

Surrogacy

Cécile Fabre

Surrogacy is a practice whereby prospective (or commissioning) parents who cannot gestate children entrust another woman with that particular task. There are many reasons why those parents resort to a surrogate mother. Typically, the female partner in a heterosexual couple is unable to bear children, because (for example) she had to undergo a hysterectomy, or suffers from severe endometriosis. In other cases, gay males who do not wish to adopt a child have no choice but to use a surrogate mother.

Surrogacy arrangements have a long history. In fact, if we are to believe the Bible, Sarah, wife of Abraham, could not have children and gave her servant, Hagar, to her husband, so that he could impregnate her. There is no mention of payment in that biblical story. Indeed it is not inherent in a surrogacy arrangement that the commissioning parents should pay the surrogate mother. Nor need such an arrangement take the form of a contract. However, commercial contractual surrogacy has traditionally elicited deeper worries than altruistic, informal surrogacy, and will thus be the focus of this essay – though I shall briefly highlight some similarities and differences between those two kinds of surrogacy.

Before outlining various arguments for and against such contracts, it is worth distinguishing between different kinds of surrogacy. Until the advent of egg donation, no distinction was drawn between surrogacy as a remedy to a woman's inability to produce eggs (traditional surrogacy), and surrogacy as a remedy to a woman's inability to bring a foetus to term (gestational surrogacy). Nowadays, however, at least in many countries, a woman who cannot produce gametes but whose womb is healthy need not resort to a surrogate mother. Accordingly, contemporary discussions focus on gestational surrogacy, though they also differentiate between *full surrogacy* (whereby the surrogate mother only provides her womb) and *partial surrogacy* (whereby she provides both her womb and her egg, and is inseminated with the father's sperm). To complicate matters further, one can imagine a scenario where the commissioning parents resort to an egg donor and to a (different) gestational mother – or, indeed, to a sperm donor other than the commissioning father. As we shall see below, whether the surrogate mother provides full or partial surrogacy is sometimes thought to have implications for her rights over the foetus (*see RIGHTS*).

There are two standard arguments in favor of surrogacy. On the one hand, some argue that individuals have full ownership rights over their own bodies, which include the right to sell some of their body parts to others, as well as a right to extract financial benefit from the performance of a service. Correspondingly, ownership rights over one's monetary wealth include a right to divest oneself of part of it for the sake of acquiring a body part and/or benefiting from the provision of a service (Nozick 1974). On that view, a surrogate mother

owns her gametes and her womb, and thus has the right to receive payment in exchange for providing either a partial or a full surrogacy service. Conversely, commissioning parents have the right to offer her a monetary reward for her reproductive services.

The view that individuals own their body and labor, however, has proved controversial (Cohen 1995; Pateman 1988). Another argument in favor of surrogacy appeals not to self-ownership, but, rather, to autonomy (*see* AUTONOMY). It holds that individuals have an important interest in framing, revising, and pursuing a conception of the good life, and in being enabled to acquire the financial wherewithal to do so. Parenthood is, for many, an important part of what a good life is; conversely, one way to earn money is to offer one's labor and services to those who need them. Surrogacy thus furthers both commissioning parents' and surrogate mothers' autonomy (Shalev 1989; Arneson 1992; Fabre 2006: Ch. 8).

To many, however, neither argument is robust enough against the following objections to surrogacy – to wit, the *commodification objection*, the *objectification objection*, the *exploitation objection*, and the *harm-to-children objection* (*see* COMMODIFICATION; EXPLOITATION). Interestingly, the first three are also often deployed against both organ sales and prostitution (*see* PROSTITUTION). As applied to surrogacy and prostitution, they are usually rooted in serious concerns about gender inequality between men and women. In fact, for some commentators, surrogacy is morally problematic to the extent that its commodifying, exploitative, and objectifying features are evidence of, and deepen, those inequalities (Satz 1992; *see* FEMINIST BIOETHICS).

According to the commodification objection, surrogacy is wrong for two reasons: in so far as it involves paying women for carrying a child, it wrongfully treats their reproductive labor, which should be undertaken out of love, as up for sale; in so far as the surrogate mother must hand over the child at birth, for which she receives payment, it is tantamount to baby selling (Warnock 1985; Anderson 1990). Clearly, the charge cannot be raised against altruistic surrogacy. As some commentators have noted, however, the view that pregnancy (whether one intends to keep the child or not) should be seen exclusively as a labor of love essentializes and idealizes reproductive labor as inherently part of women's identity, at the risk of discriminating against women who do not conceive of motherhood as a sacrosanct vocation. To the extent that human labor in general is appropriately commodified (after all, most of us get paid to work), there is no reason to condemn gestational labor on those grounds (Harris 1985: Ch. 7). In fact, there is every reason, at the bar of gender equality itself, to resist the objection (Satz 1992). In addition, as others also argue, surrogacy need not consist in selling and buying babies, since payment is owed not for the baby itself, but for the provision of a gestational service together with the transfer of whatever rights parents have over children (*see* PARENTS' RIGHTS AND RESPONSIBILITIES). Moreover, those rights are limited and are not a species of transferrable property rights in things, which further weakens the claim that surrogacy contracts treat babies as commodities (Wilkinson 2003: Ch. 8; Arneson 1992; Fabre 2006: Ch. 8).

A second objection claims that surrogacy objectifies women by treating them as nothing but incubators, whose feelings about the prospects of relinquishing the baby at birth, or, indeed, about whether or not to continue with the pregnancy, have no weight at all (Dworkin 1983; Anderson 1990). Here, concerns about gender inequality are particularly acute, since surrogacy – it seems – grants a commissioning father considerable control over the body and life of the surrogate mother. By contrast, and interestingly so, the surrogate mother's feelings are at the forefront of any moral assessment of altruistic surrogacy, since it is precisely because giving up the child is thought to be extremely difficult that her act is deemed altruistic, and, therefore, commendable. However, the objectification objection illicitly assumes that surrogacy is inherently objectifying. Yet, while it is surely true that some commissioning parents objectify surrogate mothers, not all do. More generally, whether or not surrogacy objectifies women depends on the extent to which the latter freely and willingly consent to the arrangement (*see* CONSENT), on commissioning parents' attitudes, and, crucially, on the rights of surrogate mothers. Such rights pertain to the control which they have over their own lives while pregnant, whether or not they may terminate the pregnancy, and whether or not they must hand over the child at birth (Harris 1985: Ch. 7; Jackson 2001: Ch. 6; Wilkinson 2003: Ch. 8; Fabre 2006: Ch. 8).

Now, although some surrogacy contracts have imposed burdensome restrictions on surrogate mothers (such as regular medical checks, bans on smoking, drinking, exercising, etc.), we must distinguish between legitimate restrictions under which any responsible parent in general, and gestating mother in particular, ought to be placed, and overly controlling restrictions. Proper regulation of surrogacy contracts, whereby the latter would be regarded as null and void, meets the objection. Moreover, in typical surrogacy contracts, which involve a heterosexual commissioning couple, the surrogate mother is not the only woman involved: the commissioning mother also has a considerable stake in the contract, and to describe the latter as embodying gender inequality – through objectification – between commissioning parents and surrogate mother oversimplifies the complex relationships in which all parties stand *vis-à-vis* one another.

The difficulties raised by the surrogate mother's rights (or lack thereof) to abort the pregnancy, or to keep the child at birth, are thornier. To many, 'a contract is a contract,' so much so that a surrogate mother ought not to be allowed to change her mind: she should be forced to relinquish the baby, particularly if the latter is not genetically hers, and she ought not to be allowed to have an abortion (*see* Field 1990 and Jackson 2001: Ch. 6 for useful accounts of that claim). Yet, it is worth noting that, according to empirical evidence, cases where surrogate mothers refuse to relinquish the child, or decide to abort, are very rare. Less often mentioned, but equally noteworthy, are cases where commissioning parents refuse to take the child, on the grounds, for example, that it is born with disabilities. In any event, one might think that there are good reasons for permitting a surrogate mother to change her mind, at least if she has provided not merely her womb but also her eggs, and which outweigh the harm which commissioning parents would incur as

a result (Arneson 1992). After all, adoption law generally does not bind a mother to hand over, at birth, the child she had decided to have adopted; and, in any event, there generally is no legal requirement on contracting parties to perform the specific service (here, bring a foetus to term) which they have undertaken to provide (Harris 1985: Ch. 7). The deeper point, here, is that familial relationships in general, and parental relationships in particular, ought not to fall solely within the scope of contract law, but, rather, within the scope of family law, on condition that provisions are made, in the form of the payment of damages, aimed at compensating commissioning parents should the surrogate mother change her mind (Field 1990; Jackson 2001: Ch. 6). In other words, properly regulated surrogacy contracts are not inherently objectifying.

Opponents are unlikely to be convinced. Thus, a third objection to surrogacy claims that it is exploitative of surrogate mothers, because it trades on their financial need, their emotional vulnerability, and their unthinking endorsement of patriarchal norms, to get them to agree to carry a fetus to term (with all the risks attendant on pregnancy and childbirth) under financial terms which they would not accept otherwise. Here, too, the objection is often linked to concerns about gender inequality, pitting surrogate mothers' financial need against commissioning fathers' wealth (Warnock 1985; Anderson 1990). Moreover, the exploitation objection is, perhaps, one of the most plausible which one might deploy against altruistic surrogacy, particularly when the latter occurs within families (as when a woman carries a child for her infertile sister), since emotional pressures are particularly likely to be applied, or at any rate felt, within that context. And yet here, too, according to some commentators, whether or not a surrogacy contract or arrangement is exploitative depends on the conditions under which it is entered, and (in the commercial case) on the remuneration offered to the surrogate mother. To deem surrogacy illegitimate irrespective of those conditions on the grounds that surrogate mothers ought to be protected from the consequences of their decision not only overlooks the potential for appropriate regulations to issue in fair contracts; it is also to risk the charge of undue paternalism towards the women one wants to protect (*see* PATERNALISM). Finally, exploitation can go both ways: the surrogate mother too could be charged with exploiting the desperate desire for a child of commissioning parents in general and commissioning mothers in particular. Thus, it is not clear at all that a surrogacy contract furthers gender inequalities as a result of being exploitative (Wertheimer 1992; Wilkinson 2003: Ch. 6; Fabre 2006: Ch. 8).

The aforementioned objections focus on the relationship between contracting parties. The fourth objection, by contrast, adverts to children and rejects surrogacy as illegitimate (and warranting a legal ban) on the grounds that it is harmful to them. This is because children born from a surrogacy contract are less likely to believe that their parents, having literally paid for them, love them unconditionally – a source of unhappiness compounded by the knowledge that their gestational mother gave them up at birth (Anderson 1990; Brazier et al. 1998). Note that altruistic surrogacy is not vulnerable to that particular charge, in so far as the latter targets the feelings of rearing parents, who have not (*ex hypothesi*) offered payment to the surrogate

mother. But it may be undermined by it in so far as children's feelings of abandonment are at issue.

The crucial question, here, is that of the extent to which a surrogate mother wrongs the child she is carrying when she does so with the intention of abandoning her at birth, and (in the commercial case) of the extent to which rearing parents also wrong the child whom they have asked her to carry for them with the intention of paying her. That question, specific to surrogacy as it is, raises the wider issue of the extent to which a person is harmed, and wronged, simply in virtue of the circumstances under which she came into being, *given that she would not have existed otherwise* (since she is conceived, carried to term, and delivered, as a result of the surrogacy arrangement) (Parfit 1984; Ch. 16; Archard 2004; *see* NONIDENTITY PROBLEM; WRONGFUL LIFE). Now, there is no reliable evidence that children born from surrogacy contracts are indeed harmed in the aforementioned ways. Suppose, however, that they are harmed. Given that the alternative, for them, would have been non-existence, whether they are wronged depends on whether the harms which they suffer make their life less than worth living overall. If so, then surrogacy contracts are morally illegitimate and ought to be banned, since they create children whose quality of life is so low that it would have been better for them not to exist. But if those children nevertheless do have a life worth living, and *a fortiori* enjoy a good quality of life, then it is not clear at all that surrogacy is a wrongdoing and, if it is, that it is serious enough a wrongdoing as to warrant a legal ban (Harris 1985; Wilkinson 2003: Ch. 6; Fabre 2006: Ch. 8).

See also: ABORTION; AUTONOMY; COMMODIFICATION; CONSENT; EXPLOITATION; FEMINIST BIOETHICS; NONIDENTITY PROBLEM; PARENTS' RIGHTS AND RESPONSIBILITIES; PATERNALISM; PROSTITUTION; RIGHTS; WRONGFUL LIFE

REFERENCES

- Anderson, Elizabeth 1990. "Is Women's Labor a Commodity?," *Philosophy and Public Affairs*, vol. 19, pp. 71–92.
- Archard, David, 2004. "Wrongful Life," *Philosophy*, vol. 79, pp. 403–20.
- Arneson, Richard 1992. "Commodification and Commercial Surrogacy," *Philosophy and Public Affairs*, vol. 21, pp. 132–64.
- Brazier, Margaret, Alastair Campbell, and Susan Golombok (eds.) 1998. *Surrogacy: Review for Health Ministers of Current Arrangements of Payments and Regulation*. London: Stationery Office.
- Cohen, G. A. 1995. *Self-Ownership, Freedom, and Equality*. Cambridge: Cambridge University Press.
- Dworkin, Andrea 1983. *Right-Wing Women: The Politics of Domesticated Females*. Toronto: University of Toronto Press.
- Fabre, Cécile 2006. *Whose Body is it Anyway? Justice and the Integrity of the Person*. Oxford: Oxford University Press.
- Field, Martha 1990. *Surrogate Motherhood: The Legal and Human Issues*. Cambridge, MA: Harvard University Press.

- Harris, John 1985. *The Value of Life*. London: Routledge.
- Jackson, Emily 2001. *Regulating Reproduction*. Oxford: Hart Publishing.
- Nozick, Robert 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Parfit, Derek 1984. *Reasons and Persons*. Oxford: Oxford University Press.
- Pateman, Carol 1988. *The Sexual Contract*. Cambridge: Polity.
- Satz, Debra 1992. "Markets in Women's Reproductive Labour," *Philosophy and Public Affairs*, vol. 21, pp. 107–31.
- Shalev, Camel 1989. *Birth Power: Case for Surrogacy*. New Haven: Yale University Press.
- Warnock, Mary 1985. *A Question of Life: Warnock Report on Human Fertilisation and Embryology*. Oxford: Oxford University Press.
- Wertheimer, Alan 1992. "Two Questions about Surrogacy and Exploitation," *Philosophy and Public Affairs*, vol. 21, pp. 211–39.
- Wilkinson, Stephen 2003. *Bodies for Sale: Ethics and Exploitation in the Human Body Trade*. London: Routledge.

FURTHER READINGS

- Anderson, Elizabeth 1993. *Value in Ethics and Economics*. Cambridge, MA: Harvard University Press.
- Corea, Gena 1988. *The Mother Machine – Reproductive Technologies from Artificial Insemination to Artificial Wombs*. London: Women's Press.
- Gostin, Larry (ed.) 1990. *Surrogate Motherhood: Politics and Privacy*, Bloomington: Indiana University Press.
- Kornegay, R. Jo 1990. "Is Commercial Surrogacy Baby-Selling?," *Journal of Applied Philosophy*, vol. 7, pp. 45–50.
- Malm, Heidi 1989. "Paid Surrogacy: Arguments and Responses," *Public Affairs Quarterly*, vol. 3, pp. 279–85.
- Nussbaum, Martha 1995. "Objectification," *Philosophy and Public Affairs*, vol. 24, pp. 249–91.
- Overall, Christine 1993. *Human Reproduction: Principles, Practices, Policies*. Oxford: Oxford University Press.
- Purdy, Laura M. 1996. *Reproducing Persons – Issues in Feminist Bioethics*. Ithaca: Cornell University Press.
- Radin, Margaret J. 1996. *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things*. Cambridge, MA: Harvard University Press.
- Rae, Scott B. 1994. *The Ethics of Commercial Surrogate Motherhood: Brave New Families?* Westport, CT: Praeger.