodities and (2) that this concern is a good reason legally to prohibit commercial surrogacy. My claim will be that we can go a long way toward agreeing with (1) without accepting (2).

There is no denying that many of us intuitively find the practice of attaching price tags to persons and aspects of persons to be repulsive. Commercial surrogacy aside, one can point to other social norms whose purpose is to insulate children from direct tagging by market price. For example, John Roemer has observed that a social norm appears to be in force in the field of education that prohibits a school from directly charging its students varying prices tailored to estimates of their individual teachability.[17] (To some extent talent-based scholarships offered by private schools achieve a very rough and indirect approximation to such price discrimination.) Obviously the costs of educating a child vary according to his particular traits, but allowing schools to charge a different price for the "same" education for different children would be too close to tolerating price tags on individual children—hence the social norm. The fear that commercial surrogacy would induce a commonly known price list for desired traits in children so that each child could compute what his parents might have paid for him is similar in kind to distaste for the pricing of individual children in an educational market.

However, there are reasons to doubt that a suitably regulated market in adoption and gestational services would allow market pricing to run amok. First, notice that the social norm against explicit pricing of individual children's educations is maintained without apparent legal coercion, at least in the private school arena. Second, even if commercial surrogacy and a limited market in adoption services are accepted, the overwhelming majority of children will continue to be raised by natural parents whose initial relation to their child is not mediated by surrogacy or adoption. Market trading in parental rights and duties will take place at the margin, not at the center, of childbearing practices. Moreover, the revulsion many of us feel in response to imaginary scenarios involving something uncomfortably close to explicit pricing of children will tend to

17. John E. Roemer, "Providing Equal Educational Opportunity: Public vs. Voucher Schools," *Social Philosophy and Policy* 9 (1992): 291–309.

inhibit such explicit pricing. In a somewhat similar way, there are now in contemporary societies marketlike dating practices and what economists would call "shadow pricing" of individual attributes in the quasi market for romantic mates and marriage partners.[18] Such practices coexist with social norms that work to prevent the spread of explicit economic markets in this domain. The tendency of the market to encompass ever-wider areas of social life in the absence of legal barriers to its spread is just that—a tendency, not a law of nature.[19] Third, state regulation of commercial surrogacy and adoption services could be adapted to the goal of shrouding the pricing of individual attributes if a threat of inordinately explicit pricing on a wide scale was perceived.

Perhaps most important, the fear that decriminalizing commercial surrogacy will promote market pricing of children's attributes assumes that the surrogacies in question are partial surrogacies. However, in the long run, as medical technology improves, one would expect partial surrogacy to be eclipsed by full surrogacy. But with full surrogacy the pricing of the gestational services provided by the surrogate does not even implicitly involve pricing of children's attributes. So perhaps any movement toward commodification of the sort that spurs the strongest concern will be a short-lived phenomenon. Full surrogacy leaves intact the threat of commodification of women's childbearing labor but lessens the threat of commodification of children.

Another, closely related fear expressed by opponents of commercial surrogacy is that the more persons are legitimately conceived, in some respects, as commodities, the less gripping will be the norm that each person is individually precious, has rights that should be respected, and is owed reasonable opportunities to live a good life. Once made explicit, this fear appears misplaced. We are used to the idea that market evaluation of people's labor power is fully compatible with regarding persons as nonfungible in other ways. Thomas Hobbes stated bluntly, "The *value*, or WORTH of a man, is as of all other things, his Price; that is to say, so

18. Gary Van Gorp, John Stempfle, and David Olson, "Dating Attitudes, Expectations, and Physical Attractiveness" (unpublished manuscript), cited in Eliot Aronson, *The Social Animal* (New York: W. H. Freeman, 1984), p. 418. See also Gary S. Becker, "A Theory of Marriage," in his *The Economic Approach to Human Behavior* (Chicago and London: University of Chicago Press, 1976), pp. 205–50.

19. This point is made by Eric Mack, "Dominos and the Fear of Commodification," in *NOMOS XXXI: Markets and Justice*, ed. John W. Chapman and J. Roland Pennock (New York: New York University Press, 1989), pp. 198–225.

much as would be given for the use of his Power."[20] But the history of market economies shows that a fine-grained appreciation of the differential value of people's labor power is fully compatible with an entrenched (if sometimes embattled) popular belief that all these people are endowed with certain basic rights that ought to be respected and that they are in that sense all of equal worth.

When new social practices strike us as bizarre or make us feel uncomfortable, we are tempted to place undue reliance on purely speculative harms that our fancy associates with the new and disturbing practices. Such speculative claims that the freedom to experiment with the new practices would do grave harm should be treated with caution. We should recall Lord Brougham's confidence in 1838 that a proposed parliamentary bill allowing mothers to visit their children living with their legally separated fathers could "ruin half the families in the kingdom." Lord Brougham cautioned that it would be "dangerous . . . to tamper" with the "delicate" structure of contemporaneous family law.[21] With hindsight, the dangers that some discern today from changing the symbolism of family relations by permitting commercial surrogacy may be seen to have no firmer foundation in reality than Lord Brougham's conservative fears.

Similarly, it is pure speculation to suggest that market pricing bound up with commercial surrogacy, which might result in a higher price for blond, blue-eyed babies than for others, would tend to decrease people's willingness to accord proper respect to the individual rights of all persons or to believe that the proper goal of governmental policy is the good of all citizens regardless of race, creed, ethnic origin, or the market price of their labor power.

Finally, suppose that giving legal legitimacy to commercial surrogacy would in fact cause a widespread increase in the market pricing of individual traits and that this effect would be per se undesirable. We still would need some way of deciding *how* undesirable this effect would be and of determining how to weigh this loss together with other moral costs and benefits. Welfarist consequentialism modified by varying degrees of egalitarian weighting provides ways of making these determi-

20. Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (1651; Harmondsworth, Middlesex, Eng.: Penguin Books, 1968), Pt. I, chap. 10, p. 151.

21. Cited from the English parliamentary debate in Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983): 1507.

nations. To pick out one unique way, one would have to determine the appropriate stringency of egalitarian weighting. Evidently some way is needed—the argument against commercial surrogacy must go beyond merely pointing to a possible undesirable effect.

In this connection it is important to note that there are very obvious, considerable, and morally uncontroversial benefits that would accrue from a policy of permitting commercial surrogacy and tolerating an expanded market in adoption services. Many couples want their own children but are infertile. Besides heterosexual married couples, one should count infertile lesbian and gay couples. If the cause of the infertility is the inability of either member of the couple to become pregnant or to carry a fetus to term, surrogacy can help. In other cases, a woman who wishes to have a child may find that pregnancy is unduly medically risky for her.[22] Nonstandard procreative techniques ranging from artificial insemination by donor (AID) to various surrogacy arrangements (in which the surrogate is either the genetic and gestational mother or only the latter) can provide a close substitute for having a child of one's own. This desire for one's own child is undeniably very important to many childless persons. There should be a strong legal and moral presumption in favor of permitting arrangements that enable this desire to be satisfied. A solid showing of significant harm to nonconsenting parties could overturn this presumption, as could a solid paternalistic argument to the effect that commercial surrogate mothers (or conceivably the commissioning parties) would be bringing about severe harm to themselves, in a significant number of cases, despite their willingness to engage in this contractual arrangement. I do not see even the vague outline of any such arguments in the literature assessing the practice of commercial surrogacy.

Some advocates of prohibition of surrogacy have made claims that suggest that the desires of nonchildbearing individuals who seek surrogacy arrangements are morally suspect, so that the satisfaction of these desires should be discounted in the formation of public policy. Some have speculated that the patriarchal desire of males to carry on their genetic line is the major impetus toward surrogacy. As Radin puts it, "paid sur-

22. Of course, the legal availability of surrogacy could also permit women who wish to have children to avoid pregnancy for reasons of convenience. But if this were deemed unacceptable, surrogacy for reasons of "mere convenience" could be legally prohibited. One can support a legal policy of permitting commercial surrogacy without supporting a laissez-faire unregulated market in surrogacy services.

rogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on."[23] In a similar vein, some have observed that those who have recourse to commercial surrogacy could have sought to become adoptive parents but decided against this option. Perhaps such attempts to circumvent the adoption system should raise the suspicion that some of those who seek surrogacy would not be judged fit parents by an adoption agency or are motivated by the untoward desire not to become the parents of a child (perhaps of another race) that they could get through adoption procedures. This last point suggests the claim that surrogacy offers no genuine good to prospective parents that is not already available to them through the adoption system. But if surrogacy is not needed to benefit prospective parents, then even the speculative suspicion that surrogacy might create social harm might suffice to warrant legal prohibition.

This argument fails on two counts: (1) adoption is not available for many would-be parents who should be deemed fit to assume the parenting role and (2) even if adoption were available, for many would-be parents an adopted child is not a close substitute for a child to whom they are genetically related. Adoption laws vary from country to country and, within the United States, from state to state, but everywhere the procedures are restrictive, particularly those followed by public adoption agencies. Waiting lists are long, and one can expect a time lag of several years between initiation and completion of an adoption procedure. The alternative of privately arranged adoption is costly and only quasi-legal in some jurisdictions. It is easier to obtain an older child through adoption, but most would-be adoptive parents would prefer a new baby. In many areas Anglo couples can adopt more quickly if they are willing to adopt a non-Anglo child, but in a racist society in which positive affirmation of one's racial identity is an important mode of coping among members of minority races, reluctance to cross racial lines when adopting is understandable, though unfortunate. Moreover, if the existence of a surplus of nonwhite children available for adoption is a reason to limit surrogacy arrangements, why is it not also a good reason to restrict normal childbearing by fertile individuals, who could choose to adopt instead of bearing their own children just as nonfertile individuals could adopt instead of engaging in surrogacy? I raise this question not in order to suggest

23. Radin, "Market-Inalienability," p. 1935.

restricting the freedom to bear children in the standard way but in order to challenge the bias against nonstandard procreative techniques and the motives of those who would opt to use them.

An adopted child is for many individuals and couples not a close substitute for a child to whom one is genetically related. The enormous investment by many couples in medical procedures to enhance their fertility suggests the depth of this concern (though of course it does not establish that the concern is reasonable). I postulate that much of this concern reflects the simple desire that the child one raises bear traits that run in one's family, and I think the burden of proof should be on those who would impugn the innocence of this desire to have a child of one's own, a child who carries one's genes. Moreover, it is not unreasonable for would-be parents to surmise that such a genetic relation facilitates bonding and enhances the relationship between parent figure and child.[24] There is yet a further potential advantage of surrogacy over adoption from the commissioning couple's point of view. The contractual negotiations and the screening of potential surrogate mothers by the agency and the would-be parents give the couple some assurance that the child they hope to raise will be well cared for in the womb. The adoption process rarely if ever generates this sort of assurance. So many morally innocent and understandable motives can prompt the desire for commercial surrogacy that it is idle to speculate about possible suspect motives.

Moreover, whatever one believes oneself entitled to infer about the retrograde patriarchal aspirations of a man who wishes to have a child by a commercial surrogacy arrangement, one should remember that in the typical surrogacy arrangement the would-be parents include a woman who wishes to raise a child as her own but is unable to undergo pregnancy or can do so only at excessive risk. Unless we hold that biology is destiny, we ought to respect this desire to be a parent even though one is biologically ill-equipped for pregnancy. Although I know of no empiri-

24. A recent survey of statistical patterns in family homicides provides suggestive evidence on this point. The authors appeal to a wide range of studies showing that people are less likely to kill genetic relatives than genetically unrelated family members or others living in the same household. For example, in the United States, if you are a child living with one or more stepparents you are one hundred times more likely to die of child abuse than if you are a child living with both of your genetic parents. See Martin Daly and Margo Wilson, "Evolutionary Social Psychology and Family Homicide," *Science* 242 (1988): 519–23.

cal work that directly addresses the issue, I believe it is unreasonable to suppose that in the typical couple seeking surrogacy the male is the prime mover and the female is passively acquiescing to male desires. After all, "many different kinds of evidence suggest that *on average* women feel a stronger desire for children than men do and a greater concern for their welfare after they are born."[25]

Commercial Surrogacy and Harms to Children

One set of arguments against commercial surrogacy concerns harms and benefits to children who might be affected by the practice.

According to its detractors, commercial surrogacy substitutes market norms for norms of parental love. This same encroachment of market norms is threatened by proposals to relax the present constraints of adoption law so as to permit expanded market trading between childless couples who want a baby and women who are contemplating bringing a fetus to term and who might be induced to relinquish the child at birth for a price. These intrusions of the market into parental choice are sometimes called "baby-selling."

Notice first of all that the term *baby-selling* in this context is a misnomer. What those who advocate a market in surrogacy and adoption services propose is that the right and obligation to assume parental responsibility for the care of a particular child should be marketable. This may be a good or a bad idea but is not remotely a proposal for baby-selling.

This claim might be challenged by the observation that talk of buying and selling does presuppose that the object of exchange is private property, but this can be a matter of degree. After all, we do speak of "selling pets" even though there are legal and moral limits on what one may do to a pet one "owns." Pets are not privately owned in the same full sense that cars and toothbrushes are. But this observation does not establish the propriety of the label "baby-selling" for the practice of buying and selling parental rights and responsibilities. A parent does not in any sense own her child even if she acquires parental rights and responsibilities by purchase. For any entity, an owner with a property right in that entity has some (perhaps limited) legitimate freedom to dispose of it at

25. Victor R. Fuchs, *Women's Quest for Economic Equality* (Cambridge, Mass.: Harvard University Press, 1988), p. 4.

will, according to her whim or pleasure, but parents do not have even limited rights to dispose of their children at will. The rights that parents have to control their children's behavior and to make major decisions affecting their lives while they are young are assigned to parents for the sake of their children's welfare and are supposed to be exercised for the good of their children.[26] The point of parental rights is to enable parents to carry out their obligations to care for their children. These parental rights are not property rights, so buying and selling these rights does not equate with buying and selling a child.

Notice also that even the most extreme advocates of a greater role for markets advocate a very restricted market in the right to parent. After all, the normal presumption in favor of free trade does not apply in this case.[27] Normally, if all parties voluntarily agree to an exchange of goods, the presumption is that all parties benefit from the exchange, so unless third parties are harmed, the sale should be permitted. But if the good being exchanged is the right and obligation to be the parent of a particular infant, that very infant cannot be a consenting party to the transaction, so there can be no presumption from the voluntary character of the transaction that it serves the interests of the infant. There is a prima facie case for free trade here only if the market is regulated in such a way as to ensure that the child who is indirectly the object of the transaction is not wrongfully harmed.[28]

26. A complication should be mentioned. Parents are assigned rights of control over their children for the sake of the children. But in exercising these rights parents are entitled to make decisions affecting children's welfare on the basis of what is good for the family as a whole and, within limits, on the basis of what is good for society as a whole. Parents might choose to move the family from one city to another because the move is better for the parents, even though disadvantageous for the children, if the parents stand to gain a lot and the children are (a) hurt only slightly and (b) not pushed below a minimal tolerable level of well-being. Parents are surely morally entitled to make some decisions that are expected to produce good consequences for non–family members even though they are expected to reduce the well-being of all family members, including their children. I believe that these points are consistent with my claim in the text that parental rights over children are not property rights.

27. Elisabeth M. Landes and Richard A. Posner, perhaps the most prominent advocates of something close to a laissez-faire market in adoption services for young children, explicitly acknowledge this point at p. 342 of "The Economics of the Baby Shortage," *Journal of Legal Studies* 7 (1978): 323–48. See also Richard A. Posner, "The Regulation of the Market in Adoptions," *Boston University Law Review* 67 (1987): 59–72.

28. There is a catch here, of course. In a typical commercial surrogacy arrangement, the child who is the object of the transaction would not exist if the surrogacy arrangement had not been made. Even if a child produced by a surrogacy arrangement has life prospects

The advocates of expansion of the market in the right to parent see the scope of that market as limited to infants and very small children. Nobody, to my knowledge, proposes that parenting rights and obligations with respect to a child should be tradable so long as the child is a minor. We could imagine a world in which parents disappointed by their adolescent child's failure to develop athletic prowess or the skills needed for entry to an elite college could trade away their parenting responsibilities owed to that child. Similarly, parents of an unpromising child who turns unexpectedly handsome, beautiful, smart, graceful, and so on in early adolescence could profit from the increased market value of their parenting rights in that child by selling these rights to would-be parents of high-fliers. One could also imagine a market in which parents' rights and obligations are decomposed and separately salable.

Such an extended free market in parental rights and duties would be a nightmare. No one advocates it. Parents and children alike have a strong *ex ante* interest in the stability of their bond. Having the option of divorcing one's child (or of being divorced by her) would lower expected utility for all parties. By this I mean that prior to knowing the particular traits of one's child or one's parents, one would prefer a stable parental bond—one that, at least after infancy, cannot be traded away at will by either parents or children. *Ex post*, when full information about traits is available, some children (or agents negotiating on their behalf) might do better swapping for more suitable parents. But in the most egregious cases of parental neglect that would prompt desires to dissociate from one's parents, state intervention properly carried out would better cater to the child's interests. On the other side, once traits are known, some parents would do better to divest themselves of their children, but "by upholding a system of involuntary (genetic) ties of obligation among people, even when the adults among them prefer to divide their rights and obligations in other ways, 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."[29] One might quibble about whether so much should be made

that are far below average, she cannot be harmed by the arrangement unless her life prospects are so bad that bringing her into existence should count as wronging her. Bonnie Steinbock points this out, citing the work of Derek Parfit, in her "Surrogate Motherhood as Prenatal Adoption," in *Surrogate Motherhood: Politics and Privacy*, ed. Larry Gostin (Bloomington: Indiana University Press, 1990), pp. 44–50.

29. Anderson, "Is Women's Labor a Commodity?" p. 80.

of genetic ties, but that some sort of parental ties should be assured for the sake of children's security I take to be indisputable. The questions at issue are really quite limited. One question that arises is whether the system of involuntary ties should be loosened (beyond current adoption law) to allow parents and would-be parents to trade rights and responsibilities prior to the birth of the child in question or shortly after birth.

The claim that commercial surrogacy and a limited market in infant adoption services threaten the stability of family ties is purely speculative. To my knowledge no one who asserts this claim has provided evidence for it. A paid surrogate or gestational mother brings a child into the world knowing that there are two potential parent figures who very strongly want to be the parents of that child—the commissioning couple who made the surrogacy contract with her. (If it was felt that two parents in the wings are not enough, one could require that a valid surrogacy contract be signed by a third party who pledges to take on the role of parent if the primary parties to the contract prove unable or unwilling to fulfill their responsibilities. But notice that we require nothing like this extra guarantee when an ordinary heterosexual couple decides to have a child.)[30] Why is it bad to permit a natural parent to relinquish parental responsibilities by sale in such a case? For that matter, we could say that in the case of a valid surrogacy arrangement the surrogate mother, if genetically the mother of the child, is fulfilling her responsibilities as a natural parent—understood as seeing to it that some responsible party undertakes a commitment to take on the full rights and responsibilities of parenthood with respect to one's child. Compare the surrogacy arrangement with the frequent cases in which a woman bears a child in circumstances such that there is very little or no prospect that more than one parent will care for it. If single parenthood is morally acceptable, why not surrogacy?[31]

30. Kymlicka expresses sensible doubts about our current practice of granting wide reproductive freedom to heterosexual couples while sharply curtailing the reproductive freedom of nonstandard couples and groups in "Rethinking the Family," pp. 83–97.

31. For a somewhat opposed view of this issue, see Katharine T. Bartlett, "Re-Expressing Parenthood," *Yale Law Journal* 98 (1988): 293–335. Bartlett does not favor criminalizing commercial surrogacy, but she holds that the courts should not enforce surrogacy contracts against the will of a surrogate mother who has a change of heart and wishes to keep the child she bears, in breach of the contract. Among other reasons, she states that "declining to enforce surrogacy arrangements would also disaffirm the notion of 'convenient' childbearing" (p. 335). The idea seems to be that legal rules that allow the burdens, risks, and

Women's Labor

Aside from alleged harms to children and alleged harms to all of us that are supposed to flow from the commodification of childbearing, opponents of paid surrogacy point to the intrinsic indignity and perhaps indecency of the practice from the standpoint of the woman who is paid to bear children. Capron and Radin state that we should not permit women to become "paid breeding stock, like farm animals." They further observe, "The role of paid breeder is incompatible with a society in which individuals are valued for themselves and are aided in achieving a full sense of human well-being and potentiality."[32] Why think this? Hardly anyone, to my knowledge, believes that there is anything degrading about surrogacy when motivated by altruism or other friendly noncommercial aims.[33] There is surely nothing wrong with a woman volunteering to become a surrogate mother for her infertile sister, who will at birth by prior agreement become the child's mother. Nor is there anything necessarily undesirable or unfair in the acceptance of such offers. Why, then, is it wrong, or degrading, or intrinsically harmful to the surrogate, if she is paid for the service?

The answer sometimes offered is that women's labor—the labor of pregnancy and childbearing—is peculiarly intimate and personal, somewhat like making love. Hence performing women's labor for pay is degrading and alienating, so much so that it is reasonable to judge that the person who engages in commercial surrogacy is harming herself, whatever might be her own perspective on this engagement.

This line of argument against commercial surrogacy is matched by a

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inconvenience of childbearing to be shifted or avoided by contractual provision might foster irresponsible attitudes toward parenting. See also Janet L. Dolgin, "Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett," *Women's Rights Law Reporter* 12 (1990): 103–13.

32. Capron and Radin, "Choosing Family Law over Contract Law," p. 36.

33. But consider this statement in the Warnock Report on Human Fertilisation and Embryology: "The objections [against surrogacy] turn essentially on the view that to introduce a third party into the process of procreation which should be confined to the loving relationship between two people, is an attack on the marital relationship." See Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Oxford: Basil Blackwell, 1984). See also Radin, "Market-Inalienability," p. 1930: "Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, although they may actually be reinforcing oppressive gender roles."

parallel argument against legal tolerance of prostitution. Consider Elizabeth Anderson's views on the baseness of prostitution: "Sexuality as a specifically human, shared good cannot be achieved except through gift exchange; market motives cannot provide it. The failure of reciprocity implied in the sale of sexual services signifies not simply a failure to realize a good, but a degradation of the prostitute, whose sexuality is reduced to the status of a mere service to the customer: sexuality is equated with the lesser good of money."[34]

But, first of all, it is not clear why Anderson thinks that the distinction between freely given sex and prostitution warrants the judgment that prostitution is base and should be forbidden rather than the judgment that prostitution, though good, is less good than freely given sex. The same question would arise if the same claim were made about commercial surrogacy. One could accept what the quotation above asserts—except for the suitability of the label "degradation"—without accepting that the practice should be subject to either moral condemnation or legal prohibition.

One should recognize that the ideal of freely given sex is itself controversial, and, I claim, would remain controversial even after full rational deliberation with full information among the disputants. In a diverse democracy, citizens affirm many different and conflicting conceptions of the good in sexual matters. Given such deep-seated disagreement, an argument for the conclusion that society should adopt a posture of condemnation or prohibition toward some sexual practice must go beyond the appeal to one controversial ideal among others. Again, the same point holds with respect to a train of thought that concludes that commercial surrogacy should be banned.

The argument under review is that women's labor is noble labor and performance of noble labor for pay is degrading, so commercial surrogacy and other forms of paid women's labor should be banned. Besides the difficulties already canvassed, a further problem with this argument is that it does not identify women's labor as unique and in need of unique legal handling. Many kinds of work thought by many of us to be noble labor are nevertheless regarded as appropriately done for money, and no widely held norm in market societies denigrates the performance of no-

34. Anderson, "The Ethical Limitations of the Market," p. 188.

ble labor for pay. One wonders why noble women's labor should be treated differently.

This is not to deny that some types of labor are partly insulated from the economic marketplace. By and large, religious sermons are not bought and sold on the market. Rather, a congregation customarily pays a minister who preaches for free to all who come to church at stated times. Churchgoers are expected to donate money to help defray the expenses of the church, but the nonmarket organization of religious services expresses the feelings of churchgoers that sacred matters should be kept somehow distinct from worldly affairs. The point to note here is that what sustains this partial separation of religious life and ordinary business affairs is the devotion of the faithful, not any legal prohibition.

In point of fact, from what we know of women who have volunteered to be commercial surrogates, many are not acting as purely self-interested profit-maximizers, but are moved by mixed motives, including empathy for the infertile couple they hope to help. One commercial surrogate explained her choice in these terms: "I'm not going to cure cancer or become Mother Theresa, but a baby is one thing I can sort of give back, something I can give to someone who couldn't have it any other way."[35] It strikes me that one has to be quite dogmatic to insist a priori that the personal experience of commercial surrogacy that this woman is describing must have been an instance of alienated, degrading labor.

Elizabeth Anderson argues interestingly for the position that I am claiming is dogmatic. She asserts that the commodification of women's labor—the labor of childbearing—violates women's claims to respect and consideration in three ways. First, permitting women's labor to be sold allows the exploitation of the potential surrogate's altruistic motives in seeking a surrogacy arrangement. The woman will be paid less by virtue of her partially altruistic motivation than she would be in its absence. Second, a surrogacy contract necessarily denies legitimacy to the pregnant woman's own evolving perspective on her pregnancy. Third, the contract turns women's labor into alienated labor by requiring the suppression of the feelings of parental love and attachment that the pregnant woman will predictably experience. Call these the failure of reciprocity, denial of perspective, and suppression of feeling problems.

35. Barbara Kantrowitz, "Who Keeps Baby M?" *Newsweek*, 19 January 1987, pp. 44–49, as cited in Martha A. Field, *Surrogate Motherhood* (Cambridge, Mass.: Harvard University Press, 1988), p. 20.

Failure of Reciprocity

The claim is that the commercial surrogate's desire to help the commissioning couple puts her in a position of vulnerability to exploitation. That the potential commercial surrogate is likely to be poor and the commissioning couple well-to-do exacerbates the former's weak bargaining position.

But so long as there is no fraud or misrepresentation, I do not believe that the failure to reciprocate altruism is necessarily wrongful. If a surrogate mother expects lasting emotional ties to the commissioning couple and she is misled about the chances that long-term ties will develop, she is wronged. But it is reasonable to suppose that surrogacy contracts can be regulated to minimize the dangers of such wrong. (One might require that both parties to the contract engage legal counsel, or receive psychological counseling.) But the fact that someone is willing to accept a lower price for provision of a service because she altruistically cares about those who will benefit from the service does not tend to show that the purchase price is unjust. (Notice that if altruists and purely self-interested agents compete for trade, the altruists need not do worse than the egoists. If those who purchase babysitting services are willing to pay more for a babysitter who truly cares for babies [and provided the purchasers can reliably distinguish caring from noncaring babysitters],[36] then the market will compensate caring babysitters more highly than egoistic babysitters.) At any rate, the failure of altruism issue at most raises a question about how to ensure fair pricing of surrogacy services. This concern might motivate setting a minimum price for the service or regulation of some other sort, but not prohibition.

Denial of Perspective

Any contract ties down the future and determines one's future behavior to some extent. That is what contracts are for. Signing a contract for future performance does not deny that one's views might change in the interim. Undergoing a change of one's perspective, however, does not change the terms of the contract. Our interest in having a device for providing mutual assurances of this sort is what motivates the institution of contract.

36. For some nonskeptical speculation and citation of evidence on this issue, see Robert H. Frank, *Passions within Reason: The Strategic Role of the Emotions* (New York and London: Norton, 1988), chaps. 4–6.

In this respect the problems that surrogacy contracts can engender are similar to the difficulties that any contract can cause. In particular, the idea that in case of a breach of contract for labor services, specific performance of the contracted-for labor should not be enforced perhaps applies with special force to surrogacy arrangements. There are two instances of changed views of the surrogate mother that raise special concerns. One is that surrogacy contracts might require amniocentesis and stipulate that the surrogate mother is to obtain an abortion if fetal abnormalities are revealed. I take it to be uncontroversial that courts should not require a surrogate to obtain an abortion against her will, regardless of contractual stipulation. For essentially the same reason, the surrogate mother should have the inalienable right to terminate the pregnancy by abortion against the wishes of the commissioning parties and against any contrary terms in the contract.

A second special concern is that the surrogate mother might change her mind during the pregnancy regarding her decision to turn over the baby to the commissioning couple. It is clearly desirable that the law clearly delineate rights and obligations for such scenarios, to minimize the occurrence of bitter lawsuits. The main alternatives appear to be to decide as a matter of public policy either (a) that whatever terms the parties have voluntarily agreed to will be enforced or (b) that the surrogate mother shall retain the right to keep custody of the child she bears until she relinquishes him physically to the commissioning couple after birth. The argument for (b) is that it is hard for a woman to predict how she will feel about relinquishing the child and that if she eventually wishes to retain custody it would be cruel to snatch the child from her arms.

The call between (a) and (b) seems to me close. Sometimes (b) is urged on grounds of consistency with adoption law, which in most jurisdictions does not regard as binding a prebirth agreement to give up a child for adoption. Adoption law forbids offering financial inducement to a pregnant woman or new mother to give up her baby for adoption, and also prohibits acceptance of such offers by parents. I suppose that if the assignment of the child to parents after birth in surrogacy arrangements is held to be legitimately determined by the terms of the contract, adoption law should probably be liberalized somewhat to bring it into alignment with surrogacy law.

Nonetheless, the situation of a pregnant woman considering whether

to give up her child for adoption can be distinguished from the situation of a surrogate mother considering whether to breach the contract. First, we can agree that it would be painfully confusing for many prospective parents, who either have deliberately brought about a pregnancy or simply find themselves with a child in prospect, to be faced with a choice between keeping their child and relinquishing the child to others for money. Offering financial inducement to relinquish one's child in this way might sensibly be prohibited in order to prevent such painful confusion. Similarly, if after the onset of pregnancy a woman decides to relinquish custody of her child, she might sensibly be given the inalienable legal right to change her mind at least up to the point at which the child is born and she has physically relinquished it. The commercial surrogacy case is different because the commissioned child would not exist were it not for the contractual arrangement. The initial intention on the part of the surrogate mother is to assist in producing a child for whom others are to assume parental responsibility. Moreover, this child-creating intention has taken the form of a contractual promise. For the same reason, the commissioning couple has a greater legitimate stake in the outcome of a commercial surrogate pregnancy. The deliberate act of the commissioning couple has brought this child into existence. If they keep their part of the bargain and are not reasonably suspected to be unfit parents, they arguably should get custody of the child even if the surrogate has a change of heart, just as a change of heart on the part of the commissioning couple would not release them from their obligation to become the parents of the child born of the surrogacy arrangement.[37] But on the other side there is the hardship to the surrogate. Perhaps the issue should be decided depending on whether the loss stemming from the lessened value of a voidable contract to commissioning couples plus the loss to couples who are disappointed when the surrogate reverses her decision are outweighed by the loss to the surrogates who would have to

37. Difficult cases will arise when the child is born with severe defects and neither the commissioning couple nor the surrogate mother is willing to assume parental responsibilities toward it. But these cases do not pose any special difficulties beyond the problems inherent in any childbirth that results in a severely disabled child. One might permit parents to relinquish such a child to governmental caretaking agencies, or one might not. One might permit parents to carry out infanticide against severely disabled newborns, or one might not. Whatever policy is deemed best for these hard cases can apply to the commercial surrogacy context.

give up the children they have borne against their will if specific performance of surrogacy contracts is enforced.[38]

Suppression of Feeling

To repeat: The contract does not require the surrogate mother to feel in certain ways, but rather to act in certain ways. The contract might require the surrogate woman to act against her feelings in order to fulfill its terms. To this extent the labor of fulfilling the contract might turn out to be alienated labor. But in a liberal society (whether capitalist or socialist) alienated labor is not forbidden. Citizens should be left free to arrange their work lives in ways that trade off alienated labor against other benefits according to their own notions of acceptable compromises among diverse goals and values.

Paternalism and Egalitarian Welfarism

When the layers of rhetoric in arguments against commercial surrogacy are stripped away, the morally important residual concern is paternalism. Perhaps the woman who is contemplating undertaking the role of commercial surrogate mother is being tempted to a choice that is against her best interests—either in all cases or in a sufficiently large number of cases to warrant paternalistic state intervention.

Notice that the mere observation that the women who choose commercial surrogacy tend to be poor and to have few if any minimally attractive work options other than surrogacy is not a reason to ban commercial surrogacy unless one believes that these women are choosing incompetently. No matter how restricted one's life options, the idea that the narrow range of one's options unacceptably constrains one's choice is not a reason to limit further one's range of choice.[39] This train of

38. One might also be concerned about the opportunities for extortion of the commissioning couple that would be entailed by rendering surrogacy contracts voidable at the discretion of the surrogate. I am persuaded by Martha Field that the problem of extortion is not severe. See Field, *Surrogate Motherhood*, pp. 101–3.

39. But recall that in some cases reducing one's range of choice can expand one's bargaining power. The credible statement by a union negotiator that the union membership will not accept any settlement offer that excludes certain terms can help the negotiator to induce management representatives to offer those terms. See Thomas Schelling, *The Strategy of Conflict* (Cambridge, Mass.: Harvard University Press, 1960). This line of thought might motivate regulation of commercial surrogacy (e.g., the legal stipulation of a minimal fee for surrogacy) but not prohibition of it.

thought motivates prohibition of commercial surrogacy only if one has good reason to believe that the agent is choosing badly—making a bad situation worse rather than making the best of a bad situation.

The argument in the previous paragraph does not assume that the status quo in which poor women have few life options is just. Perhaps society is obligated to take aggressive steps to widen the range of life options open to poor women. I believe that the Rawlsian difference principle and egalitarian welfarism, and indeed any principle that gives priority to the interests of the worse-off, if applied sensibly, would yield that policy conclusion. My point is simply that a concern that some people are forced to choose their lives from an unfairly small menu of options is a reason to *expand not restrict* the range of options from which these people must choose.

The suspicion that many of the women choosing commercial surrogacy are choosing from ignorance or confused reasoning or in some other less than substantially voluntary way would seem most naturally to justify state aid to foster intelligent and considered decision-making rather than a ban of the practice. Only the hard paternalist position that for some women the choice of commercial surrogacy is against their interests, no matter how well considered and fully voluntary it might be, would plausibly motivate a ban.

The egalitarian welfarist position is not in principle averse to hard paternalism. In fact, it is worth noting that the egalitarian welfarist will favor hard paternalism in circumstances in which the utilitarian following the line of John Stuart Mill will reject paternalistic state policy.

In *On Liberty* Mill offers the armchair speculation that paternalism—or at least hard paternalism—always does more harm than good in the long run. He might be right or wrong in this speculation. Assume he is right. This factual stipulation would not settle the normative issue of whether hard paternalism is morally undesirable policy, because consistently with this stipulation it could turn out that the distribution of the benefits and burdens of antipaternalistic policy raises moral questions. Indeed, Mill's arguments tend to suggest that "good choosers" will benefit from a policy that refrains from paternalism and "bad choosers" will suffer from it, but on utilitarian calculation the losses to bad or imprudent choosers are overbalanced by the gains to good or prudent choosers. But on the same facts, egalitarian welfarism might endorse a policy of paternalism on the ground that the utility gains to already worse-off per-

sons weighted by their low welfare position outweigh the utility losses that would accrue to already better-off persons from a paternalistic policy once these losses are discounted appropriately to reflect the lesser moral urgency of achieving further benefits for the already well-off.[40]

So in principle egalitarian welfarism could endorse a hard paternalist policy that denies people, for their own good, the freedom to commit themselves to commercial surrogacy contracts—even when such commitment would be substantially voluntary. In the same spirit I accept the norm, which may play a role in some feminist writing on the topic, that benefits to the commissioning couple in a surrogacy arrangement should be discounted somewhat in comparison to benefits and harms that accrue to surrogate mothers, because the latter are reasonably assumed to be worse-off on the average. Still, the thought that commercial surrogacy should be banned because the poor working women who mostly choose surrogacy are too incompetent to be entrusted to make their own decisions in this sphere has an ugly, elitist sound. Careful empirical work that goes beyond hunches and guesswork would be required before one could take a prohibitionist proposal seriously. Any such calculation of harms and benefits should proceed from the evaluative standpoint of the potential surrogates themselves and not simply impute middle-class concerns to them. Since the most severe likely harm that might arise from undertaking commercial surrogacy is that one might be required by law to relinquish to others a child one has borne and wants to keep, we should consider the weaker paternalistic option of requiring would-be surrogates to undergo a psychological screening that would prevent those most likely to be deeply distressed by surrogacy from engaging in it. In short, paternalistic reasons for state intervention are likely to support regulation, not prohibition.

Surrogacy and the Oppression of Women

At the beginning of this article I claimed that a commitment to equal rights for men and women and the dismantling of gender-based hierarchies should not dispose anyone to hostility to commercial surrogacy. But so far I have not squarely addressed this issue. Some feminists assert

40. For further discussion on this topic, see Richard Arneson, "Paternalism, Utility, and Fairness," *Revue Internationale de Philosophie* 43 (1989): 409–37.

that the practice of commercial surrogacy, like prostitution, both directly involves the subordination of women and promotes attitudes that reinforce this subordination. Readers inclined to this point of view may suspect that my treatment evades this central issue.

Carole Pateman writes that in order to appreciate the political implications of commercial surrogacy, one must see it "as another provision in the sexual contract, as a new form of access to and use of women's bodies by men." Subordination is directly involved because in the surrogacy contract a man is purchasing rights of command over a woman's body for the duration of the pregnancy that is to produce a child for the man. This purchased subordination is especially objectionable because the woman's self is intimately connected to her body in its reproductive function, just as the purchased subordination of the female prostitute is objectionable because a woman cannot fully detach her self from the sexual use of her body.

I would agree that some possible contracts involve a degrading subordination and that the human dignity of the contractor who would be degraded demands that such contracts be condemned and prohibited. Without arguing the specifics of the case, I suppose that slavery contracts should be banned on this ground. But it is stretching the point too far to condemn surrogacy on this basis. A woman who consents to a surrogate arrangement consents to the burden of pregnancy, but the limitation on her liberty should not be substantially greater in the case of surrogate pregnancy than in the case of regular pregnancy. A pregnant woman, whether or not she is a surrogate, ought to abstain from the consumption of alcohol and other drugs and should submit to prenatal examinations and the like for the good of the developing child, not because some male master issues arbitrary commands. In this respect surrogacy contracts can be compared to a contract (a) between firefighters and a city government, (b) between a professional athlete and a professional club, or (c) between a dancer and a manager or agency. Like the firefighter, athlete, or dancer, the surrogate mother might be expected to cede some control over her body by the terms of the contract she signs. Think of an athlete agreeing to submit to random drug testing or a firefighter agreeing to periodic aerobic fitness tests. Whether such contractually specified submission is reasonably experienced as a violation of one's autonomy is less a matter of how much control one cedes to others than a matter of whether or not the constraints of the contract are rea-

sonably required in order to attain mutually agreed upon goals. One can imagine surrogacy contracts that would license intolerable invasions of the privacy of the surrogate by the contracting parties during the course of pregnancy, but such contracts should not be upheld by the state.

To extend legal tolerance to surrogacy contracts is to tolerate a form of contract that enables some men to exert control over some women's bodies (according to the terms of whatever contract is agreed upon). But why suppose that this aspect of surrogacy worsens the status of women vis-à-vis men? According to Pateman, the sexual contract is a primordial contract of solidarity among men who agree to control access to women's bodies and share this control among themselves. But legal toleration of contractual surrogacy cannot be read as an implication of this "contract" that men traditionally have maintained against women. Legal toleration of surrogacy presupposes that the woman's body is hers and hers alone unless she consents to some particular use of it. One might be worried that, given the substantial economic inequalities and other inequalities of power prevailing between men and women, the consent to a surrogacy arrangement given by an impoverished woman should not be considered fully voluntary. But concern over inequality in bargaining power between men and women should motivate policy proposals to reduce such inequality. Absent some further argument not yet specified, concern over bargaining inequality is not a reason to favor prohibition of one particular sort of contract that unequal men and women might agree upon.

One possible way to show that toleration of commercial surrogacy would promote inequality between men and women is to draw attention to the symbolic significance of such toleration and its likely impact on attitudes that would support inequality. I will consider two similar versions of this argument. One might hold that toleration of commercial surrogacy would reinforce the still widespread belief that woman's proper sphere is domestic service and that it is not fitting that women participate fully in the public world of paid employment and active citizenship. Call this the *reinforcement of ideology* argument. Or one might hold that men and women who believe that engagement in commercial surrogacy, like engagement in prostitution, is wrongful and degrading may well infer from the facts that commercial surrogacy is legally tolerated and that some women choose to engage in it that women are inherently less virtuous and worthy than men and that, accordingly, it is mor-

ally permissible to deny women rights that it would be wrong to deny fully human persons. Call this the *prejudiced inference* argument.

Many cherished freedoms that we would not wish to renounce are exercised by people in ways that may tend to reinforce the ideology of separate spheres for men and women. This is not in general a good, much less a sufficient, reason for abolishing the freedom. When some teenaged women in America who face bleak life prospects choose to have babies, go on welfare, and drop out of school and the labor market, their choices may tend to reinforce the belief of many people that women's proper role is childbearing and childrearing. When women take part-time jobs rather than full-time jobs out of concern for their children or follow the "Mommy track" in their careers for the same reason, the ideology of separate spheres is reinforced in the minds of many men and women. But these possible negative effects of women's exercise of the freedom to control one's own reproductive life and the freedom to choose one's own career path do not constitute a prima facie case to abolish or curtail these liberties.

Exactly this same line of thought applies to the liberty to engage in commercial surrogacy. From the fact that some women would engage in childbearing for pay if legally free to do so it would not be sensible to infer that women's sole natural or proper role is childraising and household management. To block this bad inference by prohibiting the choice by women that elicits it strikes me as a crazy policy. A better strategy surely would be to argue that the inference is illogical. Moreover, the thought that legal toleration of commercial surrogacy would significantly strengthen many people's belief in separate spheres seems alarmist. In the United States, women's participation in the labor force has steadily increased for half a century. The notion of separate spheres for men and women is an ideology tailored to a world that, fortunately, no longer exists.

In principle, I concede that if a given type of innocent behavior by women significantly strengthened many men's bigoted beliefs about women and in this way increased the incidence of acts of violence and other vicious acts by men against women, this would be a valid reason for prohibiting the behavior, provided that there was no way to break this causal chain at a lesser moral cost. But I cannot believe that this proviso is ever fulfilled. There are always better ways to prevent crime than by

punishing innocent behavior. This is the manifest weakness in the reinforcement of ideology and prejudiced inference arguments.

Stated plainly, these arguments against surrogacy are unlikely to convince. I suspect that they would be found credible only by someone who is at least half-convinced that the behavior by women stipulated to be innocent is not really so. But my arguments in the preceding sections of this article aim to dispel the notion that engagement by women in commercial surrogacy is somehow socially harmful. In the absence of a convincing demonstration that commercial surrogacy is socially harmful, I can see no basis for the claim that tolerance of commercial surrogacy obstructs progress toward equality between women and men.