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# EXPLOITATION AND COMMERCIAL SURROGACY

ALAN WERTHEIMER\*

## I. INTRODUCTION

Commercial surrogacy has been criticized on many grounds. It has been argued that surrogacy is baby-selling, that it is harmful to the children born to surrogates, that it is harmful to many other children whose sense of security is undermined by the practice, and that it is harmful to women as a class.<sup>1</sup> Another line of argument maintains that surrogacy involves the wrongful “commodification” of procreational labor, or that it violates the Kantian maxim that persons should never be treated merely as means but always as ends in themselves.<sup>2</sup>

In addition to and often intermixed with these (and other) arguments, it is frequently said that surrogacy exploits the surrogate mothers. “[O]nce money enters into the arrangement [the] possibilities of exploitation are everywhere.”<sup>3</sup> “One of the most serious charges against surrogate motherhood contracts is that they exploit women.”<sup>4</sup> “The prohibition on payments may be understood as protecting . . . women—especially poor, single women—from being exploited . . . paid ‘breeding stock.’”<sup>5</sup> Despite the frequency with which these claims are made, they are typically advanced without much analysis or argument. In this paper I examine commercial surrogacy in light of some of the

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1. For an argument which focuses on the effects of surrogacy on women as a class, see Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107 (1992). Apart from other effects on women as a class, the legitimation of surrogacy might impose psychic costs on many women, especially poor women, who would then have to treat the decision not to be a surrogate as a constant foregone opportunity to earn additional income for their family. See Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57 (1989).

2. Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990). For a critique of this view, see Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132 (1992).

3. PETER SINGER & DEANE WELLS, *THE REPRODUCTIVE REVOLUTION* 125 (1984).

4. MARTHA FIELD, *SURROGATE MOTHERHOOD* 25 (1988).

5. Alexander M. Capron & Margaret J. Radin, *Choosing Family Law Over Contract as a Paradigm for Surrogate Motherhood*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 59, 62 (Larry Gostin ed., 1990). “But the core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women.” George J. Annas, *Fairy Tales Surrogate Mothers Tell*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 43, 43 (Larry Gostin ed., 1990). “[T]he danger of exploitation of one human being by another appears . . . to outweigh the potential benefits in almost every case.” MARY WARNOCK, *A QUESTION OF LIFE* 46 (1985).

distinctions advanced in my introductory paper. I ask whether surrogacy is a case of *harmful exploitation* or *mutually advantageous exploitation* and whether there are good reasons to think that surrogacy arrangements are typically nonconsensual. The discussion of commercial surrogacy will also allow us to sharpen the distinction between the truth conditions of an exploitation claim and the moral force of exploitation. For even if surrogacy is exploitative, we must ask whether such exploitation provides good reasons for prohibiting or refusing to enforce surrogacy contracts.

## II. IS SURROGACY EXPLOITATIVE?

Putting aside the possibility that surrogacy is not exploitative at all, there appear to be two possible answers. On one view, surrogacy is a case of harmful exploitation. The intended parents gain from the transaction while the surrogate makes a "grave self-sacrifice."<sup>6</sup> On a second view, surrogacy is a case of mutually advantageous exploitation. Both the intended parents and the surrogate gain from the transaction but the distribution of those gains is unfair to the surrogate.<sup>7</sup> There is, however, a third view, one which is difficult to locate in terms of the distinction between harmful exploitation and mutually advantageous exploitation. On this view, surrogacy is exploitative because the intended parents gain from a transaction that is fundamentally immoral. For want of a better term, call this *moralistic exploitation*.<sup>8</sup> Because I believe that moralistic objections to surrogacy must involve some sort of harm to the surrogate if they are to ground a claim of exploitation, I shall consider harmful exploitation under the rubrics of *nonmoral harm* and *moral harm* before going on to consider mutually advantageous exploitation.

## III. SURROGACY AS HARMFUL EXPLOITATION

### *Nonmoral harm*

It has been argued that surrogacy is harmful to the surrogate in straightforward nonmoral terms.<sup>9</sup> But here we must be careful. In deciding whether surrogacy is harmful, we must adopt an all-things-considered and *ex ante* conception of harm. There are, after all, negative elements in virtually all

6. Anderson, *supra* note 2, at 87.

7. For example, it has been argued that surrogacy is exploitative because "the interests of wealthy contracting couples are better served than those of the surrogates." *Baby M and the Surrogate Motherhood Controversy*, 37 AM. U. L. REV. 1013, 1024 (1987).

8. I do not mean "moralistic" in its derisive sense, in which it connotes a narrow moral attitude, but to refer to arguments that go to the intrinsic immorality of a practice rather than the gains and losses to the parties.

9. "Since there is evidence that surrogacy arrangements . . . harm contracted mothers . . . a ban on commercial surrogacy needs to rely only on the harm principle [as opposed to legal moralism]." Rosemarie Tong, *The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements*, 21 J. SOC. PHIL. 40, 47 (1990). As it stands, this is a non sequitur. After all, if surrogacy is harmful but consensual, a ban on commercial surrogacy cannot rely only on some version of the Millian harm (to others) principle; it would need to rely on a principle of paternalism. But the present question is not whether the surrogate is harmed with her consent, but whether she is harmed at all.

uncontroversially beneficial transactions. Paying money for a good that is clearly worth the price is still a negative element in the transaction. It would be better to get it for free. So the question is not whether surrogacy has harmful *elements*, but whether it is harmful, all things considered, or a net harm. We know that some surrogates, such as Mary Beth Whitehead, have regarded their experience as a surrogate as harmful, all things considered.<sup>10</sup> But this is largely irrelevant to a general assessment of surrogacy even if we assume that retrospective judgments are accurate indicators in an individual case. For the question is not whether surrogacy is a net harm in a given case, but whether it is typically or *ex ante* a net harm.

Surrogacy presents a particularly difficult context for making an all-things-considered judgment because some of the crucial benefits and harms are difficult if not impossible to measure and vary substantially from person to person. On the positive side of the ledger, we have to put the value of the monetary compensation and whatever psychological gratification the surrogate obtains from the process. These benefits may or may not be considerable. There is much that might appear on the debit side of the ledger: the risk of physical harm or death resulting from the pregnancy or delivery, the inconveniences and discomfort associated with a normal pregnancy, and perhaps most important, the psychic cost of the surrender of the baby to the intended parents.<sup>11</sup>

At this point, the defender of surrogacy might reply that the *ex ante* value of the surrogacy arrangement simply could not be negative, for, if that were so, women would not agree to serve as a surrogates. But that is false. That a woman agrees to serve as a surrogate does not show that the *ex ante* value of surrogacy is positive; it only shows that she thought it would be positive. She may have miscalculated, perhaps because surrogates are unable to make accurate predictions of their future psychological reactions. Thus, it is possible that surrogacy is harmful to most surrogates even though most surrogates believe it will be beneficial.

In addition, it might be argued that most surrogates are objectively harmed by their experience, even if they do not *feel* harmed. It is a commonplace that B's interests—as B defines them—can be harmed even if B is unaware that the harm has occurred. For example, B's self-acknowledged interest in her reputation or the fidelity of her spouse can be damaged by libel or infidelity, even if she is unaware that either has occurred. More controversially, it may be argued that a person's objective interests can be harmed even if she does not now and never will regard these interests as her interests.

Given all this, is surrogacy *ex ante* harmful, all things considered? In view of our limited factual knowledge and unresolved theoretical controversies over

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10. See ELIZABETH KANE, *BIRTH MOTHER* (1988); MARY BETH WHITEHEAD, *A MOTHER'S STORY—THE TRUTH ABOUT THE BABY M CASE* (1989).

11. A surrogacy contract may stipulate that the surrogate agrees to refrain from alcohol, tobacco, illicit drugs, and other risky activities. Although these restrictions are not independent harms to the surrogate—they may be beneficial—they do represent restrictions on her freedom and in that sense can be understood as costs.

what counts as objective harm, I am inclined to think that we should now remain agnostic.

Suppose that most surrogates are worse off for the experience, all things considered. Could surrogacy be made advantageous, all things considered, if the monetary compensation were higher? If we are operating in the territory of the surrogate's nonmoral interests, I think it is entirely possible, nay inevitable, that a sufficiently large increase in compensation would convert a net harm into a net benefit for many women. Moreover, if surrogacy is typically mutually advantageous but unjust, this unfairness can be remedied in the same way. Yet, and unlike other contexts in which it is uncontroversial that exploitation can be negated by increasing the value received by the exploited party, it is rarely argued that surrogacy would be less exploitative if the surrogate were paid more. In fact, *unpaid* surrogacy is often thought to be *less* exploitative than paid surrogacy. Among the critiques of surrogacy, higher pay is the dog that doesn't bark.

### *Moral harm*

Why does the higher pay dog not bark? I suspect that a wage increase is rarely advanced as a solution to the alleged exploitativeness of commercial surrogacy because it is thought that procreative labor should not be exchanged for money, because the commodification of procreative labor is immoral.<sup>12</sup> And if procreative labor should not be exchanged for any money, it will not improve things to exchange procreational labor for *more* money. But if, as I have argued, the wrong of exploitation always involves a defect in the values exchanged, the task is to see whether this perspective can be related to exploitation. There are two ways in which the connection might be drawn: one focuses on the *incommensurability* of the values exchanged; the other focuses on *commodification*.

For present purposes, I shall focus on the second idea. The commodification argument maintains that whereas some goods and services (for example, automobiles, houses, books, and at least some forms of labor) are appropriately exchanged for money, other goods and services (for example, citizenship, human beings, criminal justice, marriage rights) should not be exchanged for money.<sup>13</sup> On this view, surrogacy is exploitative not because it comes too cheap, but because it commodifies a form of labor that should not be exchanged for money at all.<sup>14</sup>

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12. It is also possible that higher pay is not advanced as a solution because the very receipt of monetary compensation may actually cause some of the psychological harm experienced by surrogate mothers, for example, because they feel that they are doing something "sleazy." If so, increasing the compensation may only make things worse on this score.

13. They should be treated as "blocked exchanges." See MICHAEL WALZER, *SPHERES OF JUSTICE* 100 (1983).

14. Elizabeth Anderson states:

Commercial surrogacy attempts to transform what is specifically women's labor—the work of bringing forth children into the world—into a commodity. It does so by replacing the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production processes. The application of com-

Now I suspect that some of the rhetorical force of the commodification argument derives from linguistic aesthetics. Who could support something as ugly as the *com-mod-i-fi-ca-tion* of procreational labor? But even if we assume, arguendo, that it is wrong to commodify procreational labor, it does not follow that surrogacy is harmful to the surrogate. That is a different claim. So on the assumption that the commodification of procreational labor is wrong, we must ask whether the commodification of the surrogate's labor is: (1) harmful to the surrogate's objective nonmoral interests, (2) harmful to the surrogate because she is participating in an immoral activity, or (3) wrong but not harmful to the surrogate.

It might be thought that surrogacy is harmful to the surrogate because being *treated* as a commodity injures one's self-respect. It might also be claimed that a person can lose the respect of others or be degraded in their eyes even if she does not lose self-respect or become degraded in her own eyes. But that raises at least two points. First, it is not clear that surrogacy actually does have these effects. Second, to the extent that these effects stem solely from the way surrogacy is regarded by the society—as a matter of fact and without separate normative justification—it is not clear that it represents a basis for condemning the practice rather than a basis for condemning society's reaction.

Still, it might be argued that surrogacy harms the surrogate's objective interests because it violates her rights, independent of any other physical, economic, psychological, or social harm. If a woman has a right not to have her labor commodified, then surrogacy is harmful precisely because it is a violation of her rights. The problem here, of course, is that many acts that would violate B's rights if done without B's consent do not violate B's rights if done with B's consent. To put the point in Kantian terms, we do not treat a person merely as a means rather than an end-in-herself if she consents to be treated in that way. So the commodification of procreational labor is no obvious violation of the Kantian maxim if the commodification of the surrogate's labor is consensual—absent some additional argument, for example, that the rights involved are inalienable or that the consent is defective in some important respect.<sup>15</sup>

Suppose that we grant that the commodification of procreational labor constitutes an objective harm to the surrogate. Still, it would not follow that surrogacy is harmful to the surrogate, all things considered. Surrogacy would produce a net harm to the surrogate only if the degree of harm that results from the commodification of her procreational labor is greater than the benefits that she received from the commodification of her labor and that has not

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mercial norms to women's labor reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use.

Anderson, *supra* note 2, at 80.

15. It might be argued that surrogacy commodifies—and violates the Kantian maxim with respect to—the child who, after all, does not consent to the arrangement. Although I do not see how surrogacy could be harmful to the child who, after all, would not otherwise exist but for the surrogacy arrangement, the present discussion is confined to the claim that surrogacy is harmful to the surrogate mother.

been shown. Moreover, increasing the compensation would arguably offset such harm.

It may be argued, at this point, that surrogacy is injurious to the surrogate not because she is *treated* badly, but because she *participates* in something wrong. On this view, surrogacy is bad for the surrogate because it is bad for her character. But here we must be particularly careful. It does not follow that just because it is bad to participate in something wrong that it is bad for the person's interest to participate in something wrong. Still, to the extent that one does have an interest in one's moral character, then participating in an immoral activity may be harmful to that person.<sup>16</sup> But, and once again, even if we accept this line of argument, it is not clear that the harmful moral elements necessarily outweigh the beneficial nonmoral elements, at least if we also assume that surrogacy is *otherwise* advantageous to the surrogate.<sup>17</sup> Unless it is assumed that the moral aspect of well-being always trumps the nonmoral aspects of well-being, it is possible that the nonmoral aspect in which the immoral choice is beneficial to the chooser's well-being is more weighty than the moral aspect in which it is not.<sup>18</sup>

In the final analysis, I am inclined to think that it is very difficult to argue that surrogacy is harmful to the surrogate because surrogacy is wrong qua commodification. Commodification may be better understood as a basis for thinking that surrogacy is wrong for reasons unrelated to the interests of the surrogate and, therefore, unrelated to worries about exploitation of the surrogate.

Suppose that I am wrong. Suppose that the commodification argument does support the claim that surrogacy is exploitative. The moral force of that argument would still have to be resolved. For if surrogacy is wrong and exploitative because it commodifies that which should not be commodified, it does not follow that surrogacy should be prohibited or that surrogacy contracts should not be enforceable.

#### IV. SURROGACY AS MUTUALLY ADVANTAGEOUS EXPLOITATION

Suppose that the typical surrogate is not harmed by surrogacy or would not be harmed if the compensation were higher. All things considered, surrogacy is or would be a mutually advantageous transaction. Still, surrogacy might be a case of mutually advantageous exploitation if the transaction were

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16. Now even if this sort of moral harm is possible, it is not clear to whom it applies. On the one hand, we might say, with Plato, that all persons have an interest in being moral whether or not they themselves believe they have such an interest. Or we might say, with Feinberg, that only those who desire to be good persons have an interest in being good persons and can therefore be morally harmed. See JOEL FEINBERG, *HARM TO OTHERS* 65-70 (1984).

17. It is also not clear whether an increase in compensation to the surrogate would yield an increase in the amount of moral harm or whether the degree of moral harm is inelastic with respect to price.

18. We could think that moral considerations trump nonmoral considerations with respect to what B should do without thinking that moral considerations trump nonmoral considerations with respect to what is good for B. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 189-207 (1986) (discussing the connection between "living right" and "living well").

unfair to the surrogate. The problem, of course, is that if we are going to say that a transaction is exploitative because it is insufficiently beneficial to the exploited party, we may reasonably be asked to specify the criteria by which we are making this assessment. This is a difficult matter.

It is, for example, frequently said that a fair transaction is one in which both parties gain (roughly) equally. On that account, we can say that a surrogate is exploited if she receives less value from the transaction than the intended parents. Unfortunately, this definition of a fair transaction is clearly wrong. If a physician performs a procedure (for a normal price) that saves a patient's life, we do not say that the physician has been exploited because the patient has gained far more from the transaction than the physician.<sup>19</sup> In any case, and notwithstanding that I do not have an alternative account to propose at this point, I see no reason to think that a mutually advantageous transaction cannot be unfair. So I prefer to suppose that the surrogate may be exploited even if surrogacy provides a net benefit to her. On the other hand, if the compensation is (or could be made) adequate, then we will have to conclude that the surrogate is not (or would not be) *exploited*, whatever else we may want to say about surrogacy.

### *Choice*

I suspect that there is another reason why the higher pay dog doesn't bark, and that relates to its effect on the quality of the surrogate's consent. If the lure of compensation compromises the surrogate's consent by coercing her to enter into the transaction or by distorting her judgment about the effects of surrogacy on her well-being, increasing the compensation will only make things worse.

Now resolving the question as to whether the surrogate gives appropriately voluntary consent may not be crucial to resolving the question as to whether she is exploited if, as I have argued, consensual exploitation is possible. But it would still be of importance to determine whether there is a defect in consent. It will be easier to justify the prohibition or nonenforcement of surrogacy agreements if they are nonconsensual.

### *Coercion*

On one familiar view, poor women are coerced (or forced) to become surrogates because surrogacy represents an improvement over an unacceptable *status quo*.<sup>20</sup> The equally familiar response maintains that surrogacy offers

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19. We also cannot say that a person is not exploited just because they receive more value from the transaction than the other party. For if a physician charges an exorbitant price for the procedure, we might say that the physician exploits the patient even though the patient receives more value from the transaction than the physician.

20. "[A monetary offer] may be difficult for a person of little financial means to refuse and would, in that case, be coercive." Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood?*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY*, *supra* note 5, at 136, 146. "To portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances . . . fails to

women an additional option to their present menu of choices, and the addition of options to one's menu of choices is always freedom enhancing rather than coercive.

Which view is correct? On any standard account of coercion, surrogacy is simply not coercive. In general, A coerces B to do X only if A proposes (threatens) to make B worse off with reference to some baseline condition unless B does X, and whatever else we might want to say about the intended parents' proposal (offers can be unseemly without being coercive), they do not propose to make the potential surrogate worse off if she turns it down.<sup>21</sup> True, she might decide that becoming a surrogate is more attractive than her other options. But that is true for all decisions in which one accepts an offer.

It may be thought that the preceding view fails to acknowledge that some offers are simply "too good to refuse," and that nonrefusable offers are coercive even if they add to one's present menu of options.<sup>22</sup> An offer may be nonrefusable for two reasons, only one of which is problematic. If A offers B an opportunity (a new job) that would render her so much better off than her eminently acceptable status quo that it would be *irrational* for B to refuse, there is no reason to refer to such offers as coercive or to think that they compromise the voluntariness of B's choice. In other cases, however, the short-term benefits contained in A's offer may be so tempting or irresistible that they cause B to overlook the long-term harms. A does not threaten any adverse consequence if B declines the offer, but A's offer serves to distort B's judgment. I am inclined to think that this kind of offer is not best described as coercive, but it may well compromise the voluntariness of B's choice by introducing cognitive errors into B's decision. Let us bracket worries about cognitive errors. Still, it might be said that if B's status quo is highly unsatisfactory, as in *The Drowning Case*,<sup>23</sup> then A's offer may be coercive even if B makes a perfectly rational choice in accepting A's offer. But the model of coercion exhibited in *The Drowning Case* is of no help to the argument that surrogates are coerced. For, unlike A in *The Drowning Case*, the intended parents have no special obligation to help potential surrogates without demanding anything in return.

It seems, then, that the intended parents' proposal is an offer, and offers do not coerce. And that, I think, is the truth. But it is not the whole truth. Let us assume what is often alleged but has not been shown by the critics of sur-

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take account of realities." FIELD, *supra* note 4, at 27. "To say that a woman 'chooses' to do this . . . is simply to say that when a woman is forced to choose between poverty and exploitation, she sometimes chooses exploitation as the lesser of two evils." Tong, *supra* note 9, at 45. For present purposes, I ignore the distinctions between being coerced, or forced, or acting under duress.

21. Specifying the appropriate baseline against which to measure the proposal can be a complicated question. See ALAN WERTHEIMER, COERCION 202-41 (1987).

22. FEINBERG, *supra* note 16, at 233 (arguing that a proposal can be both coercive and "freedom-enhancing"); see WERTHEIMER, *supra* note 21, at 232-33.

23. A comes upon B, who is drowning. A proposes to rescue B if B agrees to pay A \$10,000. A and B know that there are no other potential rescuers. ALAN WERTHEIMER, EXPLOITATION 110 (1996) (taking this example from Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD (Sidney Morgenbesser et al. eds., 1969)).

rogacy, namely, that women choose to serve as surrogates only because they are in dire economic straits. It may be argued that when background conditions provide an inadequate range of opportunities, the moral quality or significance of one's choice is diminished, even if the background conditions do not compromise the "voluntariness" of the choice, strictly speaking.<sup>24</sup> But even if this is so, it is arguable that it is the background conditions that are the problem and not the offer that allows B to improve on those background conditions. The offer is still a positive good. If a woman can reasonably regard surrogacy as improving her overall welfare given that society has unjustly limited her options, it is arguable that it would be adding insult to injury to deny her that opportunity. Whatever label we use to describe her choice, we must still decide whether she should be allowed to make such a choice. And referring to such choices as "coerced" will not resolve that substantive moral question.

### *Cognitive Errors*

Considerations of coercion aside, I suggested that a woman's decision to serve as a surrogate may not be appropriately consensual if the lure of the financial gain motivates her to make a decision that she will regret or would regret if she thought objectively about its effect on her life. Given that we do not know whether surrogacy is typically harmful or advantageous, I do not think that we can say whether the typical surrogate makes this kind of cognitive error. Also, do not say that a woman's judgment cannot be appropriately consensual just because she cannot fully anticipate what it will be like to give up the child. People can voluntarily consent to sterilizations, sex change operations, abortions, and plastic surgery, and (shall we add?) marriage—where one cannot or frequently does not have any experience with the consequences of the decision. By comparison with some such decisions that we do allow, the problem of miscalculation in surrogacy may be relatively small and more amenable to preventive measures: restricting surrogacy to women who have given birth and therefore have personal knowledge of the bonding process (which would not have excluded Mary Beth Whitehead) and careful psychological screening (which might have excluded her).<sup>25</sup>

The claim that the surrogate makes a cognitive error would be more controversial if her error derives from her failure to take proper account of objective or moral harms to her interests. But even if we correctly believe that the surrogate's choice is nonconsensual for just this reason, it is less clear what would follow. Here we return to the moral force of exploitation.

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24. See Thomas Scanlon, *The Significance of Choice*, in TANNER LECTURES ON HUMAN VALUES (1987).

25. It appears that an infertility center had performed a psychological evaluation of Mrs. Whitehead and that she had "demonstrated certain traits that might make surrender of the child difficult." *In re Baby M*, 537 A.2d 1227, 1247 (N.J. 1988). Unfortunately, it also appears that neither she nor the Sterns were given this information.

## V. THE MORAL FORCE OF EXPLOITATION

What follows from all this with respect to societal intervention with commercial surrogacy? If surrogacy is a case of harmful exploitation, we need to ask whether paternalistic restrictions would be justified, although here our task will be relatively easy, particularly if we have reason to think that there are defects in the quality of the surrogate's consent. If surrogacy is a case of harmful cum moralistic exploitation, we need to ask whether restrictions can be justified on grounds of moral paternalism. That question would be at least somewhat harder. It is a commonplace that a liberal democracy is not justified in prohibiting transactions just because the transactions are morally suspect or fail to incorporate the best conception of human flourishing. This is not because we lack confidence that the transactions are truly wrong, but because there are reasons—good moral reasons—to prefer a political regime that does not regard such wrongness as a sufficient justification for invoking the coercive powers of the state.

If surrogacy is a case of mutually advantageous and consensual exploitation, then it certainly does not follow that just because it is wrong for A to exploit B, that we should prohibit A from exploiting B. If exploitation is to serve as an independent basis for social restraints, we would need to explain how the exploitativeness of a transaction justifies interfering with a transaction from which she benefits, particularly if prohibition is the only viable option.

*Reducing Exploitation*

But prohibition may not be the only viable option. Suppose that surrogacy would be less exploitative (or nonexploitative) if the compensation were higher or the contract terms were somewhat different. Might this justify societal intervention?

It might, but unlike some other contexts of alleged exploitation, I see no reason to believe that the compensation received by surrogates reflects a structural inequality of bargaining power.<sup>26</sup> It seems to me that the potential surrogate should be in a very strong negotiating position vis-a-vis the intended parents. I suspect that surrogates receive rather low compensation precisely because surrogacy is viewed with such moral skepticism. Information and competition are low. And unlike many other bargaining contexts, in which bargainers believe they can legitimately press for a better deal, social norms may suggest that it is inappropriate for a surrogate to hold out for a higher wage. Somewhat ironically, the widespread acceptance of the moral norms to which the critics of surrogacy often appeal may contribute to this—low compensation—dimension of its exploitativeness.

In any case and for whatever reason, it is possible that left to their own devices, most potential surrogates might be able to negotiate an agreement that is less desirable than would be negotiated under a form of minimum wage.

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26. *But see* Allen Wood, *Exploitation*, 12 SOC. PHIL. & POL'Y. 136, 144 (1995) (maintaining that prospective adoptive couples are typically in a "significantly stronger bargaining position").

Some agreements would not occur. Some intended parents would be unwilling or unable to pay the higher price. But many would.<sup>27</sup> We would then face a problem of moral trade-offs. We would need to weigh the moral importance of reducing the exploitation of those who would be helped by this form of minimum wage legislation against the cost to those who would be excluded from the market because people refuse to purchase their services for the higher minimum wage.

Yet the latter point highlights a moral consideration that many critics of surrogacy have ignored. Any restrictions that discourage surrogacy arrangements hurt those who would have benefitted from such arrangements and arguably also interfere with their autonomy. If we are to respect the autonomy of potential surrogates in the world in which they find themselves, it is important that we not automatically apply to them the moral principles that define our conception of an ideal world.<sup>28</sup>

### *Autonomy*

The question arises then as to whether considerations of autonomy would preclude using exploitation as grounds for restricting mutually advantageous and consensual surrogacy arrangements. An adequate answer to this question would require a more fully developed theory of autonomy than I can offer—for lack of a theory as well as space. But I do want to argue that two strategies—one conceptual, one legal—that have been advanced as solutions to this problem are less than fully satisfactory.

The conceptual strategy maintains that since a woman's "true" freedom or autonomy is violated by surrogacy contracts, the prohibition of such contracts does not constitute a violation of her freedom or autonomy.<sup>29</sup> I do not want to deny that there is something to the notion of positive freedom or, perhaps more accurately, to the values it attempts to capture. But even if we say that "true" freedom includes proper self-development, and if we think that surrogacy "would detract from the ideal of human flourishing that society should seek to foster," it remains an open question whether the right to choose not to be positively or truly free is itself a crucial dimension of one's autonomy.<sup>30</sup>

It might be objected at this point, that appeals to autonomy ignore the fact that surrogacy "takes advantage of motivations—such as self-effacing 'altruism'—which women have formed under social conditions inconsistent with genuine autonomy."<sup>31</sup> And, the argument goes, we do not interfere with a woman's genuine autonomy if we prohibit decisions that result from non-

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27. Indeed, it is possible that there would be more surrogacy agreements at the higher price, because it would increase the supply of potential surrogates.

28. For the distinction between ideal theory and non-ideal theory, see JOHN RAWLS, *A THEORY OF JUSTICE* 8 (1971).

29. Prohibiting surrogacy contracts does not violate the autonomy of women because "the content of the surrogate contract itself compromises the autonomy of surrogate mothers." Anderson, *supra* note 2, at 91.

30. Capron & Radin, *supra* note 5, at 64.

31. Anderson, *supra* note 2, at 91.

autonomously acquired motivations. But even if the surrogate's motivations are not autonomous in this sense, it is not clear what would follow. We certainly do not think that we can justifiably prevent religious organizations from soliciting or accepting donations just because we (even rightly) believe that the motivations that give rise to those donations may have been formed under social conditions inconsistent with genuine autonomy.<sup>32</sup> Respect for a person's autonomy sometimes requires that we respect choices that reflect values that she presently accepts, even if we are rightly worried about the way she acquired those values.

So much for the conceptual strategy. A popular legal strategy for resolving the tension between respecting autonomy and prohibiting surrogacy agreements is to permit surrogacy transactions, but to "make the arrangement performable or not at the option of the mother."<sup>33</sup> It might be thought that this strategy would give us the best of both worlds: it would preserve the freedom of women to enter into surrogacy arrangements, but would also preserve their freedom to keep the child if they so wish.<sup>34</sup>

Now it is entirely possible that the "unenforceable contract" solution will turn out to be the preferred public policy.<sup>35</sup> Even so, it would not entirely resolve the autonomy problem. There are two related ways in which it fails to do so. First, it fails to acknowledge that the ability to enter into a binding agreement is itself a crucial dimension of one's autonomy and that the "unenforceable contract" solution will deter some potential intended parents from making agreements that potential surrogates would want to be able to make. Second, it may be argued that in trying to protect women from having to surrender a child against her strong maternal desires, we do not express the appropriate respect for women as autonomous and responsible persons.<sup>36</sup> Whether or not this line of argument is ultimately decisive, it suggests that the unenforceable contract solution does not fully resolve the tension between

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32. I have in mind contributions to "normal" religious organizations, not contributions which are clearly the product of fraud. Interestingly, to the extent that surrogacy takes advantage of altruistic preferences, it does not represent a problem of commodification. After all, it is one thing to maintain that surrogacy does not represent a "gift" relation, and another thing to assume that it does, but that women have been involuntarily socialized into giving such gifts.

33. FIELD, *supra* note 4, at 78.

34. Martha Field states:

One attractive feature of this solution is that it helps avoid resolution of the debate, which is currently dividing feminists, about whether surrogacy exploits women or liberates them. It recognizes the truth of both positions. Surrogacy is still available when the surrogate mother desires ultimately to carry out the contract. . . . But it avoids one of the most troubling features—a contract severing the maternal bond when the mother is unwilling to relinquish her child.

*Id.*

35. See Michael Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533 (1991).

36. Carmel Shalev states:

Her state of mind at the moment of agreement is not to be taken seriously because it is subject to change during the performance of her undertaking, due to the nature of pregnancy. The insinuation is that it is unreasonable to expect her to keep her promise because her faculty of reason is suspended by the emotional facets of her biological constituency.

CARMEL SHALEV, BIRTH POWER 121 (1989).

protecting surrogates from decisions that they may come to regret and respecting the autonomy of women.

### *Justice*

Finally, I wish to consider a set of arguments for interfering with surrogacy contracts that appeals to considerations of justice. I say the set of arguments "appeals to" considerations of justice, because these arguments variably assert that surrogacy *instantiates* injustice, that surrogacy *derives from* injustice, that surrogacy *symbolizes* injustice, that surrogacy *reinforces* injustice. Note that some of these verbs suggest that surrogacy has a causal impact on the social world, whereas others do not, and it may be crucial to establish just which verb is most apt.<sup>37</sup> Surrogacy could, of course, derive from injustice or symbolize injustice without causing the world to be more unjust. By contrast, the claim that surrogacy reinforces or creates injustice is to claim that the world would be less unjust if surrogacy were prohibited.

There are at least three different lines of justice-based arguments that we might consider. First, it might be argued that we should prevent transactions that instantiate unjust distributions even if the transactions are beneficial to all concerned. On this view, it is wrong to allow unjust transactions to occur, even when (as contrasted with the world in which they do not occur) these particular transactions are not bad for anyone. Now I do not think it unreasonable for an individual to refuse to participate in a transaction that will improve her welfare on the grounds that the transaction is unjust. But the question is not whether an individual can herself reasonably refuse to participate in a beneficial transaction because it is unjust, but whether society can justifiably prevent her from participating in such a transaction on the grounds that it is unjust. And it is not clear that it can.

A second justice-based argument focuses on the relational dimension of surrogacy. On this view, the problem is not that surrogacy results in different "holdings," but that surrogacy instantiates highly asymmetrical and unjust personal relations. Now relational inequality is a serious matter, and it must be included in any all-things-considered assessment of whether a woman would be benefitted or harmed by entering into a surrogacy transaction. But if a woman can still plausibly maintain that she would benefit by such an arrangement, it is hard to see why such transactions should be prohibited on the grounds that the relation is unjust—at least if the welfare of the potential surrogate is the focus of our concern.

That gives rise to a third line of argument, one that focusses on the negative externalities of commercial surrogacy. Just as it is often argued that pornography has harmful effects on virtually all women, it may be argued that surrogacy has harmful effects on women as a class, because it reinforces in-

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37. "[D]istributive justice requires that society's benefits and burdens be distributed fairly among different social classes. . . . Since women who are less well off will almost always be the ones to serve as surrogates for wealthier or professional women, the distribution is not fair." Macklin, *supra* note 20, at 147; see Annas, *supra* note 5, at 43.

equalities of gender, although it might not be harmful, all things considered, to the surrogates themselves, who are compensated for their services.<sup>38</sup>

I want to make three points about this line of argument. First, if we argue that a (potential) surrogacy arrangement between A and B should be prohibited because a policy of allowing such arrangements would have harmful effects on third parties, then we are not claiming that it is the exploitation of B that justifies its prohibition. Second, even if the prohibition of surrogacy has egalitarian consequences, we would be imposing a burden on one class of women (those who would be benefitted by serving as surrogates) in order to benefit a larger class of women. We are, of course, often justified in imposing costs on some persons in order to realize gains to other (present or future) persons. But it is harder to justify imposing such costs when they are incurred by those who are thought to be among the least well-off.

That brings me to the third point, namely, that we have no empirical evidence to support the claim that the prohibition of surrogacy actually has egalitarian consequences. Or, what amounts to the same thing, that the permissibility of surrogacy would reinforce or perpetuate social inequalities. For all we know, the legitimation of commercial surrogacy might serve to empower women in their relations to men.<sup>39</sup> Indeed, it is arguable that prohibiting surrogacy might simply shield our eyes from the background inequalities from which it derives, while allowing surrogacy would forcefully bring those inequalities to our attention and motivate us to change them.

## V. CONCLUSION

Let us be clear as to what the previous arguments do and do not show. If commercial surrogacy is a case of harmful and nonconsensual exploitation, then there is a strong *prima facie* case for prohibiting commercial surrogacy and for refusing to enforce commercial surrogacy contracts. If commercial surrogacy is a case of mutually advantageous and consensual exploitation, then there is a strong *prima facie* case for allowing commercial surrogacy and for enforcing commercial surrogacy contracts. I have examined several arguments for the view that commercial surrogacy contracts should be prohibited or unenforceable because they are exploitative, even if commercial surrogacy is mutually advantageous and consensual. I have suggested that several arguments against that position are problematic at best.

I have decidedly *not* argued for the stronger position that commercial surrogacy contracts should be allowed or enforced as a matter of public policy, for that would require a determination as to whether commercial surrogacy is, in fact, harmful and nonconsensual or mutually advantageous and consensual. It would also require attention to reasons for prohibiting or refusing to enforce commercial surrogacy contracts that are beyond the scope of this article. I

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38. "[Surrogacy] contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal treatment of women." Satz, *supra* note 1, at 123-24.

39. See SHALEV, *supra* note 36.

have argued that it does not follow that surrogacy contracts should be prohibited or unenforceable just because they are exploitative—if the transaction is consensual and mutually advantageous.

