

## Chapter 9: Gender

### Case Study: Commercial Surrogacy

A surrogate mother is a woman who agrees to undergo pregnancy and labour on behalf of someone else, and to transfer to that person (and, where appropriate, the person's partner) all of her legal rights and responsibilities over the child shortly after birth. Surrogacy is an attractive option for some couples who cannot have children naturally, and who, for whatever reason, prefer not to adopt. Combined with artificial insemination or *in-vitro* fertilization, surrogacy provides an opportunity for childless couples to have a baby who is genetically related to one or both of them. Some such couples ask a friend or family member to act as their surrogate free of charge; others enter into commercial contracts with a surrogate, and may be introduced to suitable women by an agency.

Commercial surrogacy first became popular in around the mid-1970s. In the United States, about a hundred babies were reported to have been born via commercial surrogacy agreements by 1981, and about 500 by 1986 (Field, 1989, 5). However, the ethics of the practice was soon called into question following the famous case of 'Baby M', in which a surrogate mother, Mary Beth Whitehead, refused to transfer custody of her child to the parents with whom she had entered into a contract. After a lengthy legal battle, custody of Baby M was eventually awarded to the commissioning parents, William and Elizabeth Stern, by the New Jersey Supreme Court (*In the Matter of Baby M*, 109 N.J. 396 [1988]). However, the Court came to its decision not on grounds of the contract between Whitehead and the Sterns, which it held to be null and void, but rather on grounds of the best interests of the child. Whitehead was later granted visitation rights, and co-wrote a book about her experiences as a surrogate mother (see Whitehead and Schwartz, 1989).

Today, surrogacy contracts are illegal in many European states, such as France, Germany, and Italy. In the UK it is illegal to offer a fee to a surrogate mother, but the latter can claim 'reasonable expenses' from the commissioning parents. People who live in countries that do not allow commercial surrogacy, or in which it is prohibitively expensive, now increasingly enter into surrogacy contracts abroad, with the US, India, Thailand, and Ukraine being among popular destinations for would-be parents. Prices for surrogacy services vary considerably between countries. In addition, because family and citizenship laws vary considerably between states, internationally-brokered surrogacy arrangements can lead to a host of extra legal complications regarding the nationality of the child, and who is to be understood as having legal rights and responsibilities in respect of it.

It is a hotly debated question both within feminism, and between feminists and their critics, whether surrogacy contracts should be legally recognized and their terms enforced. This case study introduces some of the theoretical arguments put forward both for and against the practice.

### Women's autonomy and the liberal case for commercial surrogacy

---

Among liberal political theorists, including liberal feminists, commercial surrogacy is often defended on autonomy-based grounds. There are two versions of the claim that surrogacy contracts should be recognized out of respect for the autonomy of women. The first appeals to the importance of *procreative liberty*. On this argument, if persons are to be free to implement their chosen conceptions of the good, they must (absent compelling moral considerations) have the right to decide without interference whether and under what circumstances they will become parents, including whether they will do so for financial remuneration (Robertson, 1990). The second variant of the autonomy argument appeals to *freedom of occupational choice*. On this view, the choice to become a surrogate mother is sufficiently like the choice to take up any other job as to be accorded the same, or similar, legal protections (Fabre, 2006). True, this argument acknowledges, pregnancy and labour pose potential dangers to a woman's health. However, if we allow persons to take on other arduous occupations, such as coal mining or fire fighting, then for consistency's sake we should also allow women to work as surrogate mothers.

Defenders of commercial surrogacy, then, claim that legal recognition of reproductive contracts is called for as a matter of the general liberal commitment to giving people control over their reproductive and professional lives. Moreover, liberal feminists add that for the state to refuse to recognize surrogacy contracts is for it to fail to take women seriously as independent agents, and thus to demean them (Shalev, 1989). For some feminist opponents of commercial surrogacy, however, the decision to become a surrogate mother is not clearly or unproblematically an autonomous one, owing to the fact that it is informed by motivations that women have acquired under the oppressive conditions of patriarchy. Elizabeth Anderson, for example, claims that women who become surrogates are often worryingly 'self-effacing' (1990, 91), and that they suffer from feelings of inadequacy that they falsely believe they can resolve only by becoming pregnant. Insofar as such women are lacking in self-respect, and/or are possessed of something like a form of false consciousness, their apparently autonomous choices to become surrogate mothers are not necessarily to be taken at face value. Moreover, because commissioning parents and surrogacy firms take advantage of the surrogate's vulnerabilities and distorted beliefs for their own ends, Anderson argues, the latter are unjustly *exploited* by the former.

### <A>Exploitation

The concept of exploitation is tricky and contested, but, on one helpful understanding of it, a person can be said to be exploited if she/he consents to a transaction which is either harmful or unfair to her/him, and does so because some aspect of her/his character or circumstances is used against her/him by the other party (or parties) to the agreement (Wertheimer, 1996). In the case of commercial surrogacy, feminist critics aver that the women are recruited largely from among the vulnerable (Anderson, 1990; Annas, 1990). They often only agree to be surrogates, the argument goes, because they are either short of money, or because they suffer from emotional or psychological problems (such as

feeling that they need to become a surrogate to make amends for having had an abortion in the past). By seizing on these characteristics, commissioning parents and surrogacy firms are allegedly able to induce women to sign contracts which are either harmful or unfair to them. Harm occurs when the surrogate is traumatized by the experience of handing over the child she has carried for nine months, and grown to love. But even if the woman does not suffer harm (say, because she does not form any attachment to the baby), the contract may still be unfair to her if she is induced to accept a significantly smaller financial settlement than she would be able to demand if her bargaining position were stronger.

Supporters of commercial surrogacy, meanwhile, maintain that it is not inherent in the practice that it be exploitative. With regard to the danger of harm, they point to evidence which suggests that surrogate mothers tend not to be traumatized by parting with their babies (Ragonné, 1994), and, indeed, are comforted by the knowledge that they have helped to make an infertile couple extremely happy. On the question of fairness, meanwhile, they reply that women may actually be in a position to negotiate favourable terms, given the strong desire of the commissioning parents for a child. And they also argue that surrogacy contracts can be regulated so as to minimize the danger of exploitation further—for example, by setting a decent minimum price for the woman's services, insisting on tests that would screen out women with psychological problems, and allowing mothers to void the contract and keep their child should they come to realize that they have made a mistake (Field, 1989; Fabre, 2006).

### **<A> The 'specialness' of woman's reproductive labour**

Feminist opponents of commercial surrogacy, however, also deploy further arguments. One of these objects to surrogacy on grounds that it wrongly treats women's procreative labour as a mere commodity, thereby devaluing both it and the woman whose labour it is. On this view, pregnancy and labour have a special, intrinsic value upon which it is inappropriate to put a monetary price. Moreover, insofar as a woman's reproductive labour is much more closely connected to her sense of self than other forms of labour, to ask a woman to sell that service comes dangerously close to asking her to sell herself, or an intimate piece of herself (Radin, 1988). Elizabeth Anderson (1990, 80ff) adds that commercial surrogacy undermines a woman's emotional perspective on her pregnancy, by requiring of her that she suppress the feelings of love which she is developing for her unborn baby. According to these criticisms, then, surrogacy ignores the distinctive nature of pregnancy, and in doing so harms and demeans the women who take part in it.

Other feminists, however, believe that these objections rest on rather questionable assumptions about the way in which women experience pregnancy. It is not the case, they reply, that all women understand childbearing as a 'labour of love', and would be incapable of viewing a surrogacy agreement as a purely commercial enterprise. In particular, as Debra Satz (1992) points out, many women choose to have abortions, which indicates that they, at least, do not experience pregnancy as special, or develop an

emotional attachment to the fetus. In addition, Satz continues, even if a woman's procreative labour does have a special intrinsic worth, it is not necessarily disrespectful to offer money in exchange for her reproductive services. By way of analogy, it is perfectly possible to respect a professor's teaching and writing skills, and to recognize that her deployment of those skills is closely bound up with her conception of herself, whilst still thinking it appropriate to pay her for her services. Therefore, Satz's counter-argument goes, one can also pay a surrogate mother while giving proper weight to the non-monetary ways in which her reproductive labour is valuable.

### <A>Gender inequality

Satz, as we have just seen, is dubious that a case against commercial surrogacy can be made on grounds of the distinctive nature of reproductive labour. Instead, she argues, it ought to be opposed on grounds that it is antithetical to gender equality, in two key respects. First, she says, surrogacy contracts represent a new means by which men are empowered to exercise control over the bodies of women—sometimes to an intolerable degree. For example, Mary Beth Whitehead's contract forbade her to smoke cigarettes, drink alcohol, or take medication without the express permission of her doctor, and also committed her to undergo an abortion at the father's request if the fetus was found to have any genetic abnormalities. Second, Satz continues, even where the terms of the contract do not impose what seem like unreasonably severe restrictions on the woman's freedom, the phenomenon of surrogacy nonetheless serves to reinforce negative stereotypes and preconceptions about the proper role and status of women. More specifically, it conveys that women's purpose is to be mothers, or, perhaps more accurately, to enable men to be fathers. Surrogate motherhood, in a nutshell, encourages us to view women as mere 'walking wombs'.

Defenders of the practice, meanwhile, reply that, insofar as our concern is that surrogacy contracts will be overly intrusive, we can again guard against this danger by properly regulating the industry. And they also argue that, although combating gender stereotypes is clearly an important objective, it cannot justify placing limits on women's freedom to choose surrogacy as an occupation (Fabre, 2006). For if it did we would have to conclude not only that women should not be able to work as surrogates, but also that they should not be able to work as, say, cleaners and secretaries—occupations which likewise tend to reinforce traditional prejudices about the role of women (and perhaps to a greater degree than surrogacy, insofar as most people, day to day, are rather more likely to come across a cleaner or a secretary than they are to meet a surrogate mother).

In sum, feminists are divided on the question of whether permitting women to lease out their reproductive services would be empowering or demeaning to them. To some, an appropriately regulated surrogacy industry would enhance the autonomy and independence of women. To others, commercial surrogacy exploits the vulnerable, devalues the special nature of pregnancy by subjecting it to the norms of the market, and strengthens inegalitarian views of women as being no more than fetal containers.

## References

- Anderson, E. (1990) 'Is Women's Labour a Commodity?', *Philosophy and Public Affairs*, 19, 71–92.
- Annas, G. J. (1990) 'Fairy Tales Surrogate Mothers Tell', in L. Gostin (ed), *Surrogate Motherhood*.
- Fabre, C. (2006) *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford: Oxford University Press.
- Field, M. (1989) *Surrogate Motherhood*, Cambridge, MA: Harvard University Press.
- Gostin, L. (ed.) (1990) *Surrogate Motherhood: Politics and Privacy*, Bloomington: Indiana University Press.
- Radin, M. J. (1988) 'Market Inalienability', *Harvard Law Review* 100, 1849–1937.
- Ragonné, H. (1994) *Surrogate Motherhood: Conception in the Heart*, Boulder: Westview.
- Robertson, J. A. (1990) 'Procreative Liberty and the State's Burden of Proof in Regulating Non-Coital Reproduction', in L. Gostin (ed.) *Surrogate Motherhood*.
- Satz, D. (1992) 'Markets in Women's Reproductive Labour', *Philosophy and Public Affairs*, 21, 107–31.
- Shalev, C. (1989) *Birth Power*, New Haven: Yale University Press.
- Werheimer, A. (1996) *Exploitation*, Princeton: Princeton University Press.
- Whitehead, M. B. and Schwartz, L. A. (1989) *A Mother's Story: The Truth About the Baby M Case*, New York: St. Martin's Press.